The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. S331 of 2014
Claim No. CV 2010-04777

Between

SHIRLEY SOOKAR

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL:

N. BEREAUX J.A.
G. SMITH J.A.
A. DES VIGNES J.A.

Date of delivery: October 28, 2020

APPEARANCES:
Mr. R. L. Maharaj SC, Mr. L. Lalla instructed by Mr. A. Ramroop, Attorneys-at-law, for the Appellant

Mr. F. Hosein SC, Ms. A. Rahaman instructed by Ms. M. Benjamin, Attorneys-at-law, for the Respondent

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) The issue in this appeal is whether a judge, appointed to the office under section 104(1) of the Constitution, who resigns his office (prior to attaining the then compulsory retirement age of 65) can be subsequently appointed as an acting judge under section 104(2)(d)(i) of the Constitution to give judgment in proceedings he heard prior to his resignation.

(2) The decision in High Court Action No. 1219 of 1999 (the 1999 action), was reserved by Mr. Justice Myers (as he then was) ("Myers J") in November 2000. The subject of the high court action (the 1999 action) was a deed of gift, No. 6112 of 1986, which the claimants Dolly Sookar and Routi Ramroop sought to have set aside on the ground of fraud. The deed of gift was in respect of a property situated at No.25 Fairley Street, Tunapuna. Dolly purportedly gifted the property to her son Meetoolal Sookar, husband of the appellant. Meetoolal subsequently conveyed the property as gift to himself with a life interest to the appellant (his wife) and after her death, to their children David Sookar and Nalenee Sookar – Chetana as joints tenants. Meetoolal built two apartments (east and west) on the property. In the 1999 action, Dolly and Routi obtained an interlocutory injunction restraining Routi's ejectment from the property pending the determination of the trial of the action. In the substantive claim, Dolly challenged the validity of the deed of gift and Routi alleged that she had a licence coupled with an interest.

(3) Despite several letters written on the appellant's behalf during the outstanding period no judgment was delivered by the trial judge until 27

July, 2011. However, this was after he had resigned from his office as Puisne Judge, effective 31st July, 2008. Letters on the appellant's behalf were written to the judge via the Clerk to the Judges on 29th January, 2002, 25th August, 2003 and 2nd February, 2004. The last such letter prompted a response on 12th July, 2004 that the judgment would be attended to during the impending long court vacation. A further letter in April, 2006 produced no response. In August, 2008, a notice was issued stating that the judgment would be given on 15th October, 2008. It was not. The appellant complained that she received no explanation for the non-delivery. A subsequent notice was issued stating that judgment would be given between the months of January to June 2009 but no such date was fixed. Meetoolal died on 4th February, 2004 and Dolly died in August 2009. Myers J resigned effective 31st July, 2008.

(4) The decision of Myers J (Ag) was delivered on 27th July 2011 after the appellant had filed these constitutional proceedings on 17th November, 2010 alleging that her rights to property and to the protection of the law were breached as a result of the delay by the judge in giving judgment in the matter. She claimed the following constitutional reliefs:

(i) A declaration that the [appellant's] rights under section 4(a) of the **Constitution of the Republic of Trinidad and Tobago** ("the Constitution") to the enjoyment of the property and the right not to be deprived thereof except by due process of law was breached as a result of the delay by Myers J in giving a judgment in the 1999 action.

(ii) A declaration that the [appellant's] right under section 4(a) of the **Constitution** to the enjoyment of property and the right not to be deprived thereof except by due process of law.

(iii) A declaration that the [appellant's] right under section 4(b) of the **Constitution** to the protection of the law was breached as a result of

the delay by Myers J in giving a judgment in the 1999 action.

It is noteworthy that in the initial fixed-date claim the appellant does not allege that the judge was *functus officio*, or that he lacked jurisdiction, or that it was now impossible for him to deliver judgment. It is also worthy of note that there were no grounds of challenge set out in the claim.

The 1999 action

(5) In so far as they are relevant the following facts are taken from the written decision of the judge (Myers J (Ag)). Dolly sought to set aside the deed of gift. She alleged that the transfer of the property exclusively to Meetoolal was contrary to her instructions to her attorney-at-law. Her true intention, as she specifically instructed, was the transfer of the western half of the property to Meetoolal and that she should retain the eastern half of the property including the eastern apartment, for life and after her death, to Routi. Dolly also alleged that she contributed to the cost of construction of the apartments. After construction Meetoolal occupied the western apartment and Routi the eastern apartment. Meetoolal, in an effort to force Routi to vacate, disconnected the water and electricity supply. He also served her with a notice to quit, removed several galvanise sheets from the roof of the eastern apartment and changed the locks on the gate so as to deny Routi access to the property.

(6) Dolly and Routi brought the 1999 action to set aside the deed of gift. Dolly also sought to have the deed of gift rectified to reflect her true intentions. Routi also sought a declaration that she was a licensee of Meetoolal and that she possessed a licence coupled with an interest. She also sought damages for trespass and aggravated and exemplary damages.

(7) Meetoolal and the appellant along with their two children were named as defendants. They counter-claimed. The details of the counterclaim are not discernible from the judgment.

(8) In his written judgment, which he signed as an acting judge, the judge made very clear and specific findings of fact. Indeed, he roundly rejected Dolly's evidence as to the instructions she purported to give her attorney and then made the following order:

(i) "Dolly Sookar's claims are dismissed.

(ii) It is hereby declared that Routi Ramroop was and is a licencee of Meetoolal Sookar and as such is entitled to possession of the eastern portion of the property, including the east apartment for the duration of her natural life free of all rent.

(iii) Routi Ramroop shall pay all outgoings and expenses related to the eastern portion of the property, including the east apartment.

(iv) Deed No. 6112 of 1986 is a valid deed.

(v) The defendants' counterclaims be dismissed.

(vi) There be no order as to the costs of this action."

(9) As can be seen, the appellant succeeded in the action in so far as the deed of gift was upheld. However, Routi was able to establish that she had a licence coupled with an interest. The effect of Routi's success was to neutralise the appellant's complaints that she has been denied the rental income over the eleven-year period of the delay. Delivery of judgment also meant that the appellant could no longer complain that she was denied the benefit of attorney's fees. Routi was as much affected by the delay as was the appellant. Indeed, she and Dolly were the parties who initiated the action and she (Routi) is at risk of serious prejudice in the outcome of this

appeal if we find that the judge lacked jurisdiction to deliver the judgment. She participated in the hearing of these proceedings before Rahim J but took no part in this appeal.

(10) A finding of lack of jurisdiction will also affect the appellant and would mean the restarting of the entire trial at a time when two of the main witnesses (and protagonists) are dead and unable to testify and a third, Routi, no doubt is at an advanced age. Indeed, it is more than a little odd that after justifiable complaints about the delay the appellant now seeks to have the judgment up-ended by this challenge which would require that the entire action be re-started.

(11) There was no appeal from the decision of Myers J. Rather, some twenty-two months after the decision the appellant amended her claim to seek the following reliefs. I shall quote them verbatim. The words appearing in parenthesis are as set out in the amended claim:

(i) "A declaration that the claimant's right under section 4(a) of the Constitution to the enjoyment of property and the right not to be deprived thereof except by due process of law was breached as a result of the failure of Myers J to give a judgment in H.C.A. No. 1219 of 1999 *Dolly Sookar and Routi Ramroop vs. Meetoolal Sookar, Shirley Sookar, David Sookar and Nalene Sookar Chetana* ("the High Court Action") prior to his resignation from the Judiciary of Trinidad and Tobago ("the Judiciary") on July 31, 2008.

(ii) A declaration that upon his resignation from the Judiciary on July 31, 2008 Myers J ceased to have jurisdiction over the High Court Action.

(iii) A declaration that the judgment given in the High Court Action on July 27, 2011 is null and void and a breach of the claimant's right under section 4(a) of the Constitution to the enjoyment of property

and the right not to be deprived thereof except by due process of law.

(iv) A declaration that the [appellant's] right under section 4(b) of the Constitution to the protection of the law was breached as a result of the failure of Myers J to give a judgment in the High Court action prior to his resignation from the Judiciary."

(12) Grounds were finally inserted into the claim. The grounds of the claim are:

(i) That the former judge Mr. David Myers, upon resignation as a judge of the Judiciary of Trinidad and Tobago, had no jurisdiction to deliberate and give judgment in H.C.A. No. 1219 of 1999.

(ii) That the former judge Mr. David Myers could not legally or constitutionally determine the [appellant's] case in H.C.A. No. 1219 of 1999.

(iii) That the appointment of Mr. David Myers as an acting judge for the sole purpose of delivering his outstanding judgments (as in H.C.A. No. 1219 of 1999) was unconstitutional, null and void.

(iv) That the [appellant] was entitled to the protection of the law in having the expectation that her claim in H.C.A. No. 1219 of 1999 would not have only been heard but adjudicated upon by Mr. David Myers prior to his resignation as a judge of the Judiciary of Trinidad and Tobago.

As can be seen the issue of delay was removed from consideration.

(13) The judge (Myers J (Ag)) delivered his judgment on 27th July, 2011 some eight months after these proceedings were filed. Indeed, the judge delivered several other judgments after his resignation. Instruments of appointment by the President were issued by which the judge was appointed to act in the

office of Puisne Judge for specific periods during which time he delivered judgments in the respective matters. In this case the judge was appointed for one day only and for the specific purpose of giving judgment.

The judgment below

(14) The trial judge, Rahim J dismissed the claim. He held as follows:

(i) That section 104(2)(d)(i) permitted the appointment of Myers J (Ag) to deliver the outstanding decision. The appointment of Myers J to act as a judge allowed the litigants the judgment to which they were entitled under the Constitution.

(ii) That the evidence was heard by Myers J when he was lawfully appointed a judge and judgment was delivered by Myers J (Ag) while lawfully appointed as a judge. Myers J took an oath of office prior to entering upon the duties of Puisne Judge when first appointed and was bound by that oath when he heard the evidence in the case. In the same manner Myers J (Ag) took an oath of office when he was appointed to act as Puisne Judge and so was bound by the oath when he delivered judgment in keeping with his duty as a judge to deliver judgment.

(iii) The appellant's entitlement to the delivery of judgment by the judge who presided over her case falls squarely within her fundamental right to protection of the law. The relevant provisions of section 104 of the Constitution have in fact secured her right to protection of the law by conferring a power to appoint the judge who had been tasked with the adjudication of her claim for the purpose of the delivery of judgment.

(iv) Alternatively, the *de facto* officer doctrine was applicable. In this regard, the appellant did in fact accept that Myers J (Ag) had jurisdiction to deliver judgment on the 27th July 2011. Further, that

Myers J (Ag) did have a colourable title or authority and he acted in good faith and must have believed that he had the necessary authority to deliver his outstanding judgment. He was treated by the litigants as having such authority.

Issues

(15) Having regard to the grounds upon which the claim is based and the decision of Rahim J, the issues to be determined in this appeal are:

(i) Whether section 104(2)(d)(i) permitted the appointment of the judge for the sole purpose of giving judgment in the 1999 action.

(ii) If section 104(2)(d)(i) did not permit an appointment for such purposes, whether the *de facto* officer doctrine validated the appointment.

(iii) Whether the appellant's right to property and to the protection of the law entitled her to the expectation that her claim would have been heard and decided upon by the judge prior to his resignation as a judge.

(iv) Whether Myers J (Ag) was biased against the appellant when he gave his decision.

Summary of decision

(16)

(i) The appointment of Myers J (Ag) as an acting judge for the purpose of delivering judgment in a long outstanding decision, was constitutional. It was sufficient that the judge, at the time of hearing the evidence and at the time of delivery of the decision held a judicial appointment which conferred on him all the powers of a Puisne Judge. Rahim J was

right to uphold the appointment.

(ii) The fact that he may have written the decision during a period in which he did not hold office is of no moment. The oath of office which he swore at the beginning of his judgeship was sufficient to bind him conscientiously. The oath of office simply binds the judge as a matter of conscience to uphold the law and to do justice. It does not itself confer authority to give judgment. Such authority comes from section 104(2) which confers on the judge all the powers and authority to perform his functions.

(iii) In any event the *de facto* officer doctrine is applicable and was sufficient to uphold the judge's appointment. The judge was appointed for one day for the specific purpose of delivering judgment. He believed he was validly appointed having received an instrument of appointment from His Excellency the President and thus had colourable authority or title. Based on that instrument of appointment he proceeded in good faith to deliver the judgment which contained robust findings of fact.

(iv) Since the judge had jurisdiction to deliver judgment and his appointment was constitutional, the claim which relies on these grounds for the declarations sought, cannot succeed.

(v) The allegation of bias is unsustainable. First, it was not pleaded as a ground, second and in any event, it is not well founded. The fact that the appellant's action may amount to an embarrassment to the judge is not a sufficient basis to impute bias or to rebut the presumption that the judge would, true to his oath, conscientiously strive to deliver judgment in accordance with the justice of the case.

Appellant's submissions

(17) Mr. Maharaj, in his oral submissions, made it clear that the challenge was not to the acting appointment itself but to whether Myers J (Ag) could have continued the trial and give judgment. He submitted that section 104 of the **Constitution** makes a distinction between a section 104 (1) judge and a section 104(2) judge. The holders of these two positions have separate and distinct offices. The effect is that Myers J (Ag) had no jurisdiction to give judgment in a case which Myers J (Ag) did not try. The oath which Myers J took as a section 104(1) judge came to an end when he resigned his substantive position. Upon resignation he became *functus officio* in respect of the judgment he reserved in this matter and lost jurisdiction over it. The oath he took as Myers J (Ag) could not have given him jurisdiction which he lost when he resigned.

(18) Section 107 of the Constitution makes it clear that only a judge who has taken the oath of office can perform judicial duties as part of the functions of a judge appointed under the Constitution. When Myers J resigned he was no longer able to perform judicial duties of a judge in respect of an outstanding judgment. Consequently, during the period from his resignation to the time he took the second oath as an acting judge he could not perform judicial duties under the Constitution as a judge. The oath he took as an acting judge could not give him jurisdiction to deliver the appellant's judgment. He could only have continued in the office of judge under section 136(2).

(19) Section 136(2) provides the sole basis on which a judge, whose tenure has come to an end, can continue in office in order to deliver judgment. Mr. Maharaj relied on the expression *expressio unius est exclusio alterius*,

submitting that the fact that there is no express provision in the Constitution to permit a judge who has resigned to deliver judgment after resignation, means that it was intended to exclude such a situation.

(20) As to the *de facto* officer doctrine he submitted that the trial judge erred in applying it. The appellant's case is not that Myers J (Ag) was not a judge. Instead the appellant's case is that Myers J (Ag) did not have any power or authority under the Constitution to complete the work of a section 104(1) judge. He could only exercise the powers of a section 104(2) judge. He added that the appellant never treated Myers J (Ag) as having the power to give judgment.

(21) Finally, he submitted that the fair minded observer would have concluded that the institution of proceedings would have been an embarrassment to Myers J (Ag); that the appellant was responsible for the embarrassment and in those circumstances conclude that there was a real possibility that Myers J (Ag) would have been biased against the appellant in his findings. In the circumstances the judge could not have produced a judgment free from apparent bias.

Relevant constitutional provisions

(22) I shall consider the main issues as I have set them out and shall address Mr. Maharaj's submissions in the course of my analysis where necessary. Mr. Maharaj had sought our leave to argue the issue of the delay in giving judgment, even though that issue had been deleted from the appellant's claim when the fixed date claim form was amended. However, in his oral reply to Mr. Hosein's submissions, he again withdrew delay as an issue. We therefore have not considered it.

(23) The following provisions of the **Constitution** are relevant to the issues in this appeal; section 104, 105, 106, 107 and 136(1)(2)(3).

(24) Section 104(1) provides:

> ***"The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission."***

(25) Section 104(2) provides:

> ***"Where -***
>
> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) the Chief Justice advises the President that the state of business of the Court of Appeal or the High Court so requires,***
>
> ***the President, acting in accordance with the advice of the Judicial and Legal Service Commission –***
>
> ***(i) may appoint a person to act in the office of Justice of Appeal or Puisne Judge, as the case may require;***
>
> ***(ii) …***
>
> ***(3)…"***

(26) Section 105 provides:

> ***"A person shall not be appointed as a Judge or to act as a Judge unless he has such qualifications for appointment as may be prescribed."***

(27) Section 106(1) provides:

> ***"Subject to section 104(3), a Judge shall hold office in accordance with sections 136 and 137."***

(28) Section 107(1) provides:

> ***"A Judge shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and the oath for the due execution of his office set out in the First Schedule."***

(29) Section 136(1)(2)(3) provides:

> ***"(1) The holder of an office to which this subsection and subsections (3) to (11) apply (in this section referred to as "the officer") shall vacate his office on attaining the age of sixty-five years or such other age as may be prescribed.***
>
> ***(2) Notwithstanding that he has attained the age at which he is required by or under subsection (1) to vacate his office, a Judge may, with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.***
>
> ***(3) Nothing done by the officer shall be invalid by reason only that he has attained the age at which he is required under this section to vacate his office."***

Analysis

Issue i – Scope of section 104(2)(d)(i)

(30) The question then is whether section 104(2)(d)(i) permits a judge's appointment to act as a judge for the sole purpose of giving judgment. The question which arises is whether the state of affairs in this case required Myers J's (Ag) appointment, that is to say, whether the fact that the judgment was outstanding for eleven years, that two witnesses had died and that the judge was in a position to give final judgment fell within the condition precedent. In my judgment the answer is in the affirmative. It was a question in the discretion of the Chief Justice and I consider it was a valid exercise of his discretion.

(31) The phrase *expressio unius est exclusio alterius* is appropriate in construing statutes in which the context of certain express words warrants an inference that other similar or related terms are excluded. A constitutional instrument is an entirely different thing. As Lord Diplock stated in **Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener) [1976] 1 All ER 353** at page 360:

> ***"To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading …"***

See also **AG of the Gambia v. Momodou Jobe [1984] AC 689, 700** Lord Diplock dealing with the Constitution of the Gambia said:

> ***"A constitution, an in particular that part of it which protects and entrenches fundamental rights and freedoms to which***

all persons in the state are to be entitled, is to be given a generous and purposive construction."

However, it does not weaken the force of Mr. Maharaj's submissions, the thrust of which is, that section 136(2) is the sole means by which a judge, whose tenure has come to end, can continue in office in order to deliver judgment. The fact that no other provision has been expressly enacted to permit his or her return for the sole purpose of delivering judgment evinces a clear intention that no such power was intended to be granted in section 104.

(32) Rahim J made helpful references to Caribbean and Commonwealth jurisdictions, the constitutions and statutes of which make specific provision for a judge, who resigns before retirement age or who attains retirement age, to deliver judgments after resignation or retirement without the necessity of being re-appointed. *Bahamas* – section 95(2) and (3) of the Constitution; *Barbados* – section 82(4) and section 84(2) of the Constitution; and *United Kingdom* – section 27(1)(a) and (b) of the Judicial Pensions and Retirement Act 1993. These provisions do not require that an oath be re-sworn. They would be the complete answer to the issue at hand if they were set out in the Trinidad and Tobago Constitution. Indeed, the Barbados Constitution - sections 82(4) and 84(2) - provides for both an acting judge whose temporary appointment expires before delivery of judgment and a permanent judge who resigns or retires, to deliver judgments subsequent to the expiry of their term or subsequent to resignation or retirement, without the need for any further appointment.

(33) The question then is whether the absence of such an express provision in the Trinidad and Tobago **Constitution** means that no such provision was

intended and that section 104(2)(d)(i) must be construed accordingly. Mr. Maharaj's submission puts an unduly restrictive interpretation on the provisions of section 104(2). Section 136(2) speaks solely to a judge's attainment of the compulsory retirement age. In such a case of compulsory retirement, the judge will be permitted to continue on as a judge for the purpose of completing trials commenced before his retirement. But section 136(2) does not contemplate the occasion in which a judge resigns his office before attaining the age of retirement as in this case. Such a resignation may not always be planned or pre-meditated and may occur quite abruptly for any number of reasons. Upon such a resignation there is no question of the judge continuing on to complete cases or deliver judgments.

(34) In my judgment when the Chief Justice acts under section 104(2)(d)(i) it is usually in exigent circumstances which require urgent attention; that is to say, there may be a heavy backlog of untried cases which need to be cleared, a shortage of judges due to a bunching of compulsory or early retirements or resignations requiring members of the bar to be appointed on an acting basis to address the backlog or to remedy the judge shortage or both. But does section 104(2)(d)(i), as Rahim J found, contemplate the appointment of a judge for the sole purpose of delivering a judgment which was long outstanding even before his resignation from the bench, such as to fall within the term of *"state of business … of the High Court"*? In agreement with Rahim J, I consider that it can.

(35) As Lord Diplock stated, the Constitution is no ordinary statute and is not to be interpreted in any narrow or pedantic way. The dictum of Dickson J in **Hunter v Southam Inc [1984] 2 SCR 145** is relevant. At 155 he said:

> ***"The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and***

obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Prof Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

(36) The absence of an express constitutional provision providing for delivery of judgment after resignation similar to that of Barbados, should not lead to any conclusion that the appointment is excluded or prohibited by the Constitution. Any such prohibition must be express. Constitutional construction must take account of *"social, political and historical realities often unimagined by its framers"*. In this case Myers J had conduct of the trial, saw and heard the witnesses and considered the law and facts. The Constitution does not differentiate between the powers of an acting judge appointed under section 104(2) and a judge holding a substantive appointment under section 104(1). The problem in this case is the hiatus between resignation and acting appointment, which is about three years. But that fact goes to whether (especially having regard to the date when judgment was reserved) the judge is able to recall the evidence of the witnesses in a sufficient manner so as to do justice to the case. Put another

way, would the delay prejudice the appellant's (or Routi's or both) right to a fair trial. There has been no such complaint here, neither has there been any appeal by the appellant in that regard. Nor has Routi complained or appealed. The judgment speaks robustly to the judge's impressions of the witnesses sufficient to suggest that his recall was vivid.

(37) The fact that the judge may have written the decision during the period when he was not a judge is of no moment. The initial oath of office which he or she swore is sufficient to bind the judge conscientiously at the time of hearing of evidence and at the time of judgment as Myers J (Ag). In any event, so would his second oath as Myers J (Ag) when delivering judgment as Rahim J rightly held. The oath of office simply binds the judge, as a matter of conscience, to uphold the law and to do justice. See **R v Chapman [1980] Crim LR 42** cited in **R v. Kemble [1990] 3 ALL ER 116** at 117 letter H. See also **AG v. Bradlaugh**. **[1885]14 QBD 667.** It does not itself confer authority to give judgment. That authority comes from sections 104 (1) and 104(2) of the **Constitution**. The mandatory provisions of section 107 of the Constitution are to ensure that the judge is bound by the oath when he is exercising his authority.

(38) Mr. Maharaj's submission that the oath of office expired upon resignation and Myers J was *functus officio* thereafter is, therefore, misconceived. There is no expiry of the oath upon resignation. The oath does not have the effect of cloaking a judge with some judicial aura or halo which dissipates upon resignation or retirement. For those of us who believe in a Supreme Being and the consequences which will be visited upon us for breach of an oath which invokes His Holy Name, the effect is to bind our conscience to do justice. For those who do not, an affirmation is supposed to have the same effect as a matter of honour. But by whatever name

called, the conscience of the judge is bound to do justice and to administer the law fairly. From that oath there is no escape. It does not expire. It is noteworthy that the Barbados provision does not require, and indeed none of the Constitutions or statutes to which I have referred requires, an oath to be re-sworn after resignation in order to give judgment. The oath does not change when a judge is appointed to act; for both appointments it is the same. The issue of *functus officio* can only arise if Myers J had purported to give judgment without being re-appointed under section 104(1) or (2). The decision of **Solomon v. Dangar [1860]**, relied on by Mr. Maharaj is distinguishable. In that case it was held that a judge, who did a trial and then demitted office but was the next day appointed acting Chief Justice, had no jurisdiction to make any order flowing out of that trial while acting as Chief Justice. The decision turned on the fact that the judge's commission to act as Chief Justice came not from the Sovereign as they usually were but from the Governor and was issued under a special power conferred on the Governor by statute. For that reason, the judge could not be regarded as the same judge who tried the case. In the present proceedings the Constitution makes no differentiation in the powers of an acting judge and that of a judge who is substantively appointed. Moreover, both are appointed by the President of the Republic of Trinidad and Tobago.

(39) Finally, in his written submissions Mr. Maharaj submitted that Rahim J, unfairly, took judicial notice of the fact of acting appointments of former judges to found his decision. He submitted that it was unfair because this was not part of the evidence. He contended that those appointments were not matters of which Rahim J could take judicial notice. I do not agree. Such acting appointments are notorious facts well within the public domain. It was perfectly within Rahim J's jurisdiction to consider them.

But I do not consider that, in any event, those matters were fundamental to his decision which was based on a construction of section 104(1) and (2).

(40) I thus answer the first issue in the affirmative and strictly speaking, it is not necessary to go on to the second issue but like Rahim J, I do so in the event that I am wrong.

Issue ii - The de facto officer doctrine

(41) The judge found in the alternative that if he was wrong in his interpretation of section 104 he would have applied the *de facto* officer doctrine. He found that the appellant did in fact accept the jurisdiction of the judge to deliver judgment on 27th July, 2011 and Myers J did have colourable title or authority and he acted in good faith and believed he had the necessary authority to deliver his judgment and was treated by the litigants as having such authority.

(42) As to the appellant's acceptance of jurisdiction, Rahim J held that when the appellant filed her constitutional motion she did not set out to contest Myers J's (Ag) jurisdiction to give a decision at that stage. No issue was made and no relief sought about his jurisdiction to sit and deliver a judgment. That, he concluded, meant that at the time when judgment was given by the judge, the appellant had accepted that the judge had the jurisdiction to sit and deliver judgment in her case.

(43) He found that this acceptance of jurisdiction was also evident from the several letters which were sent on her behalf asking for judgment to be delivered. He held that nothing prevented the appellant from taking the

point on the day that he was to deliver judgment or, even before, and no reason was provided for not doing so.

(44) Mr. Maharaj in his written submissions contended that the appellant did not treat the trial judge as having the power to give the judgment. Rather, at all times she questioned his authority to do so as was seen by the fact that once judgment was given, she did not withdraw the present action but questioned the authority of the judge to deliver judgment and amended her claim to allege a lack of constitutional authority to do so. As to the letters written post judgment, there are two letters in the record of appeal. Both sought information concerning the judge's resignation and his authority to give judgments following his resignation. Neither of them expressly challenged his jurisdiction to give the judgment. The first in time stated that the appellant would like to amend her claim but did not say what the nature of the amendment would be. Her decision appeared to be contingent upon the information provided.

(45) I agree with Rahim J that the appellant accepted the judge's jurisdiction to deliver judgment. I also agree that this is apparent from the letters she wrote asking for judgment to be delivered. The original constitutional motion sought two declarations that the delay in giving judgment was a breach of her right to property and her right to the protection of the law. The third and final relief sought was a declaration that the appellant's right to property had been infringed. The un-amended fixed date claim form contains no allegation that the basis of the appellant's claim at that stage was that the judge had no jurisdiction to deliver judgment. Her complaint was about the delay and this is even after the appellant had been told by her attorney at law that the judge had resigned (see paragraph 43 of her affidavit before Rahim J). Those allegations only appear in the amended

claim form more than a year and a half after delivery of judgment. It appears that the appellant only challenged the judgment after she did not get the complete outcome she had hoped for.

(46) Mr. Maharaj submitted that the judge erred in applying the *de facto* officer doctrine because the appellant's case was not that the judge was not a judge. Instead, the appellant's case was that the judge did not have the power or authority under the Constitution to complete the work of a section 104 (1) judge. He could only exercise the powers of a section 104(2) judge. The judge had no authority to complete the proceedings because his authority to do so ended upon his resignation on 31st July, 2008.

(47) **Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening) [2003] 4 ALL ER 60**, contains a modern and comprehensive review of the principles surrounding the de facto officer doctrine. The issue was whether a judge had jurisdiction to hear a case listed before the Queen's Bench Division in circumstances where the judge was authorized to sit as a judge of other divisions of the High Court but not authorized to sit as a judge of the Queen's Bench. In that analysis the court considered whether a lack of jurisdiction may be rescued by the common law doctrine of de facto authority. Hale LJ (as she then was) at paragraph 20 opined thus:

> ***"In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a***

general supposition of his competence to do so. In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure."

(48) Hale LJ at paragraph 20 spoke of the doctrine thus:

"Nowadays, the rule is based not on that technicality but on public policy. Sir Owen quotes from Curtis v Barton (1893) 139 NY 505, at p 511:

> ***"When a court of competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge who presides in the court to his office."***

[21] Despite its technical rationale in the notion of disseisin, the authorities show that the de facto officer must have some basis for his assumption of office, variously expressed as 'colourable title' or 'colourable authority'. Quite what suffices for that purpose has been debated, a particularly broad view being taken in State v Carroll (1871) 38 Conn 448. In that case, the elected judge of the city court not being available, the clerk of the court invited a justice of the peace to act in his place. The report does not reveal whether or not that justice knew that he had no lawful authority to sit. After an extensive review of the authorities, Butler CJ summarised the circumstances in which the doctrine would apply thus, at p 427:

> ***"An officer de facto is one whose acts, though not***

those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

Third, under color of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Fourth, [under an unconstitutional statute, not relevant here]. . .”

The first was sufficient to validate the justice's acts.

[22] But the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him."

(49) The facts of this case fall within the doctrine. The judge was appointed for one day for the specific purpose of delivering the judgment. He believed he was validly appointed under section 104(2) to give the judgment. Both the respondent and the appellant appeared on the date of judgment and took judgment (see the order of the court). Even if it is the appellant may have queried his power to give judgment (and there is no such evidence) it would not have deprived the judge of the *de facto* authority which emanated from his appointment by the President of Trinidad and Tobago. In good faith he acted on that instrument of appointment and delivered judgment.

(50) Further, Routi also had an interest in the outcome of the decision and has an interest in this appeal. She succeeded in establishing a life interest in the eastern portion of the property. She is not to be deprived of the benefit of the judge's order and be required to go through the hardship of a new trial at this stage of her life, more so since Dolly is now dead and unable to give evidence in support.

Issue iii - Right to property and protection of the law

(51) In so far as the appellant sought relief at paragraph 1 of the amended fixed date claim that the failure of the judge to give a judgment prior to his

resignation on July 31st, 2008 was a breach of due process, the claim fails because it proceeds on the ground of lack of jurisdiction after 31st July, 2008. However, I have found that section 104(2) does provide such jurisdiction.

(52) For the same reasons the other two declarations sought at paragraphs 3 and 4 of the amended fixed date claim form also cannot succeed because section 104(2)(d)(i) gave the judge jurisdiction to deliver judgment on 27th July 2011. With specific reference to the claim of deprivation of property, it is now settled that a right of action to recover damages in a court of law being a chose in action is a property right under section 4(a) of the Constitution. See **Societe United Docks v. Government of Mauritius [1895] WLR 114**. To the extent that that right may have been frustrated or rendered nugatory by the failure to deliver judgment, an infringement of the right can be established. The appellant would have had to show that the subject matter of her counterclaim is now impossible to obtain or that her successful pursuit of the right of action by counterclaim is now impossible (death of witnesses, fading memory). The decision of the judge in this case was to uphold the appellant's entitlement to the life interest in the property. Our upholding of the judge's jurisdiction to deliver judgment preserves that finding. The appellant cannot complain of any breach of section 4(a).

(53) For the same reason the appellant, on the pleadings, has been accorded the protection of the law. Her right to the life interest has been upheld. To the extent that she was aggrieved by the decision to give Routi a licence coupled with an interest in the property, her right to the protection of the law permitted her to appeal. By the decision Routi too was accorded the protection of the law which she sought when she filed her action (albeit after some delay). The contention that an appeal would have required a submission to jurisdiction in my judgment is untenable. Lack of jurisdiction

is a matter of law which can be taken as such before the Court of Appeal (unless expressly required to be pleaded by statute or by the CPR). The appellant also alleged in her amended grounds of appeal that she had an expectation that the decision be delivered before the judge's resignation. That ground, however, has not been articulated before us either as a question of the breach of section 4(b) or as a legitimate expectation.

Issue iv - Bias

(54) Mr. Maharaj submitted that the fair minded observer knowing all the relevant facts would reasonably conclude that the appellant by instituting the present proceedings was making a complaint in court about the behavior of the judge. Such an observer would have concluded that the judge would have been embarrassed by the institution of those proceedings and would have blamed the appellant. The observer would thus have concluded that there was a real possibility that the judge, in making his findings, would have been biased against the appellant.

(55) I do not agree. Firstly, the authorities are many that the fair minded observer is not unduly suspicious. Secondly, if that argument is taken to its logical conclusion, the judge should have struck down the deed of gift made in favour of Meetoolal by Dolly. He did not. Thirdly, the fact that the proceedings may have been an embarrassment to the judge, even if true, is not a sufficient reason to rebut the presumption or expectation that the judge will have given true and objective thought and consideration to the case. Indeed, a reading of the judgment shows a clear and balanced approach to the evidence and the assessment of it. Finally, this was not a pleaded ground of challenge and was not raised in argument before Rahim J.

(56) For all these reasons, this appeal must be dismissed. The appellant shall pay the respondent's costs of the appeal which shall be two-thirds of the costs assessed in the High Court.

/s/ Nolan P.G Bereaux
Justice of Appeal

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ G. SMITH J.A.

I agree with the judgment of Bereaux J.A. which I have read in draft. I have nothing to add.

/s/ A. DES VIGNES J.A.