REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. Appeal No. CA T 63 of 2014

HCA No.: T-106 of 2003

BETWEEN

L'ANSE FOURMI TRUST HOLDING COMPANY LIMITED

Appellant/Claimant

AND

ANSE FOURMI BEACH AND RAINFOREST RESORT LIMITED

MR. RANJIT WIJETUNGE

DR. ALDRIC HILTON-CLARKE

Respondents/Defendants

PANEL:

I. ARCHIE, C.J.

P. RAJKUMAR, J.A.

A. DES VIGNES, J.A.

APPEARANCES:

Mr. Stanley I. Marcus, SC and Mr. Ian L. Benjamin instructed by Ms. Dawn Palackdharry Singh for the Appellant

Mr. Mark J. Morgan instructed by Ms. Kaveeta Persad for the First and Second Respondent

Mr. D. Byam for the Office of the Administrator General on behalf of the Third Respondent

DATE OF DELIVERY: September 18th 2018

I have read the judgment of Rajkumar and des Vignes JJA, and I agree with it.

……..

Ivor Archie

Chief Justice

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JUDGMENT

Delivered by P. Rajkumar JA and A. des Vignes JA

Background

1. This appeal arises out of a dispute over the ownership of a parcel of land known as L'Anse Fourmi Estate (hereinafter referred to as "the Estate"). Prior to July 1995 the third named respondent, "Mr. Hilton-Clarke" was the original owner of the Estate. The appellant, L'Anse Fourmi Trust Holding Company, "Trust" is a holding company in whom the Estate was first vested by deed by Mr. Hilton-Clarke on July 5th 1995 ("**the 1995 Deed"**). Trust and the first named respondent, **Anse Fourmi Beach and Rainforest Resort Limited** ("hereinafter referred to as "AFB") both claim ownership of the Estate based on competing deeds. **AFB** is a company incorporated by the second named respondent ("Mr. Wijetunge").

2. Trust seeks to uphold a deed between Mr. Hilton-Clarke and Trust executed **December 28th 2001**, and **registered in 2002 (the 2002 Deed)**[1] [2].

3. AFB and Mr. Wijetunge rely on another deed of conveyance **by Mr. Hilton-Clarke** in favour of the AFB. That deed was allegedly **executed** in (either September or November) **1997** and was registered on **July 29th 2003** (the 2003 Deed). The 2003 Deed was pursuant to an alleged **agreement for sale by Mr. Hilton-Clarke** in favour of Mr. Wijetunge dated June 20th 1997.

4. The circumstances by which there came to be two Deeds by the same vendor, **Mr. Hilton-Clarke,** divesting his interest in the Estate on two separate occasions to two different purchasers required examination by the trial court.

5. Those circumstances, after the 1995 deed, included:-

   i. a 1996 deed of conveyance of the Estate (the 1996 Deed) from Trust, (then under the control of Mr. Hilton-Clarke and /or his two sons) to Mr. Hilton-Clarke by which he re-acquired title to the Estate;

[1] For consistency the undisputed year of registration of each deed is used throughout.
[2] As the third respondent is now deceased the Administrator General was appointed to represent him in this appeal

ii. a 1997 high court action (the 1997 action) and associated lis pendens filed on February 4th and 14th 1997 **(the 1997 lis pendens)** by Messrs. Kemp and Berthold, shareholders in Trust, seeking to impugn this 1996 deed;

iii. **a June 20th 1997 agreement for** sale between Mr. Hilton-Clarke and Mr. Wijetunge in respect of the Estate **(the 1997 agreement for sale)**;

iv. a high court action filed in May 2000 (the 2000 high court action) with associated **lis pendens** (the 2000 **lis pendens)** brought by Mr. Wijetunge against Mr. Hilton-Clarke seeking **specific performance** of that agreement for sale,

v. an alleged **compromise agreement** based on discussions between October 2001 and February 2002 involving several parties under which Mr. Hilton-Clarke, inter alia, **re-conveyed** the Estate to **Trust** on December 28th 2001 by the **2002 Deed (**registered on February 28th 2002**).** Mr. Wijetunge disputes that he was a party to this compromise agreement.

vi. a purported **consent order** dated June 25, 2003 between Mr. Hilton-Clarke on the one hand and AFB and Mr. Wijetunge on the other, by which the 2000 high court action by Mr. Wijetunge for **specific performance** was allegedly compromised. It is contended by AFB, Mr. Wijetunge and Mr. Hilton-Clarke that that consent order, (and the earlier dismissal of the claim by Messrs. Kemp and Berthold on April 22nd 2002), permitted the registration, on July 29th 2003, of **a deed of conveyance** from Mr. Hilton-Clarke to AFB pursuant to the 1997 agreement for sale, (the 2003 Deed**).** Various dates of execution of the 2003 deed were proffered by the respondents - **September 17th, September 18th,** and **November 10th, 1997**.

6. The issues that had to be determined were based on the status and effect of the various steps which gave rise to the 2003 Deed. To the extent that the resolution of this issue may have involved findings of fact, the trial judge had to be shown in effect to have been plainly wrong.

Issues

7. At Page 74 paragraph 195 – items 1-6 of the judgment, the trial judge identified 6 sub issues (as set out in bold type hereafter with minor modifications), and proceeded to analyse the material in respect of each.

i. T**he existence of a compromise agreement**

This involved consideration as to whether Mr. Wijetunge was a party to the compromise agreement such that its terms were binding upon him, and AFB.

ii. **The re-conveyance of the L'anse Fourmi Estate from Trust to** Mr. Hilton-Clarke. This involved consideration as to whether the 1996 Deed was valid.

iii. **The (**actual**) date of execution of the (2003) deed by Mr. Hilton-Clarke purporting to transfer the Estate to AFB**

iv. **The conveyance of the estate from Mr. Hilton-Clarke to Trust under the** 2002 **deed**.

The effectiveness of that conveyance involved consideration as to whether the 2002 Deed was subject to any prior claims or rights of Mr. Wijetunge, and, in particular, whether the 1997 **agreement for sale** was effective in conveying a beneficial interest in the estate to him.

This issue also involved consideration as to whether in any event the 2003 Deed was effective to convey any interest in the Estate given the prior 2002 Deed.

v. **The specific allegations of fraud and conspiracy to defraud made against the respondents**

This involved consideration as to whether a. the consent order was procured by fraud, b. whether in any event the consent order was binding on Trust, and c. whether the 2003 deed was procured by fraud.

vi. **The effect of a deed being held in escrow**

The findings of the trial judge

i. **The existence of a compromise agreement**

8. In considering whether Mr. Wijetunge was a party to the compromise agreement such that its terms were binding upon him and AFB, the trial judge concluded that there was not a complete and certain agreement to support the compromise agreement pleaded by Trust. Furthermore, no consideration passed from Trust to the respondent, as Mr. Robert Noonan was the party who actually paid the sum of US $250,000.00 to Mr. Hilton-Clarke to facilitate the re-conveyance of the estate to Trust[3].

9. However, whether or not Mr. Wijetunge was a party to the compromise agreement, the issue remains whether the 2002 deed takes priority over the 2003 deed. That in turn depends on whether Mr. Wijetunge had any equitable interest, of which Trust had notice, at the time of the conveyance to it on December 28th 2001 or registration in February 28th 2002.

ii. **The reconveyance of the L'Anse Fourmi estate from** Trust **to Mr. Hilton-Clarke – the 1996 deed**

10. In considering whether the 1996 Deed was valid the trial judge considered that the 1996 Deed acted as the root through which Trust claimed title to the Estate. However because the Notice of Discontinuance, and the dismissal of the 1997 action, in which the validity of the 1996 Deed had been challenged, acted as a final judgement, Trust was estopped from denying its validity in the instant action[4].

11. The action to impugn the 1996 Deed was **withdrawn** as a result of **discussions** which gave rise to the **2002 deed.** The issue of the validity of the 1996 Deed, and the fact that it was challenged in the 1997 action, have both been superseded by those events. Therefore, for that reason it is not now necessary to consider whether the 1996 Deed was valid. Further, the issue of whether the 2002 Deed, based on a conveyance by Mr. Hilton-Clarke – the registered owner under that 1996 deed - takes priority over the Deed registered in 2003, also based on a

[3] See page 81 of the judgment
[4] paragraph 208 of the High Court judgement

conveyance by Mr. Hilton-Clarke would, if resolved in favour of Trust, render moot the issue of the validity of the 1996 deed.

iii. **The date of execution of the 2003 Deed transferring the Estate to AFB**

12. The date of execution of the 2003 deed transferring the Estate to AFB was quite relevant. Upon that matter depended the issue of priority as between that deed, registered as it was in July 2003, and Trust's deed, registered in February 2002. While it was for Trust to prove fraud, it was for **the respondents to prove the existence of a deed that was executed prior to the 2002** deed, (which had been executed on December 28th 2001).

13. The trial court upheld the 2003 Deed over the 2002 deed and ordered the latter expunged. It acknowledged that the evidence on behalf of the respondents on the issue of the date of execution of the 2003 deed was weak[5]. However, it filled in the gaps by:-

a. taking judicial notice of an alleged practice by conveyancers in this country not to insert the date of execution of a deed of conveyance until the point of registration. That is not a practice, if it even exists, that is so well known that judicial notice could have been taken of it.

b. considering that Trust was under a duty to call Mr. Kelshall to clarify discrepancies regarding the date of execution. It is correct that on the issue of fraud the onus lay on Trust, and may have required the evidence of Mr. Kelshall for its determination and proof. However, the issue of the date of execution of the 2003 Deed, upon which the respondents were relying to achieve priority over the 2002 Deed, was a matter on which the onus lay squarely on the respondents. There were inconsistent dates in the evidence and pleadings of the respondents - September 17th (consent order), September 18th (testimony of Mr. Wijetunge), and November 10th (defence of AFB and Mr. Wijetunge)

14. i. The performance of several matters that indicated that the parties were attempting to reduce the areas in contention between them – including most importantly, the execution by Mr. Hilton-Clarke of the Deed on December 28th 2001, and the withdrawal of the 1997 action by Messrs. Kemp and Berthold,

[5] at para 219 of the trial judge's judgement

ii. the evidence of highly suspicious circumstances detailed hereinafter attendant upon the subsequent consent order,

iii. the inconsistencies among the various and contradictory purported dates of execution of the 2003 Deed in a. the respondents' pleadings, b. the consent order, c. in the affidavit of execution, and d. in the evidence of Mr. Wijetunge, and

iv. inconsistencies in the escrow terms for the Deed itself,

all raised the issue squarely as to **when the 2003 deed was actually executed**.

15. It must therefore be considered whether the trial judge's analysis took into account the entirety of the evidence and the inconsistencies therein in arriving at the conclusion that the 2003 Deed had been executed on September 18th 1997- a date not even pleaded by the respondents.

16. The trial judge failed to properly analyse the effect of the evidence:-

a. in failing to consider and assess these matters,

b. in paying undue regard to the failure of Trust to call Mr. Kelshall, as well as,

c. in taking judicial notice of an, (at highest), obscure, inadequately explained, and untested, alleged practice of conveyancers in this country, to explain fundamental discrepancies in the evidence as to the critical matter of the date of execution of the 2003 deed.

17. The finding, as a result, that the 2003 Deed had been executed on September 18th 1997, based on the evidence of Mr. Wijetunge and contemporaneous correspondence - despite the pleaded date and the date on the affidavit of execution being November 10th 1997, and the subject of substantial contradiction, was consequently flawed.

18. While in the absence of the evidence of Mr. Kelshall, this may not have been sufficient to establish fraud, it certainly could not justify a positive finding that the 2003 deed was actually executed on September 18th 1997, or that it was executed before the 2002 Deed. In those circumstances any finding, that on that evidence it had been proved on a balance of probabilities that the 2003 deed had been executed prior to the 2002 Deed, was plainly wrong.

iv. **The effectiveness of the conveyance of the estate from Mr. Hilton-Clarke to Trust under the 2002 deed**

19. This required consideration as to whether the Deed executed on December 28th, 2001 was subject to any prior claims or rights of Mr. Wijetunge or AFB. If there were **no constructive notice** of such a pre-existing Deed executed prior to the 2002 deed, the actual date of execution of the 2003 deed, registered as it was in 2003, would make no difference.

The 1997 lis pendens filed on February 4th and February 14th 1997

20. The effect of the 1997 lis pendens needed to have been considered in that context. The (June 20th) **1997** agreement for sale between Mr. Hilton-Clarke and Mr. Wijetunge was subject to the (February) **1997** lis pendens**.** The June 20th 1997 agreement for sale was therefore subject to any interest which was notified by the 1997 lis pendens in the 1997 action, and the claim therein by Mr. Kemp and Mr. Berthold. That lis pendens notified of a claim in HCA 29 of 1997 (Vol 2 pg. 308 Record of Appeal), which was to have the legal title in the Estate restored to Trust and the conveyance to Mr. Hilton-Clarke set aside.

21. Clearly Mr. Wijetunge was placed on notice that the entire legal interest of Mr. Hilton-Clarke, who was purporting to agree to convey the Estate to him, was under challenge. In 2001 the selfsame Mr. Hilton-Clarke re-conveyed the Estate to Trust - an outcome sought in the 1997 action of which notice was provided to Mr. Wijetunge by the 1997 lis pendens.

22. Constructive notice of this action and this claim is admitted on the respondents' pleadings. The case of the respondents was that the lis pendens fell away on April 22nd 2002 when the 1997 action was dismissed. However, by that time the 2002 deed had already been executed on December 28th 2001 and it had already been registered on February 28th 2002. The 1997 action had served its purpose – to prevent acquisition of rights by non-parties to the 1997 action until the issue in that action, (ownership of and title to the Estate), had been determined. In fact, the issue in that action was then determined by the parties thereto by compromise, and the execution of the 2002 deed which vested title in the Estate in Trust.

The effect of the lis pendens of Mr. Wijetunge in the 2000 high court action

23. **No notice of the 2003 deed was provided by the lis pendens of Mr. Wijetunge in the 2000 action**. There was notice only of an **agreement for sale dated June 20th 1997 between Mr. Wijetunge and Mr. Hilton-Clarke,** which was itself subject to the lis pendens filed in February 1997, in the 1997 action.

24. The claim for specific performance of an agreement for sale is **incompatible** with the existence of a Deed of conveyance having **already been executed** pursuant thereto. No reasonable conveyancer could anticipate, or be put on notice of, the existence of such a Deed, because the relief sought in the 2000 **high court action**, by its very nature, was inconsistent with such relief, (an executed deed of conveyance), having been already obtained at the time of its filing. (May 29th 2000). As Trust could not have had constructive notice of such a prior unregistered 1997 **Deed** via the 2000 lis pendens, the 2000 lis pendens was necessarily ineffective to displace the effect of the 2002 registered deed.

25. Further, for the reasons set out herein below:

a. even any purported transfer of the beneficial interest in the Estate by **Mr. Hilton-Clarke** to Mr. Wijetunge would have been subject to the admitted earlier 1997 lis pendens;

b. there could be no deemed notice of the existence of any 2003 Deed acquired via Mr. Kelshall; and,

c. There is no specific evidence of notice of the (unregistered) 2003 Deed prior to December 28th 2001, or February 28th 2002, derived from the correspondence among the parties.

v. **The specific allegations of fraud and conspiracy to defraud made against the respondents**

26. Therefore, it was not necessary to the resolution of the main issue – the validity and priority of the 2002 Deed - to determine whether the many curious aspects of **the consent order** amounted to fraud. However, they did provide context and background in which to assess the likelihood that the 2003 Deed had been executed since 1997 as alleged. The issue of registration of the earlier 2002 deed and the knowledge or **notice** of any **earlier acquired equitable interests** did not require a finding of fraud for its resolution.

27. As the 2003 deed was the product of a chain of events which included the consent order, the same therefore applies to a finding of fraud in relation to the **2003** deed. Such a finding was not strictly necessary. It was also not necessary to determine whether the consent order was binding on Trust. The consent order in June 2003 among the respondents would have been far too late to affect any rights acquired under a valid and registered 2002 deed, if without notice of any pre-existing interest.

vi. **The effect of a deed being held in escrow**

28. i. the original escrow condition was the payment of the purchase price by 31st January 1998. There was no evidence disclosed by the respondents that the purchase price was paid by that date or at any time prior to the registration of the 2002 deed. The original escrow condition had not been complied with by the date of registration on February 28th 2002 of the intervening 2002 deed. If that were the only escrow condition AFB's deed would have been of no effect by the date of registration of the 2002 Deed.

ii. the release of the 1997 lis pendens could not have been an **initial** escrow condition because the existence of that lis pendens was only discovered by the respondents in late 1997, after the last of the dates alleged by the respondents for the execution of the 2003 deed. Even if introduced as an **additional** escrow condition AFB could get no rights under the unregistered deed unless or until any escrow conditions had been satisfied. Neither the initial nor the additional condition had been satisfied as at the date of registration of the 2002 Deed on February 28th 2002.

iii. The principle of **relation back** is restricted to the **parties** to a deed held in escrow. That principle could not therefore affect Trust, which was not a party thereto. Trust's deed was dated December 28th 2001 and registered on February 28th 2002. This was before the registration of AFB's 2003 deed.

iv. The assertion that the 2003 Deed took immediate effect when the lis pendens in the 1997 action was removed on April 22nd **2002** therefore ignores the obvious fact that, since February 28th 2002, the relief sought in the 1997 action had already been obtained, by the intervening re-conveyance to Trust of the Estate, and the registration of the 2002 deed.

v. **Trust**, as a bona fide purchaser for value without notice of any such pre-existing unregistered deed, would be unaffected by it.

vi. Therefore, even if the 1997 unregistered deed took immediate effect upon execution, by the doctrine of relation back, (which it does not with respect to non-parties to the deed), it had to have done so subject to the intervening rights conferred by the registered 2002 Deed. The 2002 deed effected a transfer of the entire legal interest in the Estate to Trust without any express reservation of, or reference to, other third party claims.

vii. Apart from that, and in any event, AFB's deed was **subject to** notice, actual or constructive of the claim by Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust. Therefore, for that reason also, the 2003 deed could not operate to defeat the claim under the 2002 deed (even if the 1997 unregistered deed took immediate effect, upon execution, by the doctrine of relation back, -which it does not, with respect to non-parties to the deed).

Orders

29. Accordingly the judgment of the court below is set aside in its entirety.

The following orders sought by Trust are granted:

a. A declaration is granted that the registration of the **1997 deed** on July 29, 2003 is **null and void** and of no effect. The Registrar General is directed to cancel the registration of deed number 20030287260;

b. An injunction is granted prohibiting the First and/or the second named respondents from inter alia selling, leasing, mortgaging, developing, building upon, walking, driving, entering upon, or otherwise dealing with the Estate or any part thereof whether by themselves, their servants, agents, directors assigns or howsoever otherwise.

Analysis

30. As extracted from the pleadings, a summary of the material aspects of the parties' respective cases is set out below.

i. The 1995 Deed

31. Trust alleged that in 1995,[6] by deed dated July 5, 1995 and registered as No. 13372 of 1995) it became the owner of the Estate (comprising 200 acres more or less).

[6] By deed dated July 5, 1995 and registered as No. 13372 of 1995)

ii. The 1996 Deed

32. However, by deed dated June 28, 1996 registered as No. 13722 of 1996, ("the 1996 Deed"), Mr. Hilton-Clarke's sons, purporting to act as controlling directors of Trust, purported to convey the Estate back to their father.

iii. The 1997 action and associated lis pendens

33. In 1997[7], David Kemp ("Kemp") and Rolf Berthold ("Berthold"), as shareholders of Trust, commenced legal proceedings ('the 1997 action') against Mr. Hilton-Clarke, his sons and Trust alleging that, by so doing, the sons had acted fraudulently and had conspired with their father to cheat and defraud Trust and its shareholders, Mr. Kemp and Mr. Berthold.

34. Further, on February 4th and 14th 1997, Mr. Kemp and Mr. Berthold registered two *lis pendens* in respect of the 1997 action against Trust and re-registered them in 2001. With respect to the 1997 action and the *lis pendens* registered and re-registered in connection therewith, AFB and Mr. Wijetunge admitted that they had constructive notice of the claims made therein. However, they contended that by reason of the dismissal of that action by Justice Smith on 22nd April 2002, AFB's title to the Estate was no longer affected by the claims made in that action.

iv. The 1997 agreement for sale

35. On or about June 20, 1997, Mr. Hilton-Clarke purported to enter into a written agreement with Mr. Wijetunge to sell the Estate to Mr. Wijetunge for US$1,300,000.00 ('the June 1997 agreement for sale' or the "agreement for sale").

The 2000 action

36. On May 29th 2000, Mr. Wijetunge commenced legal proceedings ('the 2000 action')[8] against Mr. Hilton-Clarke seeking specific performance of the June 1997 agreement.

[7] By High Court Action No. T 29 of 1997
[8] By High Court Action No. T 99 of 2000

37. On October 31st, 2000, with express knowledge and/or in any event constructive notice of the 1997 action, as admitted in AFB's defence (para.7) and Mr. Wijetunge's defence[9] and subject to the prior registration of the *lis pendens* registered by Mr. Kemp and Mr. Berthold in February 1997, Mr. Wijetunge registered a *lis pendens* in respect of the 2000 action against the Estate.

Alleged compromise agreement

38. Between October 2001 and February 2002, Mr. Kemp and Mr. Berthold entered into negotiations, allegedly with all the respondents, together with Mr. Hilton-Clarke's sons, with a view to resolving the disputes between them, including the 1997 and 2000 actions. This is admitted by all the respondents. It was further alleged that as a result the parties agreed to a compromise ('the compromise agreement') in the following terms:

i. Mr. Hilton-Clarke's sons would resign as directors of Trust and transfer their 20% shareholding in Trust, 10% **to be held by** Mr. Wijetunge and/or his nominee, Lord Thurlow and 10% to be held by Mr. Robert Noonan or his nominee;

ii. In exchange for the 10% shareholding to be transferred to him or his nominee, **Mr. Wijetunge** would withdraw the 2000 action and remove the *lis pendens* registered pursuant thereto;

iii. In exchange for the 10% shareholding to be transferred to him or his nominee, Mr. Noonan would pay to Mr. Hilton-Clarke's sons US$250,000.00;

iv. Mr. Hilton-Clarke would re-convey the Estate to Trust. [In fact, on December 28th 2001, Mr. Hilton-Clarke did contract and agree with Messrs. Kemp and Berthold for an absolute sale of the lands and hereditaments in **the Estate to** Trust;]

v. Messrs. Kemp and Berthold would discontinue the 1997 action;

vi. Mr. Noonan would negotiate in good faith with Mr. Kemp and Mr. Berthold and their associates to acquire control of and/or a substantial shareholding in Trust with a view to developing the Estate as a Dive Resort and Eco Lodge.

39. It must be borne in mind, however, that AFB denied that it or Mr. Wijetunge entered into the alleged or any compromise

[9] (para.7) **Vol. 2 Record of Appeal pg.12,20**

40. It is undisputed however that the following actions were taken, whether in accordance with the terms of the alleged compromise agreement or otherwise.

i. **By Deed dated December 28, 2001** registered as No. 00415105 of 2002, ("the 2002 Deed"), **Mr. Hilton-Clarke re-conveyed the Estate to** Trust;

ii. On or about March 1, 2002, Mr. Noonan paid Mr. Hilton-Clarke US$250,000.00 (page 81 of the Judgement);

iii. In March 2002, Mr. Hilton-Clarke's sons resigned as directors of Trust and executed share transfers of their shareholding dated March 2002 to Mr. Noonan and Mr. Wijetunge and his nominee Lord Thurlow respectively.

iv. On April 22nd 2002 Justice Smith, as he then was, dismissed the 1997 action.

41. Whether or not the compromise agreement is, or its terms as pleaded are, admitted, the discussions and negotiations a. produced the result, and had the effect of, divesting Mr. Hilton-Clarke of his interest in the Estate, b. removing his sons as directors and shareholders of Trust, and c. vesting the Estate in Trust. There was no express reservation or retention of interest by Mr. Hilton-Clarke, or AFB or Mr. Wijetunge.

42. Trust contended that as a result of the 2001 Deed, it became the lawful owner of the Estate. However, Mr. Wijetunge, inter alia, refused to remove the *lis pendens* registered pursuant to the 2000 action.

43. Thereafter, the following developments occurred:-

The purported June 2003 consent order

i. On June 24, 2003 Mr. Hilton-Clarke filed an interlocutory summons in the 2000 action, which was heard on the following day, June 25th. He entered into a consent order ('the 2003 Consent Order' at Volume 2 Record of Appeal page 140) with AFB and Mr. Wijetunge. This provided that AFB was beneficially entitled to the Estate and was entitled to register **a deed of conveyance dated September 17, 1997** subject to all proper encumbrances and prior interests.

ii. By that deed Mr. Hilton-Clarke purported to convey the Estate to AFB for a consideration of US$1,300,000.00.

iii. The parties, *inter alia*, agreed to (a) **abridge time for service** of the interlocutory summons, (b) **join** AFB as a Plaintiff, and (c) **dispense with service** of the Amended Writ of Summons and Statement of Claim. Consequential **amendments were made** to the Writ of Summons and the Statement of Claim in the 2000 action **to claim a declaration that AFB was beneficially entitled** to the Estate pursuant to the June 20th 1997 agreement[10];

iv. The respondents relied upon an alleged September 17th 1997 deed in favour of AFB. In fact, AFB did not exist on September 17th, 1997; (It was actually incorporated on September 18th, 1997).

v. Trust contends that the respondents sought and obtained the declaration, by consent, on the hearing of the interlocutory summons, without reference to Trust, although its interest was intended to be affected;

vi. An affidavit of due execution of Mr. Hilton-Clarke's Attorney-at-Law, Mr. Brian Lee Kelshall ("Mr. Kelshall") sworn on or about July 29, 2003, **after** the entry of the consent order, deposed to the execution of the 1997 deed by Mr. Hilton-Clarke on **November 10, 1997**;

vii. Trust contends that the respondents fraudulently registered the alleged 1997 deed in 2003, and that that deed fraudulently purported to convey the Estate to AFB.

44. Trust therefore sought against the respondents (all emphasis added):

a. Aggravated and/or exemplary damages for conspiracy to cheat and defraud the Appellant and damages for **fraud**;

b. A declaration that **the 2003 Consent Order** is **not binding** and of no effect **in relation to the appellant,** its successors and assigns;

c. A declaration that the 1997 deed, purportedly dated and executed on November 10, 1997, was **fraudulent**;

[10] page 138 volume 2 Record of Appeal

d. A declaration that the **registration** of the **1997 deed** on July 29, 2003 is **null and void** and of no effect and that the Registrar General be directed to cancel the said registration;
e. Alternatively, a declaration that the 2003 **Consent Order** and the consequential registration of the deed dated November 10th 1997 on July 29, 2003 are **not binding** upon the appellant, its successors and assigns;
f. Further or alternatively, a declaration that **the deed**, registered on July 29, 2003, is **subject to** all prior interests and encumbrances and, in particular, subject to the **2002 Deed**;
g. An injunction prohibiting the first and/or the second named respondents from inter alia selling, leasing, mortgaging, developing… otherwise dealing with the Estate or any part thereof whether by themselves, their servants, agents, …howsoever otherwise;

Case for the Respondents

45. In their respective defences, AFB and Mr. Wijetunge relied upon the June 1997 agreement whereby Mr. Hilton-Clarke agreed to sell the estate to Mr. Wijetunge.

46. By the Deed[11] registered in 2003 (the 2003 Deed), Mr. Hilton-Clarke conveyed the legal interest in the Estate to AFB (a company controlled by Mr. Wijetunge), at his direction. His explanation of the execution of the 2001 deed was that that deed, which he admitted executing, was "ineffective to pass any title in the (Estate) to (Trust) until and unless (Trust) was able to successfully agree terms for sufficient compensation to (AFB and Mr. Wijetunge)[12]."

47. AFB and Mr. Wijetunge claim priority of the 2003 deed over the 2002 deed of Trust. They contended that any rights which Trust purported to have acquired by the 2002 deed were subject to the purported **consent order** made in the 2000 action.

[11] Deed registered on 29 July 2003 as No. 20030287260
[12] Paragraph 13 defence of third named respondent

48. They claimed that, in the 2000 action, by reason of the 2000 ***lis pendens*** registered by Mr. Wijetunge, notice of their claims to the Estate under the 1997 agreement for sale had been effectively given to Trust.

49. Mr. Hilton-Clarke averred at paragraph 14 of his defence that, by reason of the negotiations between the parties, Trust had **actual** notice of the June 1997 agreement for sale, **the 1997 conveyance**, the lis pendens filed in support of the 2000 action, and the claims made by AFB and Mr. Wijetunge to the Estate and, by virtue of the execution by him of the Deed dated November 1997, the legal title in the Estate was duly vested in AFB.

50. Further, Mr. Hilton-Clarke averred that by reason of the registration of the *lis pendens* in the 2000 action, Trust at the time of the execution and registration of the 2002 Deed had **constructive** notice of the 1997 agreement for sale and the claims made by Mr. Wijetunge to the Estate. (Paragraph 15 of his defence). He further avers, however, that by virtue of the 1997 **agreement**, the **equitable** title thereto was **vested** in Mr. Wijetunge and Trust was and is bound by any decree made in the 2000 action.

51. AFB and Mr. Wijetunge also contended that by reason of the negotiations between the parties, Trust had **actual** as well as constructive notice of the June 1997 agreement for sale, and the 2003 Deed in favour of AFB. (Paragraphs 15 and 16 of their defences)

52. Mr. Wijetunge contended that by virtue of the 1997 agreement for sale, the equitable title to the Estate was vested in him. However, that June 1997 agreement was entered into with admitted constructive notice of the earlier February 1997 lis pendens filed by Mr. Kemp and Mr. Berthold. The effect of the 1997 lis pendens on that agreement must therefore be examined. It was also contended that Trust was and is bound by any decree made in the 2000 action. However, that decree was made on June 25th 2003. The 2002 deed had by then long been executed and registered since February 28th 2002.

53. AFB, relying on a claim to legal title to the Estate based on the 2003 deed, contended that Trust was not a bona fide purchaser for value without **notice** of a. the 1997 agreement for sale, or

b. the 2003 deed, as it had notice of both the 1997 agreement for sale, and the conveyance allegedly executed in 1997, (even though it was registered in 2003). It was contended therefore that the 2002 Deed, though registered earlier than the 2003 Deed, was ineffective to pass any title to Trust as it was subject to the interest and title previously acquired by AFB and Mr. Wijetunge.

54. Further, AFB would have had to establish its claim to ownership under the deed registered in 2003. Apart from **notice** of the existence of that deed, (which was in any event subject to the 1997 lis pendens), it was also required to establish that that 2003 Deed was **actually executed** on a date that preceded the date of the 2002 Deed. The respondents were therefore **required to prove the date of execution** of the 2003 deed, **whether or not** Trust succeeded in proving its allegations of fraud.

55. If in fact Mr. Wijetunge had acquired the entire beneficial interest in the estate in 1997 the trial judge needed to consider what bona fide reason could exist for not expressly disclosing at that stage that there had already been a conveyance to him in 1997. While that was a matter that went to the allegation of fraud, on which the onus of proof lay on Trust, it was also a matter which went to the **existence or otherwise** of an already executed deed as at 28th December 2001, (the date of the re-conveyance to Trust under the 2002 deed), or February 28th 2002, the date of its registration). The **existence** of such a prior deed was a matter on which the onus of proof lay on AFB and Mr. Wijetunge.

56. At issue therefore is: a. whether in fact there was in existence a bona fide executed conveyance of which Trust had notice, either i. actual or ii. constructive. It is therefore necessary to determine as a question of fact whether or not Trust was aware, or had notice of, the existence of the alleged 2003 deed, purportedly executed in 1997.

Approach of the Court of Appeal

57. It is well settled that in relation to a trial judge's findings of fact, the Court of Appeal ought not to interfere with such findings unless the trial judge is shown to be plainly wrong. The

correct approach has been most recently set out in the Privy Council ruling in **Beacon Insurance Co. Ltd. v Maharaj Bookstore Ltd**. [13]and **Petrotrin v Ryan and Anor.**[14]

58. In **Beacon Insurance Co. Ltd. v Maharaj Bookstore Ltd [**paragraphs 11-17**]** it was stated as follows:-

> *11. It is important to recall the proper role of an appellate court in an appeal against findings of fact by a trial judge…*
>
> *12. In Thomas v Thomas [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:*
> *"I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge,* ***an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;*** *II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either* ***because the reasons given by the trial judge are not satisfactory****, or because it* ***unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses****, and the matter will then become at large for the appellate court."*
>
> *In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in Yuill v Yuill [1945] P 15, 19:*
> *"It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."*
>
> *It has often been said that the appeal court must be satisfied that the judge at first instance has gone "****plainly wrong****". See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is* ***required***

[13] [2014] UKPC 21 at paras. 12 to 17
[14] [2017] UKPC 30

to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. *Occasions meriting appellate intervention would include when a trial judge* ***failed to analyse properly the entirety of the evidence****: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.*

13. More recently, in In re B (A Child)(Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:
"This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was ***no evidence to support****, (ii) which was based on a* ***misunderstanding of the evidence****, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."*

14. The Board has adopted a similar approach in this jurisdiction. See Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3 in which it referred (at para 10) to the formulation of Lord Sumner in SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37, 47:
"... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, ***unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case****.*
... If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should ... be let alone."

17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In re B (a Child) (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are

important variables. As Lord Bridge of Harwich stated in Whitehouse v Jordan [1981] 1 WLR 246, 269-270:
"[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, ***an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.****"*
See also Lord Fraser of Tullybelton, at p 263G-H; Saunders v Adderley [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum.

Issues

59. In arriving at a conclusion on the issue of whether the Deed **registered in 2003** took priority over the Deed **registered in 2002**, the following sub-issues were considered by the trial judge:

i. **The existence of a compromise agreement** - Whether Mr. Wijetunge was a party to the compromise agreement such that its terms were binding upon him, and AFB. However for the reasons set out at paragraph 9 above the resolution of this issue is not necessary to the resolution of the critical issue of the competing priorities between the 2002 and the 2003 deeds.

ii. **The re-conveyance of the L'anse Fourmi Estate from the Appellant (Trust) to** Mr. Hilton-Clarke- Was the 1996 Deed Valid?

Again, however, this issue did not need to be determined as it is not necessary to the resolution of the issue of the competing priorities between the 2002 and the 2003 deeds.

iii. **The date of execution of the 2003 deed transferring the Estate to AFB**

An essential matter which needed to be determined by the trial judge was whether it had been established that the 2003 Deed had in fact been executed as alleged before the 2002 Deed or its registration.

iv. **The specific allegations of fraud and conspiracy to defraud made against the** respondents. These included a. whether the consent order was procured by fraud, b. whether in any event the consent order was binding on Trust, and c. whether the 2003 deed was procured by fraud.

A failure by Trust to prove **fraud** in relation to the 2003 Deed should not have led to the inevitable upholding of the **priority** of the 2003 Deed over the 2002 Deed. This is because, even without proof that the 2003 Deed was fraudulent, or that its date of execution was procured by fraud, the **onus** was still **on the respondents with a counterclaim who were relying on it,** to establish that such a deed actually had been in existence and executed in 1997, or in any event prior to December 28th 2001 or February 28th 2002, as they contended. This, (and notice by Trust of such a deed), was the only way in which such a deed could displace the priority of Trust's Deed (which was executed on December 28th 2001 and registered on February 28th 2002, before the registration of the 2003 Deed). Therefore, a finding on the issue of fraud is not strictly required, as a failure to prove fraud, or even the absence of fraud, does not determine the outcome of the issue of priority as between the 2002 and 2003 deeds.

v. **The conveyance of the Estate from Mr. Hilton-Clarke to Trust under the 2002 deed**
This involved consideration of a. whether **the 2002 deed** was subject to any prior claims by, or rights of, Mr. Wijetunge or AFB, b. whether the 1997 **agreement for sale** was effective in conveying a beneficial interest in the estate to Mr. Wijetunge, and c. whether in any event, given the prior 2002 Deed, the 2003 Deed was effective to convey any interest in the Estate.
These matters involved consideration of **whether Trust had <u>notice</u> of the 2003 deed allegedly executed in 1997,** and whether in turn the respondents had <u>notice</u> of the 2002 deed executed in 2001.

vi. The **effect of a deed being held in escrow**

The trial judge's conclusion on this is found at paragraph 242 of the judgement and will be addressed in detail later on.

60. We therefore propose to address the issues which were necessary to the determination of the essential issue of priorities, namely issues (ii), (v) and (vi).

The alleged date of execution in 1997 of the 2003 Deed

61. Trust was challenging the validity of the 2003 Deed which on its face was registered on 29th July, 2003. The respondents relied upon the 2003 Deed to claim priority over the 2002 Deed.

62. There were several different dates advanced by the respondents as to the date of execution of the Deed registered in 2003: 17th September 1997(consent order), 18th September 1997 (at paragraph 71 of Mr. Wijetunge's witness statement), 10th November 1997 (affidavit of Mr. Kelshall) and 20th November 1997 (Defences of AFB and Mr. Wijetunge). A critical factor in the trial judge's analysis regarding the date of execution of the 2003 Deed involved a consideration of the various dates of execution put forward by the respondents. The respondents all contended in their defences that the date, 17th September 1997, was a typographical error.

Affidavit

63. A consent order was entered before Moosai J on **June 25th 2003** between the respondents. It provided as follows (all emphasis added)

(i) *A declaration that by reason of an agreement made in writing dated the **20th day of June, 1997** between Mr. Wijetunge Wijetunge and Dr. Aldric Hilton Clarke, (hereinafter called "the Agreement"), the payment of the deposit of US$130,000.00 by the first Plaintiff to the Defendant, the filing of the lis pendens in this action on the **31st day of October 2000** and the execution by Dr. Aldric Hilton Clarke of a Deed of Conveyance (hereinafter called "the Deed of Conveyance") dated the **17th September, 1997** on the direction of Mr. Wijetunge Wijetunge pursuant to the Agreement whereby the said Dr. Aldric Hilton Clarke conveyed…(* the Estate)….. *to Anse Fourmi AFB and Rainforest Resort Limited, that Anse Fourmi AFB and Rainforest Resort Limited is and was at all material times since the 20th June, 1997 beneficially entitled to the Property (**subject to all proper***

encumbrances and prior interests*) and is entitled to proceed to register the Deed of Conveyance upon paying the proper stamp duty and that upon the registration of the same will be the fee simple owner of the Property (****subject to all proper encumbrances and prior interests****).*

Burden of Proof

64. The trial judge found Trust failed to prove that the deed, allegedly executed in 1997, was fraudulent. The trial judge accepted the evidence of the respondents that the 2003 Deed was executed on 18th September, 1997, although there were discrepancies as to the date of execution of the 2003 Deed and the explanation advanced by the respondents was weak. The trial judge found, further, that this issue could have been easily resolved had Trust called Mr. Kelshall or his secretary to give evidence because he was the Attorney-at-Law who drafted and witnessed the 2003 Deed. The trial judge drew adverse inferences against Trust based on its failure to do so. (See paragraphs 219, 220, 225, and 226 of the trial judge's judgment).

65. The affidavit of execution signed by Mr. Kelshall (p. 683 of Vol. 4 Record of Appeal) was not sworn until 29th July, 2003, four days after the consent order. In that affidavit, he deposed that he was personally present with Phyllis Daniel Clarke to witness the execution of the deed on **10th November, 1997**. In the circumstances the burden lay upon the respondents:

i. to establish the existence of a deed executed before Trust's deed executed on December 28th 2001, or registered on February 28th 2002;

ii. to clarify the disparity in the dates of alleged execution; and

iii. to clarify why the affidavit of execution was not deposed to until July 29th 2003.

66. The trial judge considered that it was Trust who should have called Mr. Kelshall to prove the fraud that it alleged[15]. While that may have been so, the trial judge failed to consider that AFB had a counterclaim, and that, apart from the issue of fraud, it was necessary for the respondents, relying on a deed executed in 1997, to prove the date of execution of that deed on a balance of probabilities, especially as it was registered in 2003. They needed to have called Mr. Kelshall for that purpose. This was more so as they had to establish the validity of their deed

[15] Paragraph 225 of the trial judge's judgement

registered in 2003 in order for it to take priority over the deed registered in 2002. To establish such priority they needed to establish, inter alia, that it was actually executed in 1997 as they claim.

67. The onus was not on Trust to disprove that it was actually executed in 1997 by calling Mr. Kelshall. In failing to appreciate where the burden of proof lay on the issue of the execution of the 2003 deed the trial judge fell into error in drawing adverse inferences against Trust for its failure to call Mr. Kelshall, especially in the context of a. the several inconsistencies in the documentary evidence of the date of execution b. an inconsistency in the escrow terms endorsed on the deed and c. the date of registration on the face of the 2003 deed was six years after the alleged date of its execution in 1997, long after the date of registration of Trust's deed in February 2002.

The date of execution of the 2003 Deed

68. The error in appreciating where the burden of proof lay re the date of execution of the 2003 deed permeated the reasoning of the judge on this issue. The trial judge found that the 1997 Deed was executed on the 18th September 1997. The trial judge relied primarily on Mr. Wijetunge's evidence that he witnessed the execution of the Deed on that date, and some contemporaneous correspondence (paragraphs 213-216). However, she recognized that that evidence was not sufficient to account for the fact that the pleaded date of execution and the date on the deed itself was November 10th 1997. Given that she had misconstrued where the onus of proof lay, the judge failed to properly take into account and analyse the several contradictory dates of execution provided to her in relation to the 2003 deed as follows:

i. According to Mr. Wijetunge, he witnessed the execution of the 1997 Deed on **18th September, 1997.**

ii. In their Defences, the respondents had alleged that the correct date of that Deed was either 10th or 20th November 1997. The trial judge also failed to take into account that the affidavit of due execution attached to the 2003 deed stated that the deed was executed on the 10th November, 1997.

iii. It was not part of the respondents' cases that the deed was executed on the 18th September, 1997 and yet the trial judge so found. In the affidavit of execution (Vol. 4, p. 683) in the name of Mr. Kelshall he swears that execution took place on 10th November 1997. That is **sworn documentary** evidence that contradicts the finding of the trial judge as to the **date of execution of the 2003 Deed.**

iv. The respondents approached the court on 25th June, 2003, for a declaration by consent that AFB was the owner of the Estate by virtue of a deed dated 17th September, 1997, when by that time Mr. Hilton-Clarke had previously conveyed the estate by the 2002 deed. No explanation was given to the court for (a) the urgency of that application, (b) the lack of notice to Trust or Kemp and Berthold, or (c) the incompatibility of the relief sought in the 2000 action with the existence of a deed already executed since 1997. At the date of filing of that application in 2003, which was for specific performance of **an agreement for sale to be performed** by Mr. Hilton-Clarke, the existence of any **Deed** would have suggested that it had already been performed by him.

v. the respondents failed to call Mr. Kelshall to give **evidence** to clarify the date of execution or to give evidence of any **conveyancing practice** of inserting a later date on the deed than the date of execution – a critical matter in respect of which explanation was required in view of the contradictory dates that had been supplied to her by the respondents themselves.

69. In the circumstances, the trial judge was plainly wrong to hold that it was Trust who should have called Mr. Kelshall or his secretary to give evidence as to the date of execution of the deed, or to draw adverse inferences against Trust for its failure to do so. This was critical as it resulted in her preference of the evidence of the respondents on the **fundamental** issue of the existence of a deed to AFB executed **before** Trust's deed executed in December 2001.

Judicial Notice

70. Neither Mr. Kelshall nor his secretary was called as a witness to explain the circumstances in which the consent order was made based on a deed dated 17th September 1997 (even if executed on 18th September 1997 as Mr. Wijetunge contended) when in fact the date on

the deed was 10th November 1997. Yet, in the absence of such explanation, the trial judge accepted as plausible, speculation advanced by the respondents, without evidence, that the "common practice in the country" of conveyancers not inserting the date of execution of a deed of conveyance until the point of registration, (Paragraph 217 of the judgment), could have accounted for this major discrepancy of dates, that is, 17th September or 18th September, 1997 or 10th November, or 20th November 1997.

71. It was necessary to analyse in the circumstances of this case what would be the point of any such practice. If it were to ensure that a time limit did not expire while waiting for fulfillment of an escrow condition, after which period late penalty fees would have become payable, then it needed to have been borne in mind that the escrow condition referred to in the correspondence from Mr. David Yung dated September 17th 1997 indicated completion was contemplated on or before January 31st 1998 (volume 4 page 328 Record of Appeal). That would have been approximately 11 weeks after the alleged execution on November 10th 1997 and approximately 19 weeks after any execution on September 18th 1997. If the reason for the alteration in the date of execution of the 2003 deed had anything to do with penalties for late registration under s. 24 of the Stamp Duty Act Chap. 76.01 this had to be a matter of evidence. If it was not, then all the more reason for evidence to be required to explain any delay in inserting the date.

72. Any practice of alteration of the actual date of execution of a deed needed to be explained rationally. It was not a matter of which judicial notice could have been taken. Even without considering whether that would have been a legitimate purpose in inserting a date different from the date of actual execution, query whether any penalty would have been completely avoided in that event as more than 8 weeks would have elapsed by the contemplated escrow release date. If even higher late penalty fees would have been payable if more than 2 months but less than 6 months had elapsed between execution and registration, the extent of any such saving on late penalty charges (if any) had to be a matter of evidence. In the absence of any discernible purpose behind such an alleged practice it would not be one of which a court could take judicial notice. As the purpose of such an alleged common practice was not clarified by any evidence led in this

regard, it would be speculative now, and speculative then to guess at the purpose of inserting the **November 10th 1997** date in that deed.

73. Had the trial judge properly analysed these facts, she could not have been satisfied on a balance of probabilities that the 2003 Deed was valid and effective to vest ownership in AFB in priority over Trust's 2002 Deed, as it had not been established on a balance of probabilities by the respondents, (who were relying on it), that it was even in existence as an **executed** Deed prior to the 2002 Deed. In fact, the evidence is that the purchase price was not even paid.

74. In the circumstances, having misconstrued where the burden of proof lay, the trial judge's finding that the deed was executed on 18th September, 1997 is not supported by the documentary evidence, and in fact is inconsistent with much of the evidence in this respect.

75. The discrepancy in dates between the 17th and 18th September, 1997 and 10th November, 1997 ought to have been resolved by the respondents calling evidence to prove the actual date of execution. The burden lay upon the respondents, and not Trust, since the respondents were relying on the Deed allegedly executed in 1997 to claim priority of that deed over Trust's 2002 Deed, indisputably executed on December 28th 2001, and registered on February 28th 2012.

Consent order dated June 25, 2003

76. It is not in dispute that Mr. Hilton-Clarke re-conveyed the Estate to Trust on December 28th 2001 by the 2002 deed. Yet AFB and Mr. Wijetunge issued an interlocutory summons in the 2000 action dated 24th June 2003, for hearing on 25th June 2003, long after the registration of that deed on February 28th 2002. The respondents purported to agree among themselves by way of a consent order that AFB was entitled to the beneficial interest in the Estate, and by deed dated **17th September 1997** entitled to register that deed.

77. In this regard, the trial judge failed to take into account the effect of the following evidence:-

1. **Documentary Inconsistency**

That AFB, Mr. Wijetunge's company- was actually incorporated **subsequent to 17th September 1997**, the date of the alleged Deed of conveyance to it of the Estate.

2. **Disclosure**

At the time of the negotiations entered into in late 2001 to 2002 involving Mr. Kemp and Mr. Berthold, which resulted in the 2002 deed (executed in December 2001), the respondents' case is that Mr. Hilton-Clarke had **already** purported to convey the Estate to AFB, in 1997. However, Mr. Kemp and Mr. Berthold were to withdraw their 1997 action on the basis of the re-conveyance of the Estate to Trust. If it were intended that the 2002 Deed were to be subject to a pre-existing interest (even a pre-existing interest not itself subject to the pre-existing claim of Mr. Kemp and Mr. Berthold), then it needed to have been brought to the attention of Trust and Mr. Kemp and Mr. Berthold.

This could have been easily achieved by a recital in the 2002 Deed or an express written communication to Mr. Kemp and Mr. Berthold. Any conduct short of this would risk being characterised as dishonest as there is a significant difference between a 2002 Deed conveying clear title free from encumbrances and/or pre-existing interests, and one which does not.

The omission to include an express recital to this effect in the 2002 deed, or produce clear unequivocal documentary evidence of disclosure of this fundamental matter, raises the issue as to whether, if the Estate had already been conveyed in 1997 to AFB by Mr. Hilton-Clarke, why was any discussion being held, far less implemented, which had as one of its outcomes the re-conveyance of the Estate to Trust by Mr. Hilton-Clarke. One possibility which had to be confronted by the trial judge was that (a) in 1997 the Estate had not in fact been conveyed, and (b) there was no extant executed deed of conveyance to disclose.

Failure to make such express disclosure of an alleged pre-existing deed as at the time of conveyance of the Estate on December 28th 2001, (or the registration date on February 28th 2002), was an issue which had to be confronted and resolved on the evidence by the trial judge.

3. **The circumstances surrounding the purported consent order**

i. The time before hearing of the interlocutory summons in which the purported consent order was entered was abridged for no obvious reason, and

ii. Mr. Wijetunge candidly admitted under cross-examination that prior to June 2003 he acted in concert with Mr. Hilton-Clarke and his sons to impair the 2002 Deed.(Vol. 1, RoA pp. 666, 675-676)

iii. Mr. Wijetunge knew of the interest of Trust in the Estate pursuant to the 2001 Deed prior to entering this hastily requested consent order in the absence of notification to Mr. Kemp and Mr. Berthold. Certainly, Mr. Hilton-Clarke did, as he had executed it. Further, Mr. Wijetunge and Mr. Hilton-Clarke were well aware of the 1997 action, and in any event had constructive notice/knowledge of the *lites pendentes* associated with that action. Yet, Trust was not served with the interlocutory summons, although its interest would have been adversely affected if an order in terms of the summons were made. The consent order aimed to validate the ownership claim of AFB to the Estate.

iv. Still further, despite the reference to prior interests in the consent order, the Honourable Moosai J., as he then was, was not expressly informed of the specific interest of Trust based on the deed to it which had been **registered** in 2002;

v. The interlocutory summons referred to a deed dated 17th September 1997 which was not produced to Moosai J. when the summons was heard. In fact, the respondents accept that there is no such deed bearing that date which could be produced. AFB had not even been incorporated at that time. Mr. Wijetunge sought to explain that this was a typographical error and the deed was in fact executed on 18th September 1997, and not 10th November 1997 (Vol. 1, RoA page 678);

vi. The 2000 action was amended, from a claim for **specific performance** to a claim for a declaration of **ownership**, without any evidence being adduced before Moosai J. in

support of the declaration sought. If the declaration of ownership sought was in fact based on an alleged deed dated 17th September 1997 and there was no actual deed of that date then that needed to be explained, if not in that action then certainly in the instant action. This was because the respondents were relying on the existence of such an executed deed preceding the 2002 Deed. The trial judge therefore fell into error when she failed to consider that the respondents had embarked upon a curious course of conduct in securing the consent order dated June 25, 2003, because though it occurred after the registration of the 2002 deed, it was clearly intended to displace its effect.

Priorities

78. It is not in dispute that i. the 2002 Deed by which Mr. Hilton-Clarke re-conveyed the Estate to Trust is dated 28th December, 2001 and **registered on 28th February, 2002** and ii. that the 1997 Deed was **registered** thereafter on 29th **July, 2003**.

79. The trial judge held (at para. 237) that the 2003 Deed, though registered in 2003, was valid and operated to transfer title to the Estate to AFB when it was executed on 18th September, 1997.

80. The trial judge considered the issue of priorities. With respect to the 2002 deed Trust's submission, that its 2001 Deed was **registered** prior to the 1997 Deed and therefore the latter is fraudulent and void, was rejected. The trial judge accepted the respondents' submission that the 2002 Deed could only defeat the 2003 Deed if Trust was a bona fide purchaser for value of the Estate without notice[16].

81. She held that in fact Trust had notice of the interest in and title to the Estate of the respondents by virtue of (i) **the lis pendens** filed by Mr. Wijetunge pursuant to the 2000 action; (ii) **the correspondence** among the parties; (iii) the knowledge of Mr. Kelshall imputed to Trust as Mr. Kelshall took execution of the 1997 Deed and had also previously acted on behalf of

[16] Paragraph 232-237 of the judgement

Trust. (Paragraph 237) iv. Further, Trust was not a purchaser for value as Mr. Noonan and not Trust paid the US$250,000 to Mr. Hilton-Clarke[17].

82. Section 16 (2) of the **Registration of Deeds Act, Chap**. 19:06 is relevant. It provides as follows (all emphasis added):

> *"(2) Every such deed that shall not be duly **registered** shall be adjudged fraudulent and void as to the lands affected by such deed against any subsequent **purchaser for value** or mortgagee **without notice** of the same lands or any part thereof, whose conveyance shall be first **registered**."*

83. An appellate court would not lightly interfere with a trial judge's findings of fact (***Beacon***). It would not be a sufficient basis for such interference simply that the appeal court would have assessed the evidence differently and arrived at different conclusions of fact. However, the trial judge must consider and confront the facts upon which those conclusions were based. Failure to consider, analyse, or assess, all the relevant facts and apply thereto the appropriate burden of proof, would be ground for reviewing findings of fact. In this case, the trial judge failed to consider the several matters above or to appreciate or apply the appropriate burden of proof in assessing the likelihood of a deed executed in 1997 existing at the time of execution or even registration of the 2002 deed. This was a matter which went to the heart of any alleged priority of the validity of the 2003 deed.

The Conveyance of the Estate from Mr. Hilton-Clarke to Trust under the 2002 deed

84. At issue is whether, given the prior Deed of Conveyance to Trust registered in 2002, the Deed registered in 2003 was effective to convey any interest in the Estate. This involved consideration as to whether the 2002 Deed was subject to any prior claims or rights of AFB or Mr. Wijetunge and in particular:-

i. Whether the respondents had notice of the 2002 deed executed in 2001, and if so, of what interest of Trust in the Estate would the respondents be affixed with constructive notice;

ii. Whether Trust had notice of the respondents' 2003 deed allegedly executed in 1997.

[17] Paragraph 233 of the judgement

Constructive Notice - Effect of the lites pendentes dated 4th February 1997 and 14th Feb 1997 (the lites pendentes or the lis pendens)

85. Any agreement for sale in June 1997 between Mr. Wijetunge and Mr. Hilton-Clarke was subject to the *lites pendentes* which had already been filed by Mr. Kemp and Mr. Berthold in February 1997 in respect of the 1997 action. In fact, both Mr. Wijetunge and Mr. Hilton-Clarke acknowledge that they were bound by the lites pendens. There is therefore no dispute that the June 1997 agreement for sale was subject to the lites pendentes. Any agreement for sale entered into by Mr. Wijetunge to purchase the Estate from Mr. Hilton-Clarke would have been with constructive knowledge of the claim filed by Mr. Kemp and Mr. Berthold to have the Estate reconveyed to Trust.

86. At paragraph 30 of submissions of AFB and Mr. Wijetunge it is stated that their "position was that, on the basis of the decision of ***CitiBank (Trinidad and Tobago) Limited v Hosein's Warehousing and Cold Storage Limited, Deepak Gul Kirpalani CvA 58 of 1996***, the effect of the Wijetunge agreement for sale was to vest the equitable title in the Estate in Mr. Wijetunge **subject to any decree** that was made in the first fraud action." The effect of the lites pendentes in the 1997 action was therefore a critical matter in the analysis of the validity and priority of the 2003 deed.

87. At paragraph 197 (vii) of the judgment, the trial judge stated *"on the 22nd April 2002 and the 24th June 2003 (sic) the legal proceedings against the L'Anse Fourmi Estate ceased and the Estate's title was now free from any encumbrances".* In fact, the lites pendens filed had the effect of providing notice of a potential encumbrance - the potential for setting aside of the 1996 deed, and the upholding of the claim that Trust was entitled to the Estate.

88. The 2002 Deed effectively provided the relief that had been sought in the 1997 action in accordance with the reliefs sought in that action. The filing of the lis pendens by Mr. Kemp and Mr. Berthold was to prevent dealings which were inconsistent with the claim in that action. Even the lis pendens filed by Mr. Wijetunge in the 2000 action was in respect of a claim that was itself subject to notice of the claim in the 1997 action.

89. The reasoning of the trial judge ignores the fact that a. the 1997 lites pendentes in the action by Mr. Kemp and Mr. Berthold had been superseded by the acquisition by Trust of the legal title in the estate, and b. by itself the declaration by consent between Mr. Hilton-Clarke and AFB and Mr. Wijetunge, subsequent to the acquisition of legal title by Trust, in proceedings (i) of which Trust had no notice and (ii) to which neither it, nor Kemp nor Berthold were a party, could have no impact on Trust's already acquired title to the Estate.

90. Any agreement for sale in June 1997 between Mr. Wijetunge and Mr. Hilton-Clarke was subject to the *lites pendentes* filed in 1997. Any equitable Estate agreed to be sold would have been subject to the prior claim that the Estate be reconveyed to Trust, as in fact was eventually done on December 28th 2001. The same applied to any alleged 1997 Deed. That too would have been subject to the *lites pendentes* filed by Mr. Kemp and Mr. Berthold and their prior claim that the Estate be reconveyed to Trust.

91. Even if the lites pendentes had been dismissed or withdrawn subsequent to the registration of the 2002 deed, their purpose was to provide constructive notice of impending litigation which could have affected title to the Estate. Notice of a claim that Trust was entitled to ownership under the 1995 deed had been therefore effectively served.

92. Further, even if notice of Mr. Wijetunge's claim had been provided by the lis pendens in the 2000 action, (without reference to the fact that it was subject to the prior claim of Mr. Kemp and Mr. Berthold in the 1997 action), examination of the facts discloses that, at highest, there would only have been notice of a claim under an **agreement for sale**. On the evidence, there could have been no notice of a **Deed already executed** transferring the Estate to Mr. Wijetunge or his company (AFB) when his claim had been filed for the purpose of compelling that very outcome. As a matter of logic and common sense, there would have been no need for that relief being claimed, and continuing to be claimed long past February 28th 2002, if it had already been obtained.

93. The lites pendentes filed by Mr. Kemp and Mr. Berthold in February 1997 would have affected and bound any conveyance by Mr. Hilton-Clarke to AFB. In their 1997 action, they

alleged that the Mr. Hilton-Clarke's sons had fraudulently transferred the Estate to Mr. Hilton-Clarke.

94. The effect of the lites pendentes was to place the respondents on notice of the **claim** of entitlement of Trust to the legal interest in the Estate, and of the **challenge to the entitlement** of Mr. Hilton-Clarke to the legal Estate under the 1996 deed. Though the 1997 action was eventually dismissed on April 22, 2002, the lis pendens was still in effect, and provided the intended notice, at all of the dates proffered for the purported conveyance in 1997 to AFB. In fact, the consent order itself took this into account as it was expressly made subject to prior interests.

95. By the February 1997 lites pendentes Mr. Wijetunge and Mr. Hilton-Clarke therefore had notice of the claims of Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust both a. at the time of the agreement for sale in **June 1997** and b. the date of the deed of conveyance, whether dated September 17th, 18th, or November 10th, 1997, or otherwise. In fact, this is admitted in their pleadings.

96. The trial judge was therefore in error i. in failing to appreciate that on September 17th, 18th or 10th or 20th November, 1997, any conveyance by Mr. Hilton-Clarke to AFB on any of those dates would have been **subject to**, and with notice of, the *lites pendentes* filed by Mr. Kemp and Mr. Berthold ii. Further, the dismissal of the 1997 action on April 22, 2002 was i**neffective to displace the effect of the 1997** lites pendentes as their intended result had already been achieved. That claim to a legal interest by Trust was given effect by the 2002 deed, long before the dismissal of the 1997 action on April 22nd 2002.

Whether Trust had notice of the 2003 deed allegedly executed in 1997

98. In essence, the trial judge considered the issue of notice to Trust as having the effect of removing Trust from the category of a bona fide purchaser of value without notice.

99. She held that Trust had notice of AFB's title by reason of i. the lis pendens filed by Mr. Wijetunge in the 2000 action, ii. the correspondence among the parties, as well as, iii. the fact that Mr. Kelshall had taken execution of the 1997 Deed and had also acted for the Appellant.

100. For the reasons set out hereunder, the evidence did not permit the trial judge to find as she did that Trust had notice, either actual or constructive, of AFB's claim to the Estate by the 1997 Deed, (and in any event any such claim was subject to the prior claim by Mr. Kemp and Mr. Berthold seeking re-conveyance to Trust).

Effect of notice via the 2000 lis pendens

101. The lites pendentes by Mr. Kemp and Mr. Berthold were filed in February 1997 and the lis pendens filed by Mr. Wijetunge was filed in 2000. As a matter of priority, therefore, Mr. Wijetunge was fixed with notice of the prior claims of Mr. Kemp and Mr. Berthold as set out in the 1997 action.

102. Therefore, even if Trust had notice of Mr. Wijetunge's agreement for sale it would have been subject to the claims in the 1997 action to have the Estate reconveyed by Mr. Hilton-Clarke to Trust. His own 2000 lis pendens giving notice of a claim to specifically enforce that agreement could not have the effect of impairing the 2002 deed as that lis pendens did no more than give notice of a claim that was itself subject to a pre-existing claim.

103. Further, even if Trust had notice of AFB's 2003 deed, allegedly executed in 1997, that would have been notice of such a deed **subject to** the claims in the 1997 action. When Mr. Wijetunge filed his high **court actions** in **1998 and 2000**, he sought specific performance of the **agreement for sale** which he claimed was made in June 1997.

104. However, as at June **1997,** he was fixed with notice of the prior claims of Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust. Both the agreement for sale, and the 2003 deed which resulted from it, were subject to the prior claims of Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust, as was in fact done by the 2002 deed**.** In fact, the consent order in 2003 itself was expressly made subject to prior interests.

105. It matters not that the relief claimed was eventually given effect by a negotiated solution in December 2001, rather than at a trial of that 1997 action.

106. It was not therefore strictly necessary to determine whether Trust had notice, actual or constructive, of the 2003 deed, as even such notice would have been notice of a deed subject to Trust's own claims.

Constructive Notice

107. The 1997 agreement for sale, the 2000 lis pendens, the 2000 action and the 2003 deed, were all subject to the 1997 lis pendens. Apart from that fact, the 2000 lis pendens could not have provided notice of the 2003 deed or of any **deed** allegedly executed in September or November 1997 for the following reasons:

a. There was no reference in Mr. Wijetunge's claims filed in 1998 and 2000 to any prior **deed of conveyance** of the Estate to AFB in September or November 1997. It would therefore be illogical to conclude that by the filing of the 2000 lis pendens, Trust or Mr. Kemp and Mr. Berthold could have been given constructive notice of any **deed** executed in **1997** because a. there was **no reference to it** in Mr. Wijetunge's high court actions b. it had **not been registered** and c. an action seeking specific performance of an **agreement for sale** was **incompatible** with the existence of a **deed** having **already** been executed pursuant to such an agreement.

108. Any inquiries re the extent of the claim connected to the lis pendens filed by Mr. Wijetunge in 2000 would have revealed that in the associated 2000 action Mr. Wijetunge was claiming **specific performance** of a June 1997 **agreement for sale**[18].

109. In fact, the very relief sought in the claim filed was **inconsistent with a deed having already been executed**. A coherent and credible explanation was required as to the reason for continuing to seek, up to two days before the consent order in 2003, specific performance of an

[18] However even that agreement for sale was subject to the prior lites pendentes filed by Kemp and Berthold). Examination of the documents filed in that 2000 litigation could not have revealed that a 1997 **Deed** had **already been executed** by the third named respondent in favour of the first named respondent in September or November 1997, or that the first named respondent was claiming to hold the legal title to the Estate pursuant to a 1997 **Deed** which was being held in escrow

agreement for sale, rather than a declaration of ownership based on a **deed of conveyance** which had already allegedly been executed since 1997. The agreement for sale would in effect have already been specifically performed.

110. In the circumstances of the already severe and glaring contradictions in the documentary evidence as to the date of alleged execution of the 2003 deed, the explanation for the drafting of the 2000 action in terms inconsistent with the existence of an already executed deed of any type required a critical analysis in the context of the entirety of that evidence.

111. The trial judge was plainly wrong in failing to take into account the effect of those several inconsistencies and their consequential impact and effect on alleged **notice** to Trust of claims prior to the 2002 deed, and therefore the consequential impact of such notice on the validity of the 2002 deed. Consideration of the evidence before the trial judge would have revealed that any notice via the lis pendens would have been limited to a. **notice of an agreement for sale** between Mr. Wijetunge and Mr. Hilton-Clarke, which b. was in any event subject to prior claims by Mr. Kemp and Mr. Berthold, and further c. was in any event superseded by the execution of a deed of conveyance by Mr. Hilton-Clarke[19] to the appellant.

112. In those circumstances, at the time of the registration of the 2002 deed, executed in December 2001, there could have been **no constructive notice** of **claims by AFB or Mr. Wijetunge,** so as to impact its validity save for a claim under an **agreement for sale subject to the prior claims** of Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust. Neither could there be any notice at all of a **deed** already executed pursuant to the alleged agreement for sale, or any claims at all by AFB which was only made a party to the 2000 action in 2003. Therefore, the trial judge was plainly wrong to find that Trust had constructive notice of the claim of AFB and Mr. Wijetunge under any **deed**, far less one executed prior to February 28th 2002. The ***Citibank*** case relied upon by the respondents does not alter this conclusion.

113. The relevant extract from the judgement is set out below:

[19] (one of the parties to the 1997 agreement for sale)

Citibank (Trinidad and Tobago) Limited v Hosein's Warehousing and Cold Storage Limited; Kirpalani, Deepak, G. [a/c Kirpalani, Gul], The Executor of the estate of the late Kirpalani, Ram, M. a/c Kirpalani, Ramchand a/c Kirpalani, Ram C.A.CIV.58/1996

Per Ibrahim JA

I am of the view that the lis pendens by referring the Appellant to the claim in the writ had put the Appellant on notice that specific performance and damages were being sought. In a contract for the sale of land the vendor executes a conveyance and the purchaser pays the purchase price. When the vendor's writ claims specific performance of the contract of sale and damages for breach of the contract and a person taking a mortgage from the purchaser with ***the deed in his hand showing that the purchase price had been paid in full but knowing that, notwithstanding that fact, that may not be so****, such a purchaser ought to be concerned to know what this action is all about.* ***He ought not merely to be content with the fact that no claim was made in the writ for a vendor's lien and sit back and say that that establishes that no issue arises with respect to the purchase money. He must ascertain the nature of the suit and make inquiries from the respondent and his attorney as to why this writ was filed.*** *He must be interested in finding out* ***the nature of the challenge to the title of the purchaser*** *from whom he was taking the mortgage.* ***He must make inquiries****,* ***not only from the executor who was giving him the mortgage, but if need be further inquiries from the respondent.*** *His failure so to do facilitated the executor in nefariously concealing the respondent's well founded claim. I do not think that the action of the Appellant was prudent and reasonable.* ***I think that the Appellant must be fixed with notice of what they would have discovered acting on skilled advice.*** *I would adopt the words of Park J. in Northern Bank Limited case (supra) and ask the question did the conveyancer obtain for the Appellant title that would not be defeated subsequently by a third party* ***whose right ought to have been discovered on proper investigation****. The answer is clearly no.* (All emphasis Added)

114. In that case, a careful conveyancer with notice of the lis pendens, on examining the writ to which it related, and observing the claim by the vendor for the unpaid amount of $722,000

would not have dismissed from his mind the possibility of an unpaid vendor's lien for that amount, which could affect the title of a subsequent purchaser. The fact that there was no claim in the writ for an unpaid vendor's lien in that case was held insufficient to exonerate the subsequent purchaser or his attorney from the need to make further enquiries. That was obviously correct.

115. A claim for an unpaid amount of $722,000 in respect of the purchase price of a property would immediately raise the issue of the possible existence of an unpaid vendor's lien, even if it had not been pleaded. It was in that context that the observations were made of the need, and the duty to contact Attorney at Law who had filed the lis pendens. In the instant case, however, the situation is far different.

116. The 2000 lis pendens related to a claim for specific performance by Mr. Wijetunge in respect of an **agreement for sale** between him and Mr. Hilton-Clarke. Even putting aside the fact that Mr. Wijetunge's claim was subject to prior claims by Mr. Kemp and Mr. Berthold, (of which he himself had notice by their 1997 lis pendens), the fact is that a claim for specific performance of an agreement for sale seeks, as one of its outcomes, a deed of conveyance, giving effect to such agreement. Such a claim is incompatible, therefore, with the existence of an extant deed of conveyance already executed pursuant to that agreement for sale.

117. While the lis pendens might have alerted a purchaser or his Attorney-at-Law to the existence of an agreement for sale, it could not, unlike the ***Citibank* case**, have placed anyone on further notice of an already **completed agreement** for sale - completed by the execution of a **deed of conveyance**. In those circumstances, no duty to make further enquiries of Fitzwilliam and Company arose, and there can be no constructive notice of the existence of any alleged 1997 **deed**.

118. In fact, by the time a decree was made in the 1997 action, by its dismissal on 22nd April 2002, legal title in the Estate had already been conveyed by deed by Mr. Hilton-Clarke to Trust and the deed already registered.

119. **The focus on the outcome of the 1997 action** on 22nd April 2002 was therefore misplaced as by that date the lites pendentes had achieved their effect of placing third parties on notice of a pending claim to the Estate. In this specific case the lites pendentes had effectively prevented the registration by AFB and Mr. Wijetunge of any intervening legal interest. It is not disputed that a purchaser or mortgagee who takes a conveyance or mortgage with notice of a **pending** suit concerning the **title** to the property conveyed or mortgaged is bound by the decree in the suit as stated by Ibrahim JA in ***Citibank (***at page 23).

120. However, nothing in that case suggests that such a purchaser or mortgagee is bound only by the decree in the suit. As a matter of logic, he can be, as in this case, affected by the acquisition by compromise of the interest sought **in the suit** by the claimant therein, even before a decree is pronounced **in the suit**, or before the suit is terminated.

121. Mr. Kemp and Mr. Berthold sought in their suit a re-conveyance to Trust and a setting aside of the purported conveyance by Trust to Mr. Hilton-Clarke. Even before the termination of their suit that is what they achieved consensually by negotiation.

Actual knowledge

122. The correspondence referred to by Mr. Wijetunge refers to the 1997 agreement for sale. In any event, notice of the 1997 agreement for sale was conveyed by the 2000 lis pendens, as discussed above. However, reference to that agreement for sale and opaque reference to "reserving rights" is not equivalent to an open and honest declaration that a 1997 deed of conveyance existed, executed and held in escrow, if it did in fact exist. Notice of the existence of such a deed is not sufficiently conveyed by the correspondence to attribute notice of it to Trust.

Whether actual knowledge via Mr. Kelshall

123. The trial judge accepted the submission of Mr. Wijetunge and Mr. Hilton-Clarke that Trust had actual knowledge of the 2003 Deed **through Mr. Kelshall** who was the Attorney-at-Law for Trust in the 1997 action and who had allegedly taken execution in 1997 of that deed. However, this was at a time when Trust was under the control of Mr. Hilton-Clarke's sons. In

fact, it was their alleged fraudulent conduct in transferring the Estate to their father that was the subject of complaint by Mr. Kemp and Mr. Berthold in the 1997 action. Pursuant to negotiations, Mr. Hilton-Clarke re-conveyed the Estate to Trust in December 2001 and Mr. Hilton-Clarke's sons resigned as directors in March 2002 and transferred their shares to Mr. Noonan and Mr. Wijetunge and Lord Thurlow.

124. Section 80 of the **Conveyancing and Law of Property Act** provides:

"80 (1) A purchaser shall not be prejudicially affected by notice of any instrument or fact or thing unless –

(a) it is within his own knowledge, or would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him; or

(b) ***in the same transaction*** *with respect to which a question of notice to the purchaser arises, it has come to the* ***knowledge*** *of* **his** ***Attorney-at-Law****,* as **such***, or of his other agent, as such, or would have come to the knowledge of his Attorney-at-Law or other agent, as such, if such enquiries and inspections had been made as ought reasonably to have been made by the Attorney-at-Law or other agent."*

Mr. Kelshall was not acting for the Appellant in the 2001 conveyance for the 2002 deed.

125. By the time Mr. Kemp and Mr. Berthold filed the Notice of discontinuance and settlement in March 2002, the legal title to the Estate had been vested once more in Trust by the 2002 deed. The action of Mr. Hilton-Clarke in executing that 2002 deed was entirely inconsistent with any equitable interest being vested in Mr. Wijetunge pursuant to the June 1997 **agreement for sale**. It was also inconsistent with any legal interest being vested in AFB pursuant to any 1997 Deed which was unregistered and not brought to the attention of Trust.

126. The attribution by the trial judge of knowledge of the alleged 1997 conveyance by Mr. Hilton-Clarke to AFB was unjustifiable and artificial in those circumstances, where the evidence was that Mr. Kelshall, even when on record for Trust, at all times was actually representing the

interests of the Hilton-Clarkes. His knowledge of a 1997 deed, (even if its existence as an executed deed prior to December 28th 2001 had been proved), could not in reality be translated to knowledge by Trust of the existence of that 1997 Deed.

127. Further, the fact that Mr. Hilton-Clarke, (or any of his sons), may have been a shareholder or director of Trust at the time of execution of the 2002 Deed, and that he was also a party with actual knowledge of the 2003 deed, allegedly executed in 1997, cannot impute such knowledge to Trust, (the alleged victim of the disputed conveyance). (See **Ken Julien v UTT 2018 UKPC page 2 paragraph 5 and 48[20])**

128. The evidence on analysis led to the inexorable conclusion that Trust did not have notice of the 2003 deed. Even if it had, however, that deed or its antecedent agreement for sale, was subject in any event to the preexisting claims and interests of Mr. Kemp and Mr. Berthold to have the Estate re-conveyed to Trust.

Whether Trust was a bona fide purchaser for value

129. The trial judge found (at para. 206, pg. 81) that i. there was an absence of consideration moving from Trust to the respondents ii. the sum of US$250,000.00 was paid by Mr. Noonan to Mr. Hilton-Clarke to facilitate the re-conveyance of the Estate to Trust iii. therefore, no consideration moved from Trust for the compromise agreement and that as a result Trust was not a purchaser for value.

130. The reality is that Trust at that time was a property holding vehicle - not a trading company. In any event, Mr. Kemp and Mr. Berthold, by their forbearance to continue their suit to trial provided value for the 2002 deed of conveyance to Trust. The value provided by Mr.

[20] 5. Besides defending the negligence claim on its merits, the appellants asserted that it was statute barred, and this met with the response from Eteck, based on section 14(2), that the appellants' breach of duty had been deliberate, in circumstances in which it was unlikely to be discovered for some time. It has always been common ground that the knowledge of, or ability to discover the alleged breach by Eteck's former directors cannot be attributed to Eteck, for the simple reason that they are the alleged wrongdoers and Eteck is the alleged victim. But the appellants asserted that the facts alleged to constitute the breach were always known, or discoverable, by Eteck's sole shareholder, namely the Minister of Finance, and that such knowledge or discoverability was attributable to Eteck, so as to negative any postponement of the running of time under section 14(1) for a claim brought against them by Eteck itself.
48. Notwithstanding its novelty, this is a powerful argument. It does conform to the general policy of the Limitation Act. Although section 14 is designed to prevent the running of time in favour of those guilty of deliberate concealment of the kinds described in subsections (1) and (2), it postpones the running of time only until the victim of the concealed breach knows about the facts, or could with reasonable diligence discover them. Where the directors' knowledge of, or ability to discover, the breach is not attributable because they are the wrongdoers and the company is the victim then, unless knowledge or discoverability by the entire body of shareholders is attributable, it may be said that there is no knowledge or discoverability which can be attributable to the company for the purposes of making section 14 work in relation to it.

Kemp and Mr. Berthold was an agreement to withdraw their action. That value was provided by them on behalf of Trust.

The effect of a deed being held in escrow

131. On the hearing of the appeal (in addition to the issue of notice and its effect on the priority of the 2002 deed over the 2003 deed), Trust argued the following additional grounds:

1. The 2003 Deed, even if executed in 1997, was a deed held in escrow which was ineffective as a deed until the escrow conditions were fulfilled. The deed did not become effective until it was registered in July 2003 (or, at the earliest when the 1997 action was dismissed in April 2002). As at either date, the 2002 Deed had already been registered and therefore it held priority over the 2003 Deed.

2. The respondents allege that the 2003 Deed was held in escrow, pending the removal of the *lis pendens* filed by Mr. Kemp and Mr. Berthold pursuant to the 1997 action, or the dismissal of the action. (See paragraph 172 of the High Court Judgement re evidence of Mr. Wijetunge). Accordingly, the respondents contend that when the 1997 action was dismissed (following a Notice of discontinuance) on 22nd April, 2002, the 2003 Deed, allegedly executed in 1997, took immediate effect. As a consequence, the 2003 Deed superseded the 2002 Deed.

132. The effect of the 2003 deed being held in escrow had to be considered. The trial judge did so at paragraphs 238 to 241 of the judgement concluding at paragraph 242 that:-

> *Therefore, on the 22nd July, 2003 Deed No. 20030287260 took immediate effect as the condition upon which it relied had been fulfilled, i.e. the dismissal of High Court Action No. T-29 of 1997. Accordingly, I hold that this Deed supersedes that made between the Claimant and the Third-named Defendant, dated the 28th December, 2001 and registered on the 28th February, 2002 as Deed No. 00415105*.

133. We consider this was incorrect because:-

i. **the original escrow condition had not been complied with** by the date of registration of the intervening 2002 deed. If that were the only escrow condition AFB's deed would have been of no effect by the date of registration of the 2002 Deed on February 28th 2002;

ii. **the release of the 1997 lis pendens could not have been an initial escrow condition** because Mr. Wijetunge did not become aware of the existence of the 1997 lis pendens until on or about 22nd November 1997- (para. 153 of Mr. Wijetunge's witness statement) , (subsequently confirmed by letter dated December 12th 1997 from Fitzwilliam and Co). Even if introduced as an **additional** escrow condition, AFB could acquire no rights under the unregistered deed unless or until the escrow conditions had been satisfied. **Neither condition had been satisfied as at the date of registration** of the 2002 Deed **on February 28th 2002.**

iii. **The principle of relation back is restricted to the parties to the deed held in escrow**. That principle could not therefore affect Trust, who was not a party thereto. Trust's deed was dated December 28th 2001 and registered on February 28th 2002. This was before the registration of AFB's 2003 deed.

iv. The assertion that the 2003 Deed took immediate effect when the lis pendens in the 1997 action was removed on April 22nd **2002**[21] therefore ignores the obvious fact that **since February 28th 2002 the relief sought Mr. Kemp and Berthold in the 1997 action had been obtained by the intervening re-conveyance to Trust of the Estate by**, and the registration of, the 2002 deed.

v. Even if the 1997 unregistered deed took immediate effect upon execution, by the doctrine of relation back, (which it does not with respect to non-parties to the deed), it would have done so **subject to the intervening rights conferred on the third party, Trust by the registered 2002 Deed**. The 2002 deed effected a transfer of the entire legal interest in the Estate to Trust without any express reservation of, or reference to, other third party claims.

vi. Trust, as **a bona fide purchaser for value without notice of any preexisting unregistered deed, would be unaffected by it**.

vii. Apart from that, and in any event, AFB's deed was **subject to** notice, actual or constructive **of the claim** by Mr. Kemp and Mr. Berthold **to have the Estate reconveyed to Trust**. Therefore for that reason also, the 2003 deed could not operate to defeat the claim under the 2002 deed (even if the 1997 unregistered deed took immediate effect, upon execution, by the doctrine of relation back, which it does not with respect to non-parties to the deed).

[21] or July 22nd 2003 – the date of entry of the order

The escrow condition/s

134. At paragraph 70 of the witness statement of Mr. Wijetunge and exhibit RW 38, different escrow conditions are indicated (See Vol. 4, p. 0032 of the record of appeal and Vol. 4, p. 0680). D. Yung sought confirmation that the deed of conveyance and the deed of mortgage would be held in escrow and not registered until 31st January 1998 (**the original escrow condition**). However, the escrow condition endorsed on the Deed, clearly endorsed after July 22nd 2003, was that the deed was to have been held in escrow pending the removal of the lis pendens filed with respect to the 1997 action or the dismissal of that action. By order of High Court dated 22nd April 2002 "and entered on 22nd July 2003" the 1997 action was dismissed (**the additional escrow condition**) (Vol. 4, p. 0680). An issue of fact arose therefore as to i. whether the 2003 deed was held in escrow since 1997, and if so, ii. what were the escrow conditions, and iii. when were they satisfied.

T**he original escrow condition**

135. The **original** escrow condition had not been complied with by the date of registration of the intervening 2002 deed on February 28th 2002, because the evidence disclosed that the purchase price had not been paid up to that date. If that were the only escrow condition the first respondent's deed would have been of no effect by the date of registration of the 2002 Deed.

The additional escrow condition

136. There would have been no knowledge by the respondents of a lis pendens at the time of the alleged execution of the 2003 deed on November 10th 1997 (See paragraph 153 of witness statement of Mr. Wijetunge where he says he became aware of the lis pendens on or about 22nd November 1997 and confirmatory letter dated December 12th 1997 from Fitzwilliam and Company informing of discovery of the lis pendens at Vol.4 page 362 of the record). Therefore the release of that lis pendens could not have been an original escrow condition. The endorsement of the escrow condition on the 2003 deed clearly on its face occurred after the **entry** of the order dismissing the 1997 action on **July 22nd 2003**.

137. It is not necessary to consider or decide whether or not the imposition of additional escrow conditions was capable as a matter of **law** of governing the actual conditions of escrow for that deed.

138. Further, even if it were accepted as an issue of **fact**, (a matter not addressed and resolved on the evidence in the judgment of the court below), that an additional escrow condition had been introduced **before the registration of the 2002 deed,** AFB could get no rights under the unregistered deed unless or until the escrow conditions had been satisfied. As at the date of registration of the 2002 deed on February 28th 2002, they had not been.

139. Therefore even if, i. as a matter of law, the original escrow condition could have been varied in this way, and ii. as a question of fact, it were accepted that it was so altered, the additional escrow condition was only satisfied after the removal of the 1997 lis pendens on April 22 2002, which was **after the registration of the 2002 deed** to the appellant on February 28 2002.

140. The issue, therefore, is what would have been the effect of this on priorities as between Trust's intervening deed registered in 2002, in the interregnum between the execution of any escrow deed on November 10th 1997 (subject to proof) and the satisfaction of the escrow condition (either January 30th 1998 or April 22nd 2002 – subject to proof).

The evidence re the additional escrow condition

141. The evidence is that:

a) as at November 1997 the original escrow condition required completion on or before January 31 1998.
b) On or around December 12th 1997 Mr. Wijetunge's lawyers realised that the 1997 lis pendens had been filed and advised him not to complete or register the deed.
c) Four (4) years later, on December 28th 2001, Mr. Hilton-Clarke executed a deed of conveyance in favour of Trust.
d) Mr. Wijetunge therefore knew that the original alleged escrow condition could not be fulfilled by January 31 1998. He also knew of the transaction between Trust and Mr.

Hilton-Clarke arising out of discussions between Mr. Kemp and Mr. Berthold and the Clarkes, leading to execution on December 28th 2001 of the 2002 deed. (see his witness statement at paragraph 335 volume 4 page 0174)

e) He knew that the additional alleged escrow condition – removal of 1997 lis pendens - would not be fulfilled by December 28th 2001.

142. Despite these uncontested facts, the respondents contend that the transaction remained alive and on foot pending removal of the 1997 lis pendens. As at December 28th 2001, more than four years had elapsed since the alleged execution on November 10th 1997 of the 2003 deed, a more than sufficient period for the fulfillment of the alleged additional escrow condition - for the removal of the ***lis pendens***. The inescapable inference is that, more than four years having elapsed, both Mr. Wijetunge and Mr. Hilton-Clarke were then of the view that the deed executed in November 1997 had lapsed, there having been no compliance with the alleged additional escrow condition, and/or no compliance with the original escrow condition. The attempt by Mr. Wijetunge and AFB to justify, after the fact, their inaction and inactivity in the face of execution of the 2002 deed to Trust is not consistent with their actions and inaction at the time. They both knew of the execution by Mr. Hilton-Clarke of the 2002 deed on December 28th 2001.

143. Further, it was to be followed by the removal of the 1997 ***lis pendens*** and the withdrawal of the associated actions by Mr. Kemp and Mr. Berthold. It would be illogical if it was intended that the effect of that removal of the 1997 ***lis pendens*** was to somehow vest in AFB, by the doctrine of relation back, or otherwise, a pre-existing legal title in the Estate, to which the Estate of Trust under the 2002 deed would then be subject. It smacked of a convenient attempt to rewrite history. In any event, it is not consistent with what the parties actually did, or the actual chronology and the evidence.

144. The implausibility of the additional escrow condition for the 2003 Deed either being in existence or remaining in effect as at December 28th 2001, and surviving thereafter, was not addressed by the trial judge. It is more consistent with the evidence that once it was realized that the original escrow condition, (which was to be complied with by January 31st 1998), could not be fulfilled (because of the 1997 lis pendens), that the parties to that unregistered 1997 deed,

(even assuming that it existed at that time), eventually realized that they could not proceed and Mr. Hilton-Clarke renounced it, as he would have been entitled to do. Hence the conveyance on December 28th 2001 to Trust. This is entirely consistent with Mr. Hilton-Clarke, (and probably Mr. Wijetunge and AFB, given paragraph 335 of Mr. Wijetunge's witness statement), by that time simply not considering that there was any longer an extant deed which prevented him from conveying the estate to Trust. The conduct of the parties was simply not consistent with the removal of the lis pendens being an escrow condition, or with any continuing common intention to treat the 1997 document as a subsisting deed binding on them.

145. In fact, this appears to be inconsistent with the facts and an attempt to reinterpret history.
a. If it were really the case (and not merely an afterthought) that it was intended to introduce as an additional escrow condition (after the 1997 lis pendens had been discovered), that the deed would be held in escrow until the lis pendens had been removed;
b. if it were even possible to consensually vary the original escrow condition, to introduce the additional escrow condition as alleged,
then it would be expected that the parties to the 2003 deed would have acted consistently with that position.

146. The case of **Alan Estates v W.G Stores Ltd [1981] 3 WLR 892** is of importance. The court there dealt with the nature of an escrow and the issue of when does an escrow take effect, as follows (all emphasis added):-

Per Lord Denning MR at page 898 C-F

> "*Thus far there can be no dispute. The question in this case is: what is the effect of an escrow* ***before the conditions are fulfilled****? One thing is clear. Whilst the conditions are in suspense, the maker of the escrow cannot recall it. He cannot dispose of the land or mortgage it in derogation of the grant which he has made. He is* ***bound to adhere to the grant for a reasonable time*** *so as to see whether the conditions are to be* ***fulfilled or not****.* ***If the conditions are not fulfilled at all, or not fulfilled within a reasonable time, he can renounce it. On his doing so, the transaction fails altogether. It has no effect at all****. But if the conditions are fulfilled*

*within a reasonable time, then the conveyance or other disposition is binding on him absolutely. It becomes effective to pass the title to the land or other interest in the land from the grantor to the grantee. The title is then said to "**relate back**" to the time when the document was executed and delivered as an escrow. **But this only means that no further deed or act is necessary in order to perfect the title of the grantee. As between grantor and grantee**, it must be regarded as a valid transaction which was effective to pass the title to the grantee **as at the date of the escrow**: see Perryman's Case (1599) 5 Co. Rep. 84a. **But this doctrine of "relation back" does not operate so as to affect dealings with third parties**: see Butler and Baker's Case (1591) 3 Co.Rep. 25a. So far as the grantee is concerned, **whilst the conditions are in suspense, he gets no title** such as to validate his dealings with third persons. He cannot collect rents from the tenants. Nor can he give the tenants notice to quit. He cannot validly mortgage the land, though, if he purports to do so, the mortgage might be "fed" later when he acquires the title."*

147. One principle that can be extracted from that decision is that, if the conditions are not fulfilled at all or not fulfilled within a reasonable time, the maker of the escrow can renounce it. On his doing so, the transaction falls altogether. It has no effect at all.

Whether fulfillment of any escrow condition

148. The trial Judge was required to consider whether or not the evidence before her demonstrated either that the **original escrow condition** or **the additional escrow condition** had been fulfilled at all. The original escrow condition, completion by January 31st 1998, was never fulfilled. The additional escrow condition - removal of the 1997 *lis pendens* - was eventually fulfilled on April 22nd 2002. That date, however, was subsequent to the execution on December 28th 2001 by Mr. Hilton-Clarke of the deed to the appellant and its registration on February 28th 2002.

149. The alternatives, therefore, are: 1) if the original escrow condition failed then the transaction had failed altogether and the 2002 deed was unaffected by the 2003 deed; or 2) if the additional escrow condition had been found, as a question of fact, to have been introduced by

variation, then the Trial Judge had to consider whether by April 2002 an escrow condition which had not been fulfilled between November 1997 and April 2002, had been fulfilled within a reasonable time.

150. The trial court did not do so and it is therefore open to us to do so now. It cannot be said that an escrow condition which had not been fulfilled for over four years had been fulfilled within a reasonable time. If that is so, then according to ***Alan Estate***s the maker of the escrow could renounce the escrow. In fact, by his execution on December 28th 2001 of the 2002 deed, that appears to be exactly what Mr. Hilton-Clarke did.

151. ***Alan Estates*** is authority for the proposition that Mr. Hilton-Clarke's actions demonstrated a recognition that the initial purported 1997 execution of the 2003 deed, had failed altogether, that it had no effect at all, and that he was entitled to, and did renounce that deed. It was only if either the original escrow condition or the additional escrow condition had been fulfilled within a reasonable time that the conveyance in 1997 by the 2003 deed would have become binding on him absolutely. It is only in that situation that the title could be said to relate back to the date when the document was allegedly executed and delivered as an escrow. It is only upon fulfillment of the escrow conditions that it could have been held that **as between grantor and grantee** it must be regarded as a valid transaction which was effective to pass the title to the grantee (that is 2nd respondent or his nominee 1st respondent) as at the date of execution in 1997 or otherwise. Further, however, ***Alan Estates*** makes it clear that this doctrine of relation back does not operate so as to affect dealings with third parties, (Trust in the instant case).

152. Mr. Wijetunge acquired no rights while any escrow condition was in suspense. He had no title. The examples given in ***Alan Estate***s were with respect to validating dealings with third persons, collecting rents from tenants or giving tenants notice to quit or mortgaging the land. These are illustrations of the general principle that while an escrow condition was in suspense Mr. Wijetunge and AFB had no title to the Estate.

153. The intervening transfer of title by Mr. Hilton-Clarke, the escrow conditions not having been fulfilled, was sufficient to divest him of his title and interest in the Estate. There was no reservation of title or interest by Mr. Wijetunge or AFB as they had none. The subsequent fulfillment of the additional escrow condition, even assuming it had been proven that there were an additional escrow condition, simply occurred too late to be of any effect whatsoever.

154. In the instant case, as at April 22nd 2002, (the date of dismissal of the 1997 actions and the extinction of the 1997 ***lis pendens)***, the conveyance of the legal estate was no longer capable of being given effect, even if that had been the original bargain between Mr. Hilton-Clarke and Mr. Wijetunge and AFB. The intervening acquisition of the legal estate by Trust, and in fact the intervening transfer of the legal estate by Mr. Hilton-Clarke, had rendered the original bargain between himself and Mr. Wijetunge and AFB incapable of being given effect.

Effect in law of non-fulfillment of escrow condition

155. Whether or not the additional escrow condition existed at the time of the execution or registration of the 2002 deed, the fact is that even if it were an additional escrow condition, the original escrow condition lapsed on January 31st 1998 and **the additional escrow condition** lapsed after a reasonable time. As at December 28th 2001, therefore, when more than four years had elapsed from the date of alleged execution, a reasonable time had been exceeded. The document therefore became of no effect. That being so the transaction failed. It had no effect at all. There would therefore have been no impediment to Mr. Hilton Clarke's executing the 2002 deed, and there would be no priority of the unregistered deed over Trust's 2002 deed.

156. The case of ***Security Trust Co. v Royal Bank of Canada [1976] A.C. 503*** was cited by the respondents in aid of their submissions. That case is quite fact specific. Competing claims over a parcel of land (the property) had to be considered as between a holder of a debenture over the assets of a company (the company), and the mortgagee of the property. The company had been negotiating to acquire the property but had not been able to pay the deposit before the debenture over its assets was executed. The **mortgage** had been executed (February 1970) and held in escrow prior to the debenture and the fixed charge created thereunder (created June 1970 and registered July 1970). The deposit to enable the acquisition of the property was paid on

April 30 1971. In fact it was obtained by the receiver of the company from a loan by the debenture holder. The deed of conveyance and the **mortgage** were then released from escrow, and registered thereafter. The issue was whether, despite the mortgage having been registered after the debenture, the fixed charge created under the debenture was upon the property or only upon the equity of redemption. This required the ascertainment of what interest existed in the company over the property at the time of the debenture. This in turn was dependent on a determination of **the intentions of the parties**. It was held by the Privy Council that on these facts, **when the debenture was created**, the company had no interest in the property and the property could not be regarded as present freehold subject to a fixed charge under the debenture. This case does not assist the respondents, as, unlike the instant case, there were no intervening rights by a bona fide third party purchaser for value without notice.

Conclusion on escrow

157. a. **Even if** as a matter of fact it can be determined that the original escrow conditions for the deed had been varied and,

b. **Even if** as a matter of law original escrow conditions for a deed can be so varied, and

c. **Even if** fulfillment of escrow conditions for a deed has the effect of rendering it effective relating back to the date of execution of that deed in relation to non-parties thereto, and

d. **Even if** the date of execution of the AFB's deed had been proven to predate the date of registration of the 2002 deed,

yet Trust, as a bona fide purchaser for value without notice of such pre-existing unregistered deed, would still be unaffected by it, unless such notice could be attributed to it.

158. The trial judge's conclusions on such notice were inconsistent with the evidence as:-

a. the attribution principle could not assist the respondents to attribute to Trust knowledge of the 2003 conveyance by Mr. Hilton-Clarke, or their attorney at law Mr. Kelshall, as Trust, being the party from whom the conveyance had been divested by the 1996 deed , and to whom it was subsequently restored by the 2002 deed, would have been the alleged victim of the 2003 conveyance,

b. constructive notice of the lis pendens could not have placed any reasonable party or advisor on notice of anything other than an agreement for sale, **itself subject to a pre-**

existing claim of a right to have the estate transferred to Trust. The lis pendens could not provide notice of a **deed** of conveyance, already executed in escrow, to the first named respondent.)

Conclusion

159. For the reasons summarised at paragraphs 1 - 28 above and expanded upon hereinabove the judgement of the court below is set aside in its entirety.

Orders

160. The following orders sought by Trust are granted:

a. A declaration is granted that the registration of the **1997 deed** on July 29, 2003 is **null and void** and of no effect. The Registrar General is directed to cancel the registration of deed number 20030287260;

b. An injunction is granted prohibiting the First and/or the second named respondents from inter alia selling, leasing, mortgaging, developing, building upon, walking, driving, entering upon, or otherwise dealing with the Estate or any part thereof whether by themselves, their servants, agents, directors assigns or howsoever otherwise.

Peter A. Rajkumar
Justice of Appeal

Andre des Vignes
Justice of Appeal