THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA P. No. 326 of 2015
CV2009-02696

BETWEEN

JUDE MOSES
(also known as Julie Moses)

ANCILLARY CLAIMANT/APPELLANT

AND

SELWYN MOSES

ANCILLARY DEFENDANT/RESPONDENT

AND

CLIVE GILL

CLAIMANT

AND

JUDE MOSES
(also known as JULIE MOSES)

DEFENDANT

PANEL: **N. BEREAUX J.A.**

J. JONES J.A.

A. DES VIGNES J.A.

APPEARANCES:

Mr. Y. Ahmed and Ms. C. Le Gall on behalf of The Appellant

Mr. C. Blaize on behalf of The Respondent

Date of Delivery: **Wednesday 29th July, 2020**

I have read the judgment of Jones J.A. and I agree.

…….
Nolan Bereaux
Justice of Appeal

I too agree

…….
Andre des Vignes
Justice of Appeal

JUDGMENT

1. This appeal is essentially a family dispute but has far reaching implications for persons not parties to this suit. Prior to her death Jude Moses also known as Julie Moses, (the Appellant) commenced action against her son Selwyn Moses (the Respondent) seeking relief from the effect of a deed of conveyance registered as No. 19914 of 1984 (the disputed deed). She alleged that the disputed deed ought to be set aside on the ground of mistake or illegality. At the hearing before the Trial Judge, evidence was led on behalf of the Appellant but the Appellant did not give evidence. The Trial Judge dismissed her claim. The Appellant subsequently died. The appeal is now being pursued by her daughter, Flora Moses, (Flora) as administratrix pendente lite of her estate.

2. The facts are not in dispute. By the disputed deed the Appellant conveyed to the Respondent a parcel of land comprising approximately three acres situate at Mausica Road D'abadie (the land). The land was originally owned by Milton Moses (Milton), the husband of the Appellant, and the father of the Respondent. By Milton's will various parcels of land were devised to his children including the Respondent. The residue of his estate was bequeathed solely to the Appellant. The land formed part of the residue of his estate.

3. By his will Milton appointed Republic Bank Limited to be his executor and trustee. After his death at a meeting held with the beneficiaries, including the Respondent and the Appellant, the will was read out by a representative of the Bank. The Respondent admits that by that meeting he understood that the land had not been left to him in the will. The bank subsequently renounced the executorship and in September 1982 the Appellant was granted Letters of Administration with the will annexed of Milton's estate.

4. In 1984 the Appellant transferred to the children, including the Respondent, the lots of land devised to them by Milton under the will. On October 12, 1984 she executed the disputed deed. There is no direct evidence of why the Appellant executed the disputed deed. By it the Appellant, as the Legal Personal Representative (LPR) of Milton's estate, purported to transfer the land to the Respondent as the beneficiary under Milton's will. A year later, on 9th October 1985, as LPR of Milton's estate she executed another deed (the deed of assent) by which she assented and conveyed the land to herself as beneficiary under the will. These deeds were all prepared by the same attorney at law. Eight years later, by a deed of mortgage dated 3rd August 1993, the Appellant mortgaged the land to Republic Bank Limited. This mortgage was later released in April 1994.

5. In or around 1999-2000 the Appellant put the land up for sale. In response to the advertisement for sale the Respondent requested that the Appellant give him the first option to purchase the land. Pursuant to that request the Respondent made enquiries at the land registry and for the first time discovered the existence of the disputed deed.

6. By two deeds of conveyance dated 2nd August 2001 and 12 November 2001 the Respondent sold the land to Colvin Blaize (Blaize) for

$300,000.00. Blaize now appears as Attorney at Law for the Respondent in these proceedings. The land was thereafter developed and subdivided into lots by Blaize. In December 2004 Blaize re-conveyed a portion of the land comprising 2279 square metres to the Respondent for the sum of $600,000.00 (the re-conveyed portion). Between the years 2005 to 2007 the Respondent sold from the re-conveyed portion three parcels of land amounting to 1,652 square metres for a total of $660,000.00.

7. During the course of the trial a report on title of the re-conveyed portion was commissioned by the Judge. The report on title revealed that in December 2008 the Respondent sold another portion of the re-conveyed land for the sum of $260,000.00. According to the report as a result of a defect in the conveyance by operation of the Conveyancing and Law of Property Act, while only intending to convey 471.2 square metres, the Respondent in fact conveyed the entire remaining portion of the re-conveyed land to the purchaser. According to the report on title none of the land is now vested in the Respondent.

8. By way of an aside the Appellant submits that this report ought not to be considered because it was never put into evidence. I do not agree with this position. The fact that this was a report commissioned by the Judge avoids the need to have the report formally tendered into evidence. It was a report requested and seen by the Judge. In any event the existence of the report was revealed to us during the course of the oral submissions before us and subsequently placed before us by consent.

9. In the meanwhile Blaize sold portions of the land to various third parties including Clive Gill (Gill). Gill thereafter instituted proceedings against the Appellant over her refusal to sign a deed confirming his title. This claim was subsequently settled and is not relevant to this appeal.

10. By way of an ancillary claim in those proceedings the Appellant commenced this action against the Respondent. By her ancillary claim she claimed that the disputed deed was null and void and of no effect and ought to be set aside on the grounds of mistake or illegality. She sought an order setting aside the disputed deed, a declaration that she was the rightful owner of the subject land, an order directing the Registrar General to expunge the disputed deed from the land registry or alternatively, that she be paid the market value of the subject land which was sold by the Respondent and that the remaining portion be re-conveyed to her.

11. The Respondent by way of a counterclaim contested the claim and sought a declaration that the Appellant had divested herself of all her interest in the land or alternatively a declaration that her right to the land had been extinguished by virtue of the provisions of the Real Property Limitation Ordinance.

12. The Judge was of the opinion that there were three issues for his determination:
    (a) whether the disputed deed was valid or should be set aside;
    (b) if found to be invalid, whether the Respondent holds the lands in trust for the Deceased; and alternatively
    (c) whether the Respondent occupied the lands adverse to the interest of the Deceased.

13. The Judge determined that there was insufficient evidence upon which he could determine that the Appellant was operating under a misapprehension when she executed the deed. He found that the deed was valid and that the Appellant voluntarily elected to divest herself of her interest in the land. With respect to issue (b) the Judge found that the elements of a trust had not been established. With respect to issue(c)

he determined that the Respondent had not established adverse possession.

14. The Appellant's challenge is directed to the Judge's conclusion that there was insufficient evidence upon which he could find that when the disputed deed was executed the Appellant was operating under a misapprehension. The Appellant submits that in coming to that conclusion the Judge got it wrong. She submits that there was evidence of a mistake of fact on the part of the Appellant sufficient to have the disputed deed set aside.

15. The Respondent defends the Judge's determination on this issue on the basis that these were findings of fact made by the Judge and that, as a court of appeal, we ought not to disturb these findings. In this regard he relies on the cases of **Beacon Insurance Company Limited v Maharaj Bookstore Ltd [2014] UKPC 21** and **The Attorney General of Trinidad and Tobago v Anino Garcia Civ Appeal 86 of 2011.** In addition the Respondent submits that at the time of executing the power of attorney in favour of Flora the Appellant was incompetent to act for herself owing to her mental health. As a result, he submits, Flora had no authority to bring the initial action against the Respondent.

16. This was not a point taken before the Judge. While in certain circumstances it is open to a party to raise a point on appeal which was not taken before the trial judge this is limited to a point in law for which there is no need for further evidence: **Diamondtex Style Ltd v NUGFW CA 59 of 2008**. There is no evidence that the Appellant was mentally incompetent at the time of instituting the action or at all. Nor can it be said that the claim was instituted by Flora on behalf of the Appellant pursuant to her power of attorney.

17. As intituled the claim is instituted by the Appellant and not by Flora as her lawful attorney. Flora merely signed the certificate of truth contained in the statement of case on the Appellant's behalf pursuant to the power of attorney. The only evidence on the Appellant's mental health was that in 2006 as a result of the Appellant's ill health Flora was appointed her lawful attorney by way of a power of attorney. Further in 2007 the Appellant had a stroke and by 2010, the time the witness statements were filed, her memory was not good. This evidence does not establish that at the time of the execution of the power of attorney or the institution of the claim the Appellant was mentally incompetent or a patient within the meaning ascribed by Part 23 of the Civil Proceedings Rules 1998 as amended (the CPR) so as to make her unable to execute the power of attorney or bring a claim on her own behalf. There is therefore no merit in the submission.

18. The Respondent is correct in his submission that the effect of the cases of **Beacon Insurance Co. Ltd. v Maharaj Bookstore Ltd [2014] UKPC 21** and **The Attorney General of Trinidad and Tobago v Anino Garcia Civ. Appeal No. 86 of 2011** is that a court of appeal will be slow to reverse a decision of a trial judge unless the appellant can show that the judge was plainly wrong. However where what is being challenged is an inference drawn from undisputed primary facts then as a court of appeal we are in as good as a position as the trial judge to make a decision on and draw inferences from those facts.

19. According to Lord Hodge:

> "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.": **Beacon at paragraph 17**.

20. Essentially the issue for determination here is whether the Appellant intended to transfer the land to the Respondent by the disputed deed or was the disputed deed executed by the Appellant acting under a mistake of fact. The evidence in this regard is undisputed. In the absence of direct evidence by the Appellant the question is what are the inferences to be drawn from this undisputed evidence. In circumstances such as these, should it be determined that the Trial Judge fell into error, we are in as good a position as the Trial Judge to draw conclusions from this evidence.

21. Accordingly the issues for our determination on this appeal are: (i); Did the Appellant intend to transfer the land to the Respondent by the disputed deed or was the disputed deed executed by her acting under a mistake of fact; (ii) if she was acting under a mistake of fact what is the effect of this in the circumstances of this case.

Did the Appellant intend to transfer the land to the Respondent by the disputed deed or was the disputed deed executed by her acting under a mistake of fact

22. This essentially is an issue of fact. The Judge concluded that given the state of the evidence, he was unable to find that at the time of execution of the disputed deed the Appellant was operating under any misapprehension. Nor, he opined, was there any evidence that could lead him to conclude that at the time the Appellant was unaware that she was the actual legatee of the land. Further, according to the Judge, there was insufficient evidence as to the Appellant's state of mind when the deed of assent was executed so as to lead him to conclude that it was done as a clear and unequivocal act that demonstrated that the disputed deed was executed in error. In the circumstances he concluded that the Appellant unilaterally and without coercion elected to convey the beneficial interest in the land to the Respondent.

23. The Appellant contends that the Judge fell into error by: (i) misconstruing the law and the facts and finding that the Appellant intended to give the land to the Respondent by the disputed deed; (ii) finding that the Appellant intended to give the property to the Respondent in circumstances that ignored the effect and presence of the 1985 deed, the subsequent mortgage deed, the deed of release, the presence of the family company on the lands and the attempt by the Appellant at a sale of the land in 1999 or thereabouts; (iii) failing to consider the evidence of the Respondent against the intention of the

Appellant that he did not know that the deed was in his name until he did a search after the Appellant put the property up for sale and (iv) holding that it was incumbent on the Deceased to herself give evidence of her intention with respect to the disputed deed.

24. The difficulty faced by the Judge arose from the fact that the Appellant was unable to give evidence of the circumstances under which she executed the disputed deed. Had the Appellant been in a position to give evidence the question would simply have been one of credibility. The Judge was of the opinion that to find in the Appellant's favor he was required to have direct evidence of her state of mind at the time she executed the disputed deed. In this regard the Judge misdirected himself and thereby fell into error. In the absence of direct evidence of the Appellant's state of mind what the Judge was required to do was to consider all of the evidence that was capable of giving some insight into the Appellant's intention with respect to the disposition of the land and determine the inferences to be drawn, if any, from that evidence. He did not do this.

25. Similarly when he determined that there was no evidence that could lead him to conclude that at the time of the execution of the disputed deed the Appellant was unaware that she was the actual legatee of the land he was not correct. The disputed deed itself by purporting to convey the land to the Respondent as beneficiary was itself evidence of this fact. The question was the weight to put on that evidence and the inference to be drawn from it.

26. In addition in arriving at the conclusion that the Appellant elected to convey her beneficial interest to the Respondent the Judge also fell into error. Despite stating that he was not prepared to draw any adverse inferences from the failure of the Appellant to give evidence he in fact does just that. While it is true that there was no evidence of coercion it

is equally evident that there was no evidence that the Appellant elected to convey her beneficial interest in the land to the Respondent.

27. The ability of a judge to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue was dealt with in this jurisdiction in the case of **Sieunarine v Doc's Engineering Works (1992) Limited HCA 2387/2000** and by the Court of Appeal in **Gulf View Medical Centre Ltd and Roopchand v Karen Tesheira Civ. Appeal 087 of 2015**.

28. Here both courts adopted the position taken by Lord Justice Brooke in **Wisniewski v Central Manchester Health Authority.**

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences that may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the latter question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness' absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

29. In coming to the conclusion that in making the deed the Appellant voluntarily elected to convey her beneficial interest to the Respondent

the Judge in fact made an adverse inference against the Appellant the effect of which was to strengthen the Respondent's evidence. He took this position as a result of the lack of evidence as to the Appellant's state of mind. Evidence of the Appellant's state of mind was evidence that one would expect to have been given by the Appellant.

30. In the absence of direct evidence of this intention the Judge makes the finding that the Appellant elected to convey her beneficial interest. The disputed deed certainly did not say that. It says that the transfer was pursuant to a disposition in the will. The fact that by the deed the Appellant intended to convey her beneficial interest to him was a position taken by the Respondent in his evidence. Despite his protestations therefore what the Judge was doing was using the failure of the Appellant to give direct evidence of her state of mind to strengthen the Respondent's case. Given his acceptance of the reasons given for the Appellant failing to give evidence the Judge ought not to have drawn this adverse inference against her. While this was a conclusion to which the Judge could have ultimately arrived he ought to only have done so after examining all of the relevant evidence. This he did not do.

31. In coming to his conclusions the Judge asked himself the wrong question. The question was not why did the Appellant execute the disputed deed. In the absence of the Appellant's evidence the answer to that question would have been pure speculation. The question that the Judge ought to have asked himself was whether the evidence taken as a whole disclosed that the Appellant intended to transfer her beneficial interest in the land to the Respondent or whether it showed that at the time of the transfer she was operating under a mistake. That was the question for his determination.

32. Given these errors on the part of the Judge "the matter now falls for our consideration": **Thomas v Thomas [1947] AC 484 at pages 487-488**.

Further the evidence being undisputed we are in as good a position as the Judge was to draw our own inferences and arrive at our own conclusions.

33. The undisputed evidence capable of giving some insight into the Appellant's intention with respect to the disposition of the land was as follows:
    (i) the disputed deed purported to transfer the land to the Respondent as though he was entitled to it under Milton's will when he was not.
    (ii) the subsequent deed of assent made by the Appellant in accordance with Milton's will sought to vest the land in the Appellant as the residuary beneficiary under the will;
    (iii) the deed of mortgage executed by the Appellant and the subsequent release;
    (iv) the attempted sale of the land by the Appellant; and
    (v) the fact that the Respondent had not been informed of the existence of the disputed deed and only knew of it when, some 15 years later, the Appellant put the land up for sale.

34. Looking at this evidence as a whole there are two inferences that can be drawn. Either by the disputed deed the Appellant intended to transfer the land to the Respondent and changed her mind or the disputed deed was executed and the land was transferred to the Respondent by mistake. The question then becomes what is the more reasonable inference to draw from this evidence.

35. In answering this question three things are apparent. The first is that an examination of the disputed deed suggests that when the Appellant executed it she was under the mistaken impression that the deed related to land that had been left to the Respondent by Milton and that in executing the deed she was complying with her responsibility as LPR

of Milton's estate. That much is made clear by the disposition in the deed transferring the land to the Respondent as the beneficiary under Milton's estate. This was an obvious mistake since the land was not devised to the Respondent by Milton.

36. The second is that it is equally evident that her intention was not to give to the Respondent the land that fell in the residue of Milton's estate. That much is apparent from a reading of both deeds. By the disputed deed the Appellant transfers the land to the Respondent as the beneficiary of the land under the will and by the deed of assent she transfers the land to herself as the person entitled to the residue. Thirdly, by mortgaging and subsequently putting the land up for sale, she was treating the land as belonging to her.

37. Given these factors the more irresistible inference to be drawn from the evidence is that the Appellant did not intend to transfer the land to the Respondent and her doing so was as a result of a mistake of fact on her part. This conclusion is supported by the fact that the Appellant never told the Respondent that she had transferred the land to him. It is clear from the evidence that he knew that the land devised to him by Milton's will had been transferred to him but did not discover the disputed deed until some 15 years after it had been executed. The mistake of fact on the part of the Appellant was that the Respondent was entitled to the land under Milton's will. For our purposes, and in the circumstances of this case, it matters not whether the mistake was with respect to the dispositions in the will or whether the Appellant mistakenly executed the disputed deed.

38. In the circumstances an examination of the evidence disclosed that in executing the disputed deed the Appellant acted under a mistake of fact and had not elected to convey the beneficial interest in the land to the Respondent. In finding the contrary the Judge fell into error.

What is the effect of the finding that the Appellant acted under a mistake of fact in the circumstances of this case.

39. "Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive a benefit by it, a gift, whether by mere delivery or by deed is binding on the donor……. In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing the he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him." per Lindley LJ in **Olgivie v Littleboy (1897)13 TLR 399 at 400**.

40. In **Pitt v Holt [2013] 2 WLR 1200** one of the issues for determination was whether relief in equity on the grounds of mistake was available to set aside a disposition made in a settlement. The Supreme Court allowed the appeal on the ground that such relief was available. According to the head note:

"…..whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief; that the test would normally be satisfied only when there was a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which was basic to the transaction; that a causative mistake differed from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a false belief or assumption which the law would recognise as a mistake; that the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences, including tax consequences, for the disponor, and the court then had

to make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected;" **page 1202.**

41. According to **Lord Walker of Gestingthorpe** giving the decision of the court at paragraph 128:

"In a passage in *Gillett v Holt* [2001] Ch 210, 225, since approved by the House of Lords (see especially the speech of Lord Neuberger of Abbotsbury, with which the rest of the House agreed, in *Fisher v Brooker* [2009] 1 WLR 1764, para 63) I said in discussing proprietary estoppel that although its elements (assurance, reliance and detriment) may have to be considered separately they cannot be treated as watertight compartments: "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round." In my opinion the same is true of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."

42. In the instant case whatever reason for the mistake it led the Appellant to a false belief or assumption that the land was devised to the Respondent under the will. Looking at the matter in the round it is clear that the Appellant did not intend the effect of the disputed deed. There was no intention on her part to transfer the land to the Respondent. The consequences to the Appellant were serious. The Appellant was

deprived of property left to her by her husband and in circumstances where the Respondent had already received his entitlement under the will. In these circumstances it would be unconscionable and unjust to leave the mistake uncorrected. The difficulty here is, given the circumstances of this case, how do we correct this mistake.

43. The land is no longer in the hands of the Respondent. In 2001 the land was sold to Blaize for $300,000.00. The evidence is that some development was done to the land. Blaize then sold portions of the land to various third parties and a portion of the land comprising 1,652 square metres back to the Respondent for $600,000.00. According to the evidence the land re-conveyed by Blaize was then sold by the Respondent to various third parties for a total of $920,000.00. At the end of the day, taking all these transactions into consideration, the Respondent received the total sum of $620,000.00 for the land.

44. By her statement of case the Appellant seeks either a declaration that she is the lawful owner of the land and an order directing the Registrar General to expunge the disputed deed from the records or alternately that the Appellant be paid the market value of the land as sold by the Respondent and that the remaining portion of the land be re-conveyed to her.

45. Under normal circumstances an order that the disputed deed be set aside and the land returned to the Appellant would suffice. This is what the first option set out in the statement of case seeks. The difficulty with the first option is that in the circumstances of this case rescission is not possible. There are now third parties involved who have not been joined in this action. The declaration and order sought will affect their interest. In any event given the particular circumstances of this case it is entirely possible that these persons may be bona fide purchasers for

value without notice. Rescission is therefore not available to the Appellant.

46. By the second option the Appellant seeks an order that she be paid the market value of that portion of the land re-conveyed to the Respondent by Blaize. Before the Judge the Appellant led evidence that the market value of this land as of May 2013 was $5,014,100.00. The problem here is that this represents the market value of the re-conveyed land as developed. There is no evidence of the market value of the land at the time of the conveyance to Blaize nor is there evidence of the market value of the re-conveyed portion in the state that it was at the time of the conveyance to Blaize.

47. In the circumstances the only footing upon which the Appellant can be granted relief seems to be on the basis of the Respondent's unjust enrichment. According to Lord Wright in **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd. [1943] AC 32** at page 61:

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

48. The basis here is not necessarily any wrongdoing on the part of the person enriched but the mere fact of a benefit obtained at another's expense in circumstances that are unjust or unfair. On the evidence it is clear that the Respondent has been enriched by the receipt of a benefit; that the benefit was at the Appellant's expense and that it would be unjust to allow the Respondent to retain that benefit. Further

the Appellant, by being entitled to have the disputed deed set aside, has established that there is no basis for the Respondent's enrichment.

49. Any doubt about the application of the principle of unjust enrichment in these circumstances arising as a result of the failure of the Appellant to seek such relief in her statement of case is answered by the fact that the Appellant also seeks from the court 'further and other relief'. This thereby permits us to apply the principle set out in **Kirin-Amgen Inc. v Transkaryotic Therapies [2002] IP & T 331** and adopted by this court in **Bobby Maharaj and others v Francis Daniel and others Civil Appeal P343/2014 at para.21**. Where therefore, as in this case, the relief is not inconsistent with the relief specially claimed; is supported by the allegations in the pleaded case and does not take the other side by surprise the court can grant relief although not specifically sought.

50. The Respondent submits that should the court be of the opinion that the Appellant is entitled to any sum based on the Respondent's unjust enrichment then the proper order ought to be the payment of the sum of $300,000.00 being the sum obtained by him from the sale of the land to Blaize. The problem with this submission is that in the circumstances of this case that the benefit received by the Respondent is greater than the $300,000.00 obtained on the initial sale.

51. In the circumstances, and in the absence of evidence as to the market value of the land at the time of the transfer, the only order available to this court which will permit some measure of restitution to the Appellant is for the Respondent to pay to the Appellant the profit made by him from the land. Accordingly the Respondent is to pay to the Appellant the sum of $620,000.00 being the profit made by him by the sale of the land.

52. Before making the final order in this appeal it is necessary here to say a few words on a matter that is of some concern to me as a Judge of the Supreme Court of Judicature. While not strictly a matter for us the conduct of the Attorney at Law for the Respondent in representing the Respondent in circumstances where, as the initial purchaser and subsequent developer of the land, he had an interest to serve in presenting the Respondent's case has caused me some unease. While this conduct may not be in direct conflict with any specific provision in the Code of Ethics contained in the **Legal Profession Act Chap 90:03** it seems to me that it has the potential to be detrimental to the profession and discredit it. In this regard the provisions of the **Code of Ethics** that states: "An Attorney-at-law shall observe the rules of this Code, maintain his integrity and the honour and dignity of the legal profession and encourage other Attorneys-at-law to act similarly both in the practice of his profession and in his private life, shall refrain from conduct which is detrimental to the profession or which may tend to discredit it." is of relevance. I hope that in the future Attorneys at Law refrain from representing parties in cases where they have a direct interest in the outcome.

53. Accordingly the Appeal is allowed. The orders of the Judge on the claim and counterclaim are set aside. The Respondent is to pay to the Appellant the sum of $620,000.00. Under normal circumstances this court would hear further submissions of the parties on costs. The Respondent has however already submitted that the appeal be dismissed with costs. In the circumstances of this case however and given the particular facts, including the factor referred to in the preceding paragraph, there is no need to hear any further submissions as to costs. The Appellant is entitled to her costs here and in the court below. In accordance with the general rule these costs shall be assessed on a prescribed costs basis based on a value of $620,000.00. The Appellant shall not be entitled to the costs of the expert valuator since

his evidence was of no assistance on the issues for determination. Accordingly, the Appellant is entitled to the costs in the High Court in the sum of $80,500 together with a sum amounting to two thirds of that sum representing her costs before us.

Judith Jones
Justice of Appeal