REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P181 of 2015
Claim No. CV2013-04946

BETWEEN

MUKESH RAMPERSAD First Appellant

SHAMILA PERSAD RAMPERSAD Second Appellant

AND

RAMKARRAN RAMPARAS First Respondent

VIDIA RAMPARAS Second Respondent

Appearances:

Mr. Elton A. Prescott S.C. leads Mr. Russell Huggins instructed by Ms Crystal Dottin-Wallace, Attorneys-at-Law for the Appellants.

Mr Ramesh Lawrence Maharaj S.C. leads Ms. Chandra Motilal instructed by Mr Alvin Ramroop, Attorneys-at-Law for the Respondents.

Panel:

P. Rajkumar J.A.

G. Lucky J.A.

M. Dean-Armorer J.A.

Date of Delivery: 29 October 2020

I have read the judgment of Lucky JA and I agree.

……

Peter Rajkumar

Justice of Appeal

I too agree.

……

Mira Dean-Armorer

Justice of Appeal

JUDGEMENT

Delivered by Gillian Lucky, J.A.

1. The Appellants and Respondents have a familial bond. The First Appellant and the Second Respondent are siblings. The First Appellant and First Respondent had a close friendship, which lasted over forty (40) years, until this matter arose.

2. This matter is premised on the validity of a Power of Attorney and a Deed of Conveyance (hereinafter referred to as "the documents") made in favour of the Respondents. The Appellants admitted that the documents were executed. However, the Appellants contended that the documents had been executed in the United States and they were only to be registered upon the occurrence of a particular event, which, according to the Appellants, never occurred. The Appellants sought to set aside the documents, and the transactions, which were effected pursuant to them.

3. The judge at the High Court did not believe the case for the Appellants and the case was dismissed.

4. The Appellants appealed the decision of the trial judge.

BACKGROUND

The Appellants' version of events

5. The Appellants resided in the United States of America (US). However, they owned various properties in Trinidad, such as, the property situated at No. 1 Southern Main Road, Chaguanas (hereinafter referred to as "the Southern Main Road property").

6. In July 2013, the Appellants encountered issues with the US authorities and were prevented from leaving the US. In an attempt to safeguard their properties situated in Trinidad, they contacted the Respondents with whom they had a longstanding friendship and business relationship.

7. Since the Appellants were unable to travel to Trinidad, the parties agreed to execute a Power of Attorney in favour of the Respondents, which would allow them to assist with the Appellants' business affairs, such as, the completion of construction of a building on the Southern Main Road property.

8. According to the First Appellant, the First Respondent also suggested the execution of a Deed for the Southern Main Road property. The Appellants pleaded that there was an agreement between the Appellants and the Respondents, that a Deed of Conveyance (hereinafter referred to as "the 2013 Deed") would be prepared and executed and the 2013 Deed would only be registered in the event that the Appellants were prohibited by the US authorities from returning to Trinidad. However, the witness statement of the First Appellant stated that the documents were prepared in the event that the authorities in the US decided to seize any property belonging to the Appellants.

9. The documents were executed on 28th July, 2013 at the home of the Appellants in Miramar Florida, in the presence of the Appellants, the Second Respondent, the First Appellant's younger brother Kendell Rampersad and his wife Elizabeth Badri-Rampersad. The presence of the Second Respondent at the execution of documents in Florida was not pleaded. However, it was included in the Appellants' witness statements. The witness statements of the Appellants stated that at the time of the execution of the documents in Florida, the documents were undated and the 2013 Deed contained no consideration.

10. The Appellants claimed that notwithstanding the conditional agreement with respect to the registration of the 2013 Deed, the Respondents proceeded to register the 2013 Deed on 6th August, 2013.

11. In September 2013, the Appellants became aware that the First Respondent was attempting to dispose of other properties belonging to them.

As a result, the Appellants revoked the Power of Attorney and began proceedings against the Respondents in the High Court. The Appellants alleged that the Respondents took advantage of the relationship they shared, to the Appellants' detriment. The Appellants pleaded particulars of undue influence, breach of the Registration of Deeds Act Chapter 19: 06 and special damages in relation to other property belonging to the Appellants which were disposed of by the Respondents.

12. The Appellants requested that a declaration be made that the execution of the 2013 Deed was in breach of the provisions of the Registration of Deeds Act and therefore void.

The Respondents' version of events

13. According to the Respondents, the Appellants experienced financial trouble in late 2011 and asked the Respondents for help in meeting the instalment payments for the mortgage on the Southern Main Road property. In October 2011 and November 2011, the First Respondent transferred a total sum of $398,000 to the First Appellant in order to assist the latter with mortgage payments for the Southern Main Road property.

14. The First Appellant contacted the First Respondent in January 2012 to assist with the construction of a building on the Southern Main Road property. In early February 2012, the First Appellant contacted the First Respondent and agreed to sell the Southern Main Road property to him for $800,000, subject to the existing mortgage.

15. On 15th February, 2012, at the office of attorney-at-law, Mr Mervyn Mitchell in Trinidad, the 2013 Deed was executed between the Appellants and Respondents for the Southern Main Road property. On the same day, the parties agreed that the $398,000 previously loaned by the Respondents to the Appellants, (for instalments) would go toward the purchase price of the Southern Main Road property. It was agreed that the balance of $402,000 would be paid off within one (1) year and the 2013 Deed would not be registered until the full consideration was paid.

16. By December 2012, the Respondents paid off the balance of $402,000. On 19th December 2012, the First Respondent transferred $1,000,000 to the First Appellant, for the development of the Southern Main Road Property.

17. In January 2012, the First Appellant told the First Respondent that he needed help with finishing a building on another property. In order to carry out the various transactions, on 4th February 2013, at the office of Mr Mervyn Mitchell, the Power of Attorney was executed between the Appellants and the Respondents.

18. From March to July 2013, the First Respondent transferred a total sum of $785,000 to the First Appellant for the development of the Southern Main Road Property.

19. In July 2013, the First Respondent wanted to obtain a loan. In order to do this, he needed to register his ownership of the Southern Main Road property and he wished to be in a position to redeem the existing mortgage on that property. Accordingly, the Power of Attorney and 2013 Deed were registered on 31st July 2013 and 6th August 2013 respectively.

20. The Respondents denied undue influence and/or fraud on their part.

DECISION OF TRIAL JUDGE

21. The judge stated that the essence of the claim was the issue of whether the documents were signed on the 28th July, **2013** in **Florida** as contended by the Appellants or in **Trinidad** on 15th February**, 2012**(in the case of the 2013 Deed) and 4th February **2013**(in the case of the Power of Attorney), in the presence of Mr Mervyn Mitchell and his clerk, Ms. Jackson, as alleged by the Respondents. This was an issue of fact.

22. The judge considered all the evidence in the case and factored into his consideration, amongst other things: (i) the inconsistencies between the witness statements and pleaded case of the Appellants; (ii) the failure to plead material facts; (iii) the unreliability of the First Appellant's evidence; and (iv) the credibility of all the witnesses.

23. The Court found that the evidence of the Appellants was unable to meet the standard of proof with respect to the circumstances surrounding the execution of the documents.

24. The Court therefore dismissed the claim.

GROUNDS OF APPEAL

25. The Appellants submitted that the judge was plainly wrong in his findings of fact and his determination of the matter. The grounds of appeal are best summarised as follows-

    a) The judge failed to analyse properly, or at all, the entirety of the evidence;
    b) The judge reached conclusions on the primary facts, that a reasonable judge could not have reached;
    c) The judge erred in the evaluation of the evidence to a degree which was sufficiently material to undermine his conclusions; and
    d) The judge displayed apparent bias, by deciding the case otherwise than on the merits of the case as presented by both parties.

APPROACH OF COURT OF APPEAL

26. The determination of this matter was based primarily on the assessment of all of the evidence by the judge. Therefore it is incumbent on this Court to be mindful of the law as it relates to the role of an appellate court when the main thrust of the challenge is based on the finding of facts by the judge.

27. In **Beacon Insurance v Maharaj Bookstore** [2014] UKPC 21, the Privy Council gave guidance with respect to the approach that should be taken when an appellate court is reviewing the decision of a trial judge. Lord Hodge said at paragraph 12: -

> "*12. ….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 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."*

28. The test is that an appeal court must be satisfied that the trial judge has gone "plainly wrong" before there is any interference with the judge's findings

Analysis of the Evidence

29. The Appellants submitted the following-

    I. that the judge limited his assessment of the evidence to the determination of the cogency and reliability of the evidence of the Appellants and therefore failed to assess the Respondents' evidence.

II. that the judge failed to make a finding with respect to the evidence surrounding the date and place of the execution of the documents and that this omission was a significant flaw because the matters of 'when' and 'where' the documents were executed were critical in determining the claim.

III. that the judge denied himself the opportunity to consider the following undisputed/unchallenged evidence –

a. The Appellants were at all material times (2013 to 2015) residing in Miramar, Florida, USA and the Respondents in Trinidad;
b. The Second Respondent and the First Appellant are siblings;
c. The First and Second Appellants and their witness, Ms Elizabeth Badri-Rampersad, gave evidence that there was a prayer meeting/ceremony at the home of the Appellants on 28th July, 2013 and that the Second Respondent was present on that occasion;
d. The Appellants had found themselves in some difficulty which led to the authorities in the US seizing their passports and investigating their activities. As a consequence they were constrained to remain in the US;
e. By letter, issued in accordance with the Pre-action Protocol practice direction, the Appellants alleged that the Second Respondent was present at their home on 28th July, 2013 when the Appellants signed the Power of Attorney and Deed of Conveyance. The attorney-at-law, responding in writing on behalf of the Second Respondent, did not deny or respond to that claim in the said letter;
f. The Second Respondent refused to provide a witness statement in compliance with directions given by the Trial Judge;
g. The First Respondent gave oral evidence that the Second Respondent was in the US in July 2013; and
h. The Appellants visited Trinidad in February 2012 and again in February 2013.

IV. that the judge had stated early in the proceedings that, if he, formed the view that having taken an oath, any party had told an untruth, he would treat the entire evidence of such a party as fundamentally unreliable. In light of that finding, the Appellants argued that the judge denied himself the opportunity to assess the entirety of the evidence as it related to the pivotal issue of the date and place of the execution of the documents.

30. The Respondents submitted that although the judge criticised the evidence of Mr Mervyn Mitchell and the First Respondent, the judge had to decide the case based on legal principles which required him to determine whether the Appellants discharged their legal burden.

31. Further, the Respondents submitted that, if the judge believed that the evidence of the Appellants did not cross the threshold of satisfying the legal burden in a civil case, the Court was entitled to dismiss the case.

32. The Respondents submitted that in the present case, it was clear that the judge had all of the evidence in mind, including that of the Respondents. Although the judge had some reservations about the Respondents' evidence, the judge still had to ensure that the Appellants had met their legal and evidential burden.

33. The essence of this first ground of appeal is that the judge did not give holistic consideration to all the evidence in the case but chose instead to focus on the credibility and reliability of the evidence of the Appellants.

34. This submission seems self-defeating, since the judge found the evidence of Mr Mervyn Mitchell to be "*in a state of shambles*". Obviously, such an adverse finding by the judge about evidence from the Respondents could only have been made after thorough consideration of all the evidence, including that of the Respondents. The judge went so far as to state that the Respondents would have found themselves in great difficulty had the evidential burden shifted onto them.

35. This finding of the judge made it clear that while he was unimpressed with the evidence of the Respondents, he had to assess the evidence of the Appellants, in order to determine whether the latter had met the legal burden and standard of proof placed upon them.

36. The eight issues raised by the Appellants listed as (a) to (h), in paragraph 29(III) above, were not matters that would have inevitably led the judge to accept the case for the Appellants. For example, even if the judge found that the Second Respondent was at the home of the Appellants in Florida (as suggested in paragraph 29(III)(c)), when the latter say that the documents were signed, her presence at the premises does not automatically lead to a finding of fact that the documents were signed at the place and time as stated by the Appellants.

37. In determining the critical issues of 'where' and 'when' the documents were signed, the judge factored other matters such as inconsistencies and omissions in the case for the Appellants in resolving the issues at hand. The trial judge found that the Appellants had not established on a balance of probabilities that the documents were signed in Miami in 2013 as they claimed.

38. The decision of the judge makes it clear that he was dissatisfied with the evidence of both parties when it came to the resolution of the critical issues in the case. Therefore, the judge was left with no alternative but to further examine the evidence of the Appellants in order to determine if the legal burden and standard of proof had been satisfied.

39. In **Rhesa Shipping v Edmunds (The Popi M)** [1985] 2 All ER 712 Lord Brandon of Oakbrook who delivered the decision, made reference to the late Sir Arthur Conan Doyle. In Doyle's book, *The Sign of Four,* the fictional character, Mr Sherlock Holmes said to the latter's friend, Dr Watson - *'How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth*?'

Lord Brandon of Oakbrook discussed three reasons that made the dictum of Sherlock Holmes inappropriate for a judge at first instance who is performing the fact finding mission at the conclusion of a case. At page 718 of **Rhesa Shipping**, Lord Brandon of Oakbrook stated at page 718, paragraphs (a)-(f) –

> *"The first reason is one which I have already sought to emphasise as being of great importance, namely that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.*
>
> *The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water that a diver's examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.*
>
> *The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to dis-charge such burden."*

40. The fact-finding mission by the judge left him in doubt with respect to the case for both parties. It was clear in his judgement, that the judge, after expressing his reservation for the respective cases for the parties, felt constrained to determine the matter, based on the burden of proof, which rested on the Appellants. There was no other option left for the judge, owing to the unsatisfactory state of the evidence for both parties.

41. It is accepted that the language used by the judge in paragraphs 144 and 145 of his judgment, at first blush, suggests that the judge did not give any consideration to the evidence of the Respondents, but focused only on whether the Appellants had established a prima facie case for the Respondents to answer. The judge stated that the Appellants did not cross the 'evidential bridge'.

42. However, while the use of the language of the judge in these paragraphs is unfortunate, it is not fatal because when cognisance is given to the substance of the action of the judge in weighing all the evidence before him, it is clear that he painstakingly considered the testimony of each witness for the both sides, assessed their credibility and then made his decision. This is reflected in the format of his judgement which included a synopsis of the evidence of each witness followed immediately by his analysis of that evidence.

43. After the First Appellant testified, the judge indicated that he would treat as unreliable, the evidence of a party who had told an untruth. The Appellant submitted that this approach meant that the judge did not consider all of the evidence. Respectfully, such a submission is flawed in logic. The judge could only determine the reliability and credibility of a witness after a thorough consideration of all of the evidence in the case. It is only fitting after such consideration, to make the relevant findings about the credit worthiness of the evidence. The utterance of the judge which was a stern reminder to all parties in the case, that any untruths told by a party would result in the unreliability of that party's evidence, is no more than a forthright explanation by the judge of the approach he would be taking in the execution of his function as the sole finder of facts.

44. The judge cannot be said to have been plainly wrong because of the timing of his utterance, which, obviously applied to all the testimony in the matter, whether given before or after his statement.

45. This Court finds no merit in this ground of appeal.

Conclusion on the Primary Facts

46. The Appellants submitted that although the Judge acknowledged that the crucial issue was when and where the documents were executed, the judge proceeded to engage in an analysis of the 'cutting and pasting' of the witness statements, the arrangements which led to the documents being prepared and the weaknesses and inconsistencies in the pleadings and the witness statements.

47. The Appellants submitted that the questions that concerned the judge about the evidence of the Respondents in paragraph 80 of his judgment, were all related to the purpose of the documents and not the pivotal issue of the date and place of the execution of those documents. Additionally, the Appellants contended that the inconsistencies in the pleadings and the evidence of the witnesses for the Appellants, identified by the judge were not related to the essential issues of the date and place of the execution of documents.

48. The Respondents agreed that the essence of the claim was whether the documents were signed on the 28th July, 2013 in Florida as stated by the Appellants or in Trinidad on the dates alleged by the Respondents.

49. The Respondents argued that the judge identified three material facts that were not pleaded by the Appellants but were included in their witness statements –

    I. No dates were on the Deeds at the time the Appellants executed them;
    II. No consideration was on the Deed of Conveyance of $800,000.00 at the time the Appellants executed it; and

III. The Second Respondent was present in Miami at the time of execution of both the Deed and Power of Attorney and signed the Deed of Conveyance.

50. The Respondents argued that the judge was entitled to draw adverse inferences against the Appellants for the introduction of new evidence which was not pleaded and which was inconsistent with the pleaded case.

51. The judge gave a structured decision in which he identified the matters which he considered before arriving at his decision. The judge recognised the crucial issue to be determined and stated at paragraph 77 of his judgment **–** "*The essence of this claim is the issue as to whether the 2013 Deed and Power of Attorney were signed on the 28th July 2013 in Florida as contended by the claimants or in Trinidad on the dates alleged by the defendants before Mr Mervyn Mitchell, attorney at law and his clerk, Ms Jackson. That is the central argument raised by the claimant*."

52. The judge then proceeded at paragraph 80 of his judgement to meticulously list rhetorical questions that highlighted the deficiencies in the case for the Respondents, in the context of the competing claims with respect to the signing of the documents. The judge stated the following at paragraphs 80-84 of the judgement:-

> *" **THE COMPETING CLAIMS AS TO THE SIGNING OF THE DOCUMENTS***
>
> *80. There are so many unanswered questions in this transaction which causes great concern to this court.*
>
> *80.1. Why would the first named defendant forward $1,760,000 to the first named claimant from December 2012 to July 2013 to build a three-storey building on the SMR property after he had already paid off for the purchase of the property as agreed in December 2012?*
>
> *80.2. Why would the first named defendant allow the first named claimant, who lives abroad, to build a three-story building on lands which, according to him, was the subject of the 2013 Deed and was*

therefore beneficially owned by the second named defendant and him by the time the building actually began in January 2013?

80.3. What motivated the first named claimant to join with the first named defendant in the conceptualization and carrying out of the construction of the building on the SMR property if the SMR property had already been sold to the defendants – there was no suggestion that he was hired as a project manager or under any contract whatsoever to assist in the building on lands which, quite clearly, the first named claimant had purchased for his own in 2011?

80.4. Why was the deed, which was allegedly signed in February 2012, not registered shortly after the last payment was made towards the purchase price, which was allegedly made on 7 December 2012?

80.5. Why did the defendants wait until August 2013 to register the deed – conveniently, after the claimants" run-ins with the US authorities in July 2013 and after the date when the claimants allege that the deed was signed i.e. 28th of July 2013?

80.6. Why was the first named defendant accounting to the first named claimant for monies spent on the property by email dated the 11 September 2013 in respect of which the former was seeking repayment if the property was now to be treated as his? Was this an acknowledgement of the ultimate interest of the claimants in the SMR property?

80.7. Why would the claimant have chosen Mr. Mervyn Mitchell to prepare the power of attorney in February 2013 when, in that same month, just five days later according to the dates on the respective documents, the claimant had retained their normal lawyer – Mr. Ramischand - to prepare a deed from the second named claimant's mother to the claimants? The other deeds presented as having been prepared on behalf of the claimants were all done by Mr. Ramischand, including a power of attorney to Mr. Steven Peters on 13 March 2013 –

that very same year. Bearing in mind the nature of a power of attorney, one would have expected an attorney-at-law who was familiar with the particular client's properties and affairs would be best placed to prepare such a document.

81. According to the defence and counterclaim filed in these proceedings, the defendants say that they registered both the 2013 Deed and the Power of Attorney because:

81.1. In July 2013, the first defendant wished to raise some money by way of a loan and in order to obtain the loan he needed to register the 2013 Deed for the SMR property; and furthermore,

81.2. He wished to be in a position to redeem the existing mortgage on the SMR property.

82. In this regard, the explanation given with respect to what this alleged loan was supposed to have been used for and why it came up conveniently in the month of July 2013 and why he wished to redeem the existing mortgage on the SMR property, despite the fact that the first named claimant had gotten $1.76 million from him toward erecting a structure on it and at a time when the claimants were both restricted in their travel capacity and were obviously in a very difficult legal, if not emotional, situation, seemed quite opportunistic.

83. Respectfully, this position put forward by the defendants did not make sense. To my mind, these explanations proffered by the defendants seem incredibly convenient. What does make sense is that in July 2013, a new ingredient was poured into the relationship mix i.e. the detention of the claimants in the USA in relation to drug-related charges which, conceivably, ***could*** *have had an effect on their property in Trinidad. Broadly speaking, that ingredient seems to have been the catalyst for the change in position with respect to the 2013 Deed and the Power of Attorney. However, as appealing as that position may seem intuitively, the court must pay due regard to the evidence before it.*

84. Ultimately, this case has to be decided upon legal principles. It is trite law that the foundation of those legal principles rest upon the legal burden of proof. In this case, the claimants carry the legal burden to establish their claim with the prima facie evidential burden to ground their allegations."

53. The analysis by the judge, as evidenced in the excerpt above, showed his full understanding of the evidence before him which related either directly or indirectly to the determination of the critical issue. The judge concluded that while the position of the Respondents on the crucial issue "*did not make sense*", he was bound to "*pay due regard to the evidence*" before him. Further, in paragraph 83 of the judgement, the judge reminded himself that the case had to be decided upon legal principles and that-"*in this case, the claimants carry the legal burden to establish their claim with the prima facie evidential burden to ground their allegations.*"

54. The complaint by the Appellants that the matters considered by the judge in paragraph 80 were unrelated to the critical issues of 'when' and 'where' the documents were executed is ill conceived.

55. A judicial officer, in determining critical issues, is entitled to examine other relevant matters which arise in the evidence in order to make his findings. This is exactly what the judge did in a circumstance in which there were two competing versions which were diametrically opposed and which went to the root of the case. It is the comprehensive dissection of the evidence by the judge, which enabled his scrupulous analysis.

56. Having identified the crucial matters that had to be determined, the judge was duty bound to look at all the evidence before him, the manner in which it was presented, the case as it was pleaded and the inconsistencies that arose in testimony and the witness statements.

57. The issue of credibility of a witness is always a live matter in any proceeding and that credibility or lack thereof affects the overall assessment of the case for whom the witness appears.

The judge did not believe the Appellants and their witnesses and his assessment of their reliability adversely affected their ability to meet the standard of proof placed upon them, namely, on a balance of probabilities, that the documents were executed at the date and place as alleged by them.

58. The fact that the judge highlighted the independent matters which he considered in addressing the crucial issues, proof of which was placed on the shoulders of the Appellants, is an approach deserving of applause rather than condemnation.

59. On the matter of the 'cutting and pasting' of witness statements of the Appellants, it must be borne in mind that this was just one matter which the judge considered in his overall assessment of the credibility of the witnesses. Further, it was not the mere act of the 'cutting and pasting' but rather the initial denial and subsequent acceptance of the act by the witnesses. The admission by the witnesses was made in circumstances which adversely affected the reliability of their evidence on the crucial issue.

60. The Appellants alleged that the documents were executed for the purpose of protecting their property from the US authorities. This reason would point in the direction of the documents being signed in 2013 as submitted by the Appellants. The Respondents alleged that the 2013 Deed was executed because the Appellants agreed to sell the Southern Main Road property to them in February 2012. The Respondents also alleged that the Power of Attorney was executed in February 2013 because the First Appellant asked the Second Respondent for help with carrying out various transactions in Trinidad.

61. The Respondents' reasons for the execution of the documents would point in the direction of the 2013 Deed being signed in 2012 and the Power of Attorney being signed in 2013, before there was a risk of the property being confiscated by US authorities. The simple point is, that contrary to the submission of the Appellants, the judge was entitled to examine the reasons put forward by each side for the execution of the documents, in determining the crucial issue in the case.

62. This Court finds no merit in this ground of appeal.

Evaluation of the Evidence

63. The Appellants submitted that, in spite of the unchallenged evidence (in paragraph 29(III)), the judge erred when he failed to resolve the balance of probabilities in favour of the Appellants. The submission was that the unchallenged evidence ought to have driven the mind of the judge in the direction of the Appellants' case. The argument was that there was sufficient direct and circumstantial evidence for the judge to have accepted that the Appellants were speaking the truth about the crucial issue in the case.

64. Upon examining the unchallenged evidence raised by the Appellants, it is clear that some of the items do no more than raise a matter which could have been used by the judge in favour of the case for the Appellants but which do not necessarily prove, even on a balance of probabilities, the particular fact in issue. For example, item g above (paragraph 29 III) refers to the oral evidence of the First Respondent that the Second Respondent had been in Florida in July and August of 2013. The Appellants submitted that this unchallenged evidence should have been used by the judge to make a finding of fact, or at least, believe the case for the Appellants, that the Second Respondent was present on July 28th at the home of the Appellants in Florida when the documents were signed.

65. While such an inference could be made by the judge, it was not the only inference that could be made overall and the judge obviously did not believe that. The Second Respondent's presence in Florida, in July 2013 does not mean that she was at the home of the Appellants when the documents were allegedly signed.

66. In the same way, because the Appellants were in Trinidad in 2012 when the Respondents say that the 2013 Deed was executed, it did not mean that the judge had to believe that the Appellants signed the documents at that time while in Trinidad. Certainly, it was an inference open to the judge, but in his judgment, it was clear that he found the case for the Appellants on the crucial issue to be lacking.

67. The judge therefore rightly resorted to the ability of the Appellants to establish their claim with the requisite standard of proof. In paragraph 143 of the judgment, the judge opined-"*try as this court might to find some semblance of consistency and reliability, the first named claimant's evidence in matters mentioned above, failed to stand up to scrutiny, even on a balance of probabilities*."

68. This Court therefore finds no merit in this ground of appeal.

Conclusion

69. The trial judge found that it had not been proved on a balance of probabilities that the 2013 Deed and Power of Attorney respectively were actually executed in Florida on the dates alleged by the Appellants. He did so because he did not accept the evidence of the Appellants on issues that were critical to their case. These included-
    i. The circumstances in which the documents were signed;
    ii. The place where the documents were executed;
    iii. The reasons for which the documents were to be registered; and
    iv. Whether the documents were signed on the dates written on them or the 28th July 2013.

70. The trial judge's assessment of the evidence resulted in the dismissal of the claim relating to the setting aside and expunging of the 2013 Deed and the Power of Attorney. For the reasons set out above this court is unable to conclude the judge was plainly wrong in doing so or that the grounds of appeal have provided any basis for reversing those conclusions.

The Issue of Bias

71. At the conclusion of the oral evidence of the First Appellant, the judge stated -

> *"…Whatever has happened has happened. But what I have before me is a case in which both sides are poles apart as to what happened with this Deed. One is saying it was signed at a lawyer's office. One is saying it was signed at the*

house. One is saying it was signed on 15th February, the other side is saying on the 28th July.

Obviously one side is not telling the truth and I am putting that very mildly. If I put it otherwise, one side is lying. And therefore what is going to happen here, is that somebody is going to be holding a Bhagavad Gita and telling a deliberate untruth and I don't take too kindly to that at all. I said this at the last PTR and I am saying this, I want all the parties to be aware of it, that I take it very seriously. Because if I find for a fact that someone has held a Bhagavad Gita and lied to me and that is what my duty is going to be; to find which one of the two sides two stories is a total lie; then the consequence of it can be very dire on both sides. So I am asking you all to think about what has happened so far, where we are right now. I will still proceed with the trial, but I still want you to consider whether or not either side wants to own up and say this is the truth and what the other side is saying otherwise you know is a total lie.
Somebody has to confess at this point and if they don't and have to find otherwise then as I have indicated there are very serious consequences…"

72. The Appellants submitted that this pronouncement led the judge to decide the issues and the case, otherwise than strictly on the merits. According to the Appellants, the judge did not bear in mind the whole picture and did not weigh in the balance, the competing expressions of the witnesses and the weight and value of their evidence.

73. The Appellants relied on the case of **Ebner v The Oficial Trustee** [2001] 2 LRC 369 where the test for determining whether there was justification for a conclusion that the judicial officer was guilty of apparent bias was stated at paragraph 8 –

"[8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical

connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

74. In oral submissions, the Appellants clarified that they were not contending that the judge was biased to one side or the other but that the judge came to the trial with a subconscious leaning away from anybody, who in the course of the trial told an untruth.

75. The Respondents submitted that the utterance of the judge was a warning to all parties and it was not an approach which could be said to show favour to one side or the other.

76. Further, the Respondents submitted that a period of seven months elapsed from the time the utterance was made, to the time that the judgment was delivered. During that time, no objection about bias was raised by the Appellants. The Respondents relied on the case of **Super Industrial Services Limited & Anor v The National Gas Company of Trinidad and Tobago CA P 094 of 2019 & P124 of 2019** in which the Court of Appeal held that having regard to the delay from the time the judge made the impugned statements to the time the issue of bias was raised, amounted to waiver and delay which precluded the Appellants from raising the issue of bias.

77. The paragraph in **Ebner** relied upon by the Appellants, proposes a two-step process. The two step process calls firstly, for an identification of the matter alleged to constitute bias and secondly, the establishment of the casual link between the matter as alleged and the deviation from a fair outcome.

78. In **The Attorney General of Trinidad and Tobago v Wayne Kublalsingh and Ors CA P018 of 2014,** delivered on 19 February, 2014**,** the Court of Appeal confirmed that the test for apparent bias was that as stated in **Porter v Magill [2002] 2 AC 357** at paragraph 103 – *"the question is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased".*

79. In **Panday v Virgil Mag App 75 of 2005,** Warner JA addressed the matter of the characteristics of the fair-minded and informed observer. At paragraphs 85, 86 and 87 she stated the following -

> ***"Who is the fair-minded and informed observer***
> *85) In general terms, as the phrase implies, the individual is someone who is not a party, but who recognises and understands all the relevant circumstances and as a result is able to conclude whether or not the public would perceive the possibility of bias, including unconscious bias.*
>
> *86) The English authorities support the formulation of Kirby J. in **Johnson v Johnson** 74 AL JR 1380 which was decided in the High Court of Australia, that the observer is "neither complacent nor is he unduly sensitive or suspicious when he examines the facts". It is useful to cite the entire passage of Kirby J. at para 53.*
>
> > *"The attributes of a fictitious bystander to whom the courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded the bystander before making a decision important to the parties and to the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know*

commonplace things, such as the fact that the adjudicators sometimes say, or do things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also be taken to have, at least in a very general way some knowledge of the fact that the adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to parties or their representatives, which has been taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

87) I say with confidence that the traits identified by Kirby J. would be present in the fair-minded and informed observer carrying out his balancing task in this legal system."

80. During the course of a trial, it is incumbent upon a judge to ensure procedural fairness. Parties must not be ambushed and neither should the judge keep close to his chest, the methodology or approach to be taken in the determination of the matter. The utterance of the judge was no more than a stern reminder to all the parties, including the First Appellant who had given evidence, that they were duty bound to speak the truth.

81. The judge explained that the two versions of events were poles apart and therefore, it was obvious that persons were not speaking the truth. It was important for the parties to understand the significance of taking the oath and not telling lies in the course of testimony.

82. The utterance when viewed as a whole does not cross any line of impropriety because it is an articulation of the role of the trier of fact and more importantly, the consequence of finding that a party had told untruths. The judge cannot be faulted for seeking to instil in the parties the need to adhere to the oath and to speak truthfully.

83. The invitation by the judge for either side to confess to the true version of events concerning the execution of the documents was his final attempt to have the matter resolved without proceeding with a trial. A judge is allowed at any time before the decision is delivered in a matter to engage and encourage the parties to settle the matter or resolve the issues. Of course, such an approach is based on the particular circumstances of the case and the manner in which the testimony unfolds.

84. To suggest that the judge entertained any bias in his role as an independent and impartial trier of fact is to misinterpret his utterance and add an ingredient that gives his words an offensive flavour. There is nothing in the decision of the judge that remotely suggests that he did not bring an objective mind to the resolution of the crucial issues that had to be decided.

85. The judge can only be said to have been generously transparent in his approach to the determination of the case. Throughout his judgment there are clear indications that the judge was not close minded to the evidence of any party who was found to be telling untruths.

86. The judge assessed the entire evidence of each witness and related it to other aspects of the case in order to determine the credibility and reliability of each witness. The judgment is structured in a manner that shows the thinking of an open-minded judge using his best critical thinking and analytical skills.

87. The fair-minded and informed observer would not conclude that there was a real possibility that the judge was biased. There is no indication of bias towards one or both sides but rather a robust commitment to a fact-finding mission in which all the parties were well aware of the rules of engagement.

88. Of greater concern is the fact that this ground of bias was not raised at any time before the judge. It was certainly open to either party to the proceedings to object to the utterance or to address the matter in submissions at the end of the case. This was not done. As a result, although the submission was allowed on the issue of bias, on which this court has made its observations, the point made in **Super Industrial Services Limited** (see paragraph 76) case is to be noted.

89. There is therefore no merit whatsoever in this ground of appeal

Conclusion

90. For the reasons set out in this judgment the appeal is dismissed and the decision of the trial judge dismissing the Appellants' claim is affirmed.

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Gillian Lucky

Justice of Appeal