

EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2011/0032

BETWEEN:

HILARY SHILLINGFORD

Appellant

and

[1] ANGEL PETER ANDREW  
[2] GLORIA BURNETTE NEE SHILLINGFORD

Respondents

DOMHCVAP2011/0033

BETWEEN:

[1] GLORIA BURNETTE NEE SHILLINGFORD  
[2] RASHIDA N. PIERRE

Appellants

and

ANGEL PETER ANDREW

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

Appearances:

Mr. Lennox Lawrence for Gloria Burnette nee Shillingford and Rashida N. Pierre

Mr. J. Gildon Richards, with him, Ms. Cara Shillingford for Hilary Shillingford

Mr. Michael Bruney for Angel Peter Andrew

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2014: November 11:

2016: November 24.

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*Civil appeal – Agency – Power of attorney – Delegation of authority under power of attorney to third party by agent – Ratification by principal of agent's delegation of authority to third party – Appellate court's approach to factual findings and findings of credibility by trial judge*

**Angel Peter Andrew ("Angel")** was the registered proprietor of lands at Grand Savannah in the parish of St. Joseph. He was desirous of selling the lands and executed a power of attorney in favour of his sister, Gloria Burnette nee Shillingford ("**Gloria**") to act on his behalf to facilitate the sale of the lands.

During an attempted sale of the lands to a company, Gloria was paid \$821,040.00 in non-refundable deposits. The sale was never finalized by the company. It was alleged that Angel received \$94,865.05 out of the deposits. Gloria had also instructed the company to pay US\$45,000.00 to her daughter, **Rashida Pierre ("Rashida")**. **The lands were** eventually sold to a new buyer for \$4.5 million with Angel receiving \$2,564,170.20 from Gloria.

Whilst completing the sale of the lands, Gloria entered an agreement with Clement Johnson ("**Clement**") and Connie Belle ("**Connie**") in which she agreed to pay them a commission of 5% of the \$4.5 million selling price for introducing a successful buyer of the lands. They each subsequently received a commission. Gloria also entered into an agreement with Hilary Shillingford ("**Hilary**") in which she purported to grant Hilary exclusive rights to sell the lands for a period of 6 months with a minimum sale price fixed at \$3 million and any amount in excess being retained by Hilary as commission. Gloria paid Hilary \$420,700.00, said to be the commission due to him as the land was sold in excess of \$3 million. Gloria also paid herself for her services in securing the sale and paid herself further sums for an alleged debt owed to her by Angel. She also paid sums to Rashida, allegedly on the instructions of Angel. Angel disputes the payments to Gloria and denies knowledge of the payment to Rashida.

Angel instituted proceedings against Gloria and Rashida in the court below seeking payment of the balance of the sale price of the lands and in the alternative, an order for Gloria to account for her dealings with the funds on his behalf. Gloria filed an ancillary claim against Hilary **seeking indemnity against Angel's claim and for a refund of the commission paid to him** and Hilary filed a counterclaim with his defence alleging that he was entitled to the sum of EC\$1,079,300.00 being the balance of the commission due to him.

In his judgment, the learned trial judge made several important factual findings and also critical findings concerning the credibility of witnesses. The trial judge did not consider the evidence of Gloria to be credible. He completely rejected the evidence of Hilary and concluded that his evidence could not be relied upon due to admissions of dishonesty. Importantly, the learned trial judge found that the exclusive agreement entered between Gloria and Hilary was outside the scope of the authority vested in Gloria as it divested her of the main power that the power of attorney bestowed upon her. The learned trial judge found no reason to depart from the general rule of *delegatus non potest delegare*. He therefore found the exclusive agreement to be invalid. He also held that the payments

made to Rashida and Hillary and the money retained by Gloria were all done without lawful authority. The learned trial judge accordingly entered judgment against Gloria and granted Angel the declaratory relief sought against Rashida. On the ancillary claim the judge **entered judgment for Gloria and dismissed Hilary's counterclaim.**

Being dissatisfied **with the learned trial judge's decision, Hilary and Gloria and Rashida** appealed against his judgment on a number of grounds including his findings in relation to the power of attorney and the exclusive agreement, as well as a **number of the judge's** factual findings.

Held: dismissing the appeals and ordering the appellants to pay prescribed costs as set out at paragraph 72 of the judgment, that:

1. Delegation by an agent is generally prohibited by the maxim *delegatus non potest delegare* without the express authority of the principal, or authority derived from statute. There normally may be no delegation where there is personal confidence placed in or skill required from an agent, unless urgent necessity compels the relinquishing of responsibility to another. However, an authority to delegate will be implied in the case of purely ministerial acts where no special discretion or skill is required and in the case of acts subsidiary to the main purpose. In the present case, the main power granted to Gloria by the power of attorney was to sell the lands. During the duration of the exclusive agreement with Hilary, that power was delegated by Gloria to Hilary and Angel did not expressly or impliedly authorise that delegation.

Allam & Co. Ltd. V Europa poster Services Ltd [1968] 1 All ER 826 applied;  
John McCann & Co (a firm) v Pow [1974] 1 WLR 1643 applied.

2. An unauthorized act may be said to be ratified where there is a clear manifestation by one on whose behalf the unauthorized act has been done that he treats the act as authorized and becomes party to the act in question. Ratification may also be implied from conduct where the conduct of the one on whose behalf the unauthorized act has been done is such as to amount to clear evidence that he adopts or recognizes such act or transaction and does so with full knowledge of all the essential facts. Generally, every act, other than one which is void at its inception may be ratified. In the instant case, there was no express ratification by Angel of the impugned delegated authority nor could it be said that ratification was implied by any conduct on his part. In any event, the learned trial judge properly found that the delegation to Hilary by Gloria of the power granted under the power of attorney was invalid and as such Angel could not have lawfully ratified this act. In the circumstances, the learned judge cannot be properly criticized for not making a finding of ratification.
3. An appellate court should be reluctant to interfere with findings of fact and credibility by the first instance judge and is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of witnesses. An appellate court should not interfere with a **judge's conclusion on primary** facts unless

satisfied that he was plainly wrong. Caution not only applies to the findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them.

Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 applied; Langsam v Beachcroft LLP [2012] EWCA Civ 1230 applied; Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 applied.

4. An appellate court can and sometimes does test the trial **judge's factual** findings against the contemporaneous documentation and inherent probabilities. Where findings depend on the reliability and credibility of the witnesses, an appellate court will generally defer to the trial judge who has had the advantage of seeing and hearing the witnesses give their evidence. The question an appellate court should consider is whether the findings made by the trial judge were open to him on the evidence.

In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 applied.

5. In the present case, the learned trial judge made a number of important negative findings in respect of the credibility of Gloria, Rashida and Hilary. He made factual findings in relation to the exclusive agreement with Hilary, the payments to **Rashida and the credibility and honesty of Hilary**. **The judge's** conclusions with respect to the central issues in the case were clearly open to him on the evidence and could not be said to be against the weight of the evidence.

## JUDGMENT

- [1] BAPTISTE JA: This judgment relates to two appeals which have been consolidated. The major protagonists are family members. The appeals essentially arise from disputes concerning the sale of two parcels of land owned by **Angel Peter Andrew ("Angel")** under a power of attorney he had executed in **favour of his sister Gloria Burnette nee Shillingford ("Gloria")**. A common thread in the appeals concerns the proper construction of the power of attorney. Related to this is an exclusive agreement entered into between Gloria and Hilary Shillingford (**"Hilary"**) for the sale of the land. Cottle J held that Gloria was not authorised by the power of attorney to execute the exclusive agreement with Hilary and to pay him monies claimed by him from the proceeds of sale of the land.

- [2] Angel instituted a claim in the court below against Gloria claiming that she owed him an outstanding amount of over \$2 million dollars from the sale of the land. Cottle J agreed. This forms **the subject of Gloria's appeal**. Gloria filed an ancillary claim against Hilary seeking an indemnity from him in relation to the monies she paid him under the exclusive agreement. Gloria was successful. Hilary counter-claimed against Gloria for monies he says she owed him under the exclusive agreement. Cottle J dismissed the counter-claim.

#### Background

- [3] To put the appeals in proper perspective, an enlargement of the above synopsis is required. Angel was the registered proprietor of approximately 14.5 acres of land at Grand Savannah in the parish of St. Joseph in the Commonwealth of Dominica. He was desirous of selling the land. In that regard on 22<sup>nd</sup> November 2005, he executed a power of attorney in favour of Gloria. The power of attorney authorized Gloria:

- (i) "To negotiate the sale of my properties described in the schedule hereto.
- (ii) To sell or enter into agreements to sell the said properties.
- (iii) To give receipts, sign memoranda of Transfer and to give good title to any buyer.
- (iv) To enter into short term (3 months) lease of the properties aforesaid and to negotiate and sign leases for same."

Angel also agreed to ratify and confirm whatsoever Gloria shall lawfully do or cause to be done in and concerning the premises by virtue of the power of attorney.

- [4] In February 2006, Gloria entered into an agreement with Caribbean Investment Homes Ltd. ("**CIH**") **for the sale of the land** for the sum of EC\$4,439,400.00. This **sale was aborted due to CIH's inability** to secure the funds to complete the transaction. CIH had, however, paid Gloria the sum of EC\$821,040.00 in non-refundable deposits. It was pleaded that Angel received \$94,865.08 of that amount. Gloria had also instructed CIH to pay a sum of US \$45,000.00 directly to her daughter Rashida Pierre, who resides in the United States. The land was eventually sold to new buyers in May 2007 for EC\$4.5 million with Angel receiving from Gloria the sum of \$2,564,170.20. Angel also approved payment of \$328,250.00 from the sale of the land to certain third parties.
- [5] In the course of completing the sale of lands, Gloria entered into an agreement with Clement Johnson and Connie Belle by virtue of which she agreed to pay them a commission of 5% of the \$4.5 million sale price for introducing a successful buyer of the lands. They in fact received \$112,500.00 each. Gloria claims that **she entered into the agreement with Angel's full knowledge and consent**. Gloria also entered into an agreement with Hilary in March 2007. This agreement forms an important part of the appeal. The agreement purported to grant Hilary exclusive rights to sell the land for a period of 6 months. The minimum sale price was fixed at \$3 million, and any amount in excess of that sum was to be retained by Hilary as his commission. Gloria paid Hilary \$420,700.00. That payment was said to be on account of the commission due to him as the land was sold in excess of \$3 million.
- [6] Gloria claimed she paid herself \$150,000.00 for her services in securing the sale of the lands and a further sum of \$10,000.00 to **extinguish Angel's** debt to her. Angel denied the debt and asserted that he had agreed to pay Gloria \$10,000.00 pounds sterling on the sale of his land. Gloria further paid \$625,000.000 to her daughter Rashida, claiming that Angel instructed her to do so in order to conceal the funds from Hilary in the event that Hilary brings a claim against him. Angel

denied knowledge of that payment. Gloria stated that Angel later permitted Rashida to use the money to purchase a house in Florida.

- [7] Angel instituted proceedings in the court below against Gloria and Rashida seeking payment of the balance of the sale price in the sum of \$2,033,494.75. In the alternative, he sought an order for Gloria to account for her dealings with the funds received on his behalf. Gloria brought an ancillary claim against Hilary, seeking an indemnity in **respect of Angel's claim and a refund of the monies she** paid to him as a commission.
- [8] In her defence, Gloria essentially disputed Angel's **allegations**. She claims that every decision and transaction relating to the sale of the land and the proceeds derived thereof were done with the prior knowledge and consent of Angel. The funds paid to Rashida were on Angel's **instructions**. They represented funds Angel owed Gloria and from which he agreed to reimburse her and to disburse them the way in which they were. Gloria asserts that she did not convert money belonging to Angel for her own use; neither did she fail to act in accordance with any fiduciary obligation, if owed, to Angel. Gloria denied being indebted to Angel for any sum.
- [9] Hilary denied that he was **liable to indemnify Gloria against Angel's** claim for payment. He asserts that he had an oral agreement with Angel by which he was made the exclusive agent to sell the land. This agreement was confirmed by the written agreement he entered into with Gloria. In any event, he posits that the power of attorney permits Gloria to enter into the contract with him. Hilary alleges that Gloria, in breach of the brokerage agreement between them, engaged two other persons - Connie and Clement. Hilary counterclaimed against Angel and Gloria alleging that he was entitled to the sum of EC\$1,079,300.00, that sum being the balance of the commission owed to him, he having received EC\$420,700.00 from Gloria.

### Judgment Below – Factual Findings and Credibility

[10] Cottle J made important findings of fact and also critical findings concerning the credibility of the appellants. Cottle J unequivocally stated that he did not find the evidence of Gloria to be credible. He found that there was no written agreement which showed that Gloria had loaned Angel any money, neither was there any supporting evidence of any loans Hilary made to Angel to justify the repayment of these alleged loans from the proceeds of the sale of the lands to both Gloria and Hilary. Cottle J rejected in totality the evidence of Hilary. At paragraph 38 of the judgment, the learned trial judge stated that:

**“...Hilary admitted that he defrauded the tax authorities... This admission of dishonesty from Hilary has led the court to feel that his unsupported evidence cannot be relied on.”**

[11] From the amount paid by CIH to Gloria, Cottle J found that the amount of EC\$327,598.41 plus the US\$45,000.00 were improperly withheld from Angel by Gloria. Cottle J also found that the exclusive agreement entered into between Gloria and Hilary was outside of the scope of the authority vested in Gloria as it divested Gloria of the main power that the power of attorney intended to clothe her with. He held that as a delegate of the power she was not authorized to delegate her authority to a third party and that there had been no oral agreement from Angel to that effect. There was nothing that was revealed which would have justified departing from the general rule of delegatus non potest delegare.

[12] Cottle J concluded that the exclusive agreement between Hilary and Gloria was invalid. Cottle J roundly rejected the evidence of Gloria and Hilary that Angel orally agreed to the exclusive agreement. Cottle J concluded that their suggestion **“flies in the face of common sense.”**<sup>1</sup> He reasoned that only a few months previously a buyer was willing to pay 4.4 million for the land and had deposited almost one million dollars in total. Cottle J stated that there was no good reason for Angel to promise Hilary a commission equivalent to any sum over 3 million

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<sup>1</sup> Judgment of Cottle J (delivered 19<sup>th</sup> October 2011) at para. 46.



dollars obtained as a sale price. Thus there would be no basis to justify the payment of EC\$1,500,000.00 to Hilary as commission on the sale of the lands. Cottle J found that the payments to Hilary were made without authority. There were no unpaid loans to Angel by Hilary. The exclusive agreement was no more than a fiction concocted by Hilary and Gloria in an effort to withhold from Angel a substantial part of the proceeds of his property.

[13] Under the terms of the agreement with Clement and Connie, they were to be paid 5% of the purchase price if they introduced a buyer who purchased the lands. Cottle J found that the power to negotiate the sale of the lands granted to Gloria under the power of attorney was wide enough to contemplate payment of a **finder's fee to Clement and Connie**. He found that this agreement was valid as per the authorization given to Gloria by Angel under the power of attorney.

[14] Cottle J held that the payments to Rashida and Hilary and the money retained by Gloria were all made without lawful authority. On the claim, Cottle J entered judgment for Angel against Gloria for the sum of EC\$1,671,098.41<sup>2</sup> and granted the declaration sought by Angel against Rashida that Rashida held EC\$625,000.00 and EC\$120,800.00 in trust for Angel. On the ancillary claim, Cottle J entered judgment for Gloria against Hilary and ordered Hilary to indemnify Gloria in respect of all monies paid to him from the proceeds of sale of the lands. Cottle J **dismissed Hilary's counterclaim**. It is against that background that the appellants filed appeals against the orders of Cottle J.

#### Grounds of Appeal – Approach

[15] The appellants advanced several grounds of appeal against the judgment and orders of Cottle J. I will consider first, the grounds relating to the power of attorney. **A central theme of the appeal concerns the judge's construction and interpretation of the power of attorney and the issue of the exclusive agreement**

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<sup>2</sup> Which includes but is not limited to the payments of EC\$625,000.00 to Rashida, EC\$150,000.00 to Gloria, EC\$10,000.00 to Gloria, EC\$437,700.00 to Hilary.

with Hilary. I will deal conjointly with the grounds of appeal concerning the power of attorney and the exclusive agreement. The main issues arising on this aspect of the appeal are whether the learned judge erred in holding that the exclusive agreement was outside the scope of the authority of the principle power of attorney and thereby wrongly delegated to Hilary the main power in the power of attorney. Later in the judgment I will deal with the other issues in the appeal. They largely revolve around challenges to factual findings of the learned judge, the **judge's assessment of witnesses and evaluation of the evidence**. Finally, I will consider the ground relating to breaches of the Civil Procedure Rules 2000 ("CPR").

#### Grounds Relating to the Power of Attorney and Exclusive Agreement

[16] Mr. Lawrence, counsel for Gloria and Rashida, complains that the learned judge erred in law in:

- i. holding or finding that the legal effect of the power of attorney was limited or restricted in its application to the principle of delegatus non potest delegare;
- ii. holding or finding that the exclusive agreement was outside the scope of the authority of the principal power of attorney;
- iii. failing to find or hold that Angel had ratified the exclusive agreement and or had acquiesced in the disbursements of commissions and all other payments made by Gloria were properly made under the power of attorney.

[17] Counsel for Hilary, Mr. Richards, complains that:

- a. the learned judge erred in his construction of the power of attorney and wrongly held that Gloria, by executing the exclusive agreement, wrongly delegated to Hilary the main power the power of attorney intended to clothe Gloria with;

- b. the learned judge wrongly held that the exclusive agreement was invalid and that all payments made to Hilary from the proc
- c. the learned judge wrongly held, contrary to the evidence and the pleadings, that the exclusive agreement was made solely pursuant to **Gloria's written authority in the power of attorney when the evidence shows that Angel was personally engaged in making the agreement and orally instructed Gloria to execute the agreement.**

#### Submissions on Power of Attorney

[18] Mr. Lawrence complains that the learned trial judge applied wholesale the general rule of **"delegatus non potest delegare"**. He submits that prior to applying this general rule the learned judge was obligated to determine whether Gloria had delegated her authority outside the limits permissible in law, where the minimum sale price was set by Gloria and the sub-agency was of a limited duration of six months. Mr. Lawrence submits further that in ruling as he did the learned trial judge erred in law and failed to consider the two approaches utilized by the court in applying the maxim *delegatus non potest delegare*. Counsel articulated the two approaches thus: (1) where there is no personal consideration reposed or skill required and the duties are capable of being equally well discharged by any person and (2) where the delegation is in accordance with the reasonable custom of usage of the business in respect of which the agent's express authority permits the delegation, the authority of an agent to delegate will generally be implied.

[19] Mr. Lawrence contends that the agency to Gloria was not premised on any specialized skill in her and the duties under the power of attorney were capable of being equally well discharged by any person other than her, without the need for specialized training. Mr. Lawrence avers that an agent always has implied authority to act in accordance with the customs and usages of the business in respect of which his express authority permits him to act. Where the custom or **usage is reasonable, the agent's implied authority to act in accordance with it is**

not affected by the fact that the principal may have been unaware of its existence. In that regard, Mr. Lawrence contends that Cottle J was duly obligated to examine the evidence to determine if there was evidence of custom and or usage of delegation to an agent or whether Gloria acted reasonably in appointing Hilary. Mr. Lawrence submits that Cottle J erred in failing to consider the substantial body of evidence or to give weight to that evidence on the implied authority of the agent.

[20] On the issue of ratification, Mr. Lawrence contends that there was sufficient evidence before the trial judge to make a proper finding that Angel had ratified the appointment of Hilary, the commissions payable to him and the various deductions made by Gloria. The judge therefore erred in failing to consider the substantial body of evidence.

[21] Counsel for Hilary, Mr. Richards, argues that pursuant to the power of attorney between Gloria and Angel and with the full knowledge, participation and consent of Angel, Gloria and Hilary executed an exclusive agreement which had at its core that Hilary had exclusive right to sell the properties which the parties intended and understood as meaning, the exclusive authority to find and introduce a buyer who would purchase the lands. Mr. Richards contends that Hilary engaged in performance of the said agreement having found a willing and able purchaser. However, unbeknownst to him and in breach of the exclusive agreement, Gloria had engaged other persons - Connie and Clement - to find and introduce another buyer to whom she sold the properties. Mr. Richards maintains that Hilary was correct to demand payment of EC\$1,500,000.00 from the proceeds of sale. Thereupon, Gloria paid to Hilary the sum of EC\$420,700.00 as a commission but has failed and or refused to pay to him the balance of \$1,079,300.00 which is outstanding and due to him.

[22] Mr. Richards submits that the evidence in the lower court was that Andrew acquiesced in the agreement between Gloria and Hilary; this goes contrary to what the learned trial judge found. In this regard, Mr. Richards is urging this Court to

hold that the judge erred in his finding of fact. He submits that the main powers granted by the power of attorney to Gloria to be performed personally were: the authority to negotiate; the power to sell; the power to sign receipts and a memorandum of transfer; and to give good title. Mr. Richards contends that Gloria, although she sought assistance towards their fulfillment, exercised those powers and authorities personally. It was never the case that Gloria relinquished or divested herself of these powers and authorities either through the agreement with Hilary or otherwise. Cottle J, by so finding, fell into error.

[23] **Mr. Richards argues that the evidence showed that the scope of Gloria's written authority was broadened by oral communication and the conduct of the parties.** When this situation arises all of the circumstances of the agency must be considered. The document must be construed as a whole for the interpretation of particular words or directions. Mr. Richards cites the case of Pole and another v Leask<sup>3</sup> as authority for his contention. Mr. Richard says that the learned trial **judge ought then to have interpreted the phrase "exclusive right to sell" with reference to the full scope of these circumstances.** Mr. Richards submits that the **phrase "exclusive right to sell" did not and could not have transferred from Gloria to Hilary the main duty/purpose in the power of attorney.** He posits that that **phrase meant no more than "exclusive right" to find a purchaser** who would complete the purchase; while the main power in the power of attorney was to execute an effective sale of the properties.

[24] Mr. Richards contends that the evidence before the learned trial judge showed that Angel in oral communication with both Gloria and Hilary expressly agreed, and subsequently instructed Gloria, to engage the service of Hilary as the sole agent to find a buyer for the properties for which he would be paid a commission. This being the case, there was privity of contract between Angel and Hilary. The conduct of the parties supported the conclusion that the intention was that Hilary would only introduce a willing purchaser to Gloria towards the fulfilment of the

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<sup>3</sup> [1861-73] All ER Rep 535.

main objective of selling the property. Mr. Richards further contends that in the construction of the power of attorney, the predominant reference is to the special powers, but incidental powers necessary for carrying out the authority ought also to have been implied.

[25] Mr. Richards submits that the written authority in the power of attorney did not fully detail all the instructions from Angel or everything that Gloria was required or permitted to do in fulfilment of the main purpose. Further, there was no express **limitation in the power of attorney on Gloria's** exercise of her discretion to engage the assistance of other persons towards her fulfilment of the main purpose. **Angel's evidence showed that he had agreed with Hilary that for a commission,** Hilary can assist him in finding a purchaser of the property. In light of this evidence and the circumstances surrounding the power of attorney, the learned judge could not have properly found that Gloria wrongfully exercised her discretion to engage Hilary as a sub-agent.

[26] Mr. Richards posits that it is the law that a **principal's authority to delegate is implied: (1) where the principal knows and accepts, at the time of the agent's** appointment, that the agent intends to delegate his authority or part of it; (2) where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a sub-agent; and (3) where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, and not inconsistent with the **express terms of the agent's authority.** **Mr. Richards submits** that these requirements were fulfilled in this case.

[27] Mr. Richards contends that it was the evidence that Angel knew Gloria would engage the service of Hilary to assist in finding a purchaser of the property. In actuality, **it was on Angel's instructions that Gloria acted.** The nature of the authority granted to Gloria necessitated her engagement of Hilary to assist her in the search for a purchaser. It was not unusual or unreasonable in the business of

selling land that persons acting as agents would employ sub-agents to assist in that endeavor. Mr. Richards submits that as such Gloria was authorised to delegate subordinate or incidental acts where she was not required to exercise any special discretion or skill and in respect of acts subsidiary to the main purpose. The delegation to Hilary represented only authority to find and introduce a buyer. That was something which Gloria felt was necessarily ancillary to the exercise of the main powers which were retained and exercised exclusively by Gloria.

[28] Learned counsel for Angel, Mr. Bruney, argues that a power of attorney is construed strictly by the courts. Where incidental powers are implied, such subordinate acts on the part of the agent must be necessary or ordinarily **incidental to the agent's** express authority. Mr. Bruney contends that in granting the power of attorney to Gloria, Angel's **only objective was to sell the lands at a reasonable price**. By this power of **attorney, contrary to the appellants'** submissions, the main power was to sell the lands. In order that Gloria could exercise that main power, he expressly granted to her incidental powers to negotiate the sale, to enter into agreement, to advertise the properties for sale, to give receipts, sign memoranda of transfer, to give good title to any buyer and to enter into short-term leases which she was empowered to negotiate and sign on his behalf. In contrast, the agreement with Hilary gives him the exclusive right to sell the lands. Mr. Bruney submits that by the natural and ordinary meaning of the **word "exclusive" the delegation of Gloria's authority meant that for the duration of** her agreement with Hilary, she did not have authority to sell the land. This exclusivity excluded Gloria from exercising the main power granted to her by the power of attorney.

[29] Mr. Bruney contends that the fact that a minimum selling price was fixed by the agreement between Gloria and Hilary does not mean that the power of fixing the selling price above EC\$3 million or identifying a suitable buyer was not completely divested to Hilary. By the agreement between Gloria and Hilary, Gloria granted

the authority to sell the lands in breach of the fiduciary relationship she had with Angel. Such delegation could not have been contemplated by Angel nor could it have been implied by the wording of the power of attorney.

- [30] Mr. Bruney further submits that the evidence adduced at trial showed that Angel reposed personal consideration in Gloria. Mr. Bruney stated that quite apart from the extremely close relationship between Gloria and Angel, one has to simply ask the question: why was it that it was Gloria and not Hilary who had been granted the power of attorney when it was Hilary who had introduced and accompanied Angel to the attorney who had prepared the power of attorney? Further Mr. Bruney submits that **even if delegation of a sales agent's authority may be in** accordance with the custom or usage of the real estate business, the extent of the delegation to Hilary was neither necessary nor ordinarily incidental to the power granted to Gloria to sell the lands. Mr. Bruney submits that such delegation could only be properly implied if, having assessed the evidence and the demeanour of witnesses, the trial judge had concluded that the delegation of authority was genuine and that it was lawfully done in pursuance of the agency agreement between Angel and Gloria.

#### Discussion

- [31] The learned trial judge applied the well-known maxim of delegatus non potest delegare. While the maxim represents a principle of general application, it is not absolute. As Mr. Bruney submits, a power of attorney is construed strictly by the courts. General words used in conferring the power are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied. Implied authority does not extend to acts which are outside the ordinary course of his business, or which are neither necessary nor incidental to his express authority.
- [32] Delegation by an agent, that is, the entrusting to another person by an agent of the exercise of a power or duty entrusted to him by his principal, is in general



prohibited, under the maxim *delegatus non potest delegare*, without the express authority of the principal, or authority derived from statute.<sup>4</sup> Where there is personal confidence reposed in or skill required from the agent, there normally may be no delegation however general the nature of the duties, unless urgent necessity compels the handing over of the responsibility to another. The duty of the agent is to undertake his task personally. This principle is well set out in *Allam & Co. Ltd. v Europa Poster Services Ltd*<sup>5</sup> in which it was held that the company, acting as an agent, could delegate to its solicitors. Buckley J stated:

**“The relation of an agent to his principal is normally at least one which is of a confidential character and the application of the maxim *delegatus non potest delegare* to such relationships is founded on the confidential nature of the relationship. Where the principal reposes no personal confidence in the agent the maxim has no application, but where the principal does place confidence in the agent that in respect of which the principal does so must be done by the agent personally unless either expressly or inferentially he is authorised to employ a sub-agent or to delegate the function to another. If the agent personally performs all that part of his function which involves any confidence conferred on him or reposed in him by the principal it is, in my judgment, immaterial that he employs another person to carry out some purely ministerial act on his behalf in completing the transaction.”<sup>6</sup> (My emphasis).**

[33] All the same, an authority to delegate will be implied in the case of purely ministerial acts, where no special discretion or skill is required and in the case of acts subsidiary to the main purpose. The practical effect of this principle can be seen in *John McCann & Co (a firm) v Pow*.<sup>7</sup> This was a case in which the estate agents, Mc Cann, claimed a commission, earned, as they alleged, through the activities of persons they described as their sub-agents. The Court of Appeal held that the principal agents, McCann, had no authority to appoint subagents, and accordingly disallowed the claim for commission.

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<sup>4</sup> *Halsbury's Laws of England* (4<sup>th</sup> edn. (re-issue), 1990) vol. 1(2), para 63.

<sup>5</sup> [1968] 1 All ER 826.

<sup>6</sup> At p. 832.

<sup>7</sup> [1974] 1 WLR 1643.

[34] The facts of McCann as taken from the headnote, are as follows: On 14<sup>th</sup> August 1972, the vendor, the owner of a leasehold flat, asked estate agents to put it on the market at £14,350 and said that he would pay them a reasonable commission if they introduced a purchaser, but without prejudice to a privately negotiated sale. On the same date, the appointed agents sent particulars of the flat to another firm of estate agents, D & Co., with whom they had regular contact. The vendor knew nothing about D & Co. The appointed agents advertised the flat, describing **themselves as “sole agents.”** On 29<sup>th</sup> August one R called to view the flat. The vendor asked him if he had come from the appointed **agents and he said “no.”** The vendor and R then negotiated privately and by 5<sup>th</sup> September their respective solicitors were preparing contracts for exchange at a price of £14,200. The vendor mentioned the matter to the appointed agents on 7<sup>th</sup> September; they said that if that deal fell through they could appoint other local agents. The vendor did not object but made it clear that it should not affect his private negotiations.

[35] On 13<sup>th</sup> September the appointed agents learned that R had been introduced to the flat by D & Co. They brought an action in the county court against the vendor claiming commission of £275 on the ground that the purchaser had been introduced by their authorised subagents, D & Co. The vendor denied knowledge of any sub-agency at the material time and denied liability for commission. The judge awarded the appointed agents the commission claimed. On appeal by the vendor, it was held that the vendor was not liable to pay commission to an estate **agent who, while claiming to be “sole agent,” had delegated his personal functions** and duties to a sub-agent without the express authority of his principal, the vendor, and that in the absence of evidence of a business usage authorising the appointment of subagents, no authority could be implied where the delegated responsibilities went beyond merely ministerial acts.

[36] As I understand the argument of learned counsel for the appellants, Mr. Richards, in the agreement with Hilary, Gloria never delegated the power bestowed on her, in actuality, she authorised Hilary to introduce a buyer for the lands. This action

**was incidental to Gloria's main power. Additionally, most of the circumstances** in which delegation can occur existed; as such, the authority to delegate ought to have been implied. Mr. Bruney takes a contrary position which commends itself to me as I find that there is considerable force in it. He submits, and I agree, that none of the enunciated categories in which delegation can occur existed in this case. There was personal consideration reposed in Gloria. The extent of the delegation to Hilary was neither necessary nor ordinarily incidental to the power granted to Gloria to sell the lands. The act delegated to Hilary went beyond purely ministerial acts.

[37] The main power granted to Gloria was to sell the lands. Cottle J properly found that the power granted to Hilary divested Gloria of the main power under the power of attorney. That power was delegated to Hilary by the exclusive agreement. Angel did not expressly or impliedly authorize that delegation. **Cottle J accepted Angel's evidence that he never** appointed Hilary as a sub-agent. Delegation was never expressed by Angel. Cottle J examined the evidence before him to determine if there was permissible delegation. He had before him conflicting evidence; he then came to a conclusion after having seen and heard the witnesses. Cottle J quite properly rejected the argument that delegation ought to have been implied. **Cottle J's finding that** delegation was never granted either expressly, or, by implication, was clearly open to him on the evidence and there is no basis for this Court to interfere with his findings.

[38] The exclusive agreement Gloria entered into with Hilary states that it was entered into by Gloria as lawful attorney for Angel. It recites that Gloria has power to sell the property belonging to Angel by power of attorney dated 22<sup>nd</sup> November 2005. The material parts of the agreement granted Hilary the exclusive right to sell the property. The right extended for a period of 6 months from the date of the agreement. It states that during that period Hilary shall diligently at his own cost do all in his power to sell the property. The property shall be sold for no less than EC \$3 million. If the property is sold for more than \$3 million, the difference over

that sum shall be paid to Hilary as commission. If the property is sold for exactly EC \$3 million, no commission shall be paid to Hilary. On no condition should the property be sold for less than EC \$3 million dollars.

[39] Applying the plain and ordinary meaning of **the word “exclusive”** found in the agreement between Hilary and Gloria, I agree with Mr. Bruney that the delegation to Hilary meant that for the duration of the agreement with him, Gloria did not have authority to sell the land. Hilary was granted the exclusive right to sell the land by Gloria. It is neither here nor there that a minimum selling price was fixed by the agreement between Gloria and Hilary. I do not accept **Mr. Richards’ submission that the phrase “exclusive right” meant no more than “exclusive right” to find a purchaser who would complete the purchase.** There is no basis for such an interpretation. In my judgment, **the effect of Gloria’s agreement** with Hilary divested her of the main power that the power of attorney intended to clothe her with.

[40] It is of interest to note that the agreement between Gloria and Clement and Connie differed in terminology from the agreement between Hilary and Gloria. The power under that agreement stated that: “[t]he said Clement Johnson and Connie Bell are **desirous of promoting the sale of the said property**”<sup>8</sup> whereas the agreement with Hilary stated that Hilary was granted the exclusive right to sell the property.

[41] Counsel for the appellants submit that in finding in favour of Connie and Clement, **the learned trial judge was effectively accepting Gloria’s evidence in finding that Angel had full prior knowledge of the appointment of this sub-agent.** I do not agree. It is inescapable that Angel granted Gloria the power to sell the lands under a power of attorney. Gloria explicitly granted to Hilary the exclusive right to sell the lands. Moreover, the agreement between Gloria, Connie and Clement to find a purchaser for the lands was clearly **within Gloria’s powers. I therefore agree with the learned trial judge when he stated that the power to negotiate the sale of**

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<sup>8</sup> Agreement (dated 16<sup>th</sup> May 2007), Record of appeal, appeal bundle #1, tab 33, p. 183.

**the lands was wide enough to contemplate payment of a finder's fee to both Clement and Connie.**

#### Ratification

- [42] I now deal with the issue of ratification. The relevant principles with respect to ratification are not in doubt. The acts which will constitute ratification are discussed in Bowstead & Reynolds on Agency at paragraph 2-070.<sup>9</sup> ratification may be express or by conduct. An express ratification is a clear manifestation by one on whose behalf an unauthorized act has been done that he treats the act as authorized and becomes a party to the transaction in question. The express manifestation need not be communicated to the third party or to the agent. Ratification will be implied from conduct where the conduct of the person on whose behalf the unauthorized act has been done is such as to amount to clear evidence that he adopts or recognises such act or transaction and such can be implied from the mere acquiescence or inactivity of the principal.
- [43] Ratification may be of one act or a series of acts and as a general rule every act, other than one which is void at its inception may be ratified, whether legal or illegal provided that it was capable of being done by the principal himself.<sup>10</sup> Ratification must be evidenced either by clear adoptive acts or by acquiescence equivalent thereto. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts.
- [44] On the evidence, there was no express ratification by Angel nor can it be said that ratification was implied by any conduct on his part. The evidence before the learned judge indicated that the impugned delegated authority and acts performed thereunder only **came to Angel's** knowledge a few months after the delegation and the commission of those acts. As soon as Angel became aware, he took immediate action to recover the sums which had been unlawfully diverted and

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<sup>9</sup> (18<sup>th</sup> edn., Sweet & Maxwell 2006) para. 2-070.

<sup>10</sup> **Halsbury's Laws of England** (4<sup>th</sup> edn. (re-issue), 1990) vol. 1(2), para 72.

withheld from him. Also relevant to the disposition of the issue of ratification is the **judge's finding** to the effect that the delegation to Hilary, which served to divest Gloria of the power granted to her under the power of attorney, was invalid and as such Angel could not have lawfully ratified this act. As Cottle J puts it: **"It is of no moment to point to the undertaking by Angel in the power of Attorney. He undertakes to ratify and confirm only the things which Gloria lawfully performed under the power of attorney"**.<sup>11</sup> In the circumstances, the arguments in favour of ratification cannot be sustained and the learned judge cannot be properly criticized for not making a finding in favour of ratification.

- [45] For all the reasons advanced, **the grounds of appeal in respect of the judge's construction and or interpretation of the power of attorney are dismissed.** The **challenge to the judge's findings with respect to the exclusive agreement is likewise dismissed.**

#### Grounds Relating to Challenges to Factual Findings and Assessment of Evidence

- [46] Mr. Richards complains that the learned judge:
- i. erred on the factual evidence before him and in law and wrongly held that there was no oral agreement between Hilary and Angel affecting the sale **of Angel's lands;**
  - ii. erred on the factual evidence before him and wrongly held that there were no unpaid loans to Angel by Hilary which were properly repaid from the **proceeds of sale of Angel's land;**
  - iii. erred on the facts and in law and wrongly held that Hilary must indemnify Gloria in respect of all monies paid to Hilary from the proceeds of sale of **Angel's land;**

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<sup>11</sup> Judgment of Cottle J (delivered 19<sup>th</sup> October 2011) at para.45.

- iv. the learned judge misdirected himself on the evidence and wrongly determined that Gloria paid Hilary the sum of \$164,000.00 pursuant to the exclusive agreement contrary to the evidence which showed that Angel paid the sum to Hilary in satisfaction of a debt, by delivering a cheque at **Hilary's house;**
- v. misconstrued the factual evidence and misdirected himself in respect of **the said sum in that he wrongly inferred or concluded that it was Hilary's** evidence that he gave Angel large sums of money to enable him to satisfy his illicit drug habit;
- vi. misdirected himself on the facts and in law by holding that the \$19,000.00 paid by Gloria to Hilary was not part of the money loaned by Hilary to Angel;
- vii. erred by holding that there was no documentation to show that the said sum was transferred to Hilary;
- viii. **wrongly stated that Hilary admitted in his evidence that he "defrauded the tax authorities by reporting a lower sale value for lands which he purchased from [Angel]" and wrongly framed his decision on that** premise.

#### Submissions of Parties

- [47] Mr. Richards' **complaints** largely represent **an attack on the judge's** assessment of the evidence and his factual findings. Mr. Bruney takes issue with the arguments **in respect of the judge's factual findings** and submits that they are largely based on evidence which has been found by the learned judge to be incredible, or at least, unreliable. Mr. Bruney submits that the learned judge examined the evidence presented by all parties and concluded that Angel had proven his case on a balance of probabilities. The judge had the opportunity to observe the witnesses and commented unfavorably on the credibility of the appellants. Mr. Bruney further submits that an appellate court will not interfere with the decision of the court below based on the credibility of witnesses except in special

circumstances, none of which exists here. He contends that the learned judge's finding as to the credibility of the appellants and their witnesses was amply justified by both the oral and documentary evidence before him.

- [48] Mr. Bruney points this Court to evidence on which he says the learned trial judge was justified in arriving at the findings which he did. He submits that the circumstances in which Angel discovered that he was short-paid on both the **aborted sale and the final sale and the fact that money was dispensed to Gloria's** immediate relative, Rashida, are all matters that the learned trial judge properly considered in determining the incredibility of the case presented to him by the appellants. Mr. Bruney indicates that the circumstances which were in evidence before the learned trial judge showed that Angel only found out the actual purchase price for the lands after having searches conducted at the Registry. Gloria had informed him that the property was sold for EC\$3 million. Further, after he commenced the claim against Gloria, he coincidentally met the potential purchasers from the aborted sale and it was only then he found out the true amount that they had paid to Gloria. He later amended his claim to include the additional sum owed to him and to include Rashida as a defendant. Mr. Bruney posits that these, along with seeing and hearing the witnesses, were some of the circumstances that the trial judge properly considered.

Appellate Approach with Respect to Findings of Fact and Issues of Credibility

- [49] An appellate court is reluctant to interfere with findings of fact and credibility by the first instance judge and is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness.<sup>12</sup> Where an appellant seeks to overturn the judge's conclusions on matters of evaluation or fact, they need to demonstrate that the judge was plainly wrong.

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<sup>12</sup> Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 at para. 28.



[50] Numerous cases have demonstrated that an appellant who challenges the judge's finding on facts and credibility has a particularly difficult task. In *Langsam v Beachcroft LLP*<sup>13</sup> Lady Justice Arden held at paragraph 72:

“It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see *Datec Electronic Holdings v United Parcels Service* [2007] UKHL 23, [2007] 4 All ER 765, [2007] 1 WLR 1325 at 46 per Lord Mance).”

[51] **There is a need for appellate caution in reversing a judge's evaluation of the facts.** As Lord Hoffman points out in *Biogen Inc v Medeva plc*,<sup>14</sup> specific findings of facts are inherently an incomplete statement of the impression which was made upon the judge by the primary evidence. **The judge's expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance, which all play an important part in the judge's overall evaluation.**

[52] In *Beacon Insurance Company Limited v Maharaj Bookstore Limited*,<sup>15</sup> in addressing the issue of whether the Court of Appeal was entitled to overturn the findings of fact made by the judge at first instance, the Board stated:

“It has often been said that the appeal court must be satisfied that the **judge at first instance has gone “plainly wrong”**...**This phrase does not address the degree of certainty of the appellate judges that they would**

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<sup>13</sup> [2012] EWCA Civ 1230.

<sup>14</sup> [1997] RPC 1 at 45.

<sup>15</sup> [2014] UKPC 21.

**have reached a different conclusion on the facts...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..."<sup>16</sup>

The Board went on:

"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."<sup>17</sup>

[53] **An appellate court should not interfere with the judge's conclusion on primary facts** unless satisfied that he was plainly wrong.<sup>18</sup> This caution applies not only to findings of primary fact but to the evaluation of those facts and to inferences to be drawn from them.<sup>19</sup> The principle and its rationale was explained by Lord Neuberger in *In re B (A Child) (Care Proceedings: Threshold Criteria)*<sup>20</sup> at paragraphs 52 and 53 as follows:

**"52. ... The court of appeal, as a first appeal tribunal, will only rarely even contemplate reversing a trial judge's findings of primary fact.**

53. ... 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."**

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<sup>16</sup> At para. 12.

<sup>17</sup> At para. 17.

<sup>18</sup> *McGradie v McGradie and another* [2013] UKSC 58.

<sup>19</sup> *Lewison J in Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, para. 114.

<sup>20</sup> [2013] 1 WLR 1911.

At paragraph 200 Lady Hale stated that the Court of Appeal can and sometimes **does test the judge's factual findings against the contemporaneous** documentation and inherent probabilities:

“But where findings depend on the reliability and credibility of the witnesses, it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence.” (My emphasis).

[54] Cottle J made important negative findings in respect of the credibility of Gloria, Rashida and Hilary. With respect to the payment of US \$45,000.00, Cottle J said **that he did not find Gloria's evidence to be credible**. He reasoned that payments were to be made through the office of Mr. Julian Prevost – an attorney at law, yet Gloria directed that the sum be paid outside the jurisdiction. Further, there was no written agreement to explain the payment. Cottle J concluded that this was a deliberate effort to keep Angel ignorant of the payment. Cottle J disbelieved the evidence of Rashida and Gloria that the payment represented the repayment of funds which Gloria had loaned Angel from monies designed to cover the expenses of Rashida's education. He asked: **“Why would a mother give loan out of her daughter's college fund with no arrangements for repayment of the loan?”**<sup>21</sup> Cottle J reminded himself of Gloria's suggestion that she knew that Angel had a “habit” and reasoned that this made it even more incredible that she would have made unsecured advances to him.

[55] Cottle J also addressed the issue of certain sums which were deducted by Gloria and paid to Hilary on account of loans said to have been made to Angel and noted that there was no supporting documentation in support of such loans. Cottle J also stated that Hilary had admitted that he defrauded the tax authorities by reporting a lower sale value and therefore paid less transfer taxes than were due in respect of a land transaction with Hilary. Cottle J concluded that this admission **of dishonesty from Hilary led him to believe that Hilary's evidence cannot be relied**

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<sup>21</sup> Judgment of Cottle J (delivered 19<sup>th</sup> October 2011) at para. 36.

on. Cottle J noted that all the loans Hilary said he gave to Angel were in cash; that none were memorialized in writing and remarked that this is not the conduct of a savvy business. Cottle J rejected as incredible, the evidence of Gerard Shillingford that Angel told him that he owed Hilary money and he saw Hilary give Angel a paper bag with \$30,000.00 in cash. Cottle J preferred and accepted **Angel's** evidence that this transaction never occurred. Cottle J reiterated that there was no supporting documentary evidence – no bank withdrawals - despite the fact that Hilary said he withdrew some of this money from the bank to give to Angel.

[56] Cottle J was scathing of the exclusive agreement and likewise scathing with respect to the credibility and honesty of Hilary. He gave cogent reasons for so finding. Cottle J described the exclusive agreement as **a “fiction concocted by Hilary and Gloria in an effort to withhold from Angel a substantial part of the proceeds of his property”**.<sup>22</sup> In my judgment, it was entirely open to him on the evidence to so find. He found that the payments to Hilary were made without authority. He also found that there were no unpaid loans by Angel to Hilary. He found that the exclusive agreement was invalid. **The judge's conclusions** with respect to the central factual issues in this appeal present a formidable, if not a complete impediment to the success of the appeal on the factual issues. The findings made by the judge were clearly open to him on the evidence and could not be said to be against the weight of the evidence. Cottle J was correct in **dismissing Hilary's counterclaim**.

[57] Cottle J was also concerned about the absence of documentary evidence. His concern was not unfounded. It is well settled that contemporary documents and admitted or incontrovertible facts and probabilities all play their part when a judge assesses the credibility of a witness.<sup>23</sup> Also in *Wetton v Ahmed and Others*<sup>24</sup> Arden LJ stated:

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<sup>22</sup> Ibid. at para 50.

<sup>23</sup> See *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p. 43 (Lord Pearce).

<sup>24</sup> [2011] EWCA Civ 610.

“There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence...”<sup>25</sup>

Arden LJ went on to say at paragraph 14 that:

“...contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.”

[58] Cottle J could not be faulted for testing the veracity of the appellants by reference to the objective facts and documents or lack thereof and to the overall probabilities. This approach is consistent with that referred to in *Armagas Ltd v Mundogas SA; The Ocean Frost*,<sup>26</sup> where Robert Goff LJ spoke to the difficulty in telling whether or not a witness is speaking the truth. He stated that where there is a conflict of evidence, reference to the objective facts and documents, to **the witnesses' motives and to the overall probabilities can be of great assistance** to a judge in ascertaining the truth. I am of the view that the probabilities and possibilities of this case are not such as to cause this Court to depart from the opinion that the trial judge formed having assessed the witnesses.

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<sup>25</sup> At para. 12.

<sup>26</sup> [1985] 3 All ER 795 at 822.

[59] In this case, Cottle J pointed out some of the matters he relied on to arrive at his decision. He said:

**“Certain sums were also deducted by Gloria and paid to Hilary on account of loans said to have been made to Angel. There is no supporting evidence of any such loans in the form of documentation...Hilary admitted that he defrauded the tax authorities by reporting a lower sale value and so paying far less transfer taxes than were due. This admission of dishonesty from Hilary has led the court to feel that his unsupported evidence cannot be relied on.”<sup>27</sup>**

[60] There was also evidence before Cottle J that Angel found out the actual sale price of the lands at a much later date and that he was ignorant of the payment made to Rashida. Cottle J found that Angel did not authorize payment of the sum of US\$45,000.00 to Rashida and that the amount improperly withheld from Angel by Gloria of the funds from the aborted sale is \$327,598.41 plus \$120,800.00 or US\$45,000.00. Cottle J had before him conflicting testimony from various witnesses and he made findings on reliability and credibility after seeing and hearing all of the witnesses. The findings made were open to him on the evidence.

[61] **Mr. Richards takes strong objections to Cottle J’s statement that Hilary admitted** defrauding the tax authorities. Mr. Richards took the Court through various pages of the transcript<sup>28</sup> and submitted that one cannot conclude that Hilary admitted or accepted that he defrauded the tax authorities. In that regard, Mr. Richards posits that the valuation was not done by Hilary. He contends that there was no evidence that Hilary provided the value as to the price of the land and that Angel signed the Memorandum of Transfer and not Hilary.

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<sup>27</sup> Judgment of Cottle J (delivered 19<sup>th</sup> October 2011) at para. 38.

<sup>28</sup> Record of Appeal Bundle 2, Volume 2.

[62] It is necessary to examine the context in which the learned judge made the statement that Hilary admitted defrauding the tax authorities. At paragraph 38 of his judgment, Cottle J said:

**“Hilary in his witness statement says he loaned Angel £10,000.00 around 1996 and a further £8,000.00 in mid 1997. At the end of 1997 Angel sold to Hilary 10,000 square feet of land. Hilary says that the land was valued at \$70,000.00 and that Angel gave it to him in part settlement of the debt owed. Angel testified under cross-examination that Hilary paid him for the land a sum of about \$43,000.00. The registered deed reflects a sale price of \$40,000.00. When questioned about this discrepancy Hilary admitted that he defrauded the tax authorities by reporting a lower sale value and so paying far less transfer taxes than were due. This admission of dishonesty from Hilary has led the court to feel that his unsupported evidence cannot be relied on.”**

At paragraph 39, the judge continued:

**“A second purchase of land from Angel by Hilary reveals the same pattern. The land is said by Hilary to have been bought for \$56,000. He declared a value to the Registrar of lands of \$23,970.00 and paid transfer taxes on the lesser value.”**

[63] The issue at hand assumed **relevance during Mr. Bruney’s** cross-examination of Hilary. It was borne out by the evidence that Hilary had a Certificate of Title for 10,000 square feet of land. He stated that Angel had given him the land in consideration for \$70,000.00 that he had advanced to him. The Assurance Fund fee noted on the Certificate of Title was \$400.00. Hilary agreed that the \$400.00 represents 1% of the declared value of the land and that the declared value would be \$40,000.000. Hilary further admitted that he declared that the value was \$40,000.00 but in fact it was representing a transaction worth \$70,000.00. He then corrected this to say that it was the surveyor who declared the value of \$40,000.000, as he (Hilary) was not an evaluator and did not evaluate the property. Hilary stated that the surveyor gave him a document with the value which he took to a law firm for processing. He did not tell the law firm that the transaction was in exchange for \$70,000.00 that he had lent Angel. Mr. Bruney

then asked Hilary the following question: “**And isn’t the proper thing to do, to pay fees on the actual value of the land?**”<sup>29</sup> To which Hilary answered:

“**Well, it is a common thing that you take your risk and if the Registry does not accept it, it goes back.**”<sup>30</sup>

[64] When asked by Mr. Bruney whether to pay transfer taxes on a value which is lower than the true value of the land is an act of dishonesty, Hilary replied that he did not value the property.<sup>31</sup> Hilary further stated that it depends on what Mr. Bruney calls the value, as the value that Angel wants for his land may not be the actual value by a person who is valuing the property. Hilary stated that Angel wanted \$7.00 a square foot for the land and he was prepared to buy the land at that price and he paid for it.

[65] Mr. Bruney also cross-examined Hilary in respect of another land transaction, reflected in a memorandum of transfer of 7,990 square feet of land. Hilary stated that he paid Angel \$56,000.00 for the land. Mr. Bruney pointed out to Hilary and Hilary agreed that the consideration stated as the selling price of the land in the Memorandum of Transfer was \$23,970.00. In response to a suggestion from Mr. Bruney, Hilary denied that he in fact paid \$23,970.00 and not \$56,000.00. Hilary stated that the declared value was \$23,970.00 and that was the value of the surveyor. Hilary further stated that he paid fees on the \$23,970.00 and not on the \$56,000.00 price.

[66] Mr. Richards submits that Hilary did not admit that he had defrauded the tax authorities by reporting a lower sale value for lands he purchased from Angel and that a fair construction of the evidence could not have led to that conclusion. Mr. Richards relies on the case of *Mahon v Air New Zealand Ltd and others*<sup>32</sup> for the proposition that a tribunal must base its finding which may be injurious to a **person’s reputation** on probative evidence. Mr. Richards submits that Cottle J

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<sup>29</sup> Transcript of trial proceedings, record of appeal, bundle #2, volume 2 at p. 625, line 10.

<sup>30</sup> *Ibid*, at lines 11-12.

<sup>31</sup> *Ibid*, at p. 627, lines 1-3.

<sup>32</sup> [1984] 3 All ER 201.



erred on the evidence in his finding that Hilary had admitted that he had defrauded the tax authorities.

- [67] The law is that a finding of dishonesty should not be made without carefully considering what the person against whom the finding is made says in his own defence. Findings of dishonesty have to be made on a firm evidential basis. Although the learned judge went too far in saying that Hilary admitted to defrauding the revenue, as Hilary made no express admission to that effect, the judge would have been left with the clear impression **from Hilary's** evidence that he would be quite willing to take the risk of so doing. In fact, it would be more than an impression. There was clear evidence from Hilary as to the price he paid for the two pieces of land in issue and that he paid fees on the much lower value reflected on the memoranda of transfer. **In my judgment, looking at Hilary's** evidence in the round and in particular, **his admission that** "it is a common thing to **take your risk**", **the learned judge was entitled to draw strong adverse inferences** against him and make a negative finding as to his honesty. To my mind, the judge had a strong evidential basis for a finding of dishonesty. I am of the view that Cottle J **adequately considered Hilary's** evidence in arriving at a finding of dishonesty and could not be faulted in so doing.

Other Grounds of Appeal:

Whether the Learned Trial Judge Erred in Holding that Hilary Must Indemnify Gloria in Respect of all Monies Paid to him from the Proceeds of Sale of the Lands

- [68] Mr. Richards complains **that the learned judge's ruling on indemnity was** erroneous as the learned trial ruled that since there was no indemnity agreement between Gloria and Clement and Connie, they were not liable to indemnify Gloria. Mr. Richards submits that there was also no evidence of an indemnity agreement between Gloria and Hilary. Mr. Richards further contends that if it was right and lawful that Clement and Connie as sub-agents should not indemnify Gloria then it must be wrongful and unfair that Hilary should be required to indemnify Gloria in

relation to Angel, in circumstances which clearly showed Angel's role in the engagement of Hilary. Mr. Richard states "like issues should be treated alike".

#### Analysis

[69] I agree with Mr. Richards that there was no evidence of an indemnity agreement between Gloria and Hilary. I am however of the view that **Mr. Richards' criticism** of the learned trial judge is unfair. The learned trial judge enunciated his reason for finding the agreement between Gloria, Connie and Clement to be a valid one when he stated that at paragraph 47 of his judgment that "[t]his court considers that the power to negotiate the sale of the land is wide enough to contemplate **payment of a finder's fee to Clement and Connie**". **The distinguishing factors** between the two agreements are the wording of each agreement. The agreement between Gloria and Hilary was vastly different and phrased differently. Accordingly, **contrary to Mr. Richards' submission, it is no like matter**. This ground of appeal is accordingly dismissed. There were other complaints made by Mr. Richards against the learned judge but they did not advance the appeal any further.

#### Whether the Trial was a Proper Trial in Law

[70] The notice of appeal was filed in 2011. Mr. Lawrence filed a notice of application on 11<sup>th</sup> November 2014 for an order that he be at liberty to argue an additional ground of appeal, namely, that the trial judge erred in law and misdirected himself in holding a trial which violated the CPR. Mr. Lawrence complains of the late filing and service of the trial bundles. He says that they were filed the weekend immediately preceding the trial and that the trial judge recognized that there was non-compliance with case management directions. Despite this, the learned judge still proceeded to have a trial.

[71] Mr. Lawrence contends that the learned judge did not properly exercise his case management powers as on finding out that the trial bundles were filed on the morning of the trial he was under a duty and or obligation to not proceed with the

trial or to make a finding adverse to Angel. Mr. Lawrence submits that a trial held under such conditions is trial by ambush. Mr. Lawrence urges upon the Court that a trial conducted on the basis of such a procedure is a nullity under the CPR. I must say that this rather extraordinary proposition does not commend itself to the Court.

- [72] Mr. Bruney submits that there was no strenuous objection by the appellants relating to the irregularities at the trial. He further submits that there was no prejudice suffered by the appellants as a result of the lateness of the filing of the bundles. Mr. Bruney points to the lack of an affidavit in support of the application and further submits that the application would prejudice the respondent and submits that it should be dismissed.

#### Analysis

- [73] Mr. Lawrence has failed to show that there was some unfairness or prejudice suffered as a result of the lateness in the filing of the bundles. The trial judge was aptly placed to determine whether the trial could have proceeded in the prevailing circumstances. He evidently exercised his discretion in the matter and continued with the trial. It has not been shown that he committed an error in principle or erred in the exercise of his discretion. Accordingly, this ground of appeal also fails.
- [74] I would dismiss both appeals and order prescribed costs to be paid by the appellants. On appeal number 32 of 2011, the appellant, Hilary Shillingford, is to pay prescribed costs to the respondent, Gloria Burnette nee Shillingford, of two thirds of the sum of \$14,000.00 as well as the prescribed costs awarded in the court below. On appeal number 33 of 2011, the appellant, Gloria Burnette nee Shillingford, is to pay prescribed costs to the respondent, Angel Peter Andrew, of two thirds of the costs of \$14,000.00 awarded in the court below as well as the prescribed costs awarded below.

[75] In his written submissions Mr. Bruney invites the Court to exercise its powers under section 32(1)(a) of the Eastern Caribbean Supreme Court (Dominica) Act<sup>33</sup> and vary the order of the learned judge and order that: the sums wrongfully paid to Rashida are jointly and severally due to Angel by Gloria and Rashida; the sums wrongfully paid to Hilary are jointly and severally due to Angel by Gloria and Hilary; and that the balance of the judgment debt after deducting the sums wrongfully paid to Rashida and Hilary be paid by Gloria to Angel. Although the section empowers the Court to vary the order of the High Court, I have examined the orders made by the learned judge and find no reason to vary them.

Davidson Kelvin Baptiste  
Justice of Appeal

I concur.

Mario Michel  
Justice of Appeal

I concur.

Gertel Thom  
Justice of Appeal

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<sup>33</sup> Cap. 4:02, Revised Laws of Dominica 1991.