EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0030

BETWEEN:

GREGORY GORDON

Appellant

and

JACQUELINE HAVENER

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Vashist Maharaj and with him Ms. Samantha May for the Appellant
Mr. Dane Hamilton, QC and with him Mr. D. R. Hamilton for the Respondent

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2017: May 31;
December 7.

Civil appeal –Whether contracts for sale of land entered into between the parties are valid and enforceable – Whether there was an intention to create legal relations between the parties – Whether consideration paid under the contracts - Specific performance – Proprietary estoppel - Whether an equitable estoppel can be established when a cause of action in contract is available – Whether learned trial judge failed to properly assess the value of the claim in awarding costs – Rule 65.5(2)(b) of the Civil Procedure Rules 2000

The appellant, Gregory Gordon, alleged that the respondent, his sister, Jacqueline Havener, agreed to sell him three parcels of land by virtue of three written agreements. The first written agreement is dated 15th June 2001 and concerns the sale of Parcel 117

being a portion of Parcel 59 in Block 25 3290A of Registration Section: St. Phillips North for US$1,000.00. The second and third written agreements are dated 27th August 2007 and concern the sale of Parcel 82B, being a portion of Parcel 82 and, Parcel 116 being a portion of Parcel 59, of Block 25 3290A in Registration Section: St. Phillips North respectively for $10.00 each. In the court below, the appellant claimed for specific performance of the said agreements or in the alternative, damages.

The appellant's case is that the respondent refused to honour the contracts to transfer ownership of the properties to him, despite him paying to her a cheque in the sum of US$3,000.00 which represented the full consideration for the purchase of the three parcels. He contended that the respondent agreed to enter into the contracts as part of a scheme of family arrangements. Relying on the agreements, the appellant entered into occupation of the various parcels of land and expended sums on maintenance, property taxes, and capital improvements to same. He further claimed that as a result of her conduct, the respondent was estopped from denying his rights to possession of and beneficial and legal ownership over the said three parcels.

In response, the respondent argued that she constituted the appellant her lawful attorney with respect to Parcel 59 and on 27th August 2007, and in breach of his duties as a fiduciary, the appellant procured the execution of the alleged contracts of sale ('the 2007 contracts") for a consideration expressed therein as $10.00. The respondent alleged that no consideration was given by the appellant in respect of the alleged contracts of sale, and that the sum of US$3,000.00 was provided to enable the respondent to retain counsel in a pending claim. She averred that the said sum was paid 17 months prior to the contracts for sale of Parcels 116 and 82B and 4 years and 7 months after the contract for sale of Parcel 117. With respect to the purported 2001 contract, the respondent submitted that the appellant, in further breach of his duties as a fiduciary, sought to benefit himself by securing the execution of the alleged contract of sale by taking advantage of the physical vulnerability of the respondent. She contended that the appellant rendered the purchase price illusory by not reflecting the true value of the land in question, and thereafter provided no consideration in respect of the contract of sale. Additionally, she submitted that no scheme of family arrangement existed.

The learned trial judge dismissed the appellant's claim in contract on the basis that the agreements were invalid and unenforceable. The learned trial judge based his decision on his findings that the parties had no intention to create legal relations, and secondly on an absence of consideration.

The learned trial judge also declined to grant any relief on the basis of equitable estoppel on the grounds that the appellant had adduced no evidence of any request by the respondent to expend the monies he did, and what the learned trial judge considered to be a conflict in the appellant's evidence in that the appellant could not be relying on a promise by the respondent to give him land which the appellant already effectively owned by virtue of his ownership of the leasehold interest.

The learned trial judge dismissed the claim and awarded costs on a prescribed basis of $7,500.00 based on a valuation of the claim as $50,000.00 pursuant to rule 65.5(2)(b) of the **Civil Procedure Rules 2000** ("CPR").

The appellant appealed the learned judge's decision arguing, inter alia, that: (i) the learned judge's finding that the appellant by virtue of a lease in respect of Parcel 59 effectively owned said parcel and could not rely upon a promise by the respondent to transfer to him the said land was wrong in law; (ii) the learned judge erred in finding that there was no intention to create legal relations; (iii) the learned judge's finding that no consideration was paid under the agreements and therefore no valid contract existed was against the weight of the evidence and wrong in law; (iv) the learned judge's finding that the appellant was not entitled to specific performance was wrong in law and unsupported by the weight of the evidence;(v) the learned judge erred in finding that the appellant did not have a claim in proprietary estoppel; and (vi) the learned judge's finding that the value of the claim was $50,000.00 was against the weight of the evidence.

The respondent filed a counter-notice of appeal limited to the order made by the learned judge in relation to costs.

Held: dismissing the appeal and the counter appeal, affirming the order of the learned trial judge, awarding costs of the appeal to the respondent in the amount of $2,500.00, that:

1. A leasehold interest is distinct from the freehold interest in property. Any ownership or possession of the former does not equate to, constitute, or prevent acquisition of ownership of the latter. The finding by the learned judge on the issue of the appellant's ownership of Parcel 59 is erroneous. The appellant's leasehold interest was distinct from the freehold interest in the property.

2. An appellate court is not entitled to interfere with a finding of fact of a lower court unless the judge's conclusion was rationally unsupportable, the decision being one that no rational judge could have reached. In the circumstances, the finding by the trial judge of lack of intention to create legal relations is one of fact.

   McGraddie v McGraddie [2013] UKSC 58 considered; **Henderson v Foxworth Investments Ltd** [2014] 1 WLR 2600 considered.

3. In deciding issues of contractual intention, the courts apply an objective test. That is, whether there is a binding contract between the parties, and, if so upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words and conduct, and whether that leads to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Traditionally in the case of agreements in a commercial context, there is generally a presumption that parties intend to be legally bound. On the other hand, parties in a domestic or social context are generally presumed not to intend to create legal relations. Whether agreements between close relatives are enforceable depends on the circumstances of each case. In the instant case, approaching the matter on the basis that these are agreements made in a social or domestic context, and that a presumption applies that it was not intended to create legal relations, the

evidence before the judge rebutted that presumption to an extent that the judge's decision simply was not rational. Objectively considered, the parties intended to be bound by their agreements at the respective dates they executed same.

RTS Flexible Systems Ltd. v Molkerei Alois Muller [2010] UKSC 14 applied; **Rose and Frank Co v J.R. Crompton & Bros. Ltd** [1925] AC 445 applied; **Snelling v John G. Snelling Ltd.** [1972] 1 All ER 79 applied.

4. In the instant case, the learned trial judge was correct when he found that no consideration was ever paid as the very contracts contained the term that stated payment was due on signing. Further, the appellant cannot now assert that the respondent never sought to rescind the agreements and that he should be allowed to pay the consideration now as this was not part of his pleaded case. It would be unfair to the respondent for the court to consider that argument by the appellant. Further, the appellant did not come to the court with clean hands when he alleged that he had paid the required consideration, the court having found that he had not, and for that reason the learned judge was correct not to grant specific performance.

5. If a claim properly lies in contract, no proprietary estoppel can be established, at least when the promise or assurance being relied upon arises exclusively out of the contract. In the circumstances, having determined that a valid contract existed between the parties, as between the contract and proprietary estoppel, it is to the contract that the appellant must look for his remedy. Therefore, the claim in proprietary estoppel arising out of a promise to transfer the properties referred to in the contracts is not available to the appellant.

   Riches v Hogben [1985] 2 QD R 292 applied; **Wilson Parking New Zealand Limited v Fanshawe 136 Limited et al** [2014] NZCA 407 applied.

6. It was the obligation of either party, if they wished to have the claim valued, to apply to the court before trial for valuation of the claim pursuant to CPR rule 65.6(1)(a). The rule recognizes that parties are apt to take convenient and self-serving positions on costs after the completion of a trial. Neither party having made any such application, the learned judge committed no legal error in not sifting through the evidence to determine the value of the claim and in applying CPR rule 65.5(2)(b).

   Rule 65.5(2)(b) of the **Civil Procedure Rules 2000** applied; **Next Level Engineering Services Ltd. v The Attorney General** ANUHVCAP2007/0017 (delivered 24th July 2007, unreported) distinguished; **Ultramarine (Antigua) Limited v Sunsail (Antigua) Limited** ANUHCVAP2016/0004 (delivered 7th April 2017, unreported) distinguished.

JUDGMENT

[1] **GONSALVES JA [AG.]**: This is an appeal from the judgment of Mr. Justice Cottle dated 6th August 2015 in which the learned judge dismissed the appellant's claim for an order for specific performance, or in the alternative damages, in relation to the transfer from the respondent of three properties described for convenience as Parcels 116, 117 and 82B, all of Registration Section: St. Phillips North. The appellant appealed the whole of the decision of the learned judge while the respondent filed a counter-notice limited to the order made by the learned judge in relation to costs.

The Appellant's Case

[2] The appellant and respondent are siblings. By his amended statement of claim filed on 14th February 2011 the appellant's case was that by three written contracts entered into between them, the respondent agreed to sell to him 3 parcels of land as follows:

(a) By a written agreement dated 15th June 2001 the respondent agreed to sell to the appellant Parcel 117, being a portion of Parcel 59 in Block 25 3290A of Registration Section: St. Phillips North, for US$1,000.00;

(b) By a written agreement dated 27th August 2007 the respondent agreed to sell to the appellant Parcel 82B, being a portion of Parcel 82 of Block 25 3290A in Registration Section: St. Phillips North, for the nominal sum of $10.00; and

(c) By written agreement dated 27th August 2007 the respondent agreed to sell to the appellant Parcel 116 being a portion of Parcel 59 of Block 25 3290A in Registration Section: St. Phillips North, for the nominal sum of $10.00.

[3] According to the appellant, in reliance upon the said agreements of sale he entered into occupation of the various parcels of land. He entered into occupation of Parcel 117 and remained in occupation for upwards of 9 years. He entered into

occupation of Parcels 82B and 116 since in or around August 2007 and in respect of all three parcels expended the aggregate sum of $192,125.00, inclusive of regular maintenance and capital improvements to same.

[4] The appellant claimed that pursuant to the contracts of sale, on or about 24th January 2006 he paid the respondent a cheque in the sum of US$3,000.00 which payment represented the full consideration for the purchase of the three parcels. He also claimed that since the said agreements were entered into, with the knowledge and approval of the respondent, he paid the property taxes for the said parcels for the years 2008, 2009 and 2010.

[5] The appellant further averred that the respondent agreed to enter into the aforesaid three contracts as part of a scheme of family arrangements, the lands being formerly owned by the parties' now deceased mother, and the desire of the respondent to see that the appellant was not excluded from benefitting from their mother's estate. In support of this the appellant referred to a memorandum signed by the respondent, and asserted that the series of contracts were part and parcel of familial arrangements.

[6] It was the appellant's case that in reliance upon the said contracts the respondent authorized the subdivision of the respective parcels. According to the appellant, he gave full consideration in satisfaction of the contract(s) and the respondent failed or refused to honour the contracts and transfer ownership of the properties to him. By letter dated 18th June 2010, the appellant through his solicitor requested that the respondent take steps to complete the sale of the parcels but, despite repeated requests, she refused to do so.

[7] The appellant also claimed that by virtue of her conduct, the respondent was estopped from denying his rights to possession of and beneficial and legal ownership over the said three parcels of land. By way of relief the appellant sought specific performance of the three contracts, or damages in the alternative.

The Respondent's Case

[8] The defence filed by the respondent did not follow the conventional course required by the **Civil Procedure Rules 2000** ("CPR"). CPR rule 10.5(3) requires a defendant to say which (if any) allegations in the claim form or statement of claim (a) are admitted; (b) are denied; (c) are neither admitted nor denied, because the defendant does not know whether they are true; and (d) the defendant wishes the claimant to prove. Under CPR rule 10.5(4), if a defendant denies any allegations in the claim form or statement of claim, (a) the defendant must state the reasons for so doing; and (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence. Under CPR rule 10.5(5) if, in relation to any allegation in the claim form or statement of claim, the defendant does not (a) admit it; or (b) deny it and put forward a different version of events; the defendant must state the reason for resisting the allegation. I repeat these rules to underscore their importance in a trial. The trial judge should not at the time of the trial be uncertain as to what exactly are the outstanding issues between the parties on the pleadings. The primary purpose of those rules is to compel a defendant to respond in such a manner as to identify, reduce, and crystalize on the pleadings, the outstanding issues that are left to be determined by the trial judge.

[9] In the respondent's filed defence, there was no discernible attempt made to comply with CPR rule 10.5(3). The defence in essence proceeded to set out a state of affairs and tell a story without squarely and properly seeking to answer the specific allegations made in the statement of claim. The respondent contended that she was the registered proprietor and person beneficially entitled to lands situate at Dian Bay, Parish of St. Phillip registered as Parcel 82 containing 0.7 acres, Parcel 59 comprising approximately 1 acre, and Parcel 60 comprising approximately 1.5 acres. The appellant is the owner of Parcel 38 situate at Dian Bay contiguous to the respondent's land that he inherited from

their mother, and Parcel 83 (located to the north of the respondent's land) which he acquired.

[10] Parcel 59 was subdivided into two parcels of land, Parcel 116 and Parcel 117 with the registered proprietors being the respondent and the parties' mother, Ruth McNutt. On or about 18th December 2003, a real estate appraisal and valuation was done and the value of Parcel 59 was appraised at US$872,000.00. There has never been any further subdivision authorised by the appellant with respect to the lands.

[11] The respondent averred that she suffers with multiple sclerosis and her mobility is greatly impaired. As a result of her condition, on or about 9th January 2007, the respondent constituted the appellant to be her lawful attorney with respect to Parcel 59. On 27th August 2007, in breach of his duties as a fiduciary, the appellant procured the execution of the alleged contract(s) of sale identified as exhibits "GG4" and "GG5" ("the 2007 contracts") for a consideration expressed therein as $10.00 respectively. The respondent alleged that no consideration was given by the appellant in respect of the alleged sale(s) and or contract(s) of sale. The respondent averred that the appellant had asserted that, in the event a particular High Court claim then pending ("the Fernandez claim") being determined successfully in the respondent's favour, he, the appellant wished to acquire several portions of the land.

[12] The respondent further averred that the appellant knew that the land (Parcel 59) was worth far more than US$500,000.00. Further, that the respondent's intention was that, in the event of the disposal of the said land, she would offer Parcel 117 for sale to the appellant (being part of the subdivided Parcel 59) at a consideration that reflected its full value.

[13] The respondent alleged that with respect to the purported 2001 contract, the appellant in further breach of his relationship of influence as a fiduciary sought to benefit himself by securing the execution of the alleged contract of sale by taking advantage of the physical vulnerability of the respondent and rendered the purchase price illusory by not reflecting the true value of the land in question, and thereafter provided no consideration in respect of "either" contract of sale. The respondent asserted that the appellant well knew:

(a) That this alleged contract of sale to him was "off the cards", for the consideration therein stated, as given the respondent's medical condition she needed funds for future care and maintenance, and never sought thereafter to insist on the legality of the said contract;

(b) This alleged contract predated by several years the Fernandez alleged contract suit which was for the sale to Fernandez of the entire property;

(c) That the appellant's[1] own evidence in the High Court in the said Fernandez claim was that "It should be noted that when she (Defendant) mentioned the possibility of selling any property, I immediately stressed a desire to acquire said property. At the time she mentioned the possibility of saving some of the property for her daughter and possibly transferring some to me".

[14] The respondent denied that the payment of US$3,000.00 by cheque dated 24th January 2006 was with reference to the possible sale to the appellant of Parcels 116, 117 and 82B. This cheque was to enable the respondent to retain counsel in the Fernandez case, and was given to the respondent some 17 months prior to the alleged contracts for Parcels 116 and 82B, and 4 years and 7 months after the contract of sale for Parcel 117.

[1] Reference is erroneously made to "Defendant" instead of "Claimant".

[15] The respondent contended that no scheme of family arrangement existed. The appellant knew that he obtained no benefit in (terms of land or trust) from his late mother's estate as it was considered that he had already benefitted from property in East Hampton and in Antigua and in any event he had no proprietary interest in Parcels 117, 116 and 82B.

[16] The respondent further contended that she revoked the 2007 power of attorney in 2009 on her discovery that the appellant had abused his duties as a fiduciary seeking to benefit himself in that he had commissioned a survey of the lands with a proposed subdivision where he "hived off" choice portions including the waterfront beach cottage for his own, thereby rendering the respondent's remaining property less valuable. The respondent said she did not consent to the said property survey and, in the result, the appellant pursued legal representation in the United States and in Antigua and Barbuda aimed at establishing a claim to an interest in the property.

[17] In concluding her defence, the respondent denied that the appellant suffered any loss or damage or that he was entitled to specific performance of the alleged contracts of sale.

[18] The appellant issued a reply and it is sufficient for present purposes to note just two points made by the appellant therein. The first is the assertion by the appellant that the respondent was aware that since the signing of the contract documents the appellant maintained Parcels 116 and 82B and paid the taxes in relation to the parcels and she raised no objections to the appellant so doing. Further with the knowledge and consent of the respondent top soil was placed, the sea wall was repaired, the garage and changing room were repaired, and that lawn cuttings and maintenance were done. The second is the assertion that Parcel 117 was not subject to the court proceedings in the Fernandez case.

The Judgment

[19] In dismissing the appellant's claim, Cottle J set out his analysis and reasons in eight paragraphs which are reproduced as follows:

> "[15] In order for the court to have a discretion to grant the claimant the equitable relief of specific performance it must first find that the contracts are valid and enforceable. This is a hurdle that the claimant has failed to clear for two reasons.
>
> [16] Firstly it is the evidence of the claimant that these contracts have their basis in family arrangements. This raises the question as to whether the parties intended to create legal relations. The defendant in her evidence says that she intended to transfer a parcel of land to the claimant but this was out of a sense of family and not as a legal entitlement. The claimant's conduct also supports the view that he viewed the family arrangements as not having any legal effect. He testified at the Fernandez trial in support of the defendant. He did not suggest that he had any entitlement to the land in contest either on the basis of his previous contract for sale or the alleged 99 year lease to him. I find it more likely than not that the parties here had no intention to create legal relations.
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> [17] The second reason that supports my view that these contracts are not binding is the absence of consideration. The claimant accepts that he did not pay the consideration in accordance with the written contracts. There was no payment on the first contract according to the claimant until some five years after the signing of the document. I do not accept that the gift of funds to contest the litigation is in any way related to the agreement of sale made so long before. The second and third contracts also require payment upon signing. No payment was made at signing and the agreements contain no expression that payment had been made before signing. The claimant prepared the documents. Had he intended the money paid more than a year before the documents were prepared to stand as consideration he would certainly have included this in the agreements.
>
> [18] For these reasons I conclude these contracts are not binding and cannot be enforced either by the equitable remedy of specific performance or by way of damages for breach. I also decline to grant the claimant any relief on the basis of equitable estoppel. He has adduced no evidence of any request by the defendant to expend the monies he said he did. It is quite equally possible that he chose to do so for the benefit of his sibling. I do not believe that the claimant had any honest belief that by expending the

sums that he did he would thereby obtain any proprietary interest. His evidence is conflicting. On the one hand he claimed that he owned the leaseholds of parcels 116 and 117.

[19] He cannot at the same time be relying on a promise by the defendant to give him lands that he effectively owns. He offers as his explanation of the sale price of $10.00 for each parcel the belief that as he owned such a long lease the residue was virtually without value. I find the positions to be inconsistent. I reject his evidence.

[20] Counsel for the claimant points to the letter of the defendant in the Fernandez case as encouragement to the claimant to continue to act to his detriment.

[21] This highlights the position that the decision to incur the initial expenses was made by the claimant without any request or encouragement by the defendant. The subsequent equivocal evidence of an act of encouragement is not sufficient to found his claim for an order from this court founded upon the doctrine of equitable estoppel.

[22] The claim is accordingly dismissed. The claimant will pay the legal costs of the defendant on the basis of prescribed costs. I fix the amount in the sum of $7,500.00 under CPR 2000 part 65.5(2)(b)(iii), as I consider the value of this claim to be $50,000.00"

The Appeal -The Notice of Appeal

[20] The appellant is unhappy with the decision of Cottle J and has appealed the entirety of the judgment, relying on 11 grounds. Apart from grounds 1 and 6[2], the grounds can conveniently be divided into the two groups, namely the contract grounds[3] and the proprietary estoppel grounds.[4] I intend to deal firstly with ground 1, then the contract grounds, followed by the proprietary estoppel grounds and lastly ground 6.

Ground 1

[21] The appellant argues in ground 1 that the judge's finding that the appellant, by virtue of the lease in respect of Parcel 59 ("Parcels 116 and 117"), effectively

[2] Ground 6 dealt with the issue of the claim valuation and costs.
[3] Grounds 4, 5, 7, 8 and 9 of the notice of appeal filed on 15th September 2015.
[4] Grounds 2, 3, 10 and 11 of the notice of appeal filed on 15th September 2015.

owned said lots and could not rely upon a promise by the respondent to effectively give him the said land is wrong in law as the appellant cannot be equated to owner of land by virtue of a lease. This statement, simply put, is unassailable and needs little explanation. The appellant's leasehold interest was distinct from the freehold interest in the property. Any ownership or possession of the former did not equate to, constitute, or prevent acquisition of ownership of the latter. The finding by the learned judge is erroneous and the appellant succeeds in relation to this particular ground.

The Contract Grounds

[22] In relation to ground number 4, the appellant argued that the learned trial judge erred when he found that the respondent intended to transfer a parcel of land to the appellant but this was out of a sense of family, and not as a legal entitlement. This ground is directed at the judge's finding that there was no intention to create legal relations. According to the appellant, the learned trial judge failed to consider the evidence of the respondent under cross-examination that she intended to contract with the appellant, but that she had changed her mind about the price of the land after the Fernandez case and after obtaining an evaluation of the lands. This part of the learned judge's analysis occurred at paragraph 16 of the judgment where the learned judge stated:

> "Firstly it is the evidence of the claimant that the contracts have their basis in family arrangements. This raises the question as to whether the parties intended to create legal relations. The defendant in her evidence says that she intended to transfer a parcel of land to the claimant but this was out of a sense of family and not as a legal entitlement. The claimant's conduct also supports the view that he viewed the family arrangements as not having any legal effect. He testified at the Fernandez trial in support of the defendant. He did not suggest that he had any legal entitlement to the land is contest on the basis of his previous contract for sale or the alleged 99 year lease to him to him. I find it more likely than not that the parties here had no intention to create legal relations."

[23] The learned judge went on at paragraph 17 of his judgment to state that the second reason that supported his view was the absence of consideration, and

that the appellant accepted that he did not pay the consideration in accordance with the written contracts.

[24] This finding by the judge of lack of intention to create legal relations is one of fact. An appellate court is not entitled to interfere with such a finding unless the judge's conclusion was rationally unsupportable, the decision being one that no rational judge could have reached.[5]

[25] In relation to the general conclusion by the judge that the parties had no intention to create legal relations, this was not a position set out in the defence. At paragraph 6 of the defence, the allegation was made that on 27th August 2007, the appellant in breach of his duty as a fiduciary (he having been appointed the respondent's lawful attorney on 9th January 2007) procured the execution of alleged contracts of sale identified in the (amended) statement of claim as exhibits "GG4" and "GG5" for a consideration expressed therein at $10.00 respectively and that no consideration was given by the appellant in respect of the alleged sale or contract of sale.

[26] At paragraph 8 of the defence, it was stated that with regard to the alleged contract of sale marked exhibit "GG2" in paragraph 6 of the amended statement of claim ("the 2001 contract for Parcel 117"), the appellant in further breach of his relationship of influence as a fiduciary sought to benefit himself by securing the execution of the alleged contract of sale taking advantage of the physical vulnerability of the defendant and rendered the purchase price illusory by not reflecting the true value of the land in question and thereafter provided no consideration in respect of either[6] contract of sale.[7]

[5] McGraddie v McGraddie [2013] UKSC 58; Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600.
[6] There was only one contract in 2001 for Parcel 117.
[7] It should be noted that this written agreement was dated 15th June 2001 while the power of attorney on which the assertion that the appellant was a fiduciary was dated 4 years after in November 2005.

[27] In my respectful opinion, there are a number of difficulties with the learned judge's finding on lack of intention to create legal relations. On the pleadings there was no independent defence put forward that the respondent had no intention to create legal relations. The defence that was run by the respondent was one of "breach of a relationship of influence as a fiduciary". In her evidence, the respondent stated that she was intimidated by the appellant and was not given any opportunity to read the contracts before she signed them.[8] Now it would be correct to argue that a person who was intimidated into signing a contract document would have had no intention to create legal relations, at least in relation to that particular document.[9] But in such case the lack of intention to create legal relations arises as a consequence of the intimidation. If the court fails to find that any intimidation occurred[10] then the issue of a consequential lack of intention to create legal relations evaporates. The learned judge did not find there to have been any improper influence or intimidation. He therefore, in essence, found that the respondent was acting voluntarily, but in so doing, had no intention to create legal relations. He therefore ascribed reasons not related to the rejected allegation of intimidation for his decision in this regard. Assuming the judge was permitted to do this based on evidence that unfolded during the course of the trial, having considered the judge's explanation for his conclusion on this point, and having considered the totality of the evidence before the judge, I am of the opinion that the judge failed to give the said evidence a balanced consideration and that his conclusion was rationally unsupportable, making his decision that the parties had no intention to create legal relations one that no reasonable judge could have reached.

[28] The judge's first reason was that this was a family arrangement not having any legal effect. The evidence that he recited as influencing his decision was that (a)

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[8] See respondent's witness statement, Record of Appeal Vol. I, p.107, and Transcript of Trial Proceedings, Record of Appeal, Vol. IV, pp. 137 and 140. Further, any such finding could not have affected the 2001 contract as the alleged relationship of influence was premised on the 2007 power of attorney.

[9] Note: Duress would have rendered any contract voidable and not void. See Halsbury's Laws of England 4th Ed., Vol. 9(1) para. 710, footnote 13 and cases cited there.

[10] Which the court impliedly rejected as it found that she signed out of sense of family.

the appellant himself said that the contracts had their basis in family arrangements; (b) the respondent in her evidence said that she intended to transfer a parcel of land to the appellant but this was out of a sense of family and not as a legal entitlement; (c) the appellant's conduct in testifying at the Fernandez trial in support of the respondent and not suggesting then that he had any legal entitlement to the land in contest either on the basis of his previous contract for sale or the alleged 99 year lease to him; and (d) the absence of consideration.

[29] In deciding issues of contractual intention, the courts apply an objective test. The test is stated as follows:

> "Whether there is a binding contract between the parties, and, if so upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words and conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations".[11]

Evidence of the subjective intention of the parties at the date the agreement is made is not admissible. Traditionally in the case of agreements in a commercial context, there is generally a presumption that parties intend to be legally bound. On the other hand, parties in a domestic or social context are generally presumed not to intend to create legal relations.[12] The question would arise whether these agreements would be categorized as agreements in a commercial context or agreements in a domestic or social context. The question may not always be simple to answer as it is possible to have a commercial agreement between family members as occurred in **Snelling v John G. Snelling Ltd.**[13] Depending upon the circumstances, agreements between close relatives are enforceable.[14] I

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[11] RTS Flexible Systems Ltd v Molkerei Alois Muller [2010] UKSC 14, Lord Clarke at para 45. See Chitty on Contracts 28th Ed., Vol 1. General Principles para 2-164 and cases cited.
[12] Rose and Frank Co v J. R. Crompton & Bros. Ltd [1925] AC 445.
[13] [1972] 1 All ER 79.
[14] See Haggar v de Placido [1972] 2 All ER 1029 (overruled on another point Donnely v Joyce [1973] 3 All ER 475 (CA); Errington v Errington and Woods [1952] 1 All ER 149.

am of the opinion that it can be argued that these are commercial agreements between family members with the presumption of enforceability applying. However I am prepared to approach the matter on the basis that they are agreements made in a social or domestic context, and that a presumption applies that it was not intended to create legal relations, in which case I am also of the opinion that the evidence before the judge, some of which he appeared not to have considered, comfortably rebutted that presumption to an extent that the judge's decision simply was not rational.

[30] Firstly, in terms of the evidence considered by the judge. I do not think that the judge can be faulted for considering (a)[15] in terms of providing context, but this in my opinion was not determinative and would have reflected motive more than intention. It would have been important for the judge not to confound motive with intention. In relation to (b) I think the judge would not have been entitled to consider the explanation of the respondent of her subjective intention at the time of her execution of the contract. But even in that regard the respondent admitted in cross examination that she changed her mind in relation to the contracts and wanted more money.[16] In relation to the appellant not mentioning his interest in the property during his testimony in the Fernandez trial, I do not attach any great significance to this. I think his introduction of that issue into the trial would not have been beneficial to and would only have served to complicate the respondent's case. In relation to (d), the alleged absence of consideration, there was in fact no absence of consideration stated in the contracts, only the absence of payment of the stated consideration. I agree with the learned trial judge that the gift of funds by the appellant to assist the respondent in contesting the Fernandez litigation did not relate to the 2001 agreement of sale made so long before, or to the 2007 agreements that were not yet in being. But the failure of the appellant to follow through with payment as required in the respective contracts does not lead to the inference (if that was what the judge was inferring)

[15] See paragraph 28 above.
[16] It must be noted for completeness, that she added that she had not agreed to those figures in the first place, but importantly the judge did not find any duress or improper influence.

that there was no intention to create legal relations or that payment was never to have been made. If there was an intention to create legal relations at the time of the making of the agreement, the subsequent failure to pay the stated consideration does not operate so as to negate that intention ex post facto. Secondly, in providing his reasons for his decision the judge would have failed to consider a number of important factors that in my opinion go to rebut the presumption of no legal consequences, namely:

(a) All of these contracts were contracts reduced to writing and executed by the parties. The very fact of execution itself tends to lead to a conclusion that the agreements were intended to be binding[17]. Further, a review of the contracts for the three parcels disclose all of these documents to be pre-printed standard form contracts, which included a warning to consult with an attorney-at-law at the very beginning. The heading was "CONTRACT OF SALE made as of the …" and the contract included 24 separate provisions setting out precisely the terms between the parties. By consideration of both form and content, one would immediately accord a sense of seriousness and formality to the transaction in question. If there was no intention to create legal relations, one would question the motive of the parties in utilizing the documents in question. The very nature of the documents suggest that the parties did intend to enter into legal relations. I adopt the reasoning of Ormrod J in **Snelling v John G. Snelling** that it is difficult to suppose that the parties would have gone to such trouble to record the transactions in this manner or to phrase the agreements in the manner they did unless they intended legal consequences to flow from them.[18]

[17] See Edwards v Skyways Ltd [1964] 1 All ER 494; Rose and Frank Co. v. J. R. Crompton & Bros Ltd [1924] All ER 245, dictum of Lord Atkin at p.249-250.
[18] Snelling v John G. Snelling [1972] 1 All ER 79 at p.85 para h.

(b) In relation to the contract of sale for Parcel 117, the evidence of the appellant was that this was first sent to the respondent in 2001.[19] It was sent back. It was not dated and all of the pages were not signed, but it was signed at the end. It was sent back and the respondent signed again at the back on the last page but still there was no date. It was therefore sent back a third time and that time it was dated. The very fact that the appellant sent the contract to the respondent three times and insisted on compliance with the stated formalities highlights the seriousness surrounding the transaction set out in the document and the significance of the document itself, and this must have been apparent to the respondent who then completed the contract in those circumstances.

(c) The fact that the contracts provided for consideration suggests that the properties were not intended to be gifts. As was stated by Carter, "There is a relationship between the presence of valuable consideration and intention to contract in that both go to the legal enforceability of an agreement. Moreover, they overlap as the presence of consideration tends to suggest the presence of an intention to contract".[20] Additionally, but related to the above, the use by the parties of minor consideration not reflecting the true value of the properties was a way for the parties to put a stamp of formality on what might otherwise appear to be gifts.

[31] In the circumstances, I am led to the conclusion that the trial judge did not consider the totality of the evidence before him, appears to have attached too much weight to the suggestion that the contracts had their basis in family arrangements,[21] wrongly considered the subjective intention expressed by the respondent, and wrongly concluded that there was an absence of consideration,

[19] See Transcript of Trial Proceedings, Record of Appeal, Vol. IV, pp. 557-559.
[20] Carter, J. (2002). Carter on Contract. Sydney, Australia: Butterworths, paras. 08-010.
[21] "We must not confound motive with consideration" Patteson J in Thomas v Thomas (1842) 1 2 Q.B. 851.

or alternatively that an absence of the performance of stated consideration could ex post facto affect the parties intention to be bound at the date of the contracts. I am of the view that, objectively considered, the parties intended to be bound by their agreements at the respective dates they executed same. The appellant therefore succeeds in relation to ground 4.

[32] In relation to ground 5, this is tied up with ground 4. The appellant challenges the learned judge's finding, that the appellant's conduct supported the view that he viewed the family arrangements as not having any legal effect, as being against the weight of the evidence. Having determined in relation to ground 4 above that the particular contracts were intended to create legal relations between the parties, it is unnecessary to determine this ground.

[33] In relation to ground 7, the appellant challenged the learned trial judge's findings that there was no intention to create legal relations between the parties as being against the weight of the evidence and wrong in law. This ground rehashes the arguments made in relation to ground 4 and this Court's determination in relation to ground 4 above applies with equal force here.

[34] In relation to ground 8, the appellant argues that the trial judge's finding that no consideration was paid under the contracts and therefore no valid contract existed was against the weight of the evidence and wrong in law. Ground 9 was that the judge's finding that the appellant was not entitled to specific performance was wrong in law and unsupported by the weight of the evidence. I shall take these two grounds together. The first argument advanced here was that the judge failed to consider the issue of acceptance of breach[22] and the appellant's evidence that consideration was paid sometime after the execution of the agreements, which sum was admitted to have been received by the respondent and that the trial judge failed to consider Amanda Rodriquez' evidence that the contracts were prepared by her, and sent to the respondent one month before

[22] The appellant did not clarify exactly what was meant by "acceptance of breach".

signing. In relation to this ground, the learned judge explained his reasoning at paragraph 17 of the judgement as follows:

> "The second reason that supports my view that these contracts are not binding is the absence of consideration. The claimant accepts that he did not pay the consideration in accordance with the written contracts. Thence was no payment on the first contract according to the claimant until some five years after the signing of the document. I do not accept that the gift of funds to contest the litigation is in any way related to the agreement for sale made so long before. The second and third contracts also require payment upon signing. No payment was made at signing and the agreements contain no expression that payment had been made before signing. The claimant prepared the documents. Had he intended the money paid more than a year before the documents were prepared to stand as consideration he would certainly have included this in the agreements".

[35] In this regard the judge's reference to the gift of funds to contest the litigation is a reference to the $3,000.00 given by the appellant to the respondent in 2006 to assist the respondent defraying legal costs in the Fernandez litigation. The appellant admitted[23] that he did not pay the $1,000.00 due under the contract for Parcel 117 when that contract was made in 2001. That contract included a provision that the purchase price of $1,000.00 was payable on the signing of the contract by cheque subject to collection. The respective contracts for Parcel 116 and 82B were dated 27th April 2007 and similarly recited in each case that the purchase price was payable on the signing of the contracts by cheque subject to collection. These contracts were made months after the appellant had given the respondent the $3,000.00. Bearing in mind the timelines specified for payment of the consideration in each of the contracts, the date when the $3,000.00 was paid, the amount paid, and the circumstances of payment, the judge was, on the evidence, clearly entitled to reject the evidence of the appellant that the $3,000.00 was effective to provide the consideration for the contracts. This however did not mean that no valid contracts existed because this only went to the payment of the stated consideration, not to the existence of consideration in the contract in the first place. On the payment point, (and still relying on the

[23] See Transcript of Trial Proceedings, Record of Appeal, Vol. IV, p. 611.

alleged payment of the $3,000.00 in satisfaction of the stated consideration) counsel for the appellant submitted[24] that it would be necessary to show that circumstances existed that suggested that there would be a departure from the normal rule that purchase and completion of a land sale were to be simultaneous, and suggested that payment was not due as the respondent as vendor had never indicated that she was in a position to perform the contracts. However, in my opinion, such circumstances did exist because the very contracts contained the term referenced above[25] that stated that payment was due on signing. The learned judge was therefore in my opinion correct when he determined that no consideration was ever paid. The appellant further submitted that, in referring to the non-payment of consideration, the learned judge alluded to a defect in the performance of the appellant's promise under the agreement as opposed to a defect in the formation of the agreement itself. The submission is in essence that the failure to pay an agreed consideration under a contract does not ex post facto imply that there was no stated consideration or that there was never an intention to create legal relations or for the contracts to be binding in the first place. I agree with counsel for the appellant in this regard only, and I have already found that the parties had the requisite intention to create legal relations.

[36] Based on the foregoing, the parties had the requisite intention to create legal relations but the appellant, despite and contrary to his asserted case, never paid the consideration. In an obvious attempt to remedy that defect and to preserve the appellant's claim for specific performance, the appellant's counsel submitted that if the appellant was at fault for not paying the consideration at the time required under the contracts, the respondent never sought to rescind the contracts[26] and the court ought now to consider the willingness of the appellant to pay the consideration. I have a serious difficulty with this suggestion. Firstly, this was never part of the appellant's pleaded case. The appellant's case was that he

[24] Seeking to rely on dicta of Lord Hutton at para 22 in Ringo and Others v Lee Gee Kee and Others (Hong Hong) [1997] UKPC 13.
[25] On which point this Court engaged counsel for the appellant during his argument.
[26] See appellant's speaking notes, p. 9, para.16.

had paid the consideration in full. Nowhere did he plead that he was ready, willing and able to perform all the terms applicable to him under the contracts. A party is bound by his pleadings and the appellant's pleaded case was that he had in fact fully performed[27] his side of the contractual bargain by paying the required purchase price consideration. This is the case the respondent was called to answer, so far as the contract and payment of consideration was concerned. Submissions do not form part of the pleadings. Assuming it was possible but not deciding, had the appellant pleaded his case alternatively to suggest that there were enforceable contracts, they were still alive not having been repudiated by the respondent due to the appellant's failure to pay the respective consideration at the times stated therein, and that the appellant was ready, willing and able to pay the consideration, it is a matter of pure speculation as to what would have been the defence of the respondent. It is quite possible that various additional defences might have been mounted by the respondent. It would be manifestly unfair to the respondent for this court to consider that new argument by the appellant. Secondly, assuming it could be otherwise proper for this court to consider acceding to the appellant's request, I would be disinclined to do so. In my mind the appellant would not have come to this court with clean hands when he alleged that he had in fact paid the required consideration (which was the main thrust of his case) only for Cottle J (with whom I agree) to find that he actually did not. In the circumstances I find that for the reasons set out above, the learned judge was correct not to grant specific performance.[28]

The Proprietary Estoppel Grounds

[37] I now turn to the proprietary estoppel grounds. By ground 2, the appellant complained that the trial judge's finding that the appellant did not adduce evidence of any request from the respondent to expend monies he says he did and that it was equally possible that he chose to do so for the benefit of his

[27] See para.16 of the Amended Statement of Claim - "The Claimant has given full consideration in satisfaction of the contract and the defendant has failed and/or refused to honour the contract and transfer the ownership of the property to the Claimant"

[28] See Halsbury's Laws of England 4th Ed., Vol 44(1), para. 879 - specifically in relation to general terms and not conditions.

sibling was against the weight of the evidence. According to the appellant, the judge failed to give due or adequate consideration to the letter from the respondent that she had given the land in particular Parcel 117 to the appellant, to the evidence of Ann Marie Williams and the respondent in respect of the maintenance of the properties and payment of taxes thereon, and that it was based on the respondent's representations and assurances that the appellant continued to incur expenses in maintaining and improving the properties.

[38] The appellant's reference to the "representations and assurances" serve to focus the court's attention on what I consider to be a fundamental problem preventing my consideration of the proprietary estoppel aspect of the appellant's case once I have found that there was a valid contract. The first requirement to establish a claim in proprietary estoppel is that the assurances or conduct of the respondent in relation to the identified property were sufficiently clear and ambiguous in the circumstances.[29] This requires the court to focus on determining what exactly were the assurances or representations alleged to have been made by the respondent and on which the claimant relied. In paragraph 9 of the amended statement of claim, the assurance was described this way:

> "In reliance upon said agreements of sale the Claimant entered into occupation of plot #117 and has remained in occupation for upwards of 9 years. In relation to plot #82B and plot #116 the Claimant entered into occupation of same since on or around August 2007 and in respect of all three (3) plots has expended the aggregate sum of EC$192,125.00 as shown on the Claimant Statement of Expenses attached hereto as Exhibit "GG6". The Claimant has regularly maintained the said properties and made capital improvements to same."

The actual assurances were not specified but by virtue of paragraph 9, the assurances were given by or contained in the contracts.

[39] By paragraphs 4 and 5 of the appellant's closing submissions, the case on the representations was put this way:

[29] See Underhill and Hayton Law of Trust and Trustees (18th Ed. 2010), para.12.49.

"4. Alternatively, the representations made to the Claimant particularly in relation to the 2005 Letter during the Court matter High Court Claim No. 2006/0025 Jacqueline Havener v Charles Fernandez (hereinafter called the Max Fernandez Case) and the steps taken thereafter by the Claimant to his detriment give rise to the Claimant (sic) an equitable interest in the land, through Proprietary Estoppel". "5. The Defendant represented and promised to the Claimant that the lands mentioned herein would be his."

[40] At page 341 of Volume III of the Record of Appeal, in the appellant's submissions before the High Court, the representations were set out as follows:

(1) The promise of Parcel 117 as seen in a letter dated 2009 which the Defendant admits under cross-examination to writing. At page 45 of Trial Bundle III, the Defendant stated "the first thing I did after mother died was to give you that beautiful piece of land adjacent to you" (which piece of land is based on Parcel 59 and is in fact Parcel 117);

(2) The Defendant's sworn testimony in the High Court Claim No 2006/025 Jaqueline Havener v Charles Fernandez. The Defendant stated: "I was not sure how I would handle the different parcels, but I did know I wanted to deed some to my brother, Gregory Gordon…". Under cross examination the Defendant admitted that these lands intended were Parcel 117;

(3) The Memorandum signed by the Defendant where she promised to share 50% of all proceeds received from the sale and or transfer of any and all pieces of property which can be found at Page 21 of Trial Bundle 3;

(4) The promise of additional lands upon receipt of the US$3,000.00;

(5) The benefit lost to the Claimant under their mother's Will by the Defendant breaking the Trust and not distributing monies as per the provisions of the Will; and

(6) The several executions of the Agreement of Sale agreeing to contract (sic) of sale and admitting to having changed her mind about the price under cross examination.

[41] It is readily apparent that there are difficulties with the description of the alleged representations made. The only representation set out in the amended statement of claim was a representation said to be contained in the agreements of 2001 and 2007. As I understand it from the submissions, the representation here was itself the promise to transfer the 3 parcels in question.[30] The other assurances between 2001 and 2009 were to have been confirmatory of that promise contained in the contracts and did not stand on their own. For example, the alleged promise of Parcel 117 said to be contained in the letter of 2009 could not on its own have been an assurance or representation on which the appellant could have claimed he acted in reliance between 2001 and 2009. Further, the statement made in the Fernandez case was equivocal at best and in any event could not have been an assurance on which the appellant could state that he relied as between 2001 and 2006. So what the appellant describes as representations in paragraph 26 are inextricably tied up with the promise said to emanate from the contracts. The difficulty that this causes is that, this Court having found that the promises contained in the contracts were enforceable, the matter then lay in contract and not in proprietary estoppel. In a review essay by Robert Anderson[31] of a publication by Michael Spence, Anderson explained the rationale for this as follows:

> "Secondly, in distinguishing estoppel from contract, Spence suggests that it is "unlikely that many parties will choose to argue their case in equitable estoppel when a cause of action like contract would be available" because relief will only be available in estoppel on a discretionary basis. **This raises the interesting and important question whether an equitable estoppel can be established when a cause of action in contract is available.** (emphasis added). In the United States there have been

[30] Note: By the appellant's pleadings any such representation was made within the context of enforceable contracts.

[31] Robert Anderson LLM(Hons) (QUT), Phd (ANU); Senior Lecturer, Faculty of Law, The University of Melbourne, Review Essay – Reliance Conscience and the New Equitable Estoppel, "Protecting Reliance: The Emergent Doctrine on Equitable Estoppel by Michael Spence." [2000] MelbULawRw 7.

> suggestions that promissory estoppel is sometimes relied upon, in lieu of traditional contract liability, in cases where bargained-for consideration has been given. In **Lydel Nominess Pty Ltd v Mobil Oil Australia Ltd**, Wilcox J at first instance seemed to assume that equitable estoppel can be relied upon in Australia where the promise in question forms part of an enforceable contract. He first considered whether the relevant promise was enforceable on the basis of equitable estoppel, finding that it was not, before considering whether it was enforceable on the basis of contract, finding that it was. It is suggested that there are two reasons why both Spence and Wilcox J are wrong to assume that equitable estoppel can be raised in relation to reliance on a contractual promise. First, a plaintiff who has enforceable contractual rights arising from a promise could not be regarded as having suffered any detriment as a result of their reliance on that promise. Secondly, if the common law provides a remedy to the promisee through contract, there is no reason for equity to intervene. The second point was acknowledged by McPherson J in **Riches v Hogben**, in a passage adopted by Gleeson CJ, McHugh, Gummow and Callinan JJ in **Giumelli**.[32] McPherson J observed that if there is a legally binding promise, "then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law, not replace it". The proper order of analysis, then, is to ask first whether a promise forms part of an enforceable contract. If it does, then the plaintiff's only remedy is in contract. It is only where the promise does not form part of an enforceable contract that that the application of equitable estoppel should be considered."

[42] The referenced quotation by McPherson J in **Riches v Hogben**[33] reads as follows:

> "A consequence of applying the principle may be to complete and otherwise imperfect gift, as in **Dillwyn v Llewellyn**, or to give effect to an agreement that, for want of certainty or consideration or some other essential element, falls short of constituting an enforceable contract. Many of the reported cases are concerned with imperfect gifts; but there is of course a sense in which all agreements made or promises given without consideration are imperfect gifts of the benefits they purport to confer. What distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise. If there is such a promise, then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it."

[32] Referring to Giumelli v Giumelli [1999] HCA 10; (1999) 196 CLR 101.
[33] [1985] 2 QD R 292.

[43] The correctness of McPherson J's thinking was by endorsed the New Zealand Court of Appeal in **Wilson Parking New Zealand Limited v Fanshawe 136 Limited et al.**[34] I agree with Anderson that if the matter lies in contract, no proprietary estoppel can be established, at least when the promise or assurance being relied upon arises exclusively out of the contract. Having determined that a valid contract existed between the parties, as between contract and proprietary estoppel, it is to the contract that the appellant must look for his remedy. I would therefore conclude that the claim in proprietary estoppel as pleaded in this case, arising out of an assurance or promise to transfer the property said to be contained in the contract itself, is not available to the appellant. This precludes any consideration of the other grounds of appeal related to proprietary estoppel.

[44] In relation to ground 6, the appellant argued that the judge's finding that the value of the claim was $50,000.00 was against the weight of the evidence and that the judge failed to give sufficient weight to the appellant's statement of expenses that indicated that he had expended $192,000.00 and that this expenditure was unchallenged by the respondent. This argument was made no doubt in the expectation by the appellant that he would prevail on the appeal. It would certainly turn against the appellant if he were to fail (as he has) in this Court. The respondent in her counter-notice similarly questioned the judge's determination that the value of the claim was $50,000.00 on the basis that the judge had failed to properly assess the evidence adduced by both sides as to the value of the properties claimed by the appellant. She sought an order setting aside the order as to costs made by the trial judge and substituting in its place an order for the payment of prescribed costs based on the assessed value of the appellant's claim. I have no doubt that this argument was bolstered by the fact that the respondent had succeeded in the court below.

[34] [2014] NZCA 407 at paras.92 and 122.

[45] In paragraph 22 of his judgment the learned trial judge fixed costs in the sum of $7,500.00 under CPR rule 65.5(2)(b)(iii)[35], stating that he considered "the value of the claim to be $50,000.00". By so doing, the learned judge was clearly indicating that CPR rule 65.5(2)(a) did not apply, that is, that there was no amount agreed or ordered to be paid, no amount agreed between the parties, and no amount stipulated by the court as the value of the claim pursuant to an application made by either party under CPR rule 65.6(1)(a) (emphasis added). Neither party made an application to the court under CPR rule 65.6(1)(a) to determine the value of the claim before trial. Although the judge used the word "considered" in referring to his methodology of valuation, by referring to CPR rule 65.5 (2)(b), he was relying on the clear directive given in that rule to ascribe a value of $50,000.00 to the claim in the circumstances set out therein. Both parties have argued that in determining the value of the claim the judge's decision was "against the weight of the evidence" or he did not "properly assess the evidence". Both parties appear therefore to be suggesting that it is for the judge to assess the evidence to determine value of the claim and that he erred in law in failing so to do. I am not attracted to this argument. It was the obligation of either party, if they wished to have the claim valued, to apply to the court before trial for valuation of the claim pursuant to CPR rule 65.6(1)(a). The rule recognizes that parties are apt to take convenient and self-serving positions on costs after the completion of a trial. Neither party having made any such application, the learned judge committed no legal error in not sifting through the evidence to determine the value of the claim and in applying CPR rule 65.5(2)(b). I have considered the decisions of this Court in **Next Level Engineering Services Ltd. v The Attorney General**[36] **and Ultramarine (Antigua) Limited v Sunsail (Antigua) Limited**[37] to see whether they might offer any guidance but I have concluded that they have no bearing on this point. Those cases dealt with the ability of the court to ascribe a value to a claim in a pre-trial application other than by way of a formal valuation application. This Court found that in those

[35] The reference to (iii) appears to have been a typographical error.
[36] ANUHVCAP2007/0017 (delivered 24th July 2007, unreported).
[37] ANUHCVAP2016/0004 (delivered 7th April 2017, unreported).

circumstances it was permissible to utilize a value set out in documents relied on by the party who was suggesting that a formal valuation exercise was required and that there was in those circumstances no need for a formal application for valuation. This however is not a pre-trial application. In the circumstances, I find that the judge committed no error in applying CPR rule 65.5(2)(b).

Conclusion

[46] In the circumstances and for the reasons set out above, the appeal and the counter appeal are dismissed. Despite being unsuccessful in the overall appeal the appellant did succeed on a number of grounds. Bearing this in mind, costs are awarded to the respondent in the amount of $2,500.00.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar