EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0009

BETWEEN:

JANE KANGAL

Appellant

and

PAUL CADETTE

Respondent

Before:

The Hon. Dame. Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Rolston Nelson, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Eghan Modeste for the Appellant
Mr. Dexter Theodore, QC, with him Ms. Isabella Shillingford for the Respondent

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2017: December 11;
December 15.

Civil appeal – Findings of fact – Beneficial interest in property – Oral agreement – Whether trial judge was wrong to find that there was no express oral agreement – Grounds on which appellate court can overturn the decision of trial judge – Judicial discretion of trial judge – Common intention

ORAL JUDGMENT

[1] **WEBSTER JA [AG]:** We heard this appeal on Monday, 11th December 2017. At the conclusion of the hearing, we informed the parties that we would deliver an oral judgment on Friday, 15th December 2017. We now do so.

Background

[2] The respondent ("Mr. Cadette") and the appellant ("Ms. Kangal") met in 1995 and commenced living together in a common law union shortly thereafter. In or about 1996, Mr. Cadette purchased a plot of land at Carellie in Castries out of his own funds and began construction of a house on the land. During this period Ms. Kangal also purchased a plot of land out of her funds. Her land is at Grand Reviere.

[3] Mr. Cadette completed construction of the house on his land to a livable state in 2001 and the parties moved into the house. Following the breakup of the relationship in April 2007, Ms. Kangal applied to the High Court for a declaration that she is entitled to one-half share of the house. The trial judge dismissed her application and she appealed to this Court seeking a reversal of the trial judge's decision.

[4] Ms. Kangal's claim for one-half share of the house is based on an express oral agreement between the parties that they would own the property jointly, or alternatively, an implied agreement for joint ownership based on her contributions to the cost of building the house. The learned trial judge found that there was no express agreement regarding the ownership of the house and that no agreement for joint ownership should be implied from the alleged contributions of Ms. Kangal to the costs of building the house or from the parties conduct.

[5] The judge's findings are based largely if not entirely on his findings of primary facts and inferences drawn from those facts. The approach of an appellate court to such findings is well documented in cases from the courts of the Eastern Caribbean and the United Kingdom. In summary, it is that an appellate court will not interfere with the findings of fact by the trial judge who has had the advantage of seeing the witness give evidence and observing their demeanour. It is only when the trial judge has misdirected himself or herself or has come to conclusions on the facts that are plainly and manifestly wrong that this Court will intervene.

The authority which is most often cited for this proposition, and which was relied on by both counsel is **Watt(or Thomas) v Thomas**[1] where Lord Thankerton said:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
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> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."[2]

[6] Counsel for Mr. Cadette, Mr. Dexter Theodore, QC, also relied on **Re B(a child)**,[3] a decision of the UK Supreme Court, where Lord Neuberger made the following observations regarding the role of an appellate court in dealing with the trial judge's findings of fact:

> "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.."

[7] Mr. Theodore, QC also referred to the judgment of the House of Lords in **Piglowska v Piglowski**[4] where Lord Hoffman, after referring to the general

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[1] [1947] 1 All ER 582.
[2] Ibid page 587.
[3] Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33.
[4] [1999] 3 All ER 632, 643.

approach to findings of fact by the trial judge, continued:

> "It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 165:
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> > 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'"

[8] These are only three of the cases that illustrate the approach that this Court should follow in reviewing the findings by the learned trial judge. There are many others, some of them with variations of the basic principles set out above, but it is not necessary to set out these variations and how they have been applied by this Court in previous cases. Suffice it to say, that we have considered the principles and reviewed the learned trial judge's findings and are satisfied that he did not misdirect himself on the evidence nor make decisions that were plainly and manifestly wrong or that a reasonable judge would not have made. As such we do not have any proper basis for interfering with his conclusions. To illustrate this we will refer to the more important findings by the trial judge and the complaints raised by Mr. Eghan Modeste, counsel for Ms. Kangal, in relation to these findings.

The Express agreement

[9] Ms. Kangal's claim for a beneficial interest in the house is based on an express oral agreement which rests entirely on the bald assertion in her witness statement that in 1997 she agreed with Mr. Cadette that they would build the house on his land and use it as a dwelling house for themselves. She did not give any further evidence as to the details of this oral agreement. The learned trial judge noted that the alleged agreement was central to Ms. Kangal's case but her evidence on the point was lacking in detail; "… leaving it to stand as a naked assertion uncorroborated by nary the tiniest of detail." The judge therefore found, quite

rightly in our opinion that Ms. Kangal had failed to prove on a balance of probabilities that there was an express oral agreement that the parties would own the house jointly.

[10] The principles applicable to claims between cohabitees are well established. Even if there is a common intention that by itself is not enough. In **Gissing v Gissing**[5] Lord Diplock stated that the claimant must prove that he or she acted to his or her detriment. What amounts to detrimental reliance is always a question of fact. Did a partner make contributions out of love and affection or in the expectation of a share in the property? If there is no finding of an express or inferred common intention or representation that the cohabitee had an interest in the property, the legal owner is free to claim a full beneficial interest in the property as the learned judge decided in this case.

The notebook and receipts

[11] Ms. Kangal produced a notebook containing entries for various purchases of building materials and asserted that the entries represented purchases made by her and that the materials were used in the construction of the house at Carellie. Ms. Kangal further asserted that, any materials that she purchased for building her own home at Grand Riviere were purchased after 2007 when she started construction of that house. Mr. Cadette denied that Ms. Kangal made any financial contribution to the cost of building the Carellie house. Mr. Cadette stated that the entries in the notebook were for some of the materials that he had purchased and that they were entered in the notebook by Ms. Kangal because he had asked her to record them as a way of keeping track of the cost of building the house.

[12] The trial judge rejected Ms. Kangal's evidence. He found that in the context of a loving relationship it was more plausible that Ms. Kangal was simply assisting Mr. Cadette with keeping a record of the building expenses. The notebook entries were not a way for Ms. Kangal to record her contributions to the building of the

[5] [1971] AC 886 at p. 905.

Carellie house.

[13] It is not surprising that the receipts for the purchase of building materials that Ms. Kangal produced do not show the house for which the materials were to be used. Receipts do not normally contain this information and the onus was on Ms. Kangal to lead additional evidence to show where the materials were used. The trial judge had to deal with Ms. Kangal's case that the receipts represented materials purchased by her and used in the building of the house at Carellie and not her own home at Grand Riviere. The trial judge admitted that he had difficulty resolving this issue but went on in paragraph 23 of his judgment to rule that Ms. Kangal's evidence was not more fulsome, and that more detailed evidence by her could have perhaps dispelled his doubts regarding the use of the materials that she purchased. This is tantamount to a finding by the trial judge that he did not accept Ms. Kangal's case that the materials that she purchased were used in construction of the house at Carellie and by extension, that she started building her house before 2007.

[14] It is also important to note that Ms. Kangal in her pleaded case and her witness statement did not seek to assert that the notebook was a record of her purchases and thus her contribution to the building of the house. This assertion was first made on appeal and is contrary to her case in the court below that she recorded "..all the materials purchased for the construction of the house"[6] in the notebook. It was clearly open to the learned trial judge to conclude that this was a mere record keeping exercise that the respondent had asked Ms. Kangal to assist him with.

The partitioning of the house

[15] In April 2007 Mr. Cadette, out of concerns for his safety, partitioned the house into two sections so that he could live separately from Ms. Kangal even though in the same house. The partition was such that Ms. Kangal occupied a larger area of the

[6] Paragraph 9 of the statement of claim.

house than Mr. Cadette and the refrigerator and stove were in the portion of the house that Ms. Kangal was to occupy. Mr. Cadette purchased a refrigerator and stove for his own use. Mr. Modeste submitted that the reason why Mr. Cadette partitioned the house in this way was an acknowledgment of Ms. Kangal's entitlement to a one-half share of the house. The learned trial judge rejected this submission and found as a fact that Mr. Cadette partitioned the house for his "peace of mind". The use of the expression "peace of mind" was, in our opinion, the trial judge's way of saying that he accepted Mr. Cadette's evidence that he was concerned about his personal safety and the rejection of Ms. Kangal's case that the house was partitioned to reflect the parties' ownership interests. There was ample evidence before the judge to support his findings.

Credibility

[16] It is also noteworthy that the trial judge made an important finding on credibility at paragraph 31 of his judgment. He found "… [Mr. Cadette] to be more forthright and forthcoming than [Ms. Kangal] upon whom the burden fell of making out her case, and therefore I am more inclined to believe [Mr. Cadette]". Mr. Modeste submitted that this Court should treat this finding as being based entirely on Ms. Kangal's description of herself as a quiet person who did not say much and Mr. Cadette as a more jovial person. We do not accept this submission. The trial judge rejected Ms. Kangal's evidence on all the important issues of fact in the case and we regard the judge's finding in paragraph 31 as his general conclusion on the credibility of the parties.

[17] The trial judge's overall assessment of the case is summarised in paragraph 31 of his judgment as follows:

> "The picture presented by the evidence is one of an unmarried cohabiting couple having their own separate jobs; retaining their own separate earnings; sharing no joint accounts; purchasing with separate loans their separate properties in their respective names; servicing their loan payment separately; bearing no children together and each eventually ended up with his/her own separate house. The fact that the couple shared household expenses and the claimant bought furniture and appliances and looked after Christal it is not, in my view, sufficient to infer

a common intention against the weight of the overall evidential picture."

These findings are based on the trial judge's assessment and evaluation of the evidence in the case and his observation of the witnesses. In our view, there is no basis on which this Court should interfere with the findings of the judge.

[18] Given that the parties were involved in a long relationship akin to a husband and wife we will make no order as to the costs of the appeal.

Order

[19] The appeal is dismissed and the orders of the learned trial judge in the court below are affirmed. There is no order as to costs of the appeal.

I concur.
Janice M. Pereira, DBE
Justice of Appeal [Ag.]

I concur.
Rolston Nelson, SC
Justice of Appeal [Ag.]

By the Court

Chief Registrar