EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0029

BETWEEN:

FLAT POINT DEVELOPMENT LIMITED

Appellant

and

MARY DOOLEY

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Ms. Jacqueline Walwyn with her, Mr. Wesley George for Appellant
Ms. Rika Bird with her, Ms. Amina Byron for the Respondent

2018: November 29;
2019: March 13.

Civil appeal — Breach of sale agreement — Approach of appellate court to findings of fact of trial judge — Whether judge erred in concluding that the purchase price for condominium block was paid in full — Whether judge erred in law finding that the deed of assignment was valid — Assignment — Whether equitable assignee can sue in his own name without joining assignor to the claim — Whether judge erred in law in granting relief — Whether judge erred in granting remedy that was not specifically sought

The appellant, Flat Point Development Limited ("Flatpoint") is a developer of a condominium complex. Flatpoint agreed to sell a block within that condominium complex ("Block D4-03") to Mr. John Hughes ("Mr. Hughes") for US$4 million. Under the agreement, Flatpoint agreed to transfer the property to Mr. Hughes or his nominee upon payment of the balance of the agreed purchase price. The respondent, Ms. Mary Dooley ("Ms. Dooley"), agreed with Mr. Hughes to purchase one unit within Block D4-03. She paid the full purchase price of US$638,000.00 after which a deed of assignment was executed. Mr. Hughes by letter directed Flatpoint to transfer the unit to Ms. Dooley. Ms. Dooley,

having obtained the deed of assignment, also requested Flatpoint to convey the condominium unit to her. Flatpoint refused to transfer the unit and gave varying reasons for doing so. Ms. Dooley therefore sued Flatpoint and sought damages for breach of the agreement among other things.

In the court below, Flatpoint admitted in its defence that it had failed to transfer to Ms. Dooley the condominium unit and offered varying reasons to justify that failure. Among which, Flatpoint stated that it was not served with a copy of a valid legal assignment from Mr. Hughes to Ms. Dooley and was unaware of the assignment, until the claim was served. Further, that Mr. Hughes failed to provide it with a list of the nominees or assignees along with the prices at which he had sold the units. Additionally, Flatpoint stated that Mr. Hughes was in breach of the agreement that he had with it.

The learned judge, having found that Flatpoint's position was untenable, granted Ms. Dooley's claim and held that Flatpoint had no justification in refusing to transfer the unit to Ms. Dooley. The judge found, among other things, that Flatpoint had acknowledged in writing that Block D4-03 had been paid in full so there was no need to await a formal deed of assignment. Further, that Flatpoint's agreement with Mr. Hughes required it to transfer the unit to his nominee simpliciter and, once it had been made aware of the deed of assignment, it could raise no further objection. The judge therefore ordered Flatpoint to transfer and convey the unit to Ms. Dooley forthwith and awarded her damages.

Flatpoint, being dissatisfied with the judge's decision, appealed. The issues for this Court's determination are: (i) whether the learned judge erred in concluding that the purchase price for Block D4-03 was paid in full; (ii) whether the learned judge erred in law finding that the deed of assignment entered into between Mr. Hughes and Ms. Dooley was valid and enforceable; and (iii) whether the judge erred in law in ordering Flatpoint to convey the unit to Ms. Dooley, specifically since that remedy was not sought.

Held: dismissing the appeal; ordering Flatpoint to transfer and convey the condominium unit to Ms. Dooley within 14 days of the date of this judgment; and awarding costs of the appeal to Ms. Dooley which are to be two-thirds of the prescribed costs awarded in the court below, that:

1. The function of the appellate court is to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle. After this determination, the appellate court should stand back and determine whether the findings of facts were open to the judge to make. If they were, the appellate court should not interfere. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to an appellate court.

   Watt (or Thomas) v Thomas [1947] AC 484 applied; Yates Associates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) followed.

2. There is no doubt that the judge, having heard the oral evidence and having read the documentary evidence including the witness statements filed by both sides, came to finding of fact that was clearly open to him that Mr. Hughes had paid the purchase price for Block D4-03. There is no doubt that the judge quite properly rejected the evidence that was led by Flatpoint based on internal inconsistencies. In addition, there was evidence before the judge to properly conclude that Ms. Dooley's evidence was more compelling and that Mr. Hughes had paid the full purchase price for Block D4-03 and had not breached the sale agreement. The evidence that was led by Flatpoint could properly be characterised as thin and consistent with the view argued on behalf of Ms. Dooley. Accordingly, there is no basis upon which the judge could properly be faulted for arriving at the reasoned position which he did and his decision cannot be impugned.

3. The benefit of a contract may be transferred to a third party through a process of assignment. As a consequence of an assignment, the assignee is entitled to sue the person who is liable under the contract. An equitable assignment of a chose or thing in action passes to the assignee the right to sue for its recovery. If the chose or thing in action is equitable and the assignment is absolute, the assignee can sue in his own name without making the assignor a party to the claim. It is clear that Mr. Hughes had assigned to Ms. Dooley, based on her payment of the total sum of US$638,000.00, the right to take a conveyance of the condominium unit. There is nothing which indicates that Ms. Dooley was suing to enforce the entire agreement Mr. Hughes had with Flatpoint. There is also nothing which prevents Ms. Dooley, having paid the full purchase price for her condominium unit and Flatpoint having refused to convey the unit to her, to sue. By way of emphasis, the assignment to Ms. Dooley of the condominium unit was absolute and she was therefore entitled to seek to have the unit conveyed to her.

   Roofman Limited v Rayford Construction Limited CV 2009-03946 (delivered 20th February 2014 High Court of the Republic of Trinidad and Tobago) distinguished; Butler v Capel (1823) 2 B&C 251 distinguished; Comfort v Betts [1891] 1 QB 737 distinguished.

4. There is nothing in law which prevented the learned judge from granting a remedy to Ms. Dooley that was not specifically sought. Rule 8.6(2) of the Civil Procedure Rules 2000 permits the court to grant any other remedy to which the claimant may be entitled. It is noteworthy that in her claim, Ms. Dooley had specifically prayed for "such further and other relief as this Honourable Court deems fit" and the relief ordered by the court falls within that category. Therefore, while it is correct that Ms. Dooley did not seek a conveyance of the unit to her in her claim, that relief was appropriately granted by the judge in the circumstances. Accordingly, there is no basis to interfere with the judge's decision on this issue.

   Rule 8.6(2) of the Civil Procedure Rules 2000 applied; Lance Kydd v Rita Williams SVGHCV2000/0323 (delivered 16th September 2002, unreported) applied.

JUDGMENT

Introduction

[1] BLENMAN JA: At the heart of this appeal is the decision of Cottle J which, in the main, ordered the appellant, Flat Point Development Limited ("Flatpoint") to transfer a condominium unit to the respondent, Ms. Mary Dooley ("Ms. Dooley"). Flatpoint complains that the learned judge erred, as a matter of law, in arriving at this decision and it has appealed against the judgment. Flatpoint also says that the judge erred as a matter of law in ordering Flatpoint to make good the defects to the condominium unit which were occasioned by a lack of maintenance. Ms. Dooley defends the correctness of the judge's order.

[2] I turn now to the factual background.

Background

[3] Flatpoint is a developer of a condominium complex. In 2005, it agreed to sell Block D4-03 within the complex to Mr. John Hughes ("Mr. Hughes") for US$4 million dollars. Block D4-03 comprised six condominium units. Under the agreement, Flatpoint agreed to transfer Block D4-03 to Mr. Hughes or his nominee upon payment of the balance of the agreed purchase price. Ms. Dooley agreed with Mr. Hughes for the purchase and sale to her of one unit within Block D4-03. She paid US$638,000.00, which was the full purchase price of the unit, after which a deed of assignment was executed. Mr. Hughes, by letter, directed Flatpoint to transfer the unit to Ms. Dooley. Ms. Dooley, having obtained the deed of assignment, also requested Flatpoint to convey the condominium unit to her. Flatpoint refused to transfer the unit and gave a number of varying reasons for doing so. In fact, they varied widely and led to Ms. Dooley forming the impression that Flatpoint simply did not want to convey the condominium unit to her. She therefore sued them.

The Claim in the High Court

[4] Having sued Flatpoint, Ms. Dooley sought the following remedies:

"(i) General Damages for Breach of Agreement.

(ii) A Declaration that the Sale Agreement dated July 30, 2005 is terminated insofar as it relates to the sale of the property described as Registration Section: St. Phillips North, Block: 25 3288A, Parcel: 242, Condominium Lot No. 50, registered at Condominium Plan No. C2900001.

(iii) Restitution of the purchase price of US$666,666.00.

(iv) Costs.

(v) Interest pursuant to section 27 Eastern Caribbean Supreme Court Act, Cap 143 of Laws of Antigua and Barbuda.

(vi) Such further and other relief as this Honourable Court deems fit."

Trial in the Court Below

[5] Flatpoint filed its defence to Ms. Dooley's claim and admitted that it had failed to transfer to her the condominium unit as requested. In its amended defence to the counterclaim, it offered several reasons to justify that failure. Firstly, Flatpoint states that it was not served with a copy of a valid legal assignment from Mr. Hughes to Ms. Dooley and was unaware of such an assignment until the present claim was served. Secondly, Flatpoint says that Mr. Hughes failed to provide them with a list of the nominees or assignees along with the prices at which he had sold the units. Additionally, Flatpoint says that Mr. Hughes was in breach of the agreement that he had with them.

[6] It is of significance that at paragraph 10 of its defence, Flatpoint stated:

> "The Defendant asserts that paragraph 14 and 15 are incorrect in that no monies were paid to [Flatpoint] and no loss has been caused because of [Flatpoint's] actions [Flatpoint] having now received verification of the price and assignment in relation to the unit is more than willing to transfer the said contract as has been set out by [Ms. Dooley] but is not responsible for the return of the payment price to Ms. Dooley but is not responsible for the return of the payment price to [Ms. Dooley] or for the interest thereafter".

[7] It is of note that both Flatpoint and Ms. Dooley provided the Court with oral and written documentary evidence in support of their respective rival positions. The judge had the benefit of reading the witness statements that were filed on behalf of the parties together with the documentary evidence and hearing the oral evidence.

Issues in the High Court

[8] The issues identified to be resolved in the High Court were:

> "(1) Whether the Deed of Assignment dated 11th July 2011 is valid;
>
> (2) Whether the Sale and Purchase agreement entered into between Mr. John Hughes and Ms. Dooley sometime in 2005 is relevant to the proceedings;
>
> (3) Whether Ms. Dooley's claim should be dismissed, and costs paid to Flatpoint."

Judgment of the High Court

[9] It is important to reproduce some of the pertinent aspects of the judgment. The learned judge stated at paragraph 10 of his judgment as follows:

> "As the trial unfolded it became apparent that the defendants accept that they are at fault for failing to transfer the unit to the claimant. They had no justification in refusing to do so. They had acknowledged in writing that Block D4-03 had been paid in full. There was no need to await a formal deed of assignment. Their contract with Mr. Hughes required them to transfer to his nominee simpliciter. And certainly once they had been made aware of the deed of assignment they could raise no further objection."

[10] In addition, having assessed the evidence that was presented to him, the judge stated at paragraph 13 that:

> "It is accepted that under the sales agreement, John Hughes agreed to purchase Block D4-03 which was comprised of six individual units. Under the deed of assignment he assigned to [Ms. Dooley] the right to take one unit in Block D4-03."

[11] At paragraphs 14 - 17 of the judgment, the learned judge said:

> "14. Under clause 4 of the Sale Agreement the defendants agreed to transfer Block D4-03 to John Hughes or his nominee or assigns upon payment of the purchase price.

15. I can find nothing in the authority cited which would prohibit an assignor from parting with a fraction of his entitlement. A right to compel a transfer of the whole would necessarily include a right to compel transfer of a constituent part.

16.In the present case the clear intention of the parties was for Mr. Hughes to be able to resell individual units in Block D4-03 to different purchasers. This is why the agreement contemplated a direct transfer to nominees or assignees of Mr. Hughes from the defendants. Indeed [Flatpoint] by their conduct of this litigation and pleading and evidence accept that this is the position. As noted earlier, they say they are now willing to transfer the individual unit to [Ms. Dooley]. This serves to deal with the first point raised in the submissions by counsel for [Flatpoint].

17.Similarly the question posed at point two can be disposed of shortly. The 2005 sale agreement is the sole basis for the acceptance by the defendants that they are liable to transfer the unit to the claimant. The sale agreement could not be more relevant."

[12] Further, the learned judge stated at paragraphs 18 and 20 of the judgment:

"18. Counsel also sought to impugn the sale agreement on the ground that it failed for want of a consideration. This is at odds with the witness statement of the former General Manager of [Flatpoint] which was filed in this claim. Mr. Guillermo Guerra at paragraph 2 stated the defendants "confirmed to the public in writing that they had received full payment for those units" referring to the units sold to Mr. John Hughes. He added 'This transaction formed part of a larger transaction which is being re-negotiated'.

…

20. Given the defendants implicit acceptance that they are in breach of the obligation to transfer what is the remedy which the claimant is entitled to have provided by this court?'"

[13] At paragraph 22 of the judgment, the learned judge stated that:

"[Flatpoint is] ordered to transfer and convey the unit to [Ms. Dooley] forthwith. They will pay damages to Ms. Dooley for failing to do so over the past 5 years. Those damages I will fix at the fair letting value of the unit over this period less any portion of time that [Ms. Dooley] was permitted to occupy the unit. I invite the parties to agree on a fair letting value. If there is no agreement this will be fixed upon assessment. [Ms. Dooley] is at liberty to apply for such assessment in the absence of agreement."

[14] The judge also said at paragraph 23 that:

> "There remains one other matter. The report of Mr. Brian D'Ornellas which was unchallenged, indicates that minor maintenance on [Ms. Dooley's] unit is now required. Had [Flatpoint] transferred the unit when they were asked to do so, [Ms. Dooley] could have maintained her unit. [Flatpoint] is ordered to make good the defects which Mr. D'Ornellas has identified. Should they fail to do so within 90 days [Ms. Dooley] is at liberty to institute the repairs and the cost of such repairs shall be for [Flatpoint] to meet. [Flatpoint] will also pay Ms. Dooley's prescribed costs on this claim. By this order I hope to place [Ms. Dooley] in the position she would have enjoyed had [Flatpoint] faithfully discharged their obligation to transfer."

Issues

[15] Flatpoint filed several grounds of appeal and the main issues which emanate from them are as follows:

(1) Whether the learned judge erred in concluding that the purchase price for Block D4-03 was paid in full.

(2) Whether the learned judge erred in law finding that the deed of assignment entered into between Mr. Hughes and Ms. Dooley was valid and enforceable; and

(3) Whether the judge erred in law in ordering Flatpoint to convey the condominium unit to Ms. Dooley, specifically since that remedy was not sought.

[16] I will now address each issue in turn.

Issue 1 - Whether the judge erred in concluding that the purchase price of Block D4 -03 was paid in full

Appellant Submissions

[17] Learned counsel, Mr. Wesley George, said that the learned judge erred in finding as a fact that the total payment of the purchase price of the unit was paid by Mr. Hughes. Mr George complained that the judge, having heard the evidence and reviewed the documents, ought to have concluded that Mr. Hughes had not paid the full purchase price for the units. He said that this is so even though there

was evidence from Ms. Dooley that Mr. Hughes had paid the full purchase price for the property. Mr. George also said that the judge ought to have accepted Flatpoint's contention in preference to those of Ms. Dooley.

[18] Mr. George stated that the judge should not have rejected the evidence of Mr. Claudio Marieschi ("Mr. Marieschi") who was the only witness for Flatpoint. He said that even though the judge stated that it was only at trial, when Mr. Marieschi was amplifying his witness statement, that he first testified that Mr. Hughes "had paid only about one half of the agreed price for Block D4-03", the judge nevertheless ought to have found that Mr. Hughes did not pay the full purchase price. Accordingly, he urged this Court to conclude that the judge made an incorrect finding of fact on this important matter which is sufficient to undermine the correctness of the entire judgment. Mr. George further stated that the judge ought not to have accorded Ms. Dooley's evidence the weight which he did and should have rejected her claim.

Issue 2 – Validity and Enforceability of Deed of Assignment

[19] Mr. George stated that the learned judge erred as a matter of law in concluding that Ms. Dooley could have sued Flatpoint based on the deed of assignment. He said that the judge should have accepted Flatpoint's argument that in order for Ms. Dooley to have been able to sue Flatpoint, Mr. Hughes was required to have transferred the whole of his interest under the sale agreement to Ms. Dooley. Mr. George purported to rely on Roofman Limited v Rayford Construction Limited.[1] in support of his argument.

[20] Mr. George said that, insofar as Ms. Dooley had purchased only one unit from Block D4-03, she only had an interest which could not be assigned. Mr. George first stated that the deed of assignment on which Ms. Dooley relied was a chose in action. He said that only the benefit could have been assigned, and this did not

[1] Roofman Limited v Rayford Construction Limited et al CV 2009-03946 delivered 20th February 2014 High Court of the Republic of Trinidad and Tobago.

clothe Ms. Dooley with the right to sue Flatpoint.

[21] Mr. George opined that an assignee of a chose in action could not sue upon it. He maintained that this is so even though Ms. Dooley had paid the full purchase price of US$638,000.00 for the unit. He said that Ms. Dooley did not receive a right of conveyance of the condominium unit which formed part of Block D4-03. In support of his argument that Ms. Dooley could not sue upon a chose in action, Mr. George purported to rely on **Halsbury's Laws of England**.[2] He cited a number of paragraphs from **Halsbury's** which, with no disrespect intended, will not be repeated since they do not advance his argument. Mr. George said that the judge erred as a matter of law in permitting Ms. Dooley to sue Flatpoint upon the basis of the deed of assignment. He therefore urged this Court to set aside the judgment in its entirety. He also relied on Butler v Capel[3] as authority for the proposition that Ms. Dooley could not sue upon the deed of assignment and argued that, based on the authorities, the judge was wrong to hold otherwise.

Issue 3 – Remedies

[22] Mr. George stated that the judge should not have ordered Flatpoint to remedy the defects to the condominium unit. He also said that the judge ought not to have granted conveyance of the unit to Ms. Dooley since this was not the remedy that she had claimed in her amended statement of claim. Mr. George therefore asked this Court to allow Flatpoint's appeal and set aside the judgment in its entirety.

Respondent Submissions

Issue 1 - Whether the learned judge erred in concluding that the purchase price of Block D4-03 was paid in full

[23] Learned counsel, Ms. Byron, stated that the judge, having heard the evidence from the respective witness who testified on behalf of Flatpoint and having read the documentary evidence including the witness statements that were filed by both sides, came to the correct finding of fact that Mr. Hughes had paid the purchase

[2] Halsbury's Laws of England, 5th Edn., Vol. 22 at para. 333.
[3] (1823) 2 B&C 251.

price for Block D4-03. Ms. Byron said that Ms. Dooley's oral evidence, as well as the documentary evidence that was placed before the court by Flatpoint, support the judge's finding of fact.

[24] Ms. Byron reminded the Court that the appellate court's ability to interfere with findings of the lower court are circumscribed. She therefore said that this Court should not interfere with the judge's findings since the conclusions at which he arrived were clearly open to him and consistent with the documentary evidence that was before the court. She said that the judge carefully referred to the evidence before him and also assessed that evidence and that he did not commit any error of law in so doing. Ms. Byron pointed out that, in particular, the evidence from the director of Flatpoint support the findings of fact made by the judge.

[25] Learned counsel, Ms. Byron, also pointed this Court to the defence that was put forward by Flatpoint. She said that paragraph 10 of the defence is of particular relevance since Flatpoint had indicated its willingness to convey the unit to Ms. Dooley but denied that it had been paid any monies. Ms. Byron said that the judge had the benefit of hearing the witnesses who testified and it was clearly open to him, to conclude that Mr. Marieschi was not a credible witness. He said that the judge's conclusion was well borne out by the documentary evidence and therefore this Court had no proper basis upon which to interfere with the judge's findings.

Issue 2 - Validity and Enforceability of Deed of Assignment

[26] Turning to the deed of assignment, Ms. Byron stated that there is nothing in law which prohibited Ms. Dooley from suing upon the deed of assignment. She said there is no legal basis which prohibits the assignor from assigning a fraction of his interest. Ms. Byron said the authority of Butler v Capel does not apply to the issues of the present matter and distinguished the factual circumstances of that authority from those in the case of bar. In Butler the instrument, which was in fact an underlease, was described as an assignment of certain leasehold premises. In

light of the factual matrix of that case, the court found that an instrument does not operate as an assignment unless the grantor parts with the whole of his interest. She said that the law is clear; in the court of equity effect is given to assignment of all kinds of choses in action when the assignment is made for valuable consideration and is not contrary to public policy. It is further provided by **Halsbury's Laws** of England that:

> "Unless the contract provides to the contrary either party may dispose of the benefit of the contract in favour of another person, wither by way of an absolute assignment of the whole contract, or of partial assignment, here, for instance, the contract is charged in favour of another, or by assignment of the contract as to part of the property."[4]

[27] Ms. Byron said that based on the evidence, it is clear that Ms. Dooley gave valuable consideration for the assignment of the unit under the agreement and the rights and benefits were lawfully transferred to her.

[28] Ms. Byron said that, upon the making of an enforceable agreement for sale, the purchaser becomes the owner of the land in equity and can dispose of his/her equitable interest to a third person. Furthermore, a contract for valuable consideration to assign a future chose in action, if and when it comes into existence and comes into the hands of the assignee, is valid and a purported present assignment of such a chose in action will be construed and given effect to, provided valuable consideration is present. In support of her argument, she referred the Court to Forster v Baker.[5]

[29] Ms. Byron sought to distinguish the cases upon which Flatpoint relied from the case at bar. She said in Roofman Limited, the assignment was found to be invalid as a result of formalities. She opined that those circumstances do not obtain in the appeal at bar and the authority is therefore irrelevant. She said that by the agreement in the present case, an assignment was not prohibited and therefore it was indeed a valid assignment. She said that the learned judge did

[4] Halsbury's Laws of England, 4th Edn., Vol. 42 at para. 201.
[5] [1908-10] All ER Rep 554.

not err in concluding accordingly.

Issue 3 - Remedy

[30] Ms. Byron acknowledged that Ms. Dooley did not claim the remedy that the learned judge ordered. She however stated that the judge had the discretion to grant a remedy that is appropriate. In the premises, Ms. Byron said Flatpoint's arguments are without merit. She said that Ms. Dooley has fulfilled her obligations under the agreement and is entitled to the relief granted. Finally, Ms. Byron said that the judge quite properly granted Ms. Dooley the appropriate relief in all of the circumstances and she implored this Court not to interfere with the judge's decision but to dismiss Flatpoint's appeal.

Discussion

Issue 1 - Whether the learned judge erred in concluding that the purchase price of Block D4-03 was paid in full

[31] I find much of what Ms. Byron argued to be very persuasive. There is no doubt that the judge quite properly rejected the evidence that was led by Flatpoint based on internal inconsistencies. The judge was careful to refer to the evidence that was led and to record his perception and assessment of the witnesses and by extension the evidence.

[32] In this regard, I find of interest that in its defence Flatpoint had indicated that the amounts necessary to fulfil the agreement for sale had been paid. Given the totality of the circumstances, the judge was quite entitled to conclude that there was no negotiation based on the evidence that was before the court, including the documentary evidence. The submissions that were made before this Court are essentially the same as those which were made before the judge.

[33] It is noteworthy that Flatpoint's defence to the amended statement of claim seemed to take the stance of putting forward technical points all aimed at justifying their failure to convey the unit to Ms. Dooley. Firstly, Flatpoint said that it recognised that there may have been a legal assignment. Flatpoint also stated

that it was not aware and received no verification from Mr. Hughes. This also runs contrary to the evidence of Ms. Dooley that Mr. Hughes had first written a letter to Flatpoint advising it that he had sold the unit to Mr. Dooley. This is equally untrue when considering that Flatpoint stated in paragraph 2 of its defence to the amended claim that: "it was not until the defendant was served with the claimant's initial statement of claim that they were made aware of the existence of a valid and legal assignment". This is incongruous with the evidence of Mr. Marieschi who, under cross-examination, was forced to resile from that position. It is of significance that he is a director of Flatpoint.

[34] Additionally, at paragraph 3 of Flatpoint's defence to the amended statement of claim it stated as follows:

> "As to the Claimant's paragraph 6 the Defendant asserts that they were responsible upon full payment to execute a transfer instrument of the said Condominium lot to the said Mr. Hughes or his nominees or assigns. However there had been repeated calls for the said Mr. Hughes to provide to the Defendant a list verifying both the names of the nominees/assigns and the prices for which the said lots/units were being sold for in order to execute the transfers and ascertain the amount in taxes that were paid by the prospective transferor and transferees. This information was not forthcoming and therefore no transfer could be executed. It is further evidenced that no proof of any assignment was provided to the Defendant until service of the Claim herewith."

[35] However, as alluded to earlier, under cross-examination Flatpoint, through its witness Mr. Marieschi, admitted that Flatpoint first became aware of Ms. Dooley's right to receive one of the condominium units sometime in 2010 upon receiving a letter from Mr. Hughes instructing Flatpoint to transfer the unit to Ms. Dooley, the latter of whom had paid the full purchase price.

[36] Unsurprisingly therefore, there was evidence before the judge upon which he could have properly concluded that Mr. Marieschi was not as forthcoming as he should have been. Equally, it was clearly open to the judge based on all of the evidence to conclude that Ms. Dooley's evidence was more compelling, that Mr. Hughes had paid the full purchase price for the Block D4-03 and that he had

not breached the sale agreement. The evidence that was led by Flatpoint could properly be characterised as thin and consistent with the view argued on behalf of Ms. Dooley. There is no basis upon which the judge could properly be faulted for arriving at the reasoned position which he did. The judge was entitled to make the findings at paragraph 10 of the judgment on the position Flatpoint took at trial since he had the benefit of hearing and seeing the witnesses for both sides.

[37] The law on the appellate court's ability to interfere with the findings of fact of a trial judge is settled. There is a strong stream of jurisprudence from this Court which has been consistently applied. The principles that were first laid down in Watt (or Thomas) v Thomas.[6] Indeed, in Yates Associates Construction Company Ltd v Blue Sand Investments Limited[7] this Court stated as follows:

> "1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision 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 judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge 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. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. 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 has to be similarly cautious in its approach to his findings of such secondary

[6] [1947] AC 484.

[7] BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.

…

3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong."

[38] Applying the above principles to the case at bar, it was clearly open to the judge to conclude that Mr. Marieschi did not paint a good picture when he testified during the amplification of his witness statement that Mr. Hughes had not paid the full purchase price for Block D4-03. The judge rejected that evidence in view of the documentary evidence and the evidence of Ms. Dooley. It is not open to this Court to seek to have a re-run of the trial and to determine who is to be believed. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to an appellate court.

[39] It is the function of the appellate court to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle. After this has been determined, the appellate court has to stand back and determine whether the findings of fact were open to the judge to make. If they were, the appellate court should not interfere. In my view, adopting this approach, there is no discernible error of law in the judge's findings.

[40] I turn now to the second issue.

Issue 2 - Validity and Enforceability of Deed of Assignment

[41] The learned author of The Law of Contract describes an assignment as follows:

> "The benefit of a contract may be transferred to a third party by a process called assignment. This is a transaction between the person entitled to the benefit of the contract (called the creditor or assignor) and the third party (called the assignee) as a result of which the assignee becomes entitled to sue the person liable under the contract (called the debtor). The debtor is not a party to the transaction and his consent is not necessary to its validity."[8]

[42] According to Chitty on Contracts, the term 'chose in action' is defined as:

> "The term 'things in action' or, as they are still called, choses in action, is used to describe "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."[9]

[43] I am not persuaded by Mr. George's argument that the chose in action was not easily identifiable. I am equally not persuaded by Mr. George's reliance on Roofman Limited as authority for the proposition that an assignee of a chose in action cannot sue since, at most, the assignee will only possess a chose in action. The critical issue for this Court's determination is whether Ms. Dooley, having paid US$638,000.00 for the purchase of the condominium unit from Mr. Hughes and in circumstances where Flatpoint is refusing to convey it to her, is debarred from suing upon the deed of assignment. Contrary to what he urged on this Court, there is nothing in the cases on which Mr. George has relied which indicates that Ms. Dooley was suing to enforce the agreement Mr. Hughes had with Flatpoint. It therefore could not reasonably be suggested that Ms. Dooley, having paid the full purchase price for her condominium unit and Flatpoint having refused to convey the unit to her, cannot sue. In my view, the assignment to Ms. Dooley of a condominium unit was absolute and she was therefore entitled to seek to have the unit conveyed to her.

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[8] G.H. Treitel, The Law of Contract, (Sweet & Maxwell: 1987) 7th Edn., p. 498.
[9] H.G. Beale, Chitty on Contracts, (Sweet & Maxwell: 1999) 28th Edn., Vol.1, para. 20-001.

[44] It is clear that Mr. Hughes had assigned to Ms. Dooley, based on her payment of the total purchase price of US$638,000.00, the right to take a conveyance of the condominium unit. It is important to emphasise that Ms. Dooley paid US$638,000.00 to purchase her condominium unit and so far has been left empty handed. I am not aware of any authority and neither was any authority brought to this Court's attention to support the contention that, unless Mr. Hughes had assigned his entire interest in Block D4-03, Ms. Dooley was unable to sue upon the deed of assignment.

[45] I do not share the view, held by Mr. George, that the case of Butler v Capel can assist Flatpoint's case and neither can Comfort v Betts.[10] The judge quite rightly rejected the proposition of law that was advanced by Flatpoint. For the sake of completeness, I refer to the following paragraph of **Halsbury's Laws of England** which recognises the right of an assignee to sue:

> "An equitable assignment of a chose or thing in action passes to the assignee the right to sue for its recovery. If the chose or thing in action is equitable and the assignment is absolute, the assignee can sue in his own name without making the assignor a party to the claim. All necessary parties must be before the court, however, and accordingly where part of a debt has been the subject of an equitable assignment, neither the assignor nor the assignee can sue the debtor without joining the assignee or assignor as the case may be."[11]

[46] Support for the position advanced in **Halsbury's** on the right of an assignee to sue is provided by the learned authors of Chitty on Contracts as follows:

> "The rule of equity, on the other hand was to permit the assignment of contractual rights whether such rights were legal or equitable. If the rights were equitable (e.g. a legacy or a share in a trust fund), the assignee could sue in his own name, but it was necessary to make the assignor a party to the suit if he retained any interest in the subject matter, for instance if the assignment was not absolute but conditional or by way of charge."[12]

[47] During oral arguments, the dispute seems to have boiled down to whether

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[10] [1891] 1 QB 737.

[11] Halsbury's Laws of England, 5th Edn., Vol. 13, para. 68.

[12] H.G. Beale, Chitty on Contracts, (Sweet & Maxwell: 1999) 28th Edn., Vol.1, para. 20-002.

Ms. Dooley could have sued in her own name or whether she was obliged to have Mr. Hughes, who had entered into the agreement with Flatpoint, file the claim. In view of the authorities to which I have already referred, there is no bar to Ms. Dooley suing Flatpoint based on the deed of assignment. As expressed earlier, the assignment of the condominium unit to Ms. Dooley was absolute. Therefore, it is clear that Ms. Dooley could have sued Flatpoint on the deed assignment in her own name. There is no basis to interfere with the learned judge's decision on this issue. Accordingly, Flatpoint's appeal in relation to this issue also fails.

[48] I now turn to the final issue.

Issue 3 - Availability of Remedy

[49] This is a short point. There is nothing in law which prevented the learned judge from granting a remedy to Ms. Dooley which she did not specifically seek. Rule 8.6(2) of the Civil Procedure Rules 2000 (the "CPR") provides that: "[n]otwithstanding paragraph (1)(b) the court may grant any other remedy to which the claimant may be entitled". Furthermore, in Lance Kydd v Rita Williams[13] the court held at paragraph 20 that: "[d]ealing with cases justly must include, in the spirit of Part 8.6(2), the granting of the remedy which is most appropriate in the circumstances of the case and is within the powers of the court". It is noteworthy that in her claim, Ms. Dooley had specifically prayed for "such further and other relief as this Honourable Court deems fit" and the relief ordered by the court falls within that category. Therefore, while it is correct that Ms. Dooley did not seek a conveyance as relief in her claim, it is considered relief which was appropriately granted by the judge in the circumstances. Accordingly, there is no basis to impugn the judge's decision on this issue.

[50] A close reading of the judgment does not indicate that any error of law was made by the learned judge. In fact, to the contrary, the judgment was closely reasoned

[13] SVGHCV2000/0323 (delivered 16th September 2002, unreported).

and the decision cannot be impugned. It was plainly within the judge's discretion to grant the remedy that the did and, in my view, the judge came to the correct conclusion.

[51] I have no doubt that the learned judge correctly stated that Ms. Dooley's rights are limited to the interest assigned to her. The evidence reveals that Flatpoint was notified of the assignment in writing since 27th October 2010. In view of the totality of the circumstances, Flatpoint is ordered to convey the condominium unit to Ms. Dooley within 14 days of the date of this judgment. For completeness, the judgment of Cottle J is also affirmed insofar as it relates to the order for Flatpoint to remedy the defects to the condominium unit.

Costs

[52] Ms. Dooley is entitled to costs on the appeal which are to be two-thirds of the prescribed costs awarded in the High Court.

Conclusion

[53] In view of the premises, I would make the following orders:

(1) Flatpoint's appeal against the decision of Cottle J is dismissed and the judgment is affirmed in its entirety.

(2) Flatpoint is ordered to convey the condominium unit to Ms. Dooley within 14 days of the date of this judgment.

(3) Costs on the appeal are awarded to Ms. Dooley which are to be two-thirds of the prescribed costs in the High Court; and

(4) Flatpoint is ordered to remedy the defects to the condominium unit within 21 days of this judgment.

[54] I gratefully acknowledge the assistance of learned counsel.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar