



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

**CICA (Civil) Appeal No. 14 of 2019
(Formerly G 5 of 2016)**

BETWEEN:

**Lindell Wellington
Audrey Wellington
Barrington Wellington
Sharon Wellington
Lynval Wellington
Lorna Wellington
Sandra Wellington**

Appellant

-and-

Delroy A. Wellington

Defendant

BEFORE: **The Hon John Martin, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal**

Appearances: **Ms Lee Halliday-Davis of Brady Law for Lindell Wellington
Mr Delroy Wellington, did not attend
Ms Reshma Sharma *KC, Solicitor General, *amicus***

Heard: **21 November 2021**

Judgment delivered: **6 April 2023**

JUDGMENT

Martin, JA

1. This is an appeal from a judgment of Richards J ('the judge') given on 15 March 2019. The judge declined to make the order sought by the appellant Lindell Wellington ('Lindell') that a parcel of land described in the Cayman Islands Land Register as George Town Central Block
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13 D Parcel III ('the property') was held by the respondent, Delroy Wellington ('Delroy') on constructive trust for himself, Lindell and their five siblings (the siblings). After painstaking consideration of the evidence the judge held that the claim failed on a balance of probabilities. She therefore dismissed it with no order as to costs.

2. Upon the hearing of the appeal on 17 November 2021, the court dismissed the appeal, again with no order as to costs. These are my reasons for concurring in that decision.
3. The principal ground of appeal was that Lindell and the siblings had been wrongly advised by counsel at trial, with the result that the judge did not have all the relevant available evidence before her in arriving at her decision. Another ground alleging bias on the part of the judge was not pursued on appeal.
4. At the outset of the hearing, Mrs Lee Halliday Davis for Lindell sought leave to adduce further evidence. The application was refused by the court on the ground that the fresh evidence on which it was sought to rely failed to satisfy the conditions specified in *Ladd v Marshall*; and that, in any event, it would not have advanced the claim in any way. After the hearing, on 30 December 2021 the judgment of this Court in *Scully Royalty Ltd & MFC 2017 II Ltd v Raiffeisen Bank International AG* (CICA (Civil) Appeal No. 21 of 2020 (Formerly Cause No. FSD 162 of 2019 (RPJ)), 30 December 2021) was handed down in which it was held that the discretion conferred by Rule 17 (2) of the Court of Appeal Rules to admit fresh evidence required consideration not only of the *Ladd v Marshall* conditions but also the Overriding Objective expressed in the Grand Court Rules. In my judgment the Court's decision not to admit that proposed fresh evidence was entirely consistent with the approach taken in the *Scully Royalty Ltd* decision.
5. In so far as the merits of the appeal were concerned, the court considered that the judge had carefully assessed in great detail the evidence given at the trial and that there was no basis upon which to disturb her decision.

Background

6. There is no dispute as to the background to the matter as recounted by the judge. What follows is therefore a summary of the judge's account.
7. Lindell, Delroy and the siblings are the children of Edna and Isaac Wellington (the Wellingtons).

8. Described by the judge as “*a hardworking and industrious couple*”, the Wellingtons acquired the property, on which they built a home. The basic structure was added to from time to time, thus providing a number of apartments for rental. As the judge explained: “*During their lifetime Edna and Isaac Wellington collected and shared between them the rental income from the property and although they lived in separate apartments, they both continued to reside on the premises up to the time of their death. ...*”
9. Mrs Wellington was the first to go, dying intestate on 24 August 2014. Upon her death the property fell into the sole ownership of Mr Wellington, pursuant to section 100 of the Registered Land Law (2004 Revision).
10. On 5 September 2014, Mr Wellington executed a transfer, adding Delroy as joint owner of the property.
11. Mr Wellington died intestate on 16 March 2015, whereupon the property devolved to the sole ownership of Delroy, again pursuant to section 100.
12. By Originating Summons dated 12 January 2016, Lindell and the siblings sought among other things declarations that the property formed part of the estate of Mr Wellington and that it was not in the sole beneficial ownership of Delroy, but rather was held by him on trust for himself, Lindell and the siblings (described collectively as ‘the plaintiffs’).
13. Delroy opposed this application on the ground that Mr Wellington’s wishes were represented in the instrument transferring the property to him.
14. Taking into account section 23 of the Registered Land Law (2004 Revision), which vests in the registered owner of any property “absolute ownership”, the judge considered (at paragraph 43) that,

“In order to establish their case, the plaintiffs would require to satisfy the Court to the civil standard that [Delroy] as the registered owner of the property is nevertheless subject to the duties or obligations of a trustee”.
15. Bearing in mind that there was no document creating a trust in this case, the judge had regard to the decision in *Stack v Dowden*¹ and the learning regarding the evidence required to establish a common intention constructive trust. After surveying a number of authorities, the judge observed that –

“the primary issue here is to determine whether there is evidence as the plaintiffs assert that their father in the absence of a will intended that the

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property transferred to [Delroy] was to be held on trust for all his children and was to be beneficially owned by all of them and importantly that [Delroy] well knew that this was what his father intended for him to do. If [Delroy] did so, the equitable position (all other required factors having been proven) is that it would be unconscionable for him to retain both the legal and the beneficial interests in the property.”

16. After reviewing the evidence on both sides, the judge concluded that the evidence of the plaintiffs was “*simply too weak to prove the case*” (para 267).

The appeal

17. The submissions on appeal were set out in a document prepared by Mrs Halliday Davis, which read as follows:

- i. *“Advice of counsel The [Plaintiffs] had followed the advice of their attorney in relation to the evidence that was presented to the court. They were advised by their attorney that it was not necessary to present the evidence of Lynval Wellington which would have shown the following:*
 - a. *That he had over the years contributed money to the building of the apartments from his earnings as a fireman.*
 - b. *That building the apartments was a family venture, all of the children helped either by working on the buildings or by contributing funds.*
 - c. *The Father contacted Lynval a few days before the transfer to Delroy was signed and asked him to oversee the apartments and take charge of the banks accounts because he was the eldest son. The Father wanted Lynval to oversee his estate for the benefit of all the children. The transfer to Delroy was only because Lynval was not available because of work commitments.*
 - d. *Lynval encouraged Delroy to ‘get involved’ with the Father because he had a work schedule that would allow him to spend time with the Father.*
- ii. *[Counsel] failed to correct Delroy during cross-examination on some basic points for example, there were in fact 15 apartments on the land and not 8 as stated by Delroy.*
- iii. *The rental income given during the evidence was underestimated.*
- iv. *The attorney had advised that a [sic] affidavit from Lynval Wellington was not necessary as the evidence of Mr Bodden was sufficient to show the Father’s intention at the time of the property transfer.*
- v. *The concerns that Lynval was not a witness at the trial and that he could undermine the evidence of Delroy was [sic] communicated to their attorney on several occasions during the trial [counsel] refused to apply for an adjournment.”*

18. On this basis, it was therefore submitted that the judge did not have all the relevant available evidence before her when she decided the case.

19. In order to make good these grounds, Mrs Halliday Davis sought leave to have the affidavit of Lynval admitted as fresh evidence. For this purpose, it was necessary to satisfy the test set

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out in *Ladd v Marshall*, viz, (i) whether the evidence could not have been obtained for use at the trial had reasonable diligence been deployed by the party seeing to introduce it; (ii) whether the new evidence would have been likely to have had an influence on the outcome of the case; and (iii) whether the new evidence was likely to be credible (see *Ladd v Marshall* [1954] 1 WLR 49, and see O'Hare and Browne, *Civil Litigation*, 16th edn, para 44-17).

20. As indicated, and Mrs Halliday Davis readily accepted, the evidence contained in Lynval's affidavit was available at the trial. It therefore failed to cross the first hurdle in that it did not amount to "*fresh*" evidence. In any event, it appeared to me that the evidence would not have had any impact on the outcome of the trial, given the judge's finding that the case had not been made out on a balance of probabilities. The version given by Lynval was amply represented by the tendency of the case for the plaintiffs as a whole and that evidence would have done no more than provide an additional version of the story already rejected by the judge.
21. As to the substantive appeal, Mrs Halliday Davis made no further submissions beyond those set out in documents captioned "*Summary of Merit*", prepared by Mr Lindell Wellington and dated 19 June 2019; and "*Submissions on behalf of Lindell Wellington*", prepared by Mrs Halliday Davis.
22. The main burden of the submissions was to demonstrate from the evidence that Mr Wellington had several times stated that the property was intended to be held by Delroy on behalf of all the siblings. I will mention a few of the items of evidence upon which Mrs Halliday Davis relied.
23. One such was the evidence of Lindell, who told the court that his father had on many occasions told him that Delroy held the property on trust for himself and his siblings.
24. Perhaps the most significant witness for the plaintiffs was Mr James Bodden, who was a Justice of the Peace and a close associate of Mr Wellington. Mr Bodden witnessed Mr Wellington's signature to the transfer on 21 August 2015. His evidence was that he was a good friend of Mr Wellington, who was not in good health on the day in question. Mr Wellington stated in Delroy's presence that it was his intention that Delroy should oversee the property on behalf of all the siblings. His impression was that the transfer to Delroy was being done as a matter of convenience and that Mr Wellington intended by signing the transfer to Delroy to give an interest to all of the siblings. He denied the suggestion put to him that, during the process of signing the Certificate of Identification, he asked Mr Wellington, "*what*

about the rest of the children”, to which Mr Wellington responded, “you are here to do what I want, not what you or anyone else wants, so if you want to remain on speaking terms for my remaining time, don’t tell me what to do. My decision is my decision to make, so what is done is done, I wouldn’t change it for anyone”.

25. Barrington Wellington, the eldest child at the time of Mr Wellington’s death, stated that *“My father made sure tell you property is leaving for everybody. Before he died, he said property must leave and anybody who need help, it must help them”.*
26. Delroy, to the contrary, testified that the property was his after the transfer was signed and that anything the others wanted to know they should speak to him. He said that Mr Wellington had told the others on several occasions that he had disinherited them. While he admitted signing a statement to the police in which he was described as a caretaker, he maintained that that was the interpretation of the police officer who took the statement and not his words. He insisted that the exchange between Mr Bodden and Mr Wellington referred to in para 24 above did not in fact take place and that Mr Wellington had at all times maintained that he, Delroy, would be the sole owner of the property upon his passing.
27. Delroy’s evidence was supported by his wife, Natalie Holden-Wellington, who said that she witnessed the signing of the transfer and at no time did Mr Wellington mention the other children.
28. Lastly, I will mention two items of video-taped evidence which were introduced at a late stage of the trial (during closing addresses). In the first, in which Mr Wellington is seen and heard saying, in answer to questioning by his daughter Audrey, *“[the property] nuh belongs to Delroy alone. Delroy ... come in like the overseer for everything”*; and, in answer to the question *“So it is to be shared with all the children”*, Mr Wellington said *“Yeah well ... If there is anything there is to be shared”*.
29. At the heart of the judge’s findings was her focus on whether the plaintiffs had proved the common intention which Mr Wellington was required to have had in order to establish the trust. In this regard, the judge did not rely solely on the evidence of Delroy. Indeed, she said at the very outset of her assessment of the evidence that *“Having assessed him carefully I was less inclined to believe him where he differed from his siblings”* (para 226). The judge expressed a similar caution at various other parts in her assessment of the evidence (see, for example, para 227, where the version of certain events given by the other siblings was preferred by the judge and described as *“the truthful version”*).

30. But the judge did find that it was clear from the evidence that Mr Wellington “*had over the course of time changed his mind as to what he wanted to do with the property*” (para 237).

31. Then, as regards the declaration of intent allegedly made and videotaped some five months after the signing of the transfer, the judge said this:

“Even if I were to put aside any misgivings about these videos. Can I be satisfied so that I can safely conclude in law that a declaration made some five months after the transfer was signed reflects what was intended at the date and time of the transfer. I believe that it would be unsafe to do so.” (para 254)

32. The matters which the judge had to decide were largely issues of fact. The single piece of documentary evidence which was before the judge was the instrument transferring the share of the property to Delroy. The question for this court was whether the judge’s preference for Delroy’s case as to Mr Wellington’s intention in signing that document should be disturbed.

33. In *Beacon Insurance Co Ltd v Maharaj Bookstores Ltd* [2014] UKPC 21, para 12, the Privy Council restated with approval the well-known guidance of Lord Thankerton in *Thomas v Thomas* [1947] AC 484, pp 487-488] as to the approach to be adopted by courts of appeal to findings of fact by a judge sitting alone:

“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; 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; 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.”

34. In *Beacon*, the Privy Council went on to review the authorities in some detail. Despite its length, I have found it helpful to set out the relevant section (at paras 12-18)) in full:

*“In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19:*

“It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest

of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

It has often been said that the appeal court must be satisfied that the judge at first instance has gone "*plainly wrong*". See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2004 SC \(HL\) 1](#), paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.

13. More recently, in *In re B (A Child)(Care Proceedings: Threshold Criteria)* [\[2013\] 1 WLR 1911](#), Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

"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. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

14. The Board has adopted a similar approach in this jurisdiction. See *Harracksingh v Attorney General of Trinidad and Tobago* [\[2004\] UKPC 3](#) in which it referred (at para 10) to the formulation of Lord Sumner in *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37, 47:

"... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the

result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.
 ... *If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should ... be let alone."*

15. There are further grounds for appellate caution. In *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477, 2014 SC (UKSC) 12, Lord Reed (at para 4) cited observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged."

16. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts and quoted from his earlier judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:

"The need for appellate caution in reversing the trial 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 qualification 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."

17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:

"[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end,

an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum.

18. In this appeal, the courts below had the various impugned documents and knew of the alterations that Mr Maharaj had made to all but the K&S invoices. Those matters were not disputed. But the assessment of (i) the genuineness of the latter invoices and (ii) Mr Maharaj's motivation in altering the other documents depended fundamentally on an evaluation of the written and oral testimony of the witnesses whom Moosai J saw and heard. His assessment of the presence or absence of fraudulent intention on the part of Mr Maharaj could be displaced only on the clearest grounds: *Akerhielm v De Mare* [1959] AC 789, 805-806."
35. In light of the fact that the primacy of findings of fact by a judge sitting alone is so well established, I came to the conclusion that the judge's findings in this case should not be disturbed. There was evidence, to be sure, to the opposite effect, but I considered that at the end of the day we must defer to the judge's conclusion that Delroy's case should be preferred on the balance of probabilities. There is nothing on the record to suggest that in coming to the decision which she did the judge failed to take advantage of the opportunity to assess the truthfulness of the evidence which she heard. To the contrary, it seemed to me, the judge assessed the evidence carefully and, despite some misgivings about Delroy's evidence, preferred that evidence to that given on the plaintiffs' behalf.

36. It was for these reasons that I concluded that the appeal should be dismissed.

Field, JA

37. I agree.

Morrison, JA

38. I also agree.