

The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

**Civil Appeal No. P013 of 2021
Claim No. CV 2018-00520**

Between

DAVE NURSE

Appellant

And

SYLVIE SUSAN RAMROOPSINGH

(Legal Personal Representative of the Estate of Methoolal Ramroopsingh)

Respondent

PANEL:

**N. BERAUX J.A.
P. RAJKUMAR J.A.
M. WILSON J.A.**

Date of delivery: 30th October 2024

APPEARANCES:

**Mr. F. Hove Masaisai instructed by Ms. J. Farah Tull, Attorneys-at-law for the appellant
Mr. G. Saroop instructed by Ms. W. St Clair, Attorneys-at-law for the respondent**

JUDGMENT

Delivered by Bereaux JA

Background

1. This is an appeal from a decision of the High Court in regard to orders made on an ancillary claim. Dave Nurse is the appellant. I shall refer to him as “Nurse” or “the appellant.” He was the defendant to an ancillary claim brought by Sylvie Ramroopsingh. Sylvie Ramroopsingh (“Sylvie” or the “respondent”) is the Legal Personal Representative of the estate of Methoolal Ramroopsingh (“Methoolal” or the “deceased”). Sylvie was the defendant to a claim brought by Ayanna Braxton-Benjamin, Angela King and Joann Vire-Lewis (“the claimants”) in which they alleged that Sylvie breached their agreements for sale and Sylvie denied all liability and brought an ancillary claim against Nurse. In the ancillary claim, Sylvie sought, *inter alia*, an order for Nurse to pay over monies he received on the behalf of the deceased under an agency agreement made between Methoolal and Nurse. I shall refer to the claim for breach of agreement as the main claim.
2. The judge found that the main claim was made out and ordered specific performance of the agreements for sale by Sylvie. On the ancillary claim, the trial judge ordered Nurse to pay over to Sylvie, the sum of five hundred and two thousand dollars (\$502,000.00) being the sums he received as agent of Methoolal, from the claimants; that sum to bear interest at a rate of 2.5% per annum. The judge also granted a declaration that Nurse breached the agency agreement. Sylvie did not appeal the findings of the judge but Nurse has appealed the order to pay over. It is this appeal which engages us.

Relevant facts

3. Meethoolal became the owner in fee simple of a 2.4 hectare parcel of land (“the parent parcel”) in Maracas, St. Joseph by deed of conveyance dated 19th December 2000 and

registered as DE 200100960795. Due to ill-health he appointed Nurse as his agent sometime in 2011 (first by way of letter and subsequently by power of attorney) to sell and receive the proceeds of sale of twelve lots of land out of the parent parcel. As agent of the Methoolal, Nurse entered into a number of agreements for sale of portions of this parent parcel (I shall refer to those portions as “the lands”). Methoolal died in 2013 and Sylvie , his widow, obtained Letters of Administration of his estate on 22nd August 2014.

The main claim

4. Ayanna Braxton-Benjamin, Angela King and Joann Vire-Lewis commenced proceedings against Sylvie as the Legal Personal Representative of Methoolal . They sought declarations that the estate of the deceased breached agreements for the sale of the certain lots of the lands to each of them when it failed to convey those lots to them. The purchase price had been paid by each claimant to Nurse as agent . A good and effectual receipt was issued by him. They also sought specific performance or damages in lieu thereof.

5. As they relate to the main claim, the following sales are relevant:

| | | | | |
|-------------------------|---------------------------------|----------------|----------|-----------|
| Ayanna Braxton-Benjamin | 14 th September 2011 | Lots 13 and 14 | 14/09/11 | \$14,000 |
| | | | 09/12/11 | \$126,000 |
| Angela King | 24 th January 2012 | 3 lots | 27/07/12 | \$147,000 |
| | | | 03/08/12 | \$50,000 |
| | | | 14/01/13 | \$4,000 |
| | | | 23/03/13 | \$8,000 |
| Joann Vire-Lewis | Partly oral partly written | Lots 15 and 16 | 26/11/10 | \$14,000 |
| | | | 23/09/11 | \$10,000 |
| | | | 06/03/12 | \$116,000 |

Although all purchase monies were received during the lifetime of Methoolal and Nurse had power of attorney to convey the lands to the claimants, no conveyance was executed.

Sylvie's defence to the main claim

6. Sylvie denied all liability. She denied knowledge of the matters raised in the claim. She contended that in or around October 2010 Methoolal suffered a stroke and was bed-ridden for about three months. She admitted that Nurse and the deceased were friends. She said that the deceased never included her in his financial and property dealings, consequently, she did not know of any of the events disclosed in the main claim. She alleged that she only saw the "purported" agency agreement in 2014 when she was served with the claim but pleaded that the agency agreement was made after Methoolal had suffered the stroke. He was not physically capable of overseeing the sale and development of the lands. According to Sylvie, if the power of attorney gave Nurse power *"to commence, prosecute, enforce and to defend answer or oppose all actions..."*, then the action ought properly to have been brought against Nurse and not her. That contention is, of course, misconceived because she is joined as Methoolal's personal representative and not in her personal capacity.

The ancillary claim

7. In the ancillary claim Sylvie sought declarations and an order that Nurse do pay over to her all monies collected pursuant to the agency agreement and/or power of attorney; that Nurse breached the terms of the agency agreement and that Nurse had fraudulently retained monies under the agency agreement and/or power of attorney. She sought to be indemnified by Nurse of all costs and/or damages arising from this claim as well as damages for breach of contract and damages for fraudulent misrepresentation.
8. Sylvie pleaded that the agency agreement only authorized Nurse to receive all monies in respect of the sale of the lands specified therein and to develop them. It did not empower him to retain monies or subdivide or sell the lands. She contended that if Nurse had the lands surveyed, he was acting on a frolic of his own and outside the agency agreement. In

any event, any sub-division was not approved by the Town and Country Planning Division. Furthermore, the signature on the agency agreement is fraudulent since it did not match the signature on the power of attorney.

Defence to ancillary claim

9. In his defence, Nurse pleaded that Methoolal and he were business partners operating a real estate business registered as Cutting Edge Brokers Limited. Sylvie was aware of this business relationship having been present on several occasions during discussions on the development of the lands. In this context he admits that he acted first as Methoolal's agent (first introduced on 14th September 2011) and then subsequently as his attorney pursuant to a power of attorney dated the 29th day of December 2011. By clause 8 of the power of attorney he was authorized to conduct all surveys in relation to the property and to execute all documents connected therewith, convey lands, enter into agreements and receive payments.

10. He contended that the deceased verbally agreed to have the parcel of land sub-divided into twelve lots, to be sold at seventy thousand dollars (\$70,000.00) each. They agreed that ninety percent of the sale monies would be retained by the deceased, seven percent would go to maintenance of the lands and three percent would go to him (Nurse) for obtaining the sales. Eleven (11) lots were sold and a total of six hundred and ninety three thousand dollars (\$693,000.00) were retained by Methoolal. The remaining seventy seven thousand dollars (\$77,000.00) were disposed of in accordance with the agreed formula. The appellant admitted that no Town and Country Planning Division approval was obtained for the sub-division of the lands or for conversion to the approved use. He denied Sylvie's assertion that he did not pay the proceeds of sale over to the deceased. Indeed, the appellant contended that immediately upon receiving the cheques from the purchasers he cashed them and delivered the proceeds in cash to Methoolal (and on at least one occasion in the presence of Sylvie) in accordance with the pre-arranged formula.

Sometime before or at trial Sylvie withdrew her challenge to Nurse's authority to act on behalf of Methoolal.

11. The judge found Sylvie to have been in breach of the agreement for sale and ordered specific performance . However he found in favour of Sylvie on the ancillary claim. He rejected Nurse's evidence and was heavily critical of his credibility while accepting Sylvie's contentions . He then ordered Nurse to pay over the sum of \$502,000.00 to Sylvie as being the sums due to the estate of Methoolal from the sale of the various lots of land and pursuant to the agency agreement.

Issue

12. The many grounds of appeal can be condensed into the single issue of whether the judge erred in finding that the appellant did not pay the proceeds of sale over to the deceased. It is of course a finding of fact. The broad issue is whether the judge was wrong in his assessment of the evidence and his findings of fact.

Summary of decision

13. I consider that the judge was plainly wrong. He failed properly to analyze the evidence, misconstrued where the burden of proof lay and failed, disproportionately, to weigh in the balance the inherent probabilities which lent credibility to Nurse's account while accepting Sylvie's evidence without considering the improbabilities which undermined her evidence. He also failed to have a proper regard to the documentary evidence which lent support to Nurse's evidence as well as Claudette Phipps' evidence which effectively corroborated Nurse's contention that he handed over monies from the sales of the subdivided parcels to Methoolal.

Appellate review

14. Where a trial judge has come to certain conclusions of fact, the Court of Appeal is “*entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration.*” See **Thomas v Thomas [1947] AC 484, 492**. Unless it can be shown that the judge was plainly wrong, the judge’s findings will not be disturbed. The judge generally enjoys an advantage over the appellate court of having seen and heard the witnesses and having formed impressions of their truthfulness and credibility. The appellate court has only the printed evidence. Intonation of voice, manner of delivery, reactions to questions, hesitations, eye contact, attitude and other courtroom dynamics are all lost in the transcription of the printed evidence to be read by the court of appeal. See **Civil Appeal No. 86 of 2011 The Attorney General v Anino Garcia** at paragraph [14]. As Lord Hodge stated in **Beacon Insurance Company Limited v Maharaj Bookstore Ltd. [2014] UKPC 21 [12]** to be “*plainly wrong*” does not mean that appellate judges having reviewed the evidence would have come to a different decision on the facts. Instead, the Court of Appeal must 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

See also de la Bastide CJ in **Civil Appeal No.116 of 1996 Carol Ettienne v Thelma Ettienne**, page 8:

For his finding to be upset there must be some demonstrable flaw in the process by which he reached it. It may be for instance that he drew an inference which was not justified or failed to draw an inference which was. Another ground on which the appeal court may interfere is that the trial judge failed to take account of some relevant piece of evidence or to appreciate its proper significance, or conversely that he took into account something which he ought not to have taken into account or attributed to it a significance which it did not rightly have.

15. It is convenient at this juncture to examine the evidence of the parties in present appeal.

The evidence

Sylvie Ramroopsingh

16. She stated in her witness statement that:

3. My husband, Methoolal Ramroopsingh, who is now deceased, was in fact that owner of a parcel of land in Maracas, St Joseph. The said parcel of land is described in Deed No. 20010096795 and is annexed as "A" to the Claimants' amended statement of case.

4. I can neither confirm nor deny that my deceased husband appointed Dave Nurse as an agent to sell or lease the said land and receive any proceeds thereof. In further response to that allegation I say that:

a. On or around October 2010 my husband, Methoolal Ramroopsingh, "Methoolal" suffered from a stroke. Around the said time, Methoolal was bed ridden and only regained mobility after three (3) months.

b. Prior to the stroke, Mr. Dave Nurse and Methoolal were friends as they worked together at the Port-of-Spain City Corporation, It was customary for Mr. Nurse to visit

our home from time to time.

c. During the marriage, it was customary for Methoolal to bypass me with respect to decision making and finances. I had limited of his financials including property transactions.

5. On or around 2014, I saw the "Agency agreement" for the first time. Without admitting to the validity and/or authenticity of the said agreement, the agreement only provided that Mr. Nurse is "authorised to receive all money in the sale of the above said lands as well as to develop said lands" ...

6... The agency agreement did not provide for or authorise Mr. Nurse to retain monies collected pursuant to this agreement. The said agency agreement also did not authorise Mr. Nurse to sub-divide the parcel of land and sell plots ...

7... as far as I am aware, the said sub-division was not approved by Town and County Division and there never existed any separate plot for sale to anyone...

11. I did not sign any agreement for sale. In any event, the agreement for sale was executed on September 14, 2011 with a completion date of December 13, 2011. The first claimant should not be allowed to pursue this claim against me due to the significant delay. The said agreement did not make "time of the essence".

12. The said agreement was executed while my husband was alive and the power of attorney was valid. Clause 12 of the power of attorney annexed as "G" gave Mr. Nurse the power to, "...Commence, prosecute enforce and to defend answer or oppose all actions suits and other legal proceedings and demand whatsoever..."

13... I believe that this action was wrongly brought against me since:

a. Methoolal executed a power of attorney in favour of the Ancillary Defendant on December 29, 2011.

b. *The Ancillary Defendant purportedly made an agreement for sale between himself and the Claimants on or around September 14, 2011. This was done prior to the execution or registration of the power of attorney which provided for the sale of the land. The said power of attorney gave the Ancillary Defendant the power to, "...commence, prosecute enforce and to defend answer or oppose all actions suits and other legal proceedings and demand whatsoever..."*

c. *At the time the agreement was executed, Methoolal was alive and the power of attorney would have been valid.*

14. *The receipts and/or cheques referred to in exhibit "E" of the statement of case were all made in the favour of the Ancillary Defendant and not me. None of the monies collected pursuant to the agreement for sale was handed over to me and/or deceased; this is contrary to any agency agreement.*

15. *I am not aware of any agreement between the Second Claimant and the Ancillary Defendant ... The said document annexed as "H" was not signed by the Second Claimant, in any event, the second agreement does not make time of the essence.*

16. *The receipts and/ or cheques referred to in exhibit "I" of the statement of case were all made in the favour of the Ancillary Defendant and not me. None of the monies collected pursuant to the second agreement for sale was handed over to me... this is contrary to any agency agreement.*

17. *The cadastral sheet annexed as part of exhibit "J" to the Statement of Case is not a plan approved by the Town and Country division.*

18. *The receipts and/ or cheques referred to in exhibit "J" of the statement of case were all made in the favour of Dave Nurse and not me. None of the monies collected pursuant to the agreement for sale was handed over to me ... this is contrary to any agency agreement ...*

20. There were no agreements for sale between the Claimants and myself. If there were any agreement at all, it was between the Claimants and the Ancillary Defendant.

21. I am not aware of "Cutting Edge Brokers Limited". No company documents have been disclosed by Mr. Nurse and I am unaware if the deceased was in fact a director of the said company and the status of the annual returns and associated financials.

22. At no material time was I ever part of any negotiations to sell or develop the disputed lands.

23. At no time did I ... receive 90% of the monies from the sale of any land or any monies whatsoever. I did not sign a receipt for same as no money was ever passed to me.

24. Mr. Nurse has not exhibited any approvals whatsoever so any for the lots including the 12 lots which was allegedly sold. The Ancillary Defendant has not exhibited any application for approvals or conversion of use from Agricultural to Commercial.

The thrust of Sylvie's evidence is that she knew nothing of the agency agreement, made no agreement to sell lots to the claimants, knew nothing of the sale of the lands and received no monies from the sales.

Dave Nurse

17. Nurse deposed that he and Methoolal became "*fast friends*" in 1983 while they both worked at the Port-of-Spain Regional Corporation. He described Methoolal whom he called Ravi as a "*shrewd businessman*". He said Methoolal invited him into the business which dealt in real estate. He had no knowledge of real estate at the time but with Methoolal's

help he was able to learn. He added that Methoolal invested fully into the business and he, Nurse would sometimes be at Methoolal's home at 2 a.m., discussing plans for the company. While there he would meet Sylvie with whom he exchanged pleasantries but who took no part in the business. He stated in his witness statement:

7. In or about October 2010 Ravi suffered a stroke that left him in a terrible state. He was unable to run his company on his own and in or about February 2011 my business partner issued a notice to all purchasers that I Dave Nurse was authorized to sell or lease the six (6) acres of land located in Maracas St Joseph owned by Ravi. Further the note stated that I was authorized to receive all money for the purchased lands.

8. Ravi wanted to sell the six (6) acres of land in Maracas St Joseph as he became very ill after his stroke and his medical bills were extensive. He needed money and could not sell the lands on his own thus he entrusted the power unto me to do the sales for him.

9. The six acres of land was agricultural land with no water, electricity or drainage. Ravi and I decided to separate the land into lots and sell twelve (12) of them at a peppercorn rate of seventy thousand (\$70,000.00) dollars per lot. Purchasers would make a 10% down payment on the land and pay off the balance at a later date.

10. The arrangement between Ravi and I was that from the sale of each lot 90% would be for Ravi to deal with his medical expenses, 7% would be towards the salaries of the labourers who maintained the lands and 3% would be my commission.

11. I started selling the plots of land over a period of three years and sold around 5

or 6 of the lots for Ravi. His health was not improving and in or about December 2011 Ravi appointed me as Power of Attorney this was also necessary to facilitate financial transactions.

12. Due to Ravi's deteriorating state he could not be a part of the financial transactions and thus instructed the purchasers to allow cheques in my name to be written and cashed. True copies of cheques written in my name and bank receipts for the purpose of the land transactions are hereto attached and marked "D.N.3".

13. Every time a cheque was written in my name for the sale of land I would go to the bank and cash the cheque and take the money directly to Ravi at his home, this happened several times and even in the presence of Slyvie.

14. In or around 2012 Ravi was dealing with another Industrial Relations matter and I with the support of Claudette Phipps assisted him with the matter we would often meet at his home to discuss the issue and during these visits I would also give money to Ravi collected from sales. On about three (3) separate occasions, Claudette was present when I exchange the sale money with Ravi. She would be present with Slyvie and the two would have conversation while Ravi and I discussed our business.

15. I carried money from sales so often for Ravi that on one occasion I even met him in the car park of Royal Bank in St Augustine with his sister and Slyvie in the vehicle and I dropped a parcel that contained One Hundred and Twenty Six Thousand (\$126,000.00) Dollars in Slyvie's lap which was the final payment for two lots of land.

16. At another time I carried money to Ravi at his home we counted it and he gave

it to his daughter to put away, I received a call from him saying that his daughter counted the money and One Thousand Five Hundred (\$1500,00) Dollars was missing, this was the first and only time there was ever a discrepancy with any money I had ever given to him. I was taken aback because I knew I gave Ravi all the money from the transaction. For days after I called him and told him "I did not take your money, I gave you all your money, I did not steal any money from you." After a few days Ravi with a very stern voice told me that we were going to leave the matter alone and we would never speak of it again and we never again did.

17.The arrangement of me selling the lands, collecting payment and giving money to Ravi continued until he died in 2013, I sold 11 plots from the original 6 acres.

18. He concluded his witness statement as follows:

31.My business partner was a shrewd man who would not have allowed me to swindle him. Even in his ill stage he was strict when it came to his money. I carried out transactions for the lands I was given the responsibility for in front of Slyvie and though she was not an integral component of the business, she was aware of what was being done as she was around several times while ... (the rest of the paragraph was struck out).

32.This experience has turned my world and has made me fearful of people as you never know who they really are or what their intention may be.

Claudette Phipps

19. Claudette Phipps deposed that she knew Methoolal and Nurse. She said she visited Methoolal's home on "several occasions" accompanied by Mr. Nurse. She added that:

7....I met and became acquainted with Mr. Ramroopsingh's wife during these occasions. I recall one instance being over the month of December, nearer to the Christmas period as his wife had just finished baking. The next occasion I would visit his home would be over the Carnival period the proceeding year. There was always a cordial relationship between all parties during these instances.

8.During my visits to Mr. Ramroopsingh's home, Mr. Nurse would hand over monies he received from persons who purchased different lots of land from Mr. Ramroopsingh. This occurred at least three (3) separate occasions in my presence, during which they both discussed the reasons and purpose of the monies.

9.On one of the occasions Mr. Nurse began counting the monies in front of me, upon which Mr. Ramroopsingh invited him to proceed to another room to complete his counting of the monies Mr. Nurse had brought for him privately.

10.On all three occasions that I accompanied Mr. Nurse to Mr. Ramroopsingh's home, Mr. Ramroopsingh wife was present and we would converse while the two men dealt with their business.

11.On one occasion Mr. Ramroopsingh after receiving the monies, gave his daughter the amounts to put away in the safe. Sometime after this occasion Mr. Nurse informed me that Mr. Ramroopsingh was querying that One Thousand Five Hundred Dollars (\$1500.00) missing from the total. Mr. Nurse indicated to me, that he reminded Mr. Ramroopsingh that upon counting the monies he gave it to his daughter to place in the safe.

12.In my presence on one occasion, Mr. Nurse and Mr. Ramroopsingh discussed a note given to Mr. Nurse by Mr. Ramroopsingh for which Mr. Nurse was required

to present to persons seeking to purchase lands belonging to Mr. Ramroopsingh for whom Mr. Nurse was acting as an agent.

13.It later came to my attention that Mr. Nurse held a quasi-Power of Attorney to act on Mr. Ramroopsingh's behalf in relation to the sale of lands and the collection of monies. This was in the form of a note which he showed me, which outlined that Mr. Nurse acting on Mr. Ramroopsingh's behalf, was authorized to transact all business relating to the sale of lands including collection of monies; but not a full power of attorney. I knew this quasi-Power of Attorney was in relation to the land as it contained everything in relation to the said land such as the approvals and cadastrals among other things.

14.Mr. Nurse informed me that when persons paid by cheque, he would cash said cheques and then remit the monies to Ramroopsingh. According to Mr. Nurse, no monies were directly deposited into his personal account.

All three deponents were cross-examined.

The reasoning of the judge

20. As it relates to Nurse's liability, the following are extracts of the relevant parts of the trial judge's reasoning :

- i. The issue between the parties is one of an account and payment over and the burden falls to Nurse to prove that the monies were paid over to the deceased as he alleged [para. 21].*
- ii. No details of how this \$693,000 were allegedly retained by the deceased [were] given in the ancillary defence and no particulars were sought in that*

regard by Sylvie [para. 24].

- iii. Much of what Nurse and his witness Ms. Phipps spoke about in evidence was not pleaded [para. 29]. In cross-examination, his [Nurse's] attention was drawn to a withdrawal of \$106,000 and he said that that was the amount that he actually threw into the respondent's lap in obvious conflict with his evidence in his witness statement. By not having included this in his defence, the appellant deprived Sylvie of an opportunity of disputing this. Further, this was not even suggested to Sylvie in cross-examination. That failure on all of these steps was a damaging blow to Nurse's credibility. Further, and more importantly, the court does not believe that as it is wholly incredible. The whole premise of somehow conveniently meeting Methoolal, Sylvie and Methoolal's sister in the carpark and suddenly throwing that amount of money on to the respondent without even having the same checked or verified in any way seems absolutely implausible and the court rejects that evidence [para. 30].*
- iv. It is clear that Nurse co-mingled the funds from the sale of the land with his own private funds. Secondly, despite what was set out in the ancillary defence and the witness statement as to how the money was to be allocated in terms of percentages, for the first time, in cross-examination, the appellant indicated that that agreement was not cast in concrete. That was not part of his witness statement or his pleading. Thirdly, Nurse accepted, in cross-examination, that he used the money from the proceeds of sale for personal transactions – another matter that was neither pleaded no[r] evidence[d] in his witness statement. Fourthly, despite the agreement as to the manner in which the percentage of the proceeds of sale were to be distributed, there was no corresponding evidence of withdrawals from his account in that percentage ratio [para. 31].*

- v. *It was drawn to his attention that the \$147,000 paid by the second claimant on or around 27 July 2012 was not deposited into his account. In response, he said that he cashed the cheque at the second claimant's bank and paid the money to Methoolal that very same afternoon. Apart from the failure to plead this, or even mention it at all in his witness statement, there is absolutely no evidence to corroborate this allegation and, once again, it seems rather far-fetched without any contemporaneous document to support it. The court does bear in mind, though, that counsel Mr. Nurse was not able to put this to the second claimant since he was not a party to the primary claim [para. 32] [emphasis added].*
- vi. *When one considers Nurse's response in cross-examination that the agreement between himself and the deceased was varied from time to time – a material fact which he agreed was very important and yet it did not form any part of his witness statement or pleading – and compare that to the definitive statement that he made at paragraph 10 of his witness statement, Mr. Nurse came across as decidedly unreliable [para.33].*
- vii. *Ms. Phipps' evidence did not bolster his case. The court accepts her evidence that she attended the home and that she saw him take cash there. Other than that, Ms. Phipps is unable to say what were the amounts of cash that she saw on the 3 occasions when she was there. She mentioned that the respondent was present but the court accepts the respondent's evidence that she was generally kept in the dark with respect to these financial matters and therefore she did not know what was happening with respect to monies. The evidence that Ms. Phipps gave was that she would speak to Sylvie while the two men conducted their business [para. 34].*

- viii. *The court has considered Sylvie’s alleged lack of knowledge in relation to what was happening – and is of the respectful view that the ancillary claim placed a firm burden on Nurse to satisfy the court on a balance of probabilities that he had paid over to Methoolal all of the sums that he said that he did. Obviously, since Sylvie was not aware of the details, even on the evidence of Ms. Phipps and Nurse she could not say yes or no to whether it was paid. Nurse’s statement that Methoolal was very particular about his money and therefore could not be swindled has to be viewed against the fact of Nurse’s unreliable evidence before this court [para. 35].*
- ix. *In the circumstances, although the court accepts that some monies in cash were given to the deceased by Nurse, without any corroborating documents, accounts, receipts etc., and with all of the transactions apparently being done in cash without any paper trail, the court cannot accept on a balance of probabilities that the monies due to the deceased, were in fact paid over. At the very least, having regard to the position of trust that he was in, there ought to have been some sort of account stated and acknowledged between the deceased and Nurse. There was evidence of prior letters and notes having been written by the deceased or someone on his behalf to which he signed authorizing Nurse to act as his agent. It would not have been very difficult for a receipt, a memo, a letter, and a document of some sort to have been signed by Methoolal acknowledging receipt of whatever sums Nurse allegedly paid him. There was none. [para. 36]*
- x. *Nurse failed to satisfy his responsibility and accountability and his fiduciary duty to the deceased and to his estate. The matter is further exacerbated when one considers the adage “dead men tell no tales.”[para. 37].*

Analysis

21. In my judgment, the judge misconstrued the evidence and was plainly wrong. His conclusion cannot be supported having regard to the evidence. **Horace Reid v Dowling Charles and Percival Bain Privy Council Appeal No. 36 of 1987**, is an example of a trial judge being plainly wrong. There, the judge misapprehended the true effect of the evidence. That was a case in which the claimant claimed a “track” as a right of way and sought an injunction to restrain interference with that right. The trial judge summarized briefly the claimant’s evidence and omitted any reference to the claimant’s unchallenged evidence of the track being obliterated by bulldozing. He also ignored or did not consider the evidence of one of the claimant’s witnesses, only referring to an admission as to the size of the track (which was extracted in cross-examination). The only portions of the claimant’s evidence that the trial judge critically analysed, were those from two other witnesses. He purported to identify various errors and misstatements in their evidence and found that the “track” was in fact a continuation of an existing street which was sufficient to dispose of the claim. It was a decidedly one-sided approach. Both the Court of Appeal and the Privy Council were satisfied that the trial judge misapprehended the true effect of the evidence of the two witnesses and was wrong to have isolated their evidence from all the other evidence that pointed to the existence of the right of way. The contemporary documents (which included evidence and pleadings supplied by the defendant in his Defence) were all consistent with the claimant’s case. The Privy Council set out the evaluative exercise which a trial judge must undertake in making his findings. Lord Ackner observed at page 6 that:

...where the wrong impression can be gained by the most experienced of judges if he relies solely on demeanour of the witnesses, it is important for him to check that impression against the contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability the rival contentions, in light in particular of the facts and matters which are common

ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.

22. The judge had a similarly one-sided approach and committed multiple errors. For the reasons which follow, the Court of Appeal is entitled to look at the matter afresh and to come to its own conclusion. I find that Sylvie failed to discharge her burden of proof and is not entitled to judgment. The evidence of the appellant was far more credible. The appeal must be allowed.
23. The judge failed to properly analyze the evidence. This failure of analysis stemmed firstly from his misapprehension of the nature of the case and of the burden of proof (error of law). But it also arose from his one-sided approach; consequently:
- (i) he failed to take into account relevant pieces of evidence;
 - (ii) he failed to check his impressions of the witnesses against the contemporaneous documents;
 - (iii) he attributed significance to matters which deserved no such significance and failed to give significance to the evidence which deserved to be; and
 - (iv) drew the wrong inferences.

Burden of proof

24. The judge found that the issue between the parties was *“simply one of an account and payment over”* wherein the *“burden falls on the [appellant] to prove that the monies were paid over to the deceased.”* He was wrong. The reliefs sought in the ancillary claim was as set out in paragraph 7 above. There was no claim for an account nor any allegation that the appellant failed to preserve proper accounts. The judge approached the case from

the wrong perspective. Article 51 of **Bowstead on Agency** states that “every agent who holds or receives money to the use of his principal is bound to pay over or account for that money at the request of his principal.” The authors state that if the agent has received money on his principal’s behalf, the principal can sue the agent for monies had and received. This is in essence the claim which Sylvie in her capacity as the Legal Personal Representative of the deceased principal made against Nurse. It is an ordinary claim for restitution arising out of a breach of the agency contract. It was for Sylvie to prove that money had been received by Nurse, that he did not pay them over and that this was a breach of contract or was fraudulent. Once she had discharged that burden, it would then fall to Nurse to show that the money was in fact paid over. The respondent had to first make out her case before Nurse had to show that he had paid the money to the respondent.

25. This, in my judgment, is the true position as to the burden of proof in civil cases. See **Phipson on Evidence (20th Edition)** at paragraph 6-06 outlines:

So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him...(emphasis added)

26. See also **Robins v National Trust Company Limited [1927] AC 515, 520**, a decision of the Privy Council in which it was stated that:

Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had

been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts.

27. In this case, Sylvie is asserting a negative but she still has to discharge the burden. In so far as the trial judge adopted the position that the initial burden was on Nurse to prove that the monies were paid over to Methoolal, he erred. No doubt Nurse had that burden but before the burden could shift to him (to demonstrate that he actually paid the money to Methoolal) Sylvie had first to show, on a balance of probability, that the moneys received by the appellant were not paid to Methoolal. It was not sufficient for her merely to allege non-payment. It was of course no easy burden given that she was seeking to prove a negative. But the respondent made no effort to discharge her burden of proof. My comments at paragraphs 28 and 29 amplify this lack of effort.

Failure to properly analyze

28. The judge's approach to the evidence was disproportionate. He approached the appellant's evidence with some suspicion or skepticism but there was no similar approach in regard to Sylvie when similar suspicion or skepticism was required. Her evidence was that she was kept totally in the dark about the affairs of the deceased. She offered nothing more by way of evidence. Yet, inconsistently, she insisted that Nurse never paid over any money to the deceased. That was a *non sequitur*. If she was kept totally in the dark by her husband about his affairs then how could she assert with certainty that Nurse never gave moneys he received from the sales to Methoolal? This was a very relevant fact to which the judge gave no consideration.

29. He also failed to consider that Sylvie only sought to implicate the appellant after the claims were filed by the claimants. She made no demand for moneys received from the sales prior to obtaining the Letters of Administration of the deceased's estate. Even before the grant of Letters of Administration, Sylvie was aware of the purchasers' claims to the lands. In order to prepare the inventory for the Grant, she would have had to call in the assets of the estate. Yet at no time during that process, did she approach Nurse for an account of the monies collected from the sale of the lands in order provide, under oath, a true inventory, in support of her application for Letters of Administration. At the trial she gave no evidence of seeking this out from Nurse.
30. Any such monies would form part of the deceased's personal estate which also fell to be distributed. Her efforts at seeking to recover monies on behalf of the estate prior to the formal grant of Letters of Administration, even if futile, would have been strong persuasive evidence in her favour.
31. The trial judge also failed to consider the effect of paragraph 8 of Nurse's witness statement. He stated:

Ravi wanted to sell the six (6) acres of land in Maracas St Joseph as he became very ill after his stroke and his medical bills were extensive. He needed money and could not sell the land on his own thus he entrusted the power unto me to do the sales for him.

The evidence supported the appellant's assertion in his Ancillary Defence that he "*acted on behalf of the deceased during his lifetime as he was not in good health and needed to obtain finances to facilitate medical attention.*" Sylvie did not dispute the claim that money was needed to fund Methoolal's medical care. Neither did she give any evidence of the care that was provided to him and how it was funded on his city assessor's salary. This was evidence that Sylvie could have given as his wife and caregiver. She need not have had any knowledge of his business affairs to be familiar with those matters. The

effect of this omission was that Nurse's evidence remained unchallenged and provided a reasonable explanation of how the money was dissipated. It also gave credibility to his story of dealing in cash. Undoubtedly, cash would have accorded Methoolal easy access to funding for his medical expenses. Surely, had the trial judge considered this evidence he would have drawn a similar inference.

32. Another significant error of the judge is set out at paragraph 36 of his judgment. He accepted that the appellant paid *"some monies"* over to Methoolal and yet the judge failed to quantify that amount or to give Nurse any credit for those sums. He gave no reasons for ignoring the sums he accepted were paid over. We are entitled to hold that he had no good reasons. This was deeply prejudicial to the appellant.

33. The evidence as a whole, including those portions ignored by the trial judge, shows that Sylvie fell far short of proving her case. Indeed, the evidence supports the inference that it was more likely than not that the monies were paid over in totality to the satisfaction of Methoolal not least because no issue was raised by him during his lifetime to the contrary.

34. Perhaps as a corollary of his misunderstanding of the burden of proof, the trial judge fixated on what he perceived were shortcomings in the appellant's case. In doing so he failed to appreciate material aspects of the evidence as a whole. At paragraph 37, the judge opined that ***"dead men tell no tales" as the deceased is not available in any manner whatsoever – by way of contemporaneous documents, statement, correspondence etc – to exonerate him.*** However, there were contemporaneous documents, statements and correspondence which indeed allowed Methoolal to *"speak from the grave"* but which the trial judge either did not consider or ignored.

- i. First, the judge did not consider the significance of the power of attorney executed by the deceased on 29th December 2011. This power of attorney was prepared and witnessed by an attorney at law in the usual way (its

authenticity was belatedly accepted by the respondent). There is no evidence or allegation of undue influence. As at the date of execution of the power of attorney, Nurse had already collected some one hundred and sixty four thousand dollars (\$164,000.00) as agent for the deceased according to the judge's own calculations at paragraph 46 of his judgment. Why would Methoolal, on the balance of probabilities, formalize the agency relationship with Nurse and indeed give him greater powers in the sale of the lands if Nurse was withholding money from him?

- ii. Second, in a letter dated 19th July 2012, Methoolal wrote to the manager of RHAND Credit Union instructing him to make a cheque received from Angela King (one of the claimants) payable to Nurse. This was more than six months after the execution of the power of attorney. This letter was supported by a handwritten note from Methoolal dated 18th July 2012 with a copy of his national identification card. The judge did not appreciate the significance of this evidence. By 19th July 2012 Nurse had collected a further one hundred and twenty six thousand dollars (\$126,000.00) as agent for the deceased. Methoolal, instead of protesting the agent's failure to pay over monies, ratified the agency by instructing the bank to make more money received from a purchaser payable to appellant. This is not the behavior of a principal dissatisfied with his agent's management of his property.
- iii. Third, there is no evidence that Methoolal complained to anyone prior to his death that the appellant was not paying over the funds collected. Both Sylvie and Angela King (who in 2013 dealt directly with Methoolal in relation to some parcels of land) in cross examination admitted that the deceased never complained to them that Nurse was withholding money.

iv. Finally, it is significant that Methoolal dealt directly with Angela King in 2013 whereby she made payments of four thousand dollars (\$4,000.00) on 14th January 2013 and eight thousand dollars (\$8,000.00) on 18th March 2013 directly to him towards the purchase of a fourth lot of land after having already advanced monies to Nurse as agent in respect of three prior lots. The fact that Methoolal was involved directly in the sale of this third plot to Angela King negatives the inference that he was unaware of lands being sold by Nurse. Furthermore, the transaction with Ms. King reveals a sufficient degree of mental agility in relation to Methoolal's ability to conduct business. This offers some insight into his recovery from the stroke he suffered in 2010. It leans against any inference that Nurse was taking advantage of the deceased under cover of the latter's illness.

35. None of this evidence featured in the judge's reasoning. There is no dispute that the deceased was a shrewd businessman. It is more probable than not that he would not have continued ratifying Nurse's power to act for him if the appellant was not fulfilling his side of the agency arrangement. As an example of Methoolal's attention to detail in this agency arrangement, we need only to look at Nurse's unchallenged evidence of Methoolal's discovery of a fifteen hundred dollar (\$1,500.00) cash discrepancy involving Nurse and Methoolal's daughter about which the appellant was confronted by the deceased. Claudette Phipps confirmed that Nurse told her about this incident close to when it occurred. There was no evidence from Sylvie to dispute this episode in circumstances in which the deceased's (and the respondent's) daughter was available to give evidence.

Credibility

36. The judge's assessment of the parties' credibility was also flawed. The judge found Nurse's version 'incredible' and that he was 'decidedly unreliable.' He pointed out that:

- i. The appellant's alleged "dumping" of \$126,000.00 in cash in a car park into the lap of the respondent was a material fact that ought to have been and was not included in the defence. Yet in cross-examination, when the appellant's attention was drawn to a withdrawal of \$106,000 he said that that was the amount that he actually threw into the defendant's lap in obvious conflict with his witness statement.
- ii. The whole premise of somehow conveniently meeting the deceased, the respondent and the deceased's sister in the carpark and suddenly throwing that amount of money on to the respondent's lap without even having the same checked or verified in any way seems absolutely implausible.
- iii. Despite what was set out in the ancillary defence and the witness statement as to how the money was to be allocated in terms of percentages, for the first time, in cross-examination, the appellant indicated that that agreement was not cast in stone. In cross-examination, the appellant admitted that he used the money from the proceeds of sale for personal transactions – another matter that was neither pleaded nor featured as evidence in his witness statement.
- iv. Despite the agreement as to the manner in which the percentage of the proceeds of sale were to be distributed, there was no corresponding evidence of withdrawals from his account in that percentage ratio as agreed.

37. The judge's adverse impression of Nurse was due principally to conflicts between the pleadings and his evidence of the informal manner in which business was conducted between the deceased and himself. I start first with the conflicts between the pleadings

and evidence. At paragraph 6 of his defence Nurse stated that *“it was also agreed between the Business Partners that 90% of the monies will be retained by the deceased, 7% to be used to hire workers to keep the lands clear and more attractive to prospective buyers and 3% to the Ancillary Defendant as compensation towards his efforts for sale of the lots.”* Nothing in this pleading suggests that the formula would be applied to every sale. The trial judge erred when he isolated individual receipts and evaluated them for compliance with the formula. The gist of the pleading is that upon the sale of all eleven lots in total during the lifetime of the deceased the proceeds of sale would have been consumed according to that formula. So in an individual receipt of purchase money it may be remitted wholly to the deceased or retained in whole, in part or not at all by the appellant as his commission or for the maintenance of the property.

38. Nurse’s evidence of dumping a sum of cash into the lap of the respondent and the overall informality of how business was conducted between himself and the deceased disproportionately influenced the judge’s reasoning. First of all, the possibility that parties would have conducted business in an informal manner does not undermine the appellant’s evidence. Secondly, the discrepancy between the sum of \$126,000.00 as stated in his witness statement and the sum of \$106,000.00 which Nurse accepted in cross-examination as the true amount he placed in Sylvie’s lap does not by itself destroy his credibility. If the judge had had proper regard to the evidence as whole, a discrepancy between \$126,000.00 and \$106,000.00 is plausible in the context of business being conducted without receipts and several years before the evidence was taken. What is even more telling is that Mr. Saroop did not put to the appellant in cross examination that this event did not occur. Rather he suggested that to drop money on someone’s lap was “inappropriate”. That is to say, there was no challenge to the fact that the incident occurred rather, it was to the inappropriateness of such conduct towards Methoolal’s wife. The exchange is captured in the following passage during cross- examination by Mr Saroop on 30th July 2020 and is found at pages 438-439 of Volume 2 of the Record of Appeal:

Q: Is putting money in somebody's lap, the way to transact with \$126,000.00?

A: That was as a result of instructions from Ravisingh [the nickname of the deceased]

...

Q: Okay. Hold on. Let us go to paragraph 5 of your witness statement. Did you consider resting the money on Slyvvie's (sic) lap to be inappropriate?

A: No she sat in a manner so as to suggest to me to rest it in her lap.

Q: Okay

A: She did not reach out with her two hands to accept the envelope from me.

Q: Okay. Read the last line of paragraph 8 of your witness statement for the Court.

A: The last line of...?

Q: Paragraph 5

A: I ensure that I do not have any major interaction with any of my friend's wives or girlfriends.

Q: Good. I put it to you that that contradicts what you are saying with respect to the appropriateness of putting the money in Slyvvie's (sic) lap.

A: I do not agree with you sir.

39. Further, the judge misplaced his focus when he considered the bank statements. He found that the accounts revealed that the appellant had co-mingled funds, used proceeds of sale for personal transactions and no withdrawals corresponding to the agreement with the deceased. The case Nurse had to meet was that he received monies on behalf of Methoolal which he failed to pay over. The purpose of the bank statements was to show that the proceeds of sale were largely converted into cash. The appellant did not purport to use the bank statements to show that these were the sums handed over to the deceased. This is the true effect of the bank statements.

40. The fact that the particulars given in the witness statements of the appellant and Ms.

Phipps were not in the pleadings did not make their evidence unreliable. The pleadings set up facts and issues that are in dispute which were then fleshed out in the witness statements by which fulsome evidence to support the facts are provided. See **Three Rivers District Council v The Bank of England (No 3) [2001] 2 All ER 513.**

41. The judge accepted the evidence of Ms. Phipps at paragraph 34 of his judgment that she attended the deceased's home with the appellant and saw the appellant take cash to the deceased on at least three occasions. Despite this finding, the judge then wrongly held that Ms. Phipps' evidence "*did not bolster his case.*" He was wrong. Rather, this was strong corroborative evidence of Nurse's version of events that he and Methoolal dealt informally and in cash. The evidential value lies in the fact that Ms. Phipps saw cash being exchanged. That she could not confirm the amount of cash was of no moment. It simply meant that she could not corroborate the quantum but her evidence was not intended to corroborate the quantum. It was intended to corroborate the fact that the appellant handed over cash to Methoolal on more than one occasion and to support Nurse's overall evidence that he did hand over the proceeds of the sales of the parcels of land to the deceased.

42. The trial judge accepted that the *Sylvie* "*was generally kept in the dark with respect to these financial matters and therefore she did not know what was happening with respect to monies*". But Sylvie's credibility on this point was undermined by the evidence. In a letter dated 25th October 2016 from the respondent's attorney to the claimants', he recited his instructions (from Sylvie) that Methoolal "*relied on my client, his wife, to conduct all business on his behalf...*". However, in her Defence and in the Ancillary Claim she pleaded that "*during the marriage, it is customary for Meetholal to bypass the defendant with respect to decision making and finances.*" She repeated this allegation in paragraph 4(c) of her witness statement and in cross examination. This conflicted with her letter of 25th October 2016. Before the main claim was brought against her, Sylvie, in order to disclaim liability, contended that she handled all of Methoolal's business and

knew nothing of the land sales. When the claim was filed, also to disclaim liability, she disavowed all knowledge of Methoolal's business affairs. This conflict reflects of one self-serving constant: Sylvie's efforts to avoid liability.

43. This conflict severely wounded her credibility as it relates to her awareness of Nurse's business affairs. It was not open to the trial judge to accept her evidence on that point. He could not on the one hand find that Sylvie had no knowledge of Methoolal's business affairs and on the other find her case proved.

44. The trial judge's rejection of Nurse's evidence was due to the litany of errors outlined above and this court is justified in taking a different and opposite view of the value of the appellant's evidence and the evidence as a whole. It follows for all the reasons herein, that the appeal must be allowed and the orders of the trial judge on the ancillary claim be set aside.

Disposition

- i. The appeal is allowed;
- ii. The orders of the trial judge on the ancillary claim are set aside;
- iii. The ancillary claim is dismissed;
- iv. The respondent shall pay the appellant's prescribed costs of the ancillary claim in the High Court; and
- v. The respondent shall pay the appellant's costs of the appeal assessed as two-thirds of the prescribed costs in the High Court.

**Nolan Breaux
Justice of Appeal**

I agree with the judgment of Bereaux JA and have nothing to add.

Peter Rajkumar
Justice of Appeal

I also agree.

Maria Wilson
Justice of Appeal