

The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

**Civil Appeal No. P253 of 2018
Claim No. CV2016-01946**

Between

JENNIFER MORALDO

Appellant

And

ANTHONY SANDIFORD

Respondent

PANEL:

**N. BERAUX J.A.
P. RAJKUMAR J.A.
R. BOODOOSINGH J.A.**

Date of delivery: 16th July 2025

APPEARANCES:

**Ms. S. Bullen Attorney-at-law for the Appellant
Mr. R. Dowlath instructed by Mr. R. Sookhansingh and Ms. M. Ramdial
Attorneys-at-law for the Respondent**

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) This is an appeal from the decision of Kokaram J (as he then was) (“the judge”) by which he refused to set aside a consent order. The appellant, Jennifer Moraldo, contends that the consent order was entered without her knowledge and consent. I shall refer to Ms. Moraldo as the appellant or as Ms. Moraldo. I shall refer to the respondent as Anthony Sandiford or as the respondent.

Background

(2) In 2011 the respondent, brought proceedings in CV 2011-02229 to recover possession of an apartment situate at No. 104 Capildeo Lands, Cleaver Road, Arima (“the site”) referred to as “the East Apartment”, from unknown defendants residing therein. I shall refer to those proceedings as “the possession action.” The respondent claimed to be the fee simple owner of the apartment by virtue of a deed of gift registered as No. 977 of 1996. The deed was made between one Arnold Sandiford and the respondent by which Arnold Sandiford conveyed the fee simple in the property to himself for the rest of his natural life with the remainder to the respondent. Arnold Sandiford is the appellant’s father. He is also the uncle of the respondent which means that the appellant and the respondent are cousins.

(3) The respondent alleges that when he learnt of the deed of gift, he made substantial renovations to the East Apartment (which was one of two apartments standing on the property). He alleged that the East Apartment

was in a dilapidated condition and occupied by Arnold Sandiford (“Arnold Sandiford” or “Arnold”). He also renovated the other apartment on the property, (“West Apartment”) and let it to tenants. The respondent lives in the USA but in 2005 he and his wife returned to Trinidad. They stayed with Arnold Sandiford in the East Apartment until June 2006 when they moved to the West Apartment after tenants vacated. In March 2007, they returned to the United States.

- (4) In April 2008, the respondent learned that Arnold Sandiford left the East Apartment to spend a weekend with the appellant. The respondent spoke by telephone with Arnold. The respondent subsequently returned to Trinidad on 21st April 2008. He enquired when Arnold would be returning to the East Apartment. Arnold told him that he intended to reside with his appellant for the time being.
- (5) The respondent alleges that Arnold later came to the site and disputed the respondent’s entitlement to rent the apartments. The respondent then sought an injunction restraining Arnold from remaining in possession of the West Apartment. An interim order was made allowing for the respondent to occupy the West Apartment and for Arnold to continue in possession of the East Apartment until the hearing and determination of the claim.
- (6) Arnold Sandiford died on 11th December 2008. One Tracy Ann Daniel was in occupation of the East Apartment. In 2011 the respondent became aware that Ms. Daniel had vacated the East Apartment and the apartment was then being occupied by persons unknown to him. He then commenced the possession action. The respondent sought possession as the fee simple owner pursuant to the deed of gift, upon the death of Arnold Sandiford.

- (7) Ms. Moraldo filed a defence to the respondent's claim in which she admitted that the respondent is recorded as the fee simple owner consequent on the death of Arnold Sandiford. However, she pleaded fraud. She alleged that sometime after 26th May 1976, Arnold Sandiford, fraudulently caused the name of her mother, Elaine Sandiford, to be erased and removed from what became deed No. 4637 of 1977 and that he substituted the name Arnold Sandiford. The fraud took place between the time the deed was signed and when it was registered. The appellant became the Legal Personal Representative of her mother's estate upon her death.
- (8) The appellant also alleged that Arnold Sandiford's fraud caused the estate of Elaine Sandiford to be deprived of the site and that the 1997 deed of gift was void and unenforceable.
- (9) The appellant thus disputes the respondent's entitlement to possession of the East Apartment or any portion of the site.
- (10) The appellant disclosed that there was tension between Arnold Sandiford and her after her mother's death. It was only after Arnold Sandiford's health deteriorated that he confessed the fraud to her.
- (11) Ms. Moraldo brought two actions against the respondent and "The Administrator of Trinidad and Tobago" in CV 200904330 and CV 20105045 seeking to impeach the 1977 deed. According to the appellant those proceedings were served on the respondent and to date no appearance or defence has been entered in either claim.

The possession action

(12) The appellant also counterclaimed in the possession action for both the 1977 deed and the 1996 deed of gift to be declared void for fraud and for a declaration that the estate of Elaine Sandiford was entitled to the site.

(13) The possession action came before Kokaram J. He referred it to mediation. On 18th February 2018 the appellant and respondent, together with their attorneys at law attended mediation proceedings facilitated by Mr. Anthony Vieira. The appellant was represented by Dr. Kenneth O'Brien. The respondent was represented by Ms. Turkessa Blades. According to the respondent, a mediation agreement was reached at the end of the mediation meeting in the following terms:

This Agreement dated and effective this day of February 2013 is made between (1) Jennifer Moraldo; and (2) Anthony Sandiford.

It is Agreed:

1. Matter settled for Nine Hundred Thousand Dollars (TT\$900,000.00) and a congruent transfer of property, specifically:

a) Jennifer Moraldo will pay Anthony Sandiford the agreed sum of TT\$900,000.00 on or before 31 December 2013; and

b) Anthony Sandiford will convey the property in Arima known as 104 Capildeo Land, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that's not feasible then otherwise by Deed of Conveyance; the costs and charges associated with the transfer to be borne by Jennifer Moraldo). The Deed of Gift/Transfer shall be prepared and signed forthwith

and in any event before 31 December 2013, but will be held in escrow until the agreed sum has been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest (12%) from 31 December 2013 to the date of final payment inclusive.

2. All further proceedings (including HCA CV2008-01690 and HCA CV2010-5045) stayed upon the terms set out above.

3. The parties acknowledge that the above terms represent their complete agreement relating in property and finance and it constitutes full and final satisfaction of all and any claims either may have against the other.

4. Each party acknowledges and agrees that upon complete compliance by each other with the terms of this Agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01890 and HCA CV2010-5045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her or his respective estates.

5. Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings.

6. This Agreement shall be filed and made an Order of the Court.

7. There shall be liberty to both parties to apply as to carrying the

agreed terms into effect.

Concurrence of the Mediator

The general provisions contained in the foregoing Agreement were reached by the parties in mediation conducted by the undersigned mediator. Legal advice and services required for vetting and approving this agreement were provided by the independent advisory attorneys whose signature appear above.

- (14) A consent order dated 13th March 2013 incorporating the terms of the mediation agreement was entered in chambers by Kokaram J (“the 2013 consent order”). The 2013 consent order was signed by the attorneys-at-law for both parties.
- (15) By claim No. CV 2016-01946, the appellant sought an order setting aside the consent order on the basis that it was entered without her knowledge and consent. She contended that she never expressly or impliedly agreed to the proposal or expressly or impliedly authorized Dr. O’Brien to agree to the 2013 consent order. She contended that upon conclusion of the mediation session, she expressly instructed Dr. O’Brien that she could not agree to the proposal because she was unable to source funding for that sum at her age. She contended that Dr. O’Brien advised her that the matter would be listed before the judge.
- (16) She alleged that after the mediation proceedings concluded she made numerous enquiries of Dr. O’Brien of when the matter would be listed. She received no responses. Only when her husband visited Dr. O’Brien’s offices in November 2014 was he informed that the 2013 consent order had been

entered. This was confirmed after they made enquiries at the Civil Registry. She then went to Dr. O'Brien's offices to make further enquiries and Dr. O'Brien allegedly undertook to have the 2013 consent order set aside. He advised the appellant to obtain a forensic examination report of the 1977 deed of gift which was obtained. To date no action was taken by Dr. O'Brien to set aside the 2013 consent order.

- (17) The appellant contends that -
- (i) If the order is allowed to stand it would result in irreparable financial loss and damage (to her).
 - (ii) It would be unconscionable to permit the respondent to benefit from its terms.

In addition to the setting aside of the order, she seeks a declaration that the order is null, void and of no effect.

- (18) The respondent has resisted the appellant's action to set aside the 2013 consent order. He gave his version of the mediation proceedings. According to the respondent, he made a proposal to the mediator that he was prepared to accept the sum of \$900,000.00 to settle all the existing matters between the parties and he would waive interest until 31st December 2013. If the transaction was not completed by that date he would accept interest at the rate of 12% per annum. He says that this proposal was accepted by the appellant. Mr. Vieira then read out the agreement that had been reached and both the appellant and himself confirmed orally that they agreed to the terms.

- (19) Because the appellant's sister had to leave the location at specific time, both parties told the mediator that their respective attorneys-at-law were authorized to sign the agreement when it was prepared.

Evidence

(20) The appellant and her husband both gave witness statements. The respondent testified on his behalf. He had no supporting witnesses.

The appellant's evidence

(21) The appellant in her witness statement deposed that she was represented by Dr. Kenneth O'Brien throughout the possession action. Her evidence was supported by her husband's. The contention of the appellant is that there was no agreement when the mediation was completed. When she left the meeting, she had a nine hundred thousand dollars (\$900,000.00) settlement proposal for consideration. She said that *"The matter came on for hearing before Kokaram J who recommended that the defendant and I attend mediation."* She agreed to attend the mediation because she hoped that the matter would be resolved amicably. Prior to the mediation, the respondent had indicated that he was prepared to accept the sum of three hundred and thirteen thousand dollars (\$313,000.00). She considered this sum excessive. She hoped that could convince the respondent to accept a lesser sum.

(22) She attended the mediation session at the Chamber of Commerce, Westmoorings. Her sister, Sharmaine King, (now deceased) and her husband, Keith Moraldo accompanied her. Mr. Anthony Vieira, attorney-at-law was the mediator appointed to facilitate the sessions.

(23) Dr. O'Brien indicated that it was his first experience doing a mediation. He said that she was not obligated to sign any documents on that day and that he would speak on her behalf. The respondent eventually proposed that a

sum of nine hundred thousand dollars (\$900,000.00) be paid to him in order to settle the matter. This was a significant increase from the sum originally proposed. She said *“when we left the mediation session I was required to given consideration to the terms of settlement proposed by [the respondent].”* She said -

“I did not agree to [the respondent] proposal for settlement nor did I authorise Dr. O’Brien to agree to the proposal.

As we left the room I expressly instructed Dr. O’Brien that I could not agree to the terms proposed by [the respondent] given my advanced age. I was already sixty (60) years old at the time. I told him that I would not qualify for financing for that large sum of money. My husband and my sister were also present. Dr. O’Brien assured me that the matter would be listed for hearing ...

Ms. Moraldo said that after the conclusion of the mediation she kept in contact with Dr. O’Brien. Whenever I enquired about the status of the matter Dr. O’Brien told her that steps would be taken to have the matter relisted for hearing but when I asked “when” she got no response. Dr. O’Brien would always say he was on top of it.”

(24) She added that:

“[I]n or around November 2014 my husband visited Dr. O’Brien’s office to enquire of the progress of the matter. He met with Ms. Thandiwe Hove-Masaisai. After meeting with her, he telephoned me and told me that a consent order was entered in the matter.

Thereafter, my husband and I enquired at the Hall of Justice, Civil Registry and received confirmation of the entry of the purported consent order."

She then discovered that the 2013 consent order had been entered "purportedly" by consent. She said that -

"The consent order set out above was entered without my knowledge and consent. At no time did I authorise Dr. O'Brien to enter this order.

After I received information that an order was made I went to Dr. O'Brien's office some time in or around November/December 2014 and had a conversation with him. Dr. O'Brien neither admitted nor denied that a consent order was entered. He stated that the matter would be re-listed and undertook to have the order dated 13th March 2013 set aside...

I did not receive any further word from Dr. O'Brien after August 2015 and no step was taken by him to set aside the consent order. As a consequence I sought new representative and I gave instructions for these proceedings to be commenced."

The appellant's evidence was supported by her husband in every material particular. He deposed that the appellant was asked to consider "*the nine hundred thousand dollars (\$900,000.00) settlement offer and the session ended*". He also supported the appellant's contention that she was too old to obtain a loan for that amount and that Dr. O'Brien assured her that the

matter would be relisted before Kokaram J.

Evidence of the respondent

(25) The respondent deposed that the 2013 consent order was entered after an agreement between the appellant and him. The agreement was concluded after they have both attended “mediation proceedings”. Relevant parts of his witness statement are at paragraphs 9 to 14. He said -

At the beginning of the mediation proceedings the mediator spoke to both parties and their representatives together and explained the mediation process. Then each party was placed in a separate room and I was asked by the mediator to say what I hoped to achieve at the end of the mediation. I told him that I wanted to recover the amount of money which I injected into the property which was about US\$200,000.00 and that I was prepared to accept the equivalent of TT1,200,000.00. I also informed him that prior to the mediation my attorney-at law had disclosed my receipts to the claimant’s attorney-at-law and that the receipts were available for inspection on that day.

The mediator left to speak to Ms. Moraldo. He returned and told me that the claimant was not prepared to pay that amount. After further discussions with the mediator going back and forth it was agreed that a valuator would be contacted and both parties would speak to the valuator and obtain an opinion of the market value of the property. I spoke to the valuator and he suggested that the market

value of the property would be higher than the figure I was proposing of TT\$1,200,000.00. I do not now remember the name of the valuator or the exact value which the valuator quoted.

After further discussions and the mediator going back and forth I proposed that I was prepared to accept the value of \$900,000.00. After further discussions I proposed that I would waive interest until 31st December, 2013 after which the claimant would have to pay the additional sum of 12% interest per annum. We continued negotiating from there and we eventually came to an agreement that Ms. Moraldo would pay to me the sum of \$900,000.00 and I agreed to give her until the end of the year being 31st December, 2013 to pay and if she needed more time that she would pay to me interest at the rate of 12% per annum. We also agreed that all existing court matters between us would come to an end.

Both parties then returned to the same room with the mediator and the agreement arrived at was then repeated for the benefit of both parties and both Jennifer Moraldo and I orally confirmed that we were in agreement with the details of the agreement repeated by the mediator. The mediator complimented both parties on being able to reach an agreement and he reminded us that we were still cousins at the end of the day and that he was happy that we could have found common ground. I felt relieved that the matter was now at an end except that the official court

order was to be made by the judge which my attorney at law informed me that she would take care of.

Because of the late hour at which the mediation was coming to an end Ms. Sharmaine King indicated that she could not stay any longer and that she had to leave. In those circumstances both parties told the mediator that their respective attorneys-at-law were authorised to sign the agreement which he would subsequently prepare for submission to the judge.

The mediation thereafter came to an end and both parties and their representatives and attorneys-at-law shook hands and remained to partake of the refreshments which had been provided. I chatted one on one with Jennifer Moraldo at that time as she was now approachable in contrast to the tension and hostile atmosphere which existed at the beginning of the mediation session. I remembered even asking Jennifer about my uncle's funeral and she informed me as to the details..."

- (26) At the trial, Kokaram J invited Mr. Vieira to give evidence to assist the court. During his evidence in chief (there was no witness statement) Mr. Vieira said that the 2013 consent order represented his understanding of what was agreed. He added that the mediation ended late in the day and the agreement was written out in manuscript. It was initialled by the parties and passed to one of the attorneys-at-law who had undertaken to have it typed. He was unable to produce the manuscript or any contemporaneous document because, as a rule, he does not keep any records of mediations

he conducts.

- (27) Mr. Vieira also indicated that he had read the respondent's witness statement and it represented exactly his recollection of what transpired. He volunteered that his distinct recall was that the parties were joking at the end of the mediation session that 'peace had broken out.'
- (28) At paragraph 14 the judge also found that it was undisputed that Mrs. Moraldo's attorney at law had the implied and ostensible authority to settle and compromise the proceedings on her behalf. It would be a rare event for a court to set aside a consent order made after such representations were made by parties at the mediation session and their attorneys to the Court.

The appeal

- (29) The appellant now appeals against the entirety of the trial judge's decision. It is trite that to succeed on appeal the appellant must demonstrate that the trial judge was wrong in point of law or was plainly wrong on the facts. See **Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21.**

The appellant's case

- (30) Ms. Bullen submitted that while an attorney at law who acts on behalf of his client is taken to have ostensible authority to so act, the court can set aside a consent order where the attorney-at-law for a party enters into an agreement contrary to the express instructions of that party. This discretion exists even after the order is perfected. The judge erred in failing to accept that there were special circumstances which justified the setting aside the

consent order.

(31) She added that the judge went wrong when he found that the appellant did not give instructions to reject the proposal coming out of the mediation. He erred because he did not properly treat with the evidence and the pleadings. She submitted that the judge made the following errors:

- i. He did not properly consider the appellant's evidence that the respondent was willing to accept the sum of three hundred and thirteen thousand dollars (\$313,000.00) for the property prior to the mediation but that the settlement was entered for nine hundred thousand dollars (\$900,000.00).
- ii. He placed too much emphasis on the lack of mention of a private conversation between the appellant and Dr. O'Brien in her pleadings. The pleadings ought to be read in the context of the appellant's case which was that a proposal was made at the end of the mediation conference and she did not authorize her attorney to accept the proposal. In fact her case is that she told the attorney she could not accept the proposal because it would be impossible to raise those funds at her age.
- iii. There was no assertion by the respondent that the appellant agreed to the terms of the mediation agreement inside or outside the mediation room. Therefore, the judge should have accepted the appellant's version.
- iv. He misunderstood her pleadings insofar as he stated that the appellant averred that there was agreement made by the parties and the consent order was entered as a material mistake of Dr.

O'Brien. The appellant never affirmed that an agreement was reached in either her pleadings or evidence.

- v. He placed too much weight on the fact that only the appellant and her husband gave evidence in support of the appellant's case
- vi. The evidence of the respondent and the mediator contradicted the respondent's pleaded case with regard to how the mediation session ended.
- vii. He gave sufficient weight to the fact that Dr. O'Brien requested a forensic examination of the 1977 deed months after the consent order was ended in circumstances where he ought to have known the matter was at an end
- viii. His criticism of the appellant's cross examination of the respondent on his pleaded case as unfair and irrelevant.
- ix. His admission of evidence from the appellant which amounted to hearsay, were scandalous and oppressive and had no basis in his Defence.
- x. He erred in finding that errors in Mr. Vieira's evidence were immaterial when they pointed to his recall being flawed and put into question the process adopted in conducting the mediation.

Respondent's case

(32) Mr. Dowlath supported the judge's decision as being plainly correct having regard to the evidence. He contended that the appellant's alleged withdrawal of authority from Dr. O'Brien in respect of entering the consent order was done in secret and not made known to opposing attorneys-at-law. In those circumstances, the respondent's attorneys were entitled to rely on Dr. O'Brien's ostensible authority to agree to the terms of the consent order.

The judge's findings

(33) Kokaram J in his analysis set out the issues, as he saw them, at paragraph 10 of his judgment. The first, an issue of fact, was whether the parties had arrived at an agreement at the mediation session. The second, an issue of law, was whether Dr. O'Brien as the appellant's attorney had the implied and ostensible authority to bind her to the terms of the agreement; and the third issue, a mixed question of fact and law whether the order should be set aside in circumstances where the appellant had instructed her attorney-at-law not to agree to the proposal put forward or, whether the appellants remedy lay in an action for damages.

(34) In regard to those issues the judge found as follows -

- (i) The parties did arrive at the agreement at the mediation session.
- (ii) The proceedings should not be set aside as the attorney had the implied and ostensible authority to compromise the proceedings based upon the agreement arrived at the mediation.
- (iii) Mrs. Moraldo's remedy for any alleged failure to comply with her instructions lies against her attorney-at-law and not Mr. Sandiford.

(35) Earlier at paragraph 13 of his judgment the judge summarized his findings which I have further condensed as follows -

- (i) There are no exceptional reasons to set aside the consent order. The mediation was conducted by a certified mediator under the **Mediation Act 2004**. On a balance of probabilities the parties themselves agreed to the terms of settlement at that mediation which were read out by the mediator. The parties gave their attorneys-at-law the authority to execute the agreement on those terms. Those terms were subsequently drawn up by the mediator and sent to the attorneys-at-law on both sides for their execution.
- (ii) The attorneys-at-law executed the settlement agreement and issued it to the court. The pending litigation was fully compromised in terms of that agreement for which full consent was obtained at the mediation session.
- (iii) In so far as Mrs. Moraldo complains that she never gave her attorney-at-law any authority to enter into an agreement or consent order after she left the mediation room, quite apart from such an allegation being a departure from her pleaded case, this was never communicated to the mediator nor to Mr. Sandiford nor his attorney at the mediation session nor was it brought to the attention of the court in a timely manner.
- (iv) If indeed it is being asserted that after the mediation she changed her mind or that she made a mistake, this is simply not enough to set aside the consent order when both parties had communicated their acceptance of terms without demur in the mediation room.
- (v) It is undisputed that Mrs. Moraldo's attorney-at-law had the implied and ostensible authority to settle and compromise the proceedings on her behalf. It would be a rare even for a court to set aside a consent order made after such representations were made by parties at the mediation session, and their counsel, to the court.
- (vi) The authorities demonstrate there is a discretion to set aside such an

order where there is no authority given by the client or, the attorney has acted in excess of his authority but it is a discretion that is to be exercised with caution. There is no evidence from Mrs. Moraldo's attorney-at-law in this case as to whether or not Mrs. Moraldo communicated with him about signing the agreement or not after the mediation session was over. It would be unfair, unjust and prejudicial to Mr. Sandiford to be set aside the agreement in the circumstances as was known and made known to him before the consent order was entered.

- (36) The judge then went on to examine and analyze the evidence in full detail so as to explain the basis of his findings. In doing so the judge preferred the evidence of the respondent and the mediator Anthony Vieira. At paragraphs 86 to 88 the judge said this –

86. It can reasonably be inferred from this evidence that an agreement was arrived at by all parties and in particular by Mrs. Moraldo together with her attorney at law, with Mrs. Moraldo being fully informed of the nature of the agreement. Importantly, the agreement that was read to the parties was the same agreement typed by the mediator subsequently which was signed by the attorneys and presented to the Court.

87. It is inherently implausible that Mr. Vieira as the impartial mediator with no interest to serve will draft up an agreement in his own terms as it were "out of thin air" and send it to the parties. It clearly represented what he understood and what was recorded by him to be the agreement by the parties. The attorney for Mr. Sandiford executed it without demur and so did Dr. O'Brien as was directed and agreed to by both parties at the mediation. Importantly,

one of the terms of the agreement which was read to the parties was that "this agreement would be made an order of the Court."

88. It is this agreement which was sent to the Court and which was reflected in the consent order. There was no indication to Mr. Sandiford or his attorney at law that Mrs. Moraldo or her attorney, Dr. O'Brien, did not agree to those terms or changed her mind or relented. The first that Mr. Sandiford would have learnt of Mrs. Moraldo's disagreement would have been when the action was filed in March 2016 some three (3) years after the fact and after he tried to enforce the order.

(37) Later at paragraph 97 of his judgment in considering whether there was an agreement at the mediation, he said this –

"I have considered the criticisms made by Counsel for Mrs. Moraldo of the Defendant and Mr. Vieira's evidence, however, they are simply not sustainable. I am convinced that it is more probable that the parties had agreed at the mediation room to the terms as set out in the mediation agreement drafted by Mr. Vieira. Mr. Vieira was unshaken in his evidence. He had no interest to serve. His testimony was consistent with the documentary evidence and the evidence of Mr. Sandiford. I took careful note of the fact that the Moraldos' themselves were not harshly critical of Mr. Vieira and paused when they were asked to say in cross examination whether Mr. Vieira was lying. It is certainly more probable based on their responses that they did agree to the terms at the mediation room and simply changed their mind at a later stage unknown to Mr.

Sandiford. It is implausible for Mr. Vieira to have manufactured such a detailed agreement without reference to the parties themselves. It was the Moraldos who had the greater motive to fabricate a story that there was no agreement arrived at in the mediation room rather than Mr Vieira.”

- (38) The consequence then is that the judge after a thorough analysis accepted the evidence of the respondent and of Mr. Vieira over the appellant's evidence and found there was agreement at the mediation and this was embodied in the consent order.
- (39) The trial judge was entitled to conclude in the way he did on the evidence before him. Both sides gave diverging evidence of what occurred at the mediation. Having heard and seen the witnesses, he accepted the respondent's evidence over the appellant's. There is a proper basis for him doing so on the evidence. There is no basis on which this court can interfere with that decision.
- (40) However, I must add that I do not agree with the judge that appellant deviated from her pleaded case. I can find no basis for such a statement. The appellant was consistent throughout that there was no agreement signed. Any difference between her pleadings and her witness statement was simply because she provided more detail (as expected) in her witness statement.
- (41) I also do not agree with the judge that the inconsistencies between Mr. Vieira's evidence and that of Mr. Sandiford were "*minor*". Mr. Vieira's cross-examination showed him to be unsure and tentative about whether the parties had initialled the agreement and whether a manuscript was in fact

produced and initialled by the parties. His evidence in cross-examination in that regard conflicted with his evidence in chief. The judge appeared to pay no regard to those inconsistencies. I do not consider, however, that his failure to do so was fatal to the conclusions he arrived at. Mr. Vieira was testifying to details of an agreement that occurred more than five years before and in regard to a mediation which was one of many that he would have conducted. As the judge found the substance of his evidence remained that the parties did arrive at an agreement at the mediation. That said, I consider that the terms of this agreement appear to be financially out of the reach for Mrs. Moraldo. It is, therefore, quite surprising that she would have agreed to a nine hundred thousand dollars (\$900,000.00) payment with a default clause which sets interest at 12%. For my part, there was much force in the appellant's contention that she would be unable, at her age, to obtain a nine hundred thousand dollars (\$900,000.00) loan to finance the agreed sum. That, coupled with the apparent uncertainty of the mediator as to the circumstances of the initialling of the agreement left me in some doubt about whether there was any agreement at all. But the trial judge is the master of fact here and he, having heard and seen the witnesses, concluded that the respondent's evidence and that of the mediator was to be preferred.

- (42) The judge was entitled to accept the respondent's evidence which was consistent and resolute and by itself, would have constituted a proper basis for upholding the consent order. On this basis alone the appeal must be dismissed.
- (43) The judge went on to address the issue of the ostensible authority of Dr. O'Brien to sign the agreement. In my judgment that was unnecessary, because the respondent's evidence (which the judge accepted) was that the

parties expressly authorised their attorneys-at-law to sign the agreement. The evidence, therefore, is that the attorneys-at-law had express authority to sign the agreement on behalf of their clients. That was sufficient to dispose of the claim before the judge and is sufficient to dismiss the appeal before us.

(44) We will hear the parties on costs.

Nolan Breaux
Justice of Appeal

Delivered by Rajkumar JA

(45) I have read the judgment of the Honourable Breaux JA and I agree that the findings of fact by the trial judge arrived at after trial where he had the opportunity to see the witnesses and assess and evaluate the entirety of the evidence, provide no basis upon which an appellate court can intervene in this case. However it important to express some concerns arising from the matters on the record.

(46) Mediation, properly conducted, is an extremely important addition to the arsenal of dispute resolution mechanisms available to parties. It can achieve considerable savings in time and costs. It can be a superior process to litigation as far as preservation of parties' relationships is concerned, as well as the flexibility of orders, resolutions and outcomes that can be enabled. Many judges of the Supreme Court in this jurisdiction as well as attorneys at law have received training as mediators and in many cases have been certified as mediators. This appeal is not about the efficacy of mediation. It concerns findings of fact made by a trial judge as to whether an agreement had been arrived at in the course of the mediation, which then formed a basis for a

consent order entered before the court. I agree that it cannot be demonstrated that the trial judge was plainly wrong - the threshold bar set for appellate review of findings of fact. Nevertheless, there remains a lurking sense of disquiet surrounding the agreement arrived at in the course of mediation.

(47) This relates to:

- i] the existence or non-existence of any terms of agreement initialled or signed by the parties themselves at the mediation before it ended, in a departure from standard mediation practice,
- ii] the unexplained delay between December 31, 2013 and July 19, 2016 before any attempt was made to enforce that portion of the alleged agreement which required conveyance of the property and payment of interest,
- iii] the rate of interest allegedly agreed and the circumstances under which it became payable.
- iv] the effect of the evidence concerning the existence of an executed deed held in escrow as of December 31, 2013.

(48) Under that agreement a deed was to be prepared forthwith and in any event by December 31, 2013 and the appellant committed to paying \$900,000 by 31 December 2013. The respondent agreed to await payment until that date without interest after which interest would accrue at the statutory rate of 12% per annum until payment was made. The trial judge set out the full terms of the mediation agreement and the consent order at paragraph 30 as follows (all emphasis added):

30. After such a long and bruising battle over the Cleaver Road property, it was fortuitous that the parties agreed to mediate their dispute. The consent order in fact reflected a final resolution of three High Court actions and where Mrs. Moraldo would obtain possession of the home and Mr. Sandiford paid a sum of money.

The mediation agreement

"This Agreement dated and effective this day of February 2013 is made between (1)

Jennifer Moraldo; and (2) Anthony Sandiford.

It is Agreed:

- 1. Matter settled for Nine Hundred Thousand Dollars (TT\$900,000.00) and a congruent transfer of property, specifically:
a) Jennifer Moraldo will pay Anthony Sandiford the agreed sum of TT\$900,000.00 on or before 31 December 2013; and
b) Anthony Sandiford will convey the property in Arima known as 104 Capildeo Land, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that's not feasible then otherwise by Deed of Conveyance; the costs and charges associated with the transfer to be borne by Jennifer Moraldo). **The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31 December 2013, but will be held in escrow until the agreed sum has been paid.** If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest (12%) from 31 December 2013 to the date of final payment inclusive.*
- 2. All further proceedings (including HCA CV2008-01690 and HCA CV2010-5045) **stayed upon the terms set out above.***
- 3. The parties acknowledge that the above terms represent their complete agreement relating in property and finance and it constitutes full and final satisfaction of all and any claims either may have against the other.*
- 4. Each party acknowledges and agrees that **upon complete compliance by each other with the terms of this Agreement** and with **any Order made embodying** or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01890 and HCA CV2010-5045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her or his respective estates.*
- 5. Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings.*
- 6. This Agreement shall be filed and made an Order of the Court.*
- 7. There shall be liberty to both parties to apply as to carrying the **agreed terms** into effect.*

Concurrence of the Mediator

The general provisions contained in the foregoing Agreement were reached by the parties in mediation conducted by the undersigned mediator. Legal advice and services required for vetting and approving this agreement were provided by the independent advisory attorneys whose signature appear above."

- (49) The consent order prepared and filed pursuant to clause 6 of the Mediation Agreement is set out hereunder:-

The Consent order

- a) That the matter is settled for Nine Hundred Thousand Dollars (TT\$900,000.00) and a congruent transfer of property specifically: Jennifer Moraldo will pay Anthony Sandiford the agreed sum of Nine Hundred Thousand Dollars (TT\$900,000.00) on or before 31st day of December 2013 and; Anthony Sandiford will convey the property in Arima at 104 Capildeo Lane, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that is not feasible then otherwise by deed of conveyance; the cost and charges associated with the transfer to be borne by Jennifer Moraldo. The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31st December 2013, but will be held in escrow until the agreed sum had been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest of twelve percent (12%) from 31st day of December, 2013 to the date of final payment inclusive;
- b) All further proceedings (including HCA CV2008-01690 and HCA CV2010-05045) are stayed upon the terms set out above;
- c) The parties acknowledging that the above terms represent their complete agreement relating to property and finance and it constitutes full and final satisfaction of all and any claims that either may have against the other;
- d) Each party acknowledges and agrees that upon compliance by each other with the terms of this agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01690 and HCA CV2010-05045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her and his respective estates;
- e) Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings;
- f) Liberty to apply; and
- g) The parties shall bear their own costs.

Concerns about whether the parties initialled any document

- (50) The mediator's evidence was recorded at paragraph 85 (g) and (h) of the judgment as set out hereunder. The trial judge referred in particular to the evidence that the Mediator recorded the terms of settlement. This was read over to the parties at the end of the session and all agreed to the terms. The mediator was unsure as to whether the parties had themselves initialled his draft of the agreement.

The mediator

85.(g) The mediator recorded the terms of settlement. This was read over to the parties at the end of the session and all agreed to the terms. (h) The mediator was unsure as to whether the parties had themselves initialled his draft of the agreement however he took his notes back to his office and as agreed by them he later typed up the agreement, signed it and sent it to the respective attorneys. (i) Both attorneys eventually executed the agreement.

- (51) The trial judge also referred to the evidence of the **respondent** that there was a handwritten agreement, which at the end of the session was **initialled by the parties**.

Paragraph 82..... He stated that there was a handwritten agreement at the end of mediation session which was initialled by the parties. He stated that the agreement was read out to both parties and Mrs. Moraldo agreed to it.

- (52) The Mediator could not recall whether the parties themselves initialled a draft agreement or terms of agreement. Mr. Sandiford apparently gave evidence that they had. This litigation could have been avoided if the usual mediation practice had been followed where parties sign any terms of agreement arrived at in mediation **even** if, as here, a more detailed type written version of the

agreement was left to be produced later by either the Mediator or the Attorneys for the parties. If that standard practice had been observed¹ there would be no lingering doubt now about what the appellant agreed to that needed to be resolved by a Court after time consuming litigation, cross examination and appeal.

Concerns about the uncertainties under the agreement to transfer and liability thereunder to make payments including interest

(53) The appellant claims that the first time that the respondent made contact concerning the execution of any deed was July 2016, more than 3 years after the alleged agreement which provided that the deed of gift/transfer was to be prepared and signed **forthwith**.

(54) At paragraph 68 of the trial judge's judgment he noted as follows:

By letter dated 19th July, 2016, Mr. Sandiford's attorney wrote to her attorney advising that Mr. Sandiford was ready to execute the Deed of Conveyance of the land in dispute in the sum of \$900,000.00 and interest of \$279,000.00. She contends that prior to that, she did not receive any request for payment from Mr. Sandiford.

(55) In fact by letter dated July 19 2016² the respondent's attorney at law wrote:

"Please be advised that my client (Mr. Sandiford) stands ready to execute the deed of conveyance of his interest in the property known as....and calls upon you to forward the engrossed deed of conveyance. The said executed deed of conveyance will be exchanged for a certified cheque in the sum of \$900,000 together with interest...."

(56) The judge records that an application was filed on 6 April 2016 attempting to enforce the judgment entered before the court which was subsequently withdrawn based upon the indication that an application would be made to set

¹ See appellant's submission at paragraph 6, page 16, pages 61 to 62 supplemental record of appeal.

² Page 141 of the core bundle

it aside. The trial judge did not have to consider therefore whether any deed of gift /transfer had been prepared **before** December 31st 2013 as required by the Order and whether the respondent had been ready willing and able to comply with that provision of the Order, (see paragraph 83 set out hereunder).

83. The proceedings in the compromised action also reveal that after the consent order was entered, Mr. Sandiford attempted to enforce his judgment by filing an application on 6th April, 2016. That application was withdrawn when it was indicated that Mrs. Moraldo intended to set aside the judgment. It was the first time that this was being communicated to Mr. Sandiford.

- (57) The letter itself suggests that the respondent was awaiting the forwarding to him of the deed of conveyance from the appellant's attorney at law which he would execute and exchange for payment by a certified cheque. There is no suggestion on the record of any demand to comply with the Court's order at any time after December 31 2013 that pre dated the 2016 demand.
- (58) This supports the inference that no deed of conveyance had been prepared **"forthwith"** by anyone **and in any event before December 31, 2013** as required by the agreement. The agreement does not specify who was to prepare it, (although Mrs. Moraldo was responsible for the costs of doing so), and it is now futile to debate where that responsibility lay given that no one did. If that were the case then **the basis for the claim for interest**, either accrued or continuing to accrue, based upon non-payment of \$900,000, itself apparently based upon the coming into existence of a **deed executed in escrow**, would be a matter that remains to be determined. That is so even if the consent order is, as it must be, upheld.
- (59) While the trial judge found that the agreement had been entered into at the mediation, there are significant uncertainties about what that agreement actually involved. While the appellant has been found to have agreed to the substance of the order that was subsequently entered before the Court, **its actual meaning** and circumstances concerning its enforcement remain

uncertain several years later, despite the consent order provided for liberty to apply.

Concerns about the agreement to pay interest at the statutory rate

- (60) It was part of the appellant's chronology that in the respondent's demand of 19 July 2016 a claim was made for interest of \$279,000 and thereafter at a daily rate of \$295.89.
- (61) Normally in this jurisdiction a party who is in breach of an agreement for sale will be liable at most to forfeiture of his deposit, usually 10% of the purchase price. In this case that would normally have been \$90,000.00. Exceptions may occur for example if special circumstances are proved which are known to both parties. No one has asserted any in this case.
- (62) The statutory rate of interest, which was then 12% per annum, is the amount payable on judgment debts. Even if the appellant did not purchase the respondent's interest in the property, it is arguable that in the absence of a deed executed in escrow a debt would not have been created. Without such a deed there would be nothing to pay for.
- (63) Parties could have agreed to any consequence for breach of any agreement they entered into. The concern in this case is why would Mrs. Moraldo have agreed to that interest provision, with interest accruing at such a rate instead of the usual consequence for breach of agreement for sale namely forfeiture of any deposit paid, usually 10%.
- (64) The alleged voluntary agreement was to pay a rate of interest as high as the then statutory rate. In fact this was apparently for an undefined period, as reflected by the respondent's claim in 2016, more than three years later, for \$279,000.00 and continuing. This reflects that the appellant was significantly disadvantaged by that commitment to pay interest a] on an uncertain legal

basis, and b] to an extent far greater than if she had simply entered into a normal standard agreement for sale with extended time for completion to 31 December 2013.

- (65) Further, the respondent's claim by the 2016 letter was based upon an assumption that a debt in the amount of the full purchase price, (rather than a claim for damages), was automatically created after December 31, 2013, **whether or not** an executed **deed** of conveyance was being **held in escrow** as required by the agreement, when **the agreement made no such provision**.
- (66) Whether the agreement is now enforceable given its terms would need to be explored in any enforcement proceedings and the significance or otherwise of the clause in the agreement "*Deed of Gift /Transfer shall be prepared and signed **forthwith and in any event before 31 December 2013***" would need to be determined.
- (67) What is clear however on this appeal is that paragraph d) of the consent order, which required compliance by each other with the terms of this agreement as a precondition to the dismissal of the three high court actions, could not apply where no one has complied with the terms of the agreement.
- (68) If no one prepared and forwarded a deed, and if no one therefore executed such a deed before December 31, 2013, then debating in 2025 whether an agreement had been entered into in 2013 would be less important than considering whether that agreement, even if entered into by Ms. Moraldo is enforceable, or can have any effect, December 31, 2013 having come and gone with no one apparently taking any step thereunder.

Peter Rajkumar
Justice of Appeal

I agree with the judgment of Bereaux JA.

Ronnie Boodoosingh
Justice of Appeal