

IN THE COURT OF APPEAL OF BELIZE AD 2016
CIVIL APPEAL NO 10 OF 2012

PROGRESSO HEIGHTS LIMITED

Appellant

v

(1)**WILFRED ELRINGTON**
(2)**PITTS AND ELRINGTON**

Respondents

BEFORE

The Hon Mr Justice (now Sir) Manuel Sosa
The Hon Mr Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz Bertram

President
Justice of Appeal
Justice of Appeal

E H Courtenay SC and P Banner for the appellant.
A Elrington Hyde for the respondents.

28 February and 3 and 12 March 2014 and 28 October 2016

SIR MANUEL SOSA P

Introduction

[1] The present appeal is from a judgment of Legall J ('the judge') delivered on 28 February 2012 in Claim No 712 of 2010 in the court below ('the Claim'). By an order signed on behalf of the Registrar on 28 March 2012, all claims contained in the relevant claim form ('the claim form') were dismissed and it was stated that there was no order as to costs.

The parties

[2] The appellant before this Court, and claimant in the court below, is Progresso Heights Limited, a private company with limited liability which was registered and incorporated in Belize under the Companies Act on 21 July 2003 with a share capital of \$10,000.00 made up of 10,000 shares of \$1.00 each ('PHL'). The first-named respondent here, and first-named defendant below, is Wilfred Elrington, an attorney-at-law and Senior Counsel as well as a politician who has been a member of the House of Representatives since 2008 and who, apart from having held the office of Attorney General in the past, is currently Belize's Minister of Foreign Affairs ('Mr Elrington'). He was also, at all material times, a senior partner in Pitts and Elrington, the second-named respondent here, and second-named defendant below, which was, at all material times also, a law firm having its office located at No 50 North Front Street in Belize City ('P&E').

The reliefs claimed and the pleadings in the court below

[3] The claim form, filed on 12 October 2010 to commence the Claim, sought the following reliefs:

- '1. The delivery up of all closing documents including transfer of title documents, certificates of title, and receipts in the defendants' possession or control for properties sold by the said claimant to various purchasers over the period September, 2009 to June, 2010.
2. Payment of the sum of \$26,120.22 had and received by the defendants.
3. Damages, including special damages.
4. Interest.
5. Costs.
6. Any further or other relief which this Honourable Court deems just.'

[4] Filed and delivered with the claim form was the statement of claim, whose chief averments, as it turned out, were those relating to the three key topics of (a) attorney/client retainers ('retainers'), (b) remittal and provision of documents and (c)

remitting of funds. The alleged retainers were the subject of paragraph 4 of the statement of claim. It was there averred that, on various dates during a period commencing in September 2009, PHL had retained both Mr Elrington and P&E 'to process transfer of title documents for the transfer of sixteen ... properties located in the Progresso Heights Registration Section'. The alleged remittal and provision of documents was dealt with in paragraphs 5 and 7, taken together. In the former paragraph, it was pleaded that PHL had 'remitted' to both Mr Elrington and P&E 'all the transfer documents'. Then, in the latter, PHL, going one step farther, averred that the 'closing documents' for all the properties had actually been 'provided' to Mr Elrington and P&E. (I unequivocally state, in passing, my view that, unlike this allegation, the other main one made in paragraph 7, viz that concerning the issue of land certificates to Mr Elrington and P&E, is not to be regarded as relating, like the two allegations of paragraphs 4 and 5 just identified, and that of paragraphs 5 and 6, immediately hereafter to be identified, to a key topic, given that such other main allegation is secondary in nature in the sense that its potential importance depends on prior proof of the alleged retainers, remittal and provision of documents and remittal – and, indeed, provision – of funds.) Finally, in paragraphs 5 and 6, read together, PHL further alleged that it also remitted to Mr Elrington and P&E 'all the closing costs and fees required by the Government of Belize ("GOB"), inclusive of GOB Stamp Duty, GOB Registration fee, and GOB certificate fee' as well as 'the processing fee charged by [Mr Elrington and P&E] of 2% of the purchase price' of each of the 16 'properties'. In regard to this last allegation, PHL further averred in paragraph 6 that 13 cheques annexed to the statement of claim, each accompanied by a slip headed 'Bank of America' and 'Customer Receipt', were 'the cheques and corresponding receipts evidencing the payment and receipt of the funds by [Mr Elrington and P&E]'. (These receipts did not in fact purport to be issued by the payee of the cheques: see further paragraph [36], below.) And at paragraph 8, PHL pleaded, with respect to transfers of seven of the 16 'parcels' (a term used interchangeably – somewhat carelessly – with 'properties' in the statement of claim), that Mr Elrington and P&E had been duly paid the 'legal/processing fee'.

[5] Regrettably and unhelpfully, the 'copy' of the defence of Mr Elrington and P&E contained in the record of appeal ('the record') bears neither its own date nor the date of its filing. (One must express the strong hope that greater vigilance will be exercised by all persons, including the registry officer, concerned in the settlement of records in the future.) As regards the alleged retainers, the defence contains at paragraph 3 a denial by Mr Elrington and P&E of the allegation that 'they or any of them were retained [by PHL] at any time and in particular in September 2009 for any purpose whatsoever including for the purposes of processing of title documents'. With respect to the alleged remittal and provision of documents, Mr Elrington and P&E first deny, at paragraph 4 of the defence, that transfer documents were ever remitted to them or either of them. Next, at paragraph 6, they deny that closing documents were ever provided by PHL to them or either of them. In relation to the alleged remitting of funds, paragraph 4, already mentioned above, also contains a denial by Mr Elrington and P&E that closing costs and fees required by the Government of Belize were ever remitted to them or either of them. At paragraph 5, they deny ever having charged PHL any processing fees and, further, that PHL ever remitted processing fees to them or either of them. Paragraph 8 of the statement of claim, which, as already mentioned above, separately alleges payment of 'legal/processing' fees in respect of transfers of seven parcels, is denied at paragraph 8 of the defence.

[6] I will note, for the sake of completeness, that the respondents, stuffed into their defence, without apparent rhyme or reason, as it were, a litany of accusations against PHL for having allegedly failed to comply with a host of provisions of the Companies Act. Those complaints were the subject of Claim No 566 of 2010 ('Claim 566'), still to be heard at the time the defence was settled, in which Mr Elrington, claiming as Wilfred P Elrington, was the sole claimant and PHL sole defendant. It is stated by the judge in his judgment that these claims were at one stage to be heard together; and one cannot understand why, if proper thought was given to a consolidated hearing in good time, as it should have been, the court below and the interested parties were subjected to this artlessly introduced barrage smack in the middle, so to speak, of the Claim. (Mr Schneider saw fit, understandably, to annex his witness statement in Claim 566 to his witness statement in the Claim.) It was with a sense of relief that I noticed that no

attempt was made in connection with the present appeal to establish relevance between those accusations and the only live issues before this Court.

The evidence at trial as contained in the witness statements

[7] There were only two witnesses in the Claim, viz Mr Lawrence Schneider for PHL and Mr Elrington for himself and P&E.

i) Witness statement of Mr Schneider

[8] In his 12-page witness statement, the filing date of which is given (without contradiction) as 25 July 2011, Mr Schneider identified himself as a director of PHL.

[9] In the context of PHL's allegation that Mr Elrington and P&E were at all material times its attorneys-at law, Mr Schneider stated that Mr Elrington had subscribed PHL's memorandum of association and that P&E were PHL's attorneys-at-law until 2010, when the Claim was filed. P&E had prepared the memorandum and articles of association of PHL and 'caused' PHL to be incorporated. He said that 'the defendant', without specifying which, had, as his own and PHL's attorney-at-law, obtained certain permissions in connection with the subscription of the memorandum.

[10] Mr Schneider then purported to provide the background to the pertinent claims for relief, stating that PHL had purchased more than 2,000 acres of land in the Corozal District, which it had then proceeded to subdivide. In connection with this subdivision, it had invested money in effecting improvements, such as the development of roads and the provision of utilities, and also in advertising the sale of lots created by the subdivision. Speaking of what he described as the 'substantial developments required in [PHL's] property', he said that Mr Elrington reached an agreement with PHL 'in view of his declared inability to contribute financially' to such developments. By that agreement, Mr Elrington was to 'provide legal advice and services to the company without charge'. Mr Elrington, he said, had only invested in 'the 20% shareholding allotted to him'. It was only the directors, of whom Mr Elrington was not one, who had 'financially invested' in the substantial developments in question.

[11] Mr Schneider then spoke of a supposed variation made to the alleged agreement just described. He said that, after having himself processed or caused to be processed 'closing documents' of PHL from 2006 to 2007 pursuant to this agreement, Mr Elrington began making requests in 2008 for the payment by PHL to him and P&E of a 'legal processing fee' of 2% of the purchase price of each property bought from PHL. He said that PHL agreed to pay this fee.

[12] Responding to the denial, pleaded in the defence, of the alleged retainers, Mr Schneider characterised it as untrue. He also referred to an e-mail of 9 April 2008, a copy of which was annexed to his witness statement, as providing proof of an admission on the part of Mr Elrington to the effect that he was, at all times, the attorney-at-law for PHL.

[13] Mr Schneider chose additionally to address the denial, contained in the defence, of the alleged remittal by PHL to Mr Elrington and/or P&E of transfer or closing documents and money for the payment of fees to the Government of Belize. That denial he likewise characterised as untrue. In this respect, he said, *inter alia*, that Mr Elrington and P&E 'processed all [of PHL's] closing documents' up to the filing of Claim 566 by Mr Elrington against PHL. Nowhere in the witness statement, however, was there even the slightest suggestion (a) that either Mr Elrington or his wife had at any time orally acknowledged the receipt of such documents or (b) that P&E had ever acknowledged, by letters, the receipt of money for the payment of fees to the Government of Belize. This was to become a subject of cross-examination for Mrs Elrington Hyde as well as of animadversion by the judge: see paragraphs [31] and [72], respectively, below.

[14] With respect to the alleged remitting of funds by PHL to Mr Elrington and P&E, Mr Schneider said in his witness statement that Mr Elrington and P&E were at all times paid for legal services provided by them to PHL and he described as untrue the denial, pleaded in the defence, of the remittal of processing fees to Mr Elrington and/or P&E. He referred in this regard to a copy of a letter dated 9 July 2005 written by him, as director of PHL, to Mr Elrington, and annexed to his witness statement, 'evidencing', according to him, 'a request for [PHL's] bill'. What he did not do, however, was to even remotely suggest anywhere in his witness statement that Mr Elrington had ever

acknowledged to him, whether orally or otherwise, the receipt of such fees.(I shall revert to this, in passing, at paragraph [40], below.)

ii) Witness statement of Mr Elrington

[15] Mr Elrington's witness statement, filed on a date not provided to this Court, is said (again without contradiction) to have been delivered on 20 July 2011, an indication that, for some unknown reason, Mr Elrington and P&E, despite being defendants, freely elected to file ahead of PHL. Operating under that self-imposed disadvantage, Mr Elrington accepted, early on in his statement, that he had, right up to the time of its preparation, a 20% shareholding in PHL. He elaborated in this regard by stating that he had subscribed for that percentage of the shares because, to adopt his phraseology, 'that was the amount that I could comfortably afford to pay for'. He further pointed out that the other director of PHL, apart from Mr Schneider, was his (Mr Schneider's) son, Adam Schneider.

[16] Mr Elrington then dealt with the issues raised by what I have already identified, at paragraph [4], above, as the chief averments of the statement of claim, as well as with secondary issues raised by other allegations such as that to which I have already adverted at that same paragraph. (I see no need to clutter the present judgment with the rehearsal of evidence relating to issues falling under the latter description.)

[17] Tackling the key topic of alleged retainers first, Mr Elrington flatly denied that PHL ever retained him or P&E, whether speaking generally or with particular reference to the processing of documents in connection with the transfer of the 16 'properties' in question. With regard to the narrower question whether he himself had been so retained, he further stated, first:

'I have never entered into a professional relationship with [PHL] in my professional capacity as an attorney-at-law.'

Returning later in his statement to the allegation made against both him and P&E, he repeated his earlier denial, in general as well as in particular terms.

[18] Mr Elrington, in his statement, also directed his attention to the alleged remittal and provision of documents, stating, first, that PHL never sent, or otherwise caused to be delivered, to him any transfer of title documents at all. Next he referred to the same allegation insofar as it related not only to him but also to P&E. He said in this respect that, neither in general nor with specific reference to the period commencing sometime in September 2009, had PHL sent any documents to him or to P&E, adding that neither he nor P&E had ever had closing documents belonging either to PHL or to persons purchasing 'properties' from it .

[19] Also receiving the attention of Mr Elrington in his statement was the third key topic, viz the alleged remitting of funds. Never, according to him, had PHL paid him or P&E for any services rendered by either of them to it. Concerning closing costs or fees required by the Government of Belize specifically, he denied that such funds had ever been sent to him or to P&E. Turning then to the alleged legal/processing fee of 2% of the purchase price of each 'property', he said that no such fee had ever been paid to him or P&E in respect of the 16 'properties' in question. In relation to the specific allegation that the sum of \$42,436.74 had been paid to him and/or to P&E, he said that no such sum, or indeed any other sum, had been paid to both or either of them in 'respect of legal or processing fees for the recording and registration of transfer of land documents'.

The rest of the evidence at trial

i) Of Mr Schneider

[20] The judge permitted Mr Schneider to testify by video link at trial.

[21] Cross-examination of him was long, unnecessarily long in my view. And its length was not exactly a measure of its success.

[22] In the course of the cross-examination of Mr Schneider, the attention of Mrs Elrington Hyde, counsel for Mr Elrington and P&E, was properly directed at, but regrettably not confined to, the three key topics already identified at paragraph [4], above.

[23] She turned first to the allegation of a retainer. Under her questioning, Mr Schneider testified in that regard that the attorney/client relationship was evidenced by Mr Elrington's involvement in the following:

- i) setting up or preparing the corporate documents;
- ii) advising 'us' on all 'our' corporate dealings;
- iii) preparing contracts on behalf of PHL concerning the building of roads and a community pier and the construction of buildings; and
- iv) advising him (Mr Schneider) and his son during discussions on corporate matters.

It became clear during this part of the cross-examination that this witness was claiming that Mr Elrington and P&E, between whom he did not distinguish, had been the retained attorneys-at-law not only of PHL but also of him (Mr Schneider) and his son individually. In his own words -

'We [ie he and his son] confided with Mr Elrington, we spoke to him on a very regular basis, he prepared agreements for the companies [ie PHL and other companies in which he and Mr Elrington held shares].'

[24] The foundation of this broad claim, and hence each of its components, came under strong attack in the following exchanges between counsel and witness:

'Q. And how much money would you say that you paid personally to [Mr Elrington] for legal fees as (*sic*) him acting as your attorney?

A. I don't know. There was no arrangement.

Q. That was not your (*sic*) arrangement because there was no arrangement for him to act as your attorney.

A. My arrangement with Mr Elrington was yes in fact he was to act as our attorney and act in harmony in running the companies that we had in Belize.

Q. And you personally in your personal capacity paid no sums to [P&E] either, did you?

A. I don't recall.

Q. And neither did your son, correct?

A. I don't recall, I don't know.

Q. And you have no receipts to show any payments of that nature, do you?

A. I don't know.

Q. Mr Schneider, aren't you a careful businessman? Wouldn't you say that you are a careful businessman?

A. I would say so, yes.

Q. And as a careful businessman, if you were paying sums to anyone especially the person you are claiming to be your attorney, wouldn't you keep receipts of such sums being paid?

A. No. We trusted Mr Elrington, no, I would not have. Our relationship was trust based.

Q. Are you paying your current Counsel today who are acting on your behalf?

A. Yes.

MRS ELRINGTON HYDE: My Lord, it's relevant to show - - he just said that he is a careful businessman.'

(Mrs Elrington Hyde's protestation at the end of the above excerpt from the transcript indicates that there was some prior judicial intervention at this critical point of the cross-examination. For my part, having read what next follows in the transcript and with the greatest respect to the judge, he was being hyper-sensitive towards counsel for PHL and Mr Schneider and it was wholly unfair of him to prevent Mrs Elrington Hyde from further developing a strikingly apt analogy.)

[25] It bears noting that, when the subject of receipts was eventually returned to, Mr Schneider, comparing (sincerely or otherwise) Mr Elrington to his own son, said:

'Asking Mr Elrington for a receipt was like asking my son for a receipt.'

It is, however, to be recalled that, if only because of the abiding presence of PHL's auditors in the background, there was not much room for informality in its (PHL's) financial affairs. Thus, amongst the documents annexed to Mr Schneider's witness statement, was a letter of 9 July 2005 which ends as follows:

'Please indicate the amount owed to you for services and expenses, billed and unbilled, at December 31, 2004.'

[26] Later on in the cross-examination, the allegation that Mr Elrington had in 2008 required the payment thenceforth by purchasers of a 2% legal/processing fee was tested by Mrs Elrington Hyde. The following exchange merits reproduction:

'Q. Let's look at paragraph 11 [of Mr Schneider's witness statement]. Can you tell the court when exactly in 2008 did [Mr Elrington] begin requesting that [PHL] pay 2% legal processing fee to [P&E] on all the properties sold by [PHL]?

A. No, I can't tell you exactly.

Q. You can't tell us because it's untrue, isn't it?

A. What is your question?

Q. You cannot tell us when specifically because that is untrue.

A. No, I can't tell you why (*sic*) specifically because I don't remember the date. Mr Elrington put to us that he expected a 2% legal fee at that time.

Q. When you say that he put to us that he expected the 2 percent (*sic*) legal fee you mean he put that to you and your son?

A. To me and my son. The legal fee was to be paid by [PHL] and be charged to the purchasers of the property, the purchase (*sic*) from [PHL].

Q. So who specifically did he say that to?

A. Both me and to Adam.

Q. How was this request made, the two percent (*sic*) legal fee?

A. Verbally.

Q. And what was the decision that [PHL] made with respect to that request?

A. We paid it.'

[27] Mrs Elrington Hyde proceeded to the remaining key topics of the alleged remittal, indeed provision, of documents and the alleged remitting, and provision, of funds, though not in that order and, as already pointed out above, without confining herself to them.

[28] In regard to the first of these two topics, Mrs Elrington Hyde unsuccessfully sought some basic details (in the form of purchasers' names only) from Mr Schneider as to the 'transfer documents' allegedly remitted. The pertinent exchange was as follows:

'Q. ... Can you tell the court how (*sic*) these purchasers are that you refer to?

A. Are you asking who the purchasers are?

Q. Yes.

A. I don't have the list of the purchasers here with me, no.

Q. So you can't tell the court who they are.'

[29] At a later stage in the cross-examination, the witness was pointedly asked about his alleged remittal of the documents in question and their alleged receipt by Mr Elrington and P&E. The following exchange took place:

'Q. And the transfer documents?

A. And we sent the transfer documents, yes, for Registration (*sic*).

Q. Can you tell us who specifically received those things that you allege to have sent in the (*sic*) paragraph 19 [of Mr Schneider's witness statement]?

A. Mr Elrington's office actually received the documents when they came in via Federal Express.

Q. You said that the defendants received it (*sic*). The defendants are [Mr Elrington] and [P&E] so I am trying to figure out who would have been the one to have received it. Do you know if anyone at [P&E] received it or (*sic*) Mr Elrington's office?

A. I don't know who at Mr Elrington's office actually received the documents. They were sent registered mail in every case.

Q. Do you know if anyone received it?

A. Yes.'

[30] When Mrs Elrington Hyde went on to ask the witness to say who had received the documents, there ensued the exchange (in which Mr Schneider alleged for the first time that the receipt of documents was orally acknowledged) which follows:

"A. Mr Elrington told me that he was in receipt of the documents or that Mrs Elrington received the documents because she was the one that generally took care of the documents for [PHL].

Q. So now you are saying it is Mr Elrington or Mrs Elrington?

A. You are asking who specifically received the documents, am I correct?

Q. Yes.

A. I don't know who actually received each one. The only thing I am certain of was that they were sent out registered mail and that either Mr Elrington or Mrs Elrington acknowledged receipt of the documents. They may have also been sent out expressed (*sic*) or priority mail.

Q. So in fact they were not sent Registered (*sic*) mail. You can't tell the court that they were sent Registered (*sic*) mail. You said Federal express (*sic*), express mail, priority mail, registered mail, which one of them is it?

A. It could have been any one of them but we do have those records in our possession. In addition we had discussions with either Mr Elrington or Mrs Elrington informing us of the status of the documents so part of (*sic*) affirming or confirming the receipt of the documents they let us know whether the documents were at the Land Registry or whether they had not been filed yet.

Q. Can you tell the Court who is the Mrs Elrington you are speaking of?

A. Mrs Barbara Elrington, Mr Elrington's wife.

Q. So now you are saying that you would have had communication with either Mr Elrington or Mrs Elrington about these (*sic*) documentation, correct?

A. Yes.'

[31] This evidence, contradictory as well as lacking in specificity, was next challenged as false for not having appeared in Mr Schneider's witness statement. The relevant question and answer were as follows:

'Q. But that is not in your witness statement. You have nowhere (*sic*) in your witness statement of any Mrs Barbara Elrington who would have had knowledge of these documents, yes or no?

A. I don't believe we have any statement regarding Mrs Elrington. Mrs Elrington was the Manager of [P&E] and the handle (*sic*) of the documents that came in to [P&E]. I myself was not aware that the witness statement required us to put that much specific information in the witness statement nor do I know what happened after Mrs Elrington physically received the documents.'

[32] In rapid succession, two suggestions were thereupon both put to Mr Schneider and rejected by him. The first, supported by the evidence of Mr Elrington, was that Mrs Elrington was never employed by [P&E]. The second, unsupported by any evidence, was that, in September 2009, Mrs Elrington had nothing at all to do with [P&E].

[33] Mr Schneider went on to give evidence that, while it was a fact that Mrs Elrington sent documents to PHL from time to time, following 'processing' of transfers, he did not

at the time of giving his testimony have in his possession any of her pertinent covering letters to PHL. He said, however, that he could, if it were to be required of him, produce such letters, presumably for the court. As a matter of fact, there were three such covering letters exhibited to Annex 10 to Mr Schneider's witness statement. (This annex, to which reference has already been made at paragraph [6], above, comprised Mr Schneider's witness statement in Claim 566.) But, alas, two of those three covering letters, to be found together with other correspondence between pages 443 and 448, inclusive, of the record, bear dates in 2005 and 2006; and the third is undated. They cannot, in other words, be taken, without more, to have had anything whatever to do with the processing of transfers in 2009 and 2010. As far, then, as written acknowledgement of the receipt of documents concerning the relevant transfers is concerned, the position is as starkly revealed in the following earlier short exchange between Mrs Elrington Hyde and Mr Schneider:

'Q. But you have nothing in writing?

A. Correct. I do not have anything in writing. I trusted them at their word.'

[34] With regard to the second of the topics mentioned at paragraph [27], above, viz the remitting and provision of funds, Mrs Elrington Hyde cross-examined Mr Schneider concerning the dates in September 2009 and thereafter when PHL was claiming to have paid 'the defendant' for the transfer of the 16 'properties' in question. The following exchange is found in the record:

'Q. Can you tell the court which date in September 2009 and thereafter did [PHL] pay the defendant to process the transfer of title documents for the transfer of the 16 properties that you speak of in paragraph 18 [of Mr Schneider's witness statement].

A. Yes, I think I can. You said between what dates?

Q. September 2009 and thereafter?'

[35] Mr Schneider at this point proceeded to refer to a number of payments said by him to have been made into an account operated by Mr Elrington at a branch of Bank of

America in Miami, Florida, USA. As far as the record goes, a total of 10 such payments were referred to; but, having regard to certain amendments made to the notice of appeal at the hearing of the appeal to this Court (to be identified at paragraph [59], below), it is necessary to mention only two of them, both of which were said to have been effected by PHL cheques drawn in favour of 'Wilfred P Elrington' and on Bank of America.

[36] The first of these cheques was in the sum of \$1,362.08, numbered 1243 and dated 21 April 2010. It bore a notation reading 'For transfer fees # 1165, 1166, 1167 Progresso Heights'. The second was in the sum of \$1,110.04, numbered 1245 and dated 29 April 2010. It bore a notation reading 'For closing costs parcel # 1321 Progresso Heights'. Mr Schneider tendered with each cheque a receipt issued by the bank (rather than the payee) to the drawer, together with certain particulars including the last four digits of an account number, viz 9853 and the word 'Deposit'. There is no indication on either cheque as to whether or not the sum stated on it covers the supposed 2% fee for the services of the attorney/attorneys. (The record reflects, however, at lines 3-6, page 279, that it was the clear testimony of Mr Schneider that such fee was always remitted: see further reference to this at paragraph [63], below.)

[37] Deciding not to leave well enough alone (the rather blunt observations of the judge on this are to be found at paragraph 19 of his judgment, the first two sentences of which I would underscore), Mrs Elrington Hyde pressed Mr Schneider on the matter of a link between the account in question and Mr Elrington. The initial part of the relevant exchange follows:

'Q. So now you have all these cheques that are written to Wilfred Elrington, correct?

A. Yes.

Q. Do you have any proof that it was (*sic*) actually deposited in Wilfred Elrington's account?

A. I have the deposit slips, yes.

Q. On the deposit slips of each of those is the name Wilfred Elrington anywhere there?

A. No.'

[38] Mrs Elrington Hyde pushed Mr Schneider yet farther in the remainder of the exchange, which, as material, follows:

'Q. So therefore, you can't tell this court that those sums were deposited into the account of the (*sic*) Wilfred Elrington?

A. No that's not correct. I know for a fact that they were. I made the deposits myself. Mr Elrington gave me a blank deposit ticket with his account number and I knew the account number. I made the deposits myself.

...

Q. But you will agree with me that each of the documents that you have, each document below the cheques that state customer receipt, the document that is below each of your cheques that state (*sic*) customer receipt, there is no name anywhere on any of those documents, is that correct?

A. That's the account number and no name. There is no name.

Q. I am asking if there is a name.

A. There is no name.

Q. So you can't tell this court that that is Mr Elrington (*sic*) account?

A I can tell the court that it is Mr Elrington's account because I have a blank deposit ticket from Mr Elrington instructing me where (*sic*) to make the deposits into that specific account.

Although Mr Schneider, who generally appeared less than well-prepared to testify (see, eg, paragraphs**[24]** – especially his first, third, fourth and fifth replies in that paragraph – **[28]**, **[30]** and **[33]**, above), was not sure whether the blank deposit slip had been

exhibited to his witness statement in the Claim, the fact is that such a slip was exhibited, marked 'LS5', to his witness statement in Claim 566, which, for its part, was exhibited to the former. On such slip was printed not only the name 'Wilfred P Elrington' but also an account number ending with the digits '9853'. (There was also exhibited, numbered 'LS16', to the latter witness statement a facsimile message dated 16/12/03, purportedly addressed by Mr Elrington to Mr Schneider and containing the same account information.)

[39] Mr Elrington was to admit, in the course of his cross-examination later in the trial, having provided his Bank of America account number to Mr Schneider.

[40] When Mrs Elrington Hyde sought to suggest that, despite the payment of funds into his account, Mr Elrington may not have received such funds, a state of affairs not easy to imagine, Mr Schneider replied:

'A. ... When I spoke with Mr Elrington after these deposits were made he acknowledged receipt and thanked me for the funds.'

This reply provoked the following exchange:

'Q. But you have not said that in your witness statement at all, correct?

A. I don't know if we have made those statements.

Q. Mr Schneider, you made this [witness] statement, the 43 paragraphs in it. In any of the 43 paragraphs did you say that it was acknowledged to you by Mr Elrington that he received those sums?

A. No.'

(The pertinent omission from the witness statement has been previously noted, at paragraph **[14]**, above.)

[41] The similarity of the circumstances in which this allegation of an oral acknowledgment and that referred to at paragraph **[30]** above came to be made by Mr Schneider in the witness-box is not easily overlooked.

ii) Of Mr Elrington

[42] With respect to the subject of a retainer, it was the evidence of Mr Elrington from early on in his cross-examination that, while he was never retained by PHL, he did, other than as a partner in P&E, render legal services, such as the preparation and filing of annual returns, to them.

[43] He had also performed some legal work for Mr Schneider's son Adam, but not for Mr Schneider himself. It had, however, been performed on a voluntary basis and free-of-charge, rather than as a result of having been retained to perform it. For Mr Schneider himself, however, he had never performed any such work.

[44] While he similarly denied, in blanket fashion, that P&E had at any time performed legal work for PHL, he subsequently admitted, when told by Mr Courtenay SC of a copy of a Deed of Mortgage between PHL and Atlantic Bank Limited which was in his (Mr Courtenay's) possession, that he may have prepared such deed. He was then driven further to admit that such deed may have purported to have been prepared by P&E and may have been signed by him. (The first part of this admission flatly contradicted, of course, Mr Elrington's blanket denial to which I have just adverted.)

[45] As had become inevitable during the preceding cross-examination of Mr Schneider, the name of Mrs Barbara Elrington – not to be confused with Mrs Elrington Hyde– arose in relation to the subject of the alleged remittal and receipt of documents in the course of the cross-examination of Mr Elrington.

[46] The stage was sought to be set by Mr Courtenay in the following exchange with an uncooperative witness:

'Q. And it is ... true, Mr Elrington that Mrs Barbara Elrington **works** at [P&E]?

A. Mrs Barbara Elrington let me clarify that she **does work** at [P&E], yes, she **does work** at P&E.' (emphasis added)

This almost-loaded question (see paragraph [48], below) gave way in due course to the new, more straight forward one whether Mrs Barbara Elrington had worked (ie in the

past) at P&E. The exchange, in which Mr Elrington introduced and expounded on the phrase 'worked out of', was as follows:

'Q. ... Mrs [Barbara] Elrington works at [P&E] or at least worked at [P&E]. You accept that?

A. She worked **out of** the office of P&E.

Q. What does that mean Mr Elrington because I see her signing on the letterhead so what does that mean that she worked out of the office?

A. Alright from the inception of [PHL] I Wilfred Elrington did all legal work for [PHL] free of charge because I had a 20 percent (*sic*) interest in it and I wanted to see the company succeed. I could not ask members of the firm of [P&E] to be involved in something that was personally mine. It was my investment and so I enlisted the support of my wife to help me to do this pro bono (*sic*) work. Neither my wife was paid nor myself was paid nor [P&E] was paid. So she was doing pro bono (*sic*) work **out of** the law firm because it was convenient to do it there **from 2004, 2005, 2006 whatever it is. No contract or retainer or nothing. And she was never employed by [P&E]** as could have been verified by the Income Tax Department (*sic*) you (*sic*) go there and find out and they will tell you (*sic*) social security, income tax (*sic*) you (*sic*) could have done that. **At no time she was employed.**' (emphasis added)

[47] In the face of this clear and unfavourable assertion, Mr Courtenay, admirably betraying no disappointment at it, turned at once to the further question whether such work, even if only being done out the office of P&E rather than by an employee of P&E, was being done on Mr Elrington's behalf. This was the relevant exchange:

'Q. And just so that I get it clear, Mr Elrington, in so far as PHL is concerned, Mrs Elrington was doing that work on your behalf?

A. **Through** me, yes. Because well we are family. I have an interest in business so to that extent it was being done.' (emphasis added)

The handling of this question was not lacking in adroitness. The witness expressly construed the broad expression ‘on your behalf’ to mean ‘through’ – no more and no less. (One of the meanings of the word ‘through’ found in the The Concise Oxford Dictionary of Current English, 8th ed is ‘because of’.) Mr Courtenay, undoubtedly not satisfied with that answer, made one last try to obtain a more favourable one. This sterile exchange ensued:

‘Q. For you?

A. You could say **for** me.’ (emphasis added)

(According to the same dictionary, ‘because of’ is also one of the many meanings of ‘for’.)

[48] At this, the focus of the cross-examination temporarily shifted to the nature of the work which Mrs Barbara Elrington had been doing. (Left untouched and unaddressed was the fact that the witness had not, as matters now stood, admitted that Mrs Barbara Elrington had worked out of the office of P&E at any time after the alleged cessation of his own practice on 6 Feb 2008, this despite the invitation so to do implicit in the first question – couched as it was in the present tense – reproduced at paragraph **[46]**, above.)

[49] Unsurprisingly, however, Mr Courtenay, experienced counsel that he is, saw reason to return, with due subtlety, to the suggestion that Mrs Barbara Elrington had been performing work for PHL on behalf of (rather than merely because of) Mr Elrington. The exchange, arising in the context of Mrs Barbara Elrington’s role in the transfer registration process, went as follows:

‘Q. But the relevant fees would be paid, documents processed and [P&E] or I should be more specific, Mrs Elrington **on your behalf** would attend?

A. Not on my behalf. Mrs Elrington dealt with them. They were sent to her. They were not sent to me.

Q. Mr Elrington, it is less than 5 minutes ago that you told His Lordship when I specifically asked you whether she was working on your behalf and you said yes.

A. Well she did the work **because of** me. Let's put it that way. **Because of** me she did the work.

THE COURT: I don't think he used the word on my behalf.

MR COURTENAY: My Lord, I used that and he said yes.

A. But counsel **because of** me she did the work.

THE COURT: We have the tape. We will see the tape.'(emphasis added)

What the tape revealed, as far as I am concerned, can only be what has already been reproduced from the record at paragraph [47], above.

[50] It is, I think, necessary before proceeding any farther to be clear as to why the question whether Mrs Barbara Elrington was working at the time of trial for P&E gave way, as noted at paragraph [46], above, to the question whether she had worked there in the past. The explanation lies in a bundle of nine letters with which Mr Courtenay confronted Mr Elrington in the course of cross-examination. Written on the letterhead of P&E and signed by Mrs Barbara Elrington, these letters, to the extent that they were dated, all bore dates in 2006, whereas the trial, as already noted above, was held in 2012. The letters were thus incapable of supporting any claim that Mrs Barbara Elrington was still at the office, whether or not as an employee of P&E, at the time of trial. (These letters are joined in commonality with the three mentioned at paragraph [33], above, which, as is to be recalled, similarly failed to fit the bill.) It was in the cross-examination of Mr Elrington on these nine letters that Mr Courtenay, obviously with no reason to be satisfied, turned from the pursuit of the former question to the pursuit of the latter. (I shall return to these nine letters at paragraph [70], below.)The significance of this effective retreat by Mr Courtenay, in the middle of the trial, from the thitherto aggressively advocated position that Mrs Elrington had been at P&E even after the exit of Mr Elrington may well have been lost on the judge. (How could he otherwise have subsequently written in his judgment, at paragraph 28 -

‘Since [Mr Elrington] was working as a minister of the government at the time, it is highly likely that the documents were received by ... Mrs Barbara Elrington at the office of [P&E] ...’?)

(I shall revisit this quoted passage at paragraph **[68]**, below.)

[51] Returning now to the description of the evidence, it was, as has already been observed at paragraph **[32]** above, put to Mr Schneider in cross-examination that Mrs Barbara Elrington no longer had anything to do with P&E in September 2009; but in fact, quite curiously, there was no evidence from Mr Elrington as to that, although he made it very clear that he himself ceased practicing law on 6 February 2008.

[52] Towards the end of the cross-examination, Mr Courtenay, in the course of reiterating his main suggestions, initiated the following relevant exchange:

‘Q. And I want to suggest to you, Mr Elrington, that at this time your law firm is in possession of 8 title documents retrieved from the Lands (*sic*) Registry that you are refusing to hand over to [PHL].

A. Let me clarify, we have them, my law firm have (*sic*) them, Mrs Elrington have (*sic*) them, who have (*sic*) them? What is the question you are asking?

Q. One of those three have (*sic*) them.

A. So you don’t know who have (*sic*) them?

Q. Do you?

A I don’t know. I certainly have none. I can tell you that the firm of [P&E] have (*sic*) none. I have none, the firm of [P&E] have (*sic*) none.

Q. Mrs Elrington doesn’t have them?

A. You have to ask her. You could have subpoenaed her, she was right there, you could have done all of that.’

[53] Mr Elrington had been further cross-examined earlier on the key topic of the remitting of funds. The questioning commenced in earnest right after the round of cross-examination concerning the performing of work by Mrs Barbara Elrington at the offices of P&E at the only time when, on the evidence, she maintained a presence there, viz, in Mr Elrington's words, 'from 2004, 2005, 2006, whatever'. Mr Elrington admitted that moneys were sent to him with which to pay stamp duty and fees charged by the government of Belize. There was, initially, no indication from Mr Courtenay that his question related to any period other than that thus vaguely identified by Mr Elrington. When the former raised the matter of payments from an account designated the Jason Weaver Iota Trust account, Mr Elrington made clear that he had only discovered the year before, ie 2011, that moneys from that particular account were being placed in his account. (It is to be noted that the defence of him and P&E and his witness statement, neither of which acknowledged the receipt of such moneys, were, respectively, prepared in 2010 and dated 15 July 2011 and would thus be reconcilable with a discovery made between the latter date and 1 January 2012.) The exchanges and interventions to which this clarification led are reproduced below:

'Q. But you accept that the stamp duties and related fees to process these transactions were deposited in your account in the US?

MRS ELRINGTON HYDE: My Lord, if I may, could you just specify which transactions you are talking about if it's generally or in relation to these 16.

THE COURT: In relation to the documents supplied.

MRS ELRINGTON HYDE: My Lord, the reason I am asking is because they spoke of documents that would have been in the possession of [PHL]. So if these are the cheques or the transfer cost or whatever it is, for my own clarification and for the benefit of my client I would like to know whether, My Lord, if they are speaking from the inception of [PHL] or with respect to these 16 parcels.

THE COURT: I think Mr Elrington is about to answer. He apparently knows what he is speaking about. Do you know?

A. My Lord, as far as I am aware, when I did work for the company **while I was there at the firm** and I did work for [PHL], moneys that were deposited into my account by the Schneiders would be used to defray the costs of documents and that was done routinely. (emphasis added)

This last answer left no room for doubt that Mr Elrington was speaking of a period of time not extending beyond 6 February 2008.

[54] It is therefore to be assumed, as I see it, that both Mr Courtenay and Mr Elrington were conscious of this temporal parameter during the following exchange (page 312, record):

‘Q. I didn’t think my learned friend was confused with the question, My Lord. So, just to clarify again, the moneys on a routine basis, to use your word, in relation to land transfers that were received by Mrs Elrington were deposited in your accounts in the US, Mrs Elrington looked after the filing, Registration (*sic*) of these documents, paid the necessary fees and attended to the return of the documents, would that be accurate?’

A. That would be accurate.’

[55] It is plain, however, that Mr Courtenay was no longer heeding this parameter during the following subsequent exchange (page 327, record):

‘Q. How much money was deposited in your bank account in Bank of America by [PHL] in relation to **the land transfer** [transfers?]?’

A. Not a cent as far as I am aware.

Q. Hold on. You told His Lordship a while ago - -

A. I am telling you as far as I am aware not a cent.

Q. Mr Elrington, please. You told this court a while ago that routinely money was paid into your account, Bank of America Miami in relation to the documents that were sent to Mrs Elrington. You recall saying that?

A. Yes.' (emphasis added)

Surprisingly, Mr Elrington did not in this last answer go on to remind Mr Courtenay that he (Mr Elrington) was at the time in question speaking of the period ending on 6 February 2008 and not of 2009, the year in which he and P&E were supposedly retained in connection with the 16 land transfers. The only thing he went on to explain was that moneys relating to disbursements such as stamp duties and registration fees came from purchasers of land, not from PHL as suggested by Mr Courtenay.

[56] Pressed further on this point, however, Mr Elrington did clearly point to the dividing line he had earlier drawn between the period ending 6 February 2008 and that which next followed, thus:

'A. I will say to you Counsel (*sic*), My Lord, I may have done that prior to 2008. After 2008 I left the office. I had nothing to do with the office and up to that time I was not paid a cent by anybody for any work done and I was not contracted by anybody to do any work.'

[57] Mr Courtenay, in reiterating his main suggestions to the witness towards the end of the cross-examination, engaged the latter in the following exchange:

'Q. And I want to put it to you Mr Elrington that there are moneys deposited in your bank account in the US that relates (*sic*) to a further 9 transfer (*sic*) that have not been processed by neither (*sic*) you nor (*sic*) Mrs Elrington nor (*sic*) [P&E].

A. And I will say to you that I am not aware of it.'

The judgment of the judge

[58] The judgment of the judge was to the effect already indicated at paragraph [1], above.

The grounds of appeal before this Court

[59] Following the raising of certain questions by me at the outset of the hearing, Mr Courtenay voluntarily jettisoned a total of 10 of the 12 grounds of appeal he had filed in the notice of appeal and thus retained, in amended form, the following two only:

- '[t]he [judge] erred in law and misdirected himself in accepting the evidence of [PHL] that conveyancing costs and fees were paid to [Mr Elrington] but failed [in failing?] to conclude that [PHL] was entitled to at least US\$2,472.12 from [Mr Elrington].'

- '[t]he [judge] erred in law and misdirected himself in finding that it is "highly likely" that the conveyancing documents were received by Mrs Elrington and that there was no doubt that the conveyancing documents were posted to [P&E] but in proceeding to find that [PHL] had not proven on a balance of probabilities that [Mr Elrington and P&E] received the documents as this finding by the [judge] is against the weight of the evidence.'

Discussion

i) Ground 1

[60] Mr Courtenay correctly stated, as I understood him, that the modest reduced amount claimed before this Court was the sum of the amounts of two cheques deposited into Mr Elrington's bank account in question. These two cheques have already been identified at paragraph **[36]**, above. The first, shown at page 21, record, bore date 21 April 2010 and was in the amount of US\$1,362.08. It related to the transfer of land in the form of parcels 1165, 1166 and 1167 from PHL to unidentified purchasers. The second, shown at page 22, record, bore date 29 April 2010 and was in the amount of US\$1,110.04. It related to the transfer of land in the form of parcel 1321 to an unidentified purchaser/purchasers.

[61] In my view, this ground, insofar as it relates to the first cheque, must fail for two alternative reasons.

[62] First, as respects parcels 1165, 1166 and 1167, the question inevitably arises whether the relevant documents were remitted and received by either Mr Elrington or P&E as alleged in the statement of claim. In this regard, it is to be noted that Mr Schneider himself gave no evidence of having personally mailed the particular documents relating to the transfer of these 3 specific parcels of land to either respondent. His evidence relating to the posting of documents was for the most part general and unspecific (he could not even name relevant purchasers: paragraph **[28]**, above), though one would note, for whatever it may be worth, that annex 3 to his witness statement comprised a total of four purported copies of Customer Copies of four US Postal Service slips (each headed 'Post Office to Addressee') purporting to evidence the mailing of items by PHL to 'P&E Attention Mrs Barbara Elrington' on four separate occasions. But these 'copies of copies' bore dates 19 September 2009, 4 February 2010, 22 April 2010 and 3 June 2010, respectively, and, of course, gave no indication of what documents, if any, were being mailed on those dates. That is not, in my respectful view, material on which a self-respecting court of law can confidently reach a finding that, on a balance of probabilities, the pertinent documents relating to all or any of these transfers have been mailed to, let alone received by, Mr Elrington or P&E, or even Mrs Barbara Elrington for that matter (assuming, without accepting, that Mrs Barbara Elrington was the employee or agent of either respondent – and present at P&E to boot – at the relevant time, ie April 2010). With respect, I consider that this most critical point escaped the attention of the judge (perhaps understandably, given that he was required to deal with all land transfers – at least 16 in number – and hence with the alleged receipt of all related documents). Absent proof of such receipt, PHL can claim neither completion of the land transfer registration nor a return of documents. And PHL has not referred the court to any contractual term under which it would be entitled, in such circumstances, to the return of the moneys allegedly deposited in Mr Elrington's account in respect of these three parcels – of the whole enchilada, so to speak.

[63] This brings me to the alternative reason mentioned at paragraph **[61]**, above. Even if the question raised at paragraph **[62]**, above, did not constitute a game-losing stumbling block, as it were, for PHL, as respects the first cheque, it (PHL) would be required to contend with the separate question of what exactly was represented by the

sum of such cheque. To be specific, did it cover the alleged 2% processing fee? If so, did it then cover three such fees, given that it related to three distinct parcels of land? Or was it a case of a single land transfer meant to effect the transfer of all three parcels all at once? Or was it, instead, a case of one transfer of a single parcel and another transfer of two parcels together? These are questions which simply cannot be answered on the evidence, so far as it goes, in the instant case. Obviously, if the cheque was made up of fees as well as disbursements, as the evidence of Mr Schneider himself clearly indicates (for citation of the record, see paragraph [36], above), there should have been testimony from him of the breakdown. Far from adducing any such evidence, however, PHL did not even identify for the assistance of the judge the all-essential figure representing the purchase price of the parcel/parcels the subject of the, or each, land transfer in question. Such figure would have at least rendered possible an arithmetical calculation in court (if need be) of the alleged 2% fee and the stamp duty applicable to the, or each, transfer.

[64] It is my further view, that, insofar as it relates to the second cheque, this ground must fail for one single reason.

[65] Even although the Court granted to PHL leave to amend its first ground of appeal and thus enabled it to argue in support of the return to it of a portion of the money allegedly paid into Mr Elrington's bank account, I am unable to accept the submission of Mr Courtenay that, having gone to the judge with a claim which, insofar as it related to parcel 1321, was exclusively for the delivery of the land certificate supposedly obtained by Mr Elrington and P&E from the Land Registry, PHL should now have the option to claim for the portion of such money relating to that parcel. As was emphasised by Mrs Elrington Hyde, paragraph 7 of the statement of claim averred that parcel 1321 was one of eight parcels in respect of which land certificates had been duly issued by the registry in question. That particular parcel was not among the 'other seven' referred to in paragraph 8 of the Statement of Claim. In my view, paragraph 9 of the Statement of Claim predicated that what was claimed in respect of parcel 1321 was the land certificate said to have been issued, not some proportionate part of the total sum of US\$42,436.74 allegedly paid into the bank account in question. Put differently, the sum

of US\$1,110.04 was deliberately not included in the figure of \$26,120.22 referred to in paragraph 9 of the Statement of Claim and claimed in full in the court below. Claim no 1 set out at the end of the Statement of Claim is necessarily shaped and informed by paragraphs 7, 8 and 9, which precede it in that pleading. It was met, as thus shaped and informed, by the respondents at all stages of the proceedings in the court below as well as up to the day of the hearing in this Court. Only by a descent to the level of palm tree justice could this Court allow the claim now advanced for a return of money already pellucidly admitted to have been duly spent, so far as disbursements are concerned, and earned, so far as the alleged 2% fee is concerned.

ii)Ground 2

[66] Mr Courtenay contends with regard to ground 2 that there is inconsistency, nay contradiction, in the reasoning which led the judge to conclude that neither respondent was proven to have received the documents in question. The first insuperable obstacle to the success of this argument, to my mind, is that the question whether Mrs Barbara Elrington, or anyone else for that matter, received any relevant documents cannot even properly arise in the absence of proof that they were ever posted. It is for this reason that, in paragraph **[62]**, above, I resorted to simply assuming for the sake of argument not only that she did receive them but also that she did so as either employee or agent of one or the other respondent and was still present at P&E. I have already demonstrated in that paragraph, why, in my opinion, the evidence of PHL is deficient in this regard. It remains only to add that the evidence of Mr Elrington, which represents the sum total of the evidence of the respondents, was limited, insofar as it dealt with the receipt of documents relating to land transfers from PHL, to a period which ended on 6 February 2008. (Mr Courtenay's point that 'six of the documents were delivered to the Land Registry and titles issued' is utterly devoid of force given the icy realities: there is no evidence that either respondent, whether acting by employees or agents or in person, either took the documents in question to such registry or collected the titles in question from such registry.)

[67] The second such obstacle arises from the following considerations. There is no denying that the judge did, as Mr Courtenay emphasises, express the view that it was

'highly likely' that Mrs Barbara Elrington received the documents, by which last word he was, of course, referring not only to papers relating to the only four parcels still relevant at the present appellate stage but also to papers relating to all parcels relevant during the hearing of the claim below. And it is indisputable that the judge further stated that those documents were undoubtedly posted to P&E. (Here I would again stress that the judge was speaking of the documents generally – and doing so with undue generosity to PHL, whereas, in the present judgment, I am confining my attention to those documents which would have been pertinent to the transfers of the only four parcels of land still relevant and, more crucially, concentrating on the severe limitations of what may appropriately be dubbed the so-called documentary evidence of posting.) But even although the judge concluded that posting to P&E had been established, he nowhere found that Mrs Barbara Elrington, to him the likely recipient, fell to be regarded as an employee or agent of either respondent. In choosing not to reach such a finding, the judge, in my respectful opinion, committed no error *prejudicial to PHL*. To the reason for, and significance, of this italicised qualification I shall next turn.

[68] I have so far considered ground 2 on the assumption, crucial to the success of Mr Courtenay's argument, that the judge's finding in question was grounded in the evidence. I speak here of the finding that it is 'highly likely' that the relevant land transfer documents were received by Mrs Elrington. To again quote the judge, at para 28 of his judgment:

'Since [Mr Elrington] was working as a minister of the government at the time, it is highly likely that the documents were received by ... Mrs Barbara Elrington at the office of [P&E] ...'

It is as plain as plain can be that, after all was said and done, there was no evidence from Mr Elrington that Mrs Elrington remained at P&E after he, as it were, bade farewell to practice as part of that firm. He insisted that it was during the time that he was at P&E that she performed work for PHL, as he said, not on his behalf but because of him. He did, for sure, accept, perhaps owing to lack of concentration, Mr Courtenay's oblique invitation to admit in cross-examination that Mrs Elrington was working at P&E even at the time of trial. But Mr Courtenay, to his credit, chose not to hold him to that surprising

admission. Rather, Mr Courtenay almost immediately changed direction and thereafter made it PHL's case that Mrs Elrington had worked at P&E during the pre-2008 years, a time during which, as has been previously noted above, Mr Elrington himself admitted to her having been present at P&E (though only performing the work of PHL because of him). See further, paragraphs [46]-[50] above. So much for the evidence of Mr Elrington. What was the evidence of the only other witness in the case in this regard?

[69] Only two aspects of Mr Schneider's testimony demand attention as being, to any extent, pertinent in this respect.

[70] First, he claimed that Mrs Elrington had written and signed letters on the letterhead of P&E from which it was clear that she was at that firm's office at all material times, ie 2009 and 2010. This claim floundered dramatically, however, when such letters as were produced in court all turned out to have pre-dated the departure date of 6 February 2008 (see paragraph [50], above). It would have been perverse for the judge to have purported to find, in such evidence, support for his finding under discussion.

[71] Secondly, Mr Schneider, apparently constructing his case on the hoof in the course of cross examination, testified, initially, that Mr Elrington had informed him orally that he (Mr Elrington) or Mrs Elrington had received the pertinent documents and, thereafter, that either Mr Elrington or Mrs Elrington had made that oral acknowledgement to him. (In his witness statement, his silence on this very point had been 'like to' deafening thunder.) But the judge memorably scoffed at that testimony, stating at paragraph 20 of his judgment:

'[Mr Schneider] also said that he did not state in his witness statement that the defendant admitted to him that he received the documents, the cost and fees because he was not aware that he had to put them in the witness statement. These are vitally important matters in relation to [PHL's] case and it is doubtful whether the claimant (*sic*) is truthful when he said that he was not aware that these matters should be in his witness statement.'

(Given the judge's use of the singular. ie 'defendant', I must, in the interest of accuracy, point out that Mr Schneider was, in the relevant portion of his testimony, alleging an oral acknowledgement by either Mr Elrington or Mrs Elrington – not only by Mr Elrington.)

[72] Before continuing, I pause here to express my view that this testimony was rightly scoffed at. I acknowledge that, in his witness statement, filed (as previously noted at paragraph **[15]**, above) for some unknown reason ahead of Mr Schneider's, Mr Elrington omitted to deal with the question whether Mrs Elrington so much as remained at P&E following his (Mr Elrington's) departure therefrom on 6 February 2008. But there was, clearly, a good explanation for this, viz that the central allegation that either Mrs Elrington or he (Mr Elrington) had orally acknowledged to Mr Schneider the receipt of land transfer documents from time to time was conspicuously absent from PHL's statement of claim. It is equally true, as Mrs Elrington Hyde suggested to Mr Schneider (see paragraph **[31]**, above), that this most material allegation was also absent from the latter's witness statement (see paragraph **[13]**), above; but this does not furnish Mr Elrington with an additional excuse for the omission from his own witness statement since, as seen at paragraph **[15]**, above, he filed that document ahead of Mr Schneider's witness statement anyway. (Mr Courtenay's valiant counter, by way of submission to this Court – lines 8 - 11, page 52, appeal transcript – that Mr Schneider could not reasonably be expected to mention Mrs Elrington when neither the defence of the respondents nor Mr Elrington's witness statement had had anything to say about her holds absolutely no water, considering that the defence and statement both emphatically denied the receipt by either respondent of any such land transfer documents and should therefore have nonetheless elicited the claim of an oral acknowledgement.)

[73] Continuing now, it is inconceivable that, having already heaped contempt, if not scorn, on it, the judge would have thereafter turned around and accepted any part of this evidence of Mr Schneider. Which brings one to the ineluctable conclusion that the judge's finding under consideration, quoted at paragraph **[68]**, above, is not at all rooted in the evidence that was before him. From which it follows that ground 2 is, in reality, an

imposing edifice built on nothing but sand or, expressed in other words, a ground wholly devoid of merit.

Other issues

[74] The respondents were at the hearing given leave to place before the Court and rely upon submissions made under the sub-heading Findings of the Trial Judge against the Weight of the Evidence in their written submissions. The appellant was also permitted to file written submissions in reply. The issues arising from these submissions, are now, in my view, of no more than academic interest, given the conclusion to which the preceding discussion must inevitably lead.

Conclusion

[75] For the reasons given in the course of the preceding discussion, I would dismiss the appeal, with costs to the respondents, to be agreed or taxed, and confirm the orders of the judge. I would further order (a) that the above order as to costs of the appeal be provisional in the first instance but become final after 10 clear working days from the date of delivery of this judgment, unless any party shall file application for a contrary order within such period of 10 days and (b) that in the event of the filing of such an application, the matter of costs be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

Apology

[76] I extend my sincere and profuse apologies to all parties for the lengthy delay in preparing this judgment, for which I alone bear full responsibility and which I am able only to explain as the unfortunate result of extreme pressure of work.

SIR MANUEL SOSA P

AWICH JA

[77] I concur.

AWICH JA

HAFIZ-BERTRAM JA

[78] I have had the privilege of reading in draft, the judgment of Sir Manuel Sosa, President, and wish only to say that I concur in the reasons for judgment given, and the orders proposed, in it.

HAFIZ-BERTRAM JA