IN THE COURT OF APPEAL OF SIERRA LEONE

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CIV APP 50/2007

BETWEEN:

ELIZABETH AHMED - APPELLANTS

AND

MEMUNA BAH

(By her Attorney AMADU BALLA KAMARA) - RESPONDENT

CORAM:

HON MR JUSTICE N C BROWNE-MARKE, Justice of Appeal

HON MR JUSTICE E E ROBERTS, Justice of Appeal

HON MR JUSTICE S A ADEMOSU, Justice of Appeal.

COUNSEL:

N D TEJAN-COLE esq for 1st Appellant

J B JENKINS-JOHNSTON esq for Respondent

JUDGMENT

1. This is an appeal brought by MRS ELIZABETH AHMED, as Appellant against the Judgment of the Honourable MRS JUSTICE A SHOWERS (hereafter Learned Trial Judge, LTJ) dated the 12th day of November,2007. In the Notice of Appeal, the Relief sought by the Appellant, is that this Court Sets Aside the Judgement of the High Court, granting Recovery of Possession to the Respondent herein, and that it Orders Specific Performance of the enforceable contract between the Appellant's predecessor-in-title, her deceased husband ISBIR AHMED who was 1st Defendant in the Court below, and the 5th Defendant in the Court below, Herbert Thorpe. For reasons of clarity, I shall hereafter refer to MRS AHMED as Appellant; MADAM MEMUNATU BAH, as Respondent, and the other parties in the Court below, to the number assigned to each of them in those proceedings. Since the Appellant only became a party in those proceedings after the demise of her husband, ISBIR AHMED, who was the 1st Defendant, the

deceased shall be referred to as such in this Judgment. The 2nd to 6th Defendants inclusive, did not appeal against the said Judgment.

2. The Grounds of Appeal are that the LTJ erred when she granted possession of the property situate at, and known as 3 Clarke Street, Tengbeh Town, Freetown, to the Respondent, notwithstanding that she had found, firstly, that the Respondent was not a bona fide purchaser of the legal estate for good consideration; secondly, that the Respondent qua purchaser, did not take reasonable care expected of a prudent purchaser to make the necessary enquiries before payment of the purchase price, and consequently had constructive notice of any encumbrances; thirdly, that the Respondent held the property subject to the equitable interest of the 1st Defendant, and subsequently, by succession, the Appellant; and fourthly, that she was not in possession.

3. The Appellant contends also, that the decision of the trial Court ought to have been based on the evidence adduced before it, and that on the facts found by the LTJ, the Respondent's case ought to have been dismissed by the LTJ. Further, that the LTJ misdirected herself in that she did not treat the Counter Claim of the Appellant as a separate and independent cause of action, as should have been the case, notwithstanding that its subject matter was the same as that in the Statement of Claim. It follows that once she had held that the contract between the Appellant and the 5th Defendant at the trial, was specifically enforceable, she ought to have granted Appellant's prayer for Specific Performance.

4. The Appellant contends further, that the award of Le50million as Damages made in her favour, which said sum of money was to be paid to her, by the 5th and 6th Defendants in Lieu of Specific Performance, was made Per Incuriam, and was a wrongful exercise of the Court's Discretion; and lastly, that the Judgment of the Court was against the weight of the evidence.

5. On 21 November,2008 the Appellant filed Additional Grounds of Appeal to the effect that, firstly, that the LTJ injudiciously exercised her discretion in favour of the Respondent regarding the Appellant's Counter Claim. She refers in particular to Page 199 Line 25 of the Record, and avers that there was no need for such an exercise, and that it had resulted in a miscarriage of justice. Finally, she contends that the issue of Hardship was never canvassed by either party, and that the LTJ

ought to have allowed Counsel the opportunity to address her on this issue.

6. The appeal first came up for hearing on 21 October,2008 when we Ordered the filing of synopses, by Counsel on both sides. The Appellant was to file hers against 13 November,2008; and the Respondent, against 21 November, 2008. Further oral arguments were fixed for 25 November, 2008. In the event, the Appellant filed her synopsis, together with the authorities cited therein, on 13 November,2008; and the Respondent, only on 28 January,2009. Brief additional arguments were heard on 29 January,2009 when Judgment was reserved.

7. Rule 9(1) of this Court's Rules,1985 states that "*all appeals shall be by way of rehearing....*" Rule 31 states that this Court "*..... shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may REHEAR the whole case.....*" This being the mandate of this Court, I shall dwell a bit on the facts of the case as presented in the High Court. I shall also bear in mind that the actual Trial Judge, RASCHID,J died before Judgment, and that with the concurrence of Counsel on both sides, SHOWERS,J was authorised to give Judgment on the basis of evidence led before her deceased brother. She thus had no opportunity to see and hear the witnesses who testified on both sides.

PLEADINGS AND PRELIMINARY PROCEEDINGS

8. The facts of the case, are as set in the Respondent's Statement of Claim, as amended, and her Defence to the Defendants' Defence and Counter Claim; and in the 1st Defendant's Defence and Counter Claim, and Reply to the Respondent's Defence to Counter Claim. The specially indorsed Writ of Summons was issued by the Respondent on 26 November,1996. In it, she claimed, inter alia, for the recovery of immediate possession of the house, land and premises situate at and known as 3 Clarke Street, Tengbeh Town, Freetown. The action was brought on her behalf by her Attorney, AMADU BALA KAMARA, who was appointed as such by virtue of a Power of Attorney dated 2 November,1996 and duly registered as No. 205 at page 98 in volume 65 of the Record Books of Powers of Attorney kept in the office of the Registrar-General, Freetown. According to the Respondent's pleading, she became entitled to the fee simple estate, and to possession of this property by virtue of a Deed of

Conveyance dated 10 October,1996 made between herself as Purchaser and the 5th Defendant, HERBERT THORPE. She paid the sum of Le32m for the property, then approximately equivalent to USD35,000. By letter dated 18 October,1996, she as the new owner of the premises, gave notice to quit the property, in writing, to the deceased 1st Defendant, ISBIR AHMED, and to the other Defendants, who were residing there. The 1st Defendant, and the other Defendants for the reasons later stated in their joint Defence, did not give vacant possession to the Respondent, within the 7 day period stipulated by her. The Respondent also claimed mesne profits at the rate of USD8,000 per annum with effect from 25 October,1996 the date the Notice expired, until delivery up of possession.

9. Appearance was entered for the 3rd Defendant separately, by the late EDWARD AKAR Esq. Appearance for the other Defendants was entered by N D TEJAN-COLE Esq, who also appealed, and argued this appeal, on behalf of the Appellant. On 13 December,1996 the late EDWARD AKAR Esq filed a Defence on behalf of the 3rd Defendant, PASTOR MOMODU CONTEH. In that pleading, the 3rd Defendant denied all knowledge of the sale of the property to the Respondent. He averred that he only got to know about the sale when he received the letter dated 18 October,1996 from Respondent's Solicitor. He had been paying rent to the late 1st Defendant whom he acknowledged as the owner of the property, and he was not in arrears of his rent.

10. By way of Defence and Counter Claim, dated 18 December,1996, the then 1st Defendant, ISBIR AHMED, and the 2nd and 4th Defendants, brought action, not only against the Respondent, but also her Vendor, HERBERT AKINOLA OLADIMAGE THORPE (hereafter HERBERT THORPE). In their Defence, the late 1st, and the 2nd and 4th Defendants, averred as follows: that they were tenants of HERBERT THORPE up to 17 June,1995 when the late 1st Defendant paid the final instalment of the purchase price for the property at 3 Clarke Street, to HERBERT THORPE, and that by accepting such payment, HERBERT THORPE became a Trustee of the property for and on behalf of the said 1st, 2nd and 4th Defendants; that on dates prior to the date conveyance of the property was executed in her favour, Respondent was aware that the late 1st Defendant had become the owner of the property. These Defendants admitted receiving the letter dated 18 October,1996, and that as a result

of its contents, they instructed their Solicitors to reply to the same by respective letters dated 25 and 28 October,1996; that the late 1st Defendant was the freehold owner of the property; and that he and the other Defendants were in possession of the same at the time.

11. In their Counter Claim, the late 1st Defendant, and the 2nd and 4th Defendants, averred, inter alia, that by an Agreement in writing dated 20 September,1994 made between the late 1st Defendant, and HERBERT THORPE, HERBERT THORPE agreed to sell, and the late 1st Defendant agreed to buy the property at 3 Clarke Street. The agreement provided, inter alia, that the 1st Defendant should pay HERBERT THORPE, immediately, the sum of Le4,300,000 as deposit, the full purchase price being Le15million. HERBERT THORPE acknowledged receipt of this amount from the late 1st Defendant. It was agreed also that the balance of the purchase price should be paid by instalments as and when demanded by HERBERT THORPE. As evidence of his good intent, HERBERT THORPE deposited with the late 1st Defendant, his title deed, i.e. the Deed of Conveyance dated 10 January,1994 and duly registered, executed by his late father THOMAS EBUN OLADIPO THORPE (hereafter THOMAS THORPE) in his favour.

12. The late 1st Defendant paid a further instalment of Le10,124,000 to HERBERT THORPE on 15 May,1995 leaving an outstanding balance of Le576,000. HERBERT THORPE duly acknowledged receipt of this amount as well. On 17 June,1995 on demand made by HEBERT THORPE, the late 1st Defendant paid to him the final instalment of Le576,000, thereby completing payment of the full purchase price of Le15m. HERBERT THORPE duly acknowledged receipt of this final amount also.

13. The late 1st Defendant averred further in his Counter Claim, that HERBERT THORPE well knew that he the 1st Defendant required the property in which he and his extended family had been staying, as a fully-owned residence for himself and his extended family. This extended family included his mother-in-law and sisters-in-law, who had also been staying there for upwards of 3 years. But, it appeared that HERBERT THORPE was wilfully refusing to complete the agreement for sale with the late 1st Defendant, despite several requests and the letter dated 23 June,1995 was addressed to him, for him to do so; thus the Counter Claim for him to remedy this default.

14. In the particulars of Special Damage, the late 1st Defendant claimed that on 10 October,1996 HERBERT THORPE wrongfully conveyed the property to the Respondent; that the Respondent had knowledge of the contract between the late 1st Defendant and HERBERT THORPE; and that she and/or her agents enquired of, tenants and in-laws of the late 1st Defendant, and that she and they knew, late 1st Defendant had bought the property. In the premises, the late 1st Defendant Counter Claimed for Specific Performance of the agreement between late 1st Defendant and HERBERT THORPE;, Damages in Lieu of, or in addition to Specific Performance; Further or other Relief; and as against the Respondent, Cancellation of the Deed of Conveyance dated 10 October,1996 conveying the property to her; a Declaration that the Respondent was a Trustee of the property for the benefit of the late 1st Defendant; alternatively, a Declaration that the Respondent was bound to convey the said property to the late 1st Defendant in accordance with the terms of the said agreement; if necessary, a Vesting Order; and lastly, an Injunction Restraining the Respondent and her servants and/or agents from disposing of, entering upon, or otherwise interfering with the said land.

15. The Respondent robustly joined issue with the late 1st Defendant on his Counter Claim. She averred in her Reply and Defence to Counter Claim, dated 30 December,1996, that prior to 10 October,1996 she had no knowledge of the matters pleaded by the 1st Defendant in paragraphs 2 and 3 of his Defence and Counterclaim, and that, in any event, as the legal estate of the property was at no time vested in the 1st Defendant, he could not be the owner of the same. She was the bona fide purchaser for value of the legal estate for value, and relied on Section 2 of the Registration of Instruments (Amendment) Act,1964. In her Defence to the 1st Defendant's Counter Claim, she reiterated that she was not aware of the transactions between 1st Defendant and HERBERT THORPE, and that her searches at the Registry had not disclosed any encumbrance on the property; and that as the legal estate in the property had not been vested in the 1st Defendant, the legal principle of NEMO DAT QUOD NON HABET applied - HERBERT THORPE could not give what he did not have. Finally, she averred that 1st Defendant's Counter Claim disclosed no reasonable cause of action.

16. In his Reply, also dated 30 December,1996 the Respondent joined issue with the 3rd Defendant upon his Defence. The Respondent also on the

same day, entered the action for trial, and gave Notice of the same to the Defendants. On 26 February,1997 MASSALLAY,J (now deceased) fixed Monday 10 March,1997 as the date of trial, upon application made to him for a speedy trial by the Respondent. For reasons which are not disclosed in the Record, but which are not hard to find, the trial did not actually take off in 1997: the military coup occurred on 25 May,1997; the civilian Government was restored the following year; but in January,1999 Freetown was again invaded by rebel forces, and Law and Order was again disrupted. From the Record (page 58) it appears that the action was again on 22 June,1999 entered for trial by the Respondent on 6 July,1999 though the trial did not commence on the latter date.

17. The first proceeding in the Cause is recorded to have been taken on 12 November,1998 when MR JENKINS-JOHNSTON appeared for the Respondent, and MR TEJAN-COLE appeared for 1st, 2nd & 4th Defendants, before the late RASCHID,J - page 101; but the trial proper only commenced on 25 January,2000 before the late RASCHID,J - page 106. On Monday 23 April,2001 RASCHID,J Ordered, pursuant to an Application made by the Respondent (pages 60-75), that HERBERT THORPE and THOMAS THORPE be joined as 5th and 6th Defendants to the Respondent's Original Action, and that pleadings be amended if needs be, and that the same be served - pages 76 - 77;and pages 112-113. Of note, in that Application, is that the Respondent exhibited to it a letter, marked "C", pages 69-70, dated 1 December,1998, addressed to THOMAS THORPE in which her Solicitor, MR JENKINS-JOHNSTON states that "*...As you are no doubt aware, hearing of the above matter has already commenced, and the witnesses should start their testimony within the next fortnight. Reading through the various papers, it seems to me that your son has committed a very serious fraud on both parties and then left the country. It has even been suggested that he acted in complicity with you. In the circumstances I think it will be in your interest and especially in the interest of your son for us to meet and explore ways of getting out of this mess. The fact that your son has left the country does not change anything because INTERPOL can reach him wherever he is.*"

18. I have quoted this letter at length, because it bears on the issue of whether the offer of alternative accommodation was made either to the Respondent, or to the 1st Defendant. Though MR JENKINS-JOHNSTON

refers to his "....*reading through the various papers..*" it is quite clear that as far back as 18 December,1996, the date of filing of the Defence and Counterclaim, i.e. two years before 1998, he already knew that 1st Defendant was claiming that HERBERT THORPE had agreed to sell the property to 1st Defendant, and that he, HERBERT THORPE had played a trick on the Respondent. And the Application itself was only made in 2001, nearly 5 years after these facts had become known to Respondent's Solicitor. Could it be the case that negotiations had been going on between the Respondent and the THORPES for a return of the purchase price, and that the trial only proceeded because this did not happen? Was it part of a realisation that Respondent should be directing her angst at HERBERT THORPE, and should be demanding her money back from HERBERT THORPE for fooling her, and not against the Defendants who really had nothing to do with HERBERT THORPE's trick? Whether this is so or not, will become apparent on going through the evidence. HERBERT THORPE did not enter appearance to 1st Defendant's Counter Claim, dated 18 December,1996, but THOMAS THORPE entered appearance to the amended Writ on 11 May,2001 though he only got a Solicitor, MR EDWARDS to file a Defence on his behalf on 30 November,2004. According to MR TEJAN-COLE in his address, at page 155, HERBERT THORPE was not served as he could not be found.

19. In her amended Statement of Claim, pages 71-74, the Respondent not only adds on both THORPES, father and son, but extensively amends the same, to include an alternative claim for Restitution of the whole of the purchase price from both father and son. She alleges Misrepresentation , and that both of them, i.e. 5th and 6th Defendants, had "*fraudulently induced her to pay the purchase price of $35,000 to them without revealing their dealings with the 1st Defendant (i.e. the deceased ISBIR AHMED) or that monies had been received from him.*" Further, that "*.....the 5th Defendant (i.e. HERBERT THORPE) promised to take her to the said premises to introduce her to the "tenants" therein ...2 days after the purchase price was paid, but, that knowing the fraud that had been perpetrated and with intent to perpetrate the fraud, immediately left the country the day after the purchase price was paid and has still not returned, while the 6th Defendant (i.e. THOMAS THORPE) tried to cover up the fraud by attempting to offer 1st Defendant alternative premises, which offer was refused.*" 1st Defendant denied the last averment in an amended Defence dated 9, but filed on 11 May,2001 - page 83. There, he

denied that THOMAS THORPE offered him alternative premises which he is said to have refused to accept; and that on the contrary, THOMAS THORPE indicated that he would offer alternative premises to the Respondent.

20. As stated above, THOMAS THORPE entered appearance in person on 11 May,2001. But on 30 November,2004 C F EDWARDS Esq, Solicitor, entered appearance on his behalf. This is of course, irregular. A Defendant cannot have, at one and the same time, two appearances filed on his behalf. On 7 December,2004 MR EDWARDS filed a Defence dated 3 December,2004 on THOMAS THORPE'S behalf. In that Defence, THOMAS THORPE denied that he was aware of any encumbrance on his son's title to the said property; nor was he aware of any monetary transaction between his son, and 1st Defendant; he only came to know about the transaction between them when it failed. Specifically, he avers that he offered Respondent alternative premises as he did not wish the property to be sold outside the family. The Record does not disclose any appearance being entered, or any Defence being filed for and on behalf of HERBERT THORPE, the linch-pin of the litigation.

EVIDENCE AT TRIAL

21. I shall now move on to the Respondent's evidence, and highlight those points which go to the root of this appeal. At pages 114-116, she said that she met HERBERT THORPE in September,1996 when she was introduced to him by one ABU BAKARR whom she had intimated of her desire to buy property in Freetown. Both she and MR THORPE agreed on a purchase price for the house at Clarke Street of USD35,000. Later, she visited the house. She conducted a search at the Registry, and verified that the property was registered in MR THORPE's name. She consulted a Solicitor, who also confirmed the same. She went to the Ministry of Lands with MR THORPE where she found out the property was registered in his name as well. MR THORPE issued her a receipt for the sum of USD1,000 which she paid as a deposit. MR THORPE did not tell her that he had received money from 1st Defendant. On her return from the USA to Freetown, later, she paid MR THORPE the outstanding agreed balance of USD34,000. He issued a receipt, exhibit "E" dated 10 October,1996 which incorporated the receipt dated 6 September,1996 for the sum of USD1,000. MR CHARM prepared the conveyance. According to her, at page 115 "*..after the payment the 5th Defendant told me that he would*

take me to the tenants at the said No 3 Clarke Street to inform them that i was the new owner. On the appointed day, the 5th defendant did not show up. Thereafter we went to his house, but he was not in. The following day myself and Balla Kamara went to the disputed house at No 3 Clarke Street (to) inform them that I had purchased the property. I saw a lady who told me she was a tenant. She told me the purported owner (was) upstairs. I went upstairs and found a lady. I introduced myself that I was the new owner of the said house. She told me that the owner of the said house was one Kondo and not the 5th Defendant..... the lady told me they also had documents in respect of the premises.....the following day I .....found 1st Defendant. He told me..... he had been paying monies to the 5th defendant.....he advised me to go in search of 5th defendant.....we went in search of him for 2 days but to no avail....one ABUBAKARR led me to the 6th defendant's office at Kissy Road..... the 6th defendant asked 1st defendant to produce his documents..... he suggested that the 1st defendant should give up the house and he would give him another house.....the 1st defendant refused. The following day myself and Balla Kamara went to the 6th accused. He took us to his house at Pademba Road. He suggested that he would give us this house in lieu of the one at Tengbeh Town I refused. He took me to another one at Regent Road. I refused it."

22. What Respondent's evidence clearly shows, is that she may not have carried out a proper inquiry to find out the status of the property she intended to buy. At page 114 she does say "*later I visited the house.*" But it is clear from her later testimony at page 115 that she only attempted to go inside the house after she had paid HERBERT THORPE. Was this the action of a prudent person? Or was it the action of someone who knew the truth of the matter, but was willing to take her chances? Under cross-examination by MR TEJAN-COLE, she admitted that 1st Defendant told her he had completed payment to HERBERT THORPE for the property; and that when she asked him, i.e. HERBERT THORPE, for the original of his Deed, he told her he had lost it - page 117. Since it is not part of the Appellant's case that a Deed of Conveyance had been executed in 1st Defendant's favour, it is unnecessary to dwell on the steps Respondent took to confirm that HERBERT THORPE was the legal owner of the property on 10 October,1996. What matters, is whether she knew, or ought to have known that he was bound in equity to another person. It seems strange therefore, that ABU BAKARR whom Respondent claims,

told her about the HERBERT THORPE, and took her to meet him the first time, was not called as a witness. He would have shed light on whether proper enquiries were made by the Respondent before she purchased the property or not. PW3 AMADU BALLA KAMARA, Respondent's Attorney's evidence, is only relevant as regards the exchange of money, and the visit to the house after the conveyance had been prepared. Sierra Leone has not got in its Law Books something akin to the UK Land Charges Act,1925. Under that Act, an interest such as that acquired by the 1st Defendant would be registerable, and if not registered, would not bind a purchaser for value without notice. It is true that an agreement to sell land could be executed and registered by the interested parties. But even without it, at Common Law, and in Equity, part performance, a fortiori, full performance, have been recognised as enforceable rights available to one who has paid the purchase price for land, but has not yet had the same conveyed to him in the appropriate manner.

EVIDENCE FOR THE DEFENCE

23. The late 1stDefendant in his evidence, told the Court how he came to occupy the property. His son, JIMMY AHMED was the original tenant. When he left, he took over the tenancy. 4th Defendant, who was his mother-in-law, died on 22 December,2001. I do not know what the original notes show, but this date is clearly wrong as the date on which he was giving evidence was 22 November,2001. Though the death certificate was tendered in evidence as "M", it does not form part of the Record

24. The late 1st Defendant in his evidence, set out the sequence of his transactions with HERBERT THORPE, in the manner set forth in his Counter Claim. MR THORPE handed over to him, his title Deed. Perhaps, this is the reason why, 5th Defendant was unable to hand it over to Respondent. When the last payment was made by him, MR THORPE signed exhibit "L". "L" is not only a receipt, but contains an undertaking. In it, MR THROPE undertakes "*to sign all documents pertaining to the transfer of sale of the land and house situate at No. 3 Clarke Street, Tengbeh Town when called upon to do so.*" It is dated 17 June,1995, signed by H A O THORPE and witnessed by MS STEVENS, 1st Defendant's sister-in-law. This receipt, with its undertaking, together with the other receipts, form the basis for 1st Defendant claim for Specific Performance of the contract for sale of the house at Clarke Street. The 1st Defendant went on to say further at page 125, that during his meeting with Respondent at

the house in August,1996 he not only showed her the receipts issued to him by HERBERT THORPE, but also advised her not to part with her money; "*not to give (a deposit) a cent to the 5th defendant.*" On a second occasion, during the same month, Respondent was accompanied by the 6th Defendant; who, at the end of the encounter, muttered: "*oh Herbert, you have disgraced me.*" During that meeting, 6th Defendant offered Respondent one of three houses as replacement for the Clarke Street house. According to 1st Defendant, "*thereafter, the plaintiff (respondent), her brother, and PW2 (presumably, PW3 as Respondent was herself, PW2) left together with the 6th defendant to inspect the three houses suggested by the 6th defendant. Before they left we shook hands....*"

25. DW3 JULIET LAHAI, a niece of 1st Defendant, was, according to her, the first person Respondent met when she went to the house. She said she told Respondent at that first meeting that her uncle, 1st Defendant owned the house.

DEMISE OF 1ST AND 4TH DEFENDANTS

26. On 17 February,2004 consequent upon the death of the 1st Defendant, and the granting of Probate of his estate to the current Appellant, his widow, she was substituted in his stead. The death certificate of Mrs Manu Stevens, the 4th defendant, was also tendered on 20 April,2004 - page 138, though it does not appear it was numbered as an exhibit.

MR THOMAS THORPE'S EVIDENCE

27. THOMAS THORPE himself gave evidence on 3 May,2005 before RASCHID,J. He was then defended by C F EDWARDS Esq. He denied knowledge of any transaction between 1st Defendant and his son, before 15 October,1996. When he first saw Respondent, he told her to take him to his son. His son was not at home. At page 143, he said he offered Respondent alternative accommodation.

28. These were the facts which formed the basis of Counsel's respective addresses, and the Court's judgment. Mr TEJAN-COLE began his address on 25 October,2005. At some stage, it appears, the Court agreed to accept written submissions. The last entry made by RASCHID,J was on 23 May,2006 when he noted at page 150 that MR JENKINS-JOHNSTON was unwilling to submit his written address. He therefore reserved

Judgment. He died in November that year. The case was assigned to SHOWERS,J. It appears also on a perusal of pages 150 to 153 that both Counsel agreed that she could deliver Judgment based on the certified typed record of the proceedings, and Counsel's written addresses. She delivered Judgment on 12 November,2007.

THE JUDGMENT

29. In her Judgment, the LTJ found the following facts:

a) at page 197, that "*it is clear that the receipts exhibits H-L satisfy the provisions of S.4 of the Statute of Frauds, and they respectively represent the required memorandum of the agreement identifying part payment, the parties the property concerned, and contain the main part of the agreement. They therefore form a specifically enforceable contract for the sale of the said property, and the purchaser can take steps to enforce the contract." She went on to cite with approval a passage from MEGARRY & WADE 4th Edition at page 575 that "if the purchaser is potentially entitled to the equitable remedy of specific performance, he obtains an immediate equitable interest in the property contracted to be sold... it does not matter that the date for completion, when the purchaser may pay his money and take possession has not yet arrived....from the date of the contract the purchaser becomes owner in the eyes of equity..."*

b) further down at page 197, she goes on to state that "*the general principle is that a trust created by a vendor of a legal estate would be binding on everyone coming to the land except the bona fide purchaser of the legal estate without notice. Counsel for the Plaintiff has stressed that the Plaintiff is such a purchaser, and that she therefore takes free of the 1st defendant's equitable trust. Now, can the Plaintiff be said to be a purchaser without notice. ..... the argument here is that had the Plaintiff made the necessary inspection of the property before making payment of the purchase price to the 5th defendant, she would have had notice of the incumbrance on the property. She therefore has constructive notice of the 1st defendant's equitable interest in the said property.."* In my humble opinion, this finding would have been sufficient for the LTJ to found her decision without going any further. That this opinion is well grounded, is shown by what follows. She cites MEGARRY& WADE again at page 122 where

the position of a purchaser who does not carry out a proper inspection of the property he intends to buy, is set out: "*a purchaser would only be able to plead absence of notice only if he had made all usual and proper inquiries and had still found nothing to indicate the equitable interest. If he fell short of this standard, he could not plead that he had no notice of rights which proper diligence would have discovered... a purchaser's ordinary duties fall into two categories: inspection of land, and investigation of the vendor's title.*" The important case of PILCHER v RAWLINS (1872) LR 7 Ch App at 259 is also cited with approval. She finds (at the top of page 199) that "*In this case it has been shown that the Plaintiff, the purchaser did not take the reasonable care expected of a prudent purchaser to make the necessary enquiries, before making payment, and as such is held to have constructive notice of the 1st Defendant's equitable interest in the said property. The Plaintiff therefore takes the property subject to the 1st Defendant's interest therein and holds the property as trustee for the 1st Defendant.*" I agree entirely with this finding. It is my view that having made this finding, the LTJ should have gone on to set aside the Respondent's Deed of Conveyance, as prayed for by the then 1st Defendant. That she failed to do so, is in my considered opinion, an error of Law.

APPELLANT'S ARGUMENTS

30. The Appellant argues that since the late 1st Defendant had paid the 5th Defendant in full for the property, the fee simple interest in the property was no longer held by him, but he held the same on a constructive trust for the 1st defendant; and the Respondent, having failed to properly inspect the property before paying the purchase price to the 5th Defendant, her remedy was to claim a refund of the purchase price from the 5th Defendant, as what he had purported to convey to her, was no longer his at the time he executed the Deed of Conveyance in her favour. Further, once, the LTJ had held that the Respondent held the property as a Constructive Trustee for the benefit of the late 1st Defendant, the Respondent's claim for possession ought to fail. She could not be said to be holding property on trust for someone else, and at the same time be entitled to possession of the same, particularly, where, as in this case, the 1st Defendant and his family were in actual possession of the property. Her duty then was to dismiss the Respondent's claim as not

proven. The question of hardship did not arise, as neither side had canvassed that point, and it was therefore wrong on the part of the LTJ to hold, as she did at page 199 that "*...in this case there is clear evidence that if specific performance were ordered it would cause hardship to the plaintiff.*" Here, Mr Tejan-Cole claims, the LTJ conflated the Respondent's claim, and the 1st Defendant's Counter Claim, rather than treating them as two separate cross actions tried together.

RESPONDENT'S ARGUMENTS

31. The Respondent on the other hand, argues firstly, that the LTJ granted the Appellant's second prayer in the Writ of Summons, to wit: "*Damages in lieu of or in addition to specific performance.*" The LTJ awarded the Appellant, Le50million. The Appellant cannot, in Respondent's Counsel's words, "*approbate and reprobate.*" The Appellant was bound by the 1st Defendant's pleadings. I should have thought the Respondent did approbate and reprobate in her pleadings, pages 72-75. At page 73 in paragraph (6) she accuses the added 5th Defendant of Misrepresentation; and at page 74, in her prayer (B) she seeks the alternative relief of a refund of the sum of USD35,000 paid to 5th Defendant, and a total additional sum of USD6,000 for various other items of expenditure. The 'approbate and reprobate' charge is not therefore applicable to the Appellant alone. She was clearly hedging her bets, and making sure, all her eggs were not confined to one basket.

32. Secondly, the Respondent contends that she was the bona fide purchaser of the property for value without notice – that she had no knowledge of the contract between 1st Defendant and 5th Defendant; thirdly, that the LTJ had a discretion whether to grant Specific Performance or not, and there was no showing that she had exercised that discretion wrongly or injudiciously. Respondent had acted judiciously, she had in fact consulted two Solicitors, the Registrar-General's Office, and the Surveys Department before deciding to buy. The case law showed that an appellate tribunal would not interfere with the discretion exercised by a Judge at first instance, unless there was clear evidence that discretion had been exercised wrongly.

33. Both Counsel have stated the law correctly. Where they differ, is on the question of notice, and the manner in which the LTJ exercised her discretion.

34. The crucial date, as far as the Appellant's case for specific performance is concerned is 17 June,1995. On that day, the 1st Defendant made full and final payment to 5th Defendant for the property. That transaction is evidenced by exhibit "L" at page 252 which reads:

" Receipt

I Herbert A O Thorpe of No 17 Cannon Street, Freetown, hereby acknowledge receipt of the sum of Le576,000 .....from Isbir Ahmed of 14 Barracks Road, Cole Farm, Murray Town, as balance for full settlement in respect of sale of land and house situate at No. 3 Clarke Street, Tengbeh Town.

I also undertake to sign all documents pertaining to the transfer of sale of the land and house situate at NO.3 Clarke Street, Tengbeh Town when called upon to do so.

Dated this 17th day of June, 1995

_____

H A O Thorpe.

Witnessed by

_____

2 Thunder Hill Road

Kissy Mess Mess, F/Town "

35. The LTJ accepted that as of that date, the 1st Defendant had an enforceable right to have Deed of Conveyance executed in his favour. The 5th Defendant had become Trustee of the property in favour of the 1st Defendant.

36. The crucial dates, as far as the Respondent is concerned, are 10 October,1996 when she paid over the purchase price to 5th Defendant, and the date she went inside the house, and was told that the 1st Defendant had bought it. The latter date has not been specified, but from the answer she gave her evidence-in-chief at page 115, and under cross-examination at the top of page 117, she went there after she had

paid for the property. She herself admits that she and her agent could not get 5th Defendant to go with them to the house the day after payment was made. She went there with Balla Kamara, and they met a lady who told her the owner of the house was one 'Kondo.'

THE LAW

BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

37. Section 3(1) of the Conveyancing and Law of Property Act,1882 (and not the 1881 Act as cited by Mr Tejan-Cole) which is part of the adopted Law of Sierra Leone by virtue of the Schedule to Chapter 18 of the Laws of Sierra Leone,1960 provides that: " *3(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless - (i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.*" Clearly, this provision attributes constructive notice to the purchaser. The subject of the notice need not be a Deed or registerable Instrument as in the case of equitable charges registered as Land Charges under the English Land Charges Act,1925. It could be a fact or thing, and not necessarily an instrument. The facts of this case show, that at the time the purchase price was paid in full by the Respondent, she had not made the proper inquiries as to the status of the property, to wit, whether there was any equitable right binding the 5th Defendant to another person. It follows that, the Respondent cannot lawfully or factually claim that she was a bona fide purchaser for value without notice. That being the case, and the LTJ having so found, and having found also, that as of 17th June,1995, the 1st Defendant had an enforceable right to have a Deed executed in his favour, it is my Judgment, that she should have found that the Respondent could not then be entitled to possession of the property, as she had been in a position where she could have found out, that the 5th Defendant had no beneficial interest to convey to her.

38. In SNELL'S PRINCIPLES OF EQUITY 27th Edition, page 50, the Learned Editors have this to say about Notice under the rubric '2.Constructive Notice': "(a) *The general principle is that a purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. Constructive notice has been said to be "in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. There are two main heads of constructive notice, namely:- (i) those where the purchaser had actual notice that the property was in some way encumbered.....and (ii) those where the purchaser has, whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made."* This case, contrary to the assertions and submissions made by Mr Jenkins-Johnston, is not about whether 5th Defendant had a Deed in his possession showing that he was the owner of the property; or that the Deed was properly registered; or that the survey plan in the Deed was duly authorised by the Director of Surveys and Lands; but whether, if Respondent has taken the proper steps, she would have found out that 5th Defendant was no longer the beneficial owner of the property. The only way she could have found this out, would have been to visit and inspect the property, as she eventually did, after paying for the same.

39. HUNT v LUCK (1902) 1900-1903 All ER Reprint 295, cited by Counsel on both sides, is a case in point. There, VAUGHAN-WILLIAMS,LJ in the Court of Appeal, said at page 597 para E: "*..if there is a purchaser or a mortgagee and he has notice that the vendor or mortgagor is not in possession, he must make enquiries of the tenant in possession and find out from him what his, the tenant's rights are, and, that if he does not choose to do so, then, whatever title he gets as purchaser or mortgagee, that title will be subject to the title of the tenant in possession." Later, the Learned Judge points out at page 298 that "..In my judgment the only inquiry which ought reasonably to have been made here by the intending mortgagee was an inquiry to protect himself against any right which the tenants would have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation whatsoever to make these enquiries of the tenant in reference to any other thing but protection against the rights of the tenant."* There, the Court recognised that the raison d'etre for the inquiry, was not to find out the status of the vendor's title, but to ascertain the

rights of the tenants. This is exactly what the Respondent did, but only after, after she had paid the purchase price to the 5th Defendant. She did not have to go to the house to find out whether 5th Defendant had title to the property, but rather, to find out whether there were tenants there, and what those tenants' rights were. It appears, Mr Jenkins-Johnston has missed this fine distinction at page 11 of his synopsis.

40. Further, STIRLING,J had this to say in BAILEY v BARNES [1894] 1 Ch 25 at page 31. Citing LORD CRANWORTH in WARE v LORD EGMONT 4 D.M.&G 460,473, he said: "*But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him- that he would have acquired it but for his gross negligence in the conduct of the business in question.*" At page 35, STIRLING,J says further: "*..ought here does not import a duty or obligation.....the expression 'ought reasonably' must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances.*" In TURAY v KAMARA [1967-68] ALR SL 172 H.C. BETTS,J found that the 2nd Defendant in that case, interviewed the Plaintiff, and it was as a result of that interview that he found out that the Plaintiff had indeed sold the property at 2 Hagan Street. He had therefore done all that was reasonably necessary to ascertain the status of the property, and whether there were any incumbrances on it. It follows that Mr Jenkins-Johnston's reliance on the Judgment of JAMES,LJ in PILCHER v RAWLINS (1872) 7 Ch App 259 is insupportable on the facts of the instant case. There, the purchaser had no notice. Here, there was clear evidence that if she had made enquiries before hand, she would have found out about 1st Defendant's equitable interest.

IS SPECIFIC PERFORMANCE AVAILABLE?

41. The next issue is, having found that the Respondent was not a bona fide purchaser for value without notice, does it necessarily follow that the 5th Defendant no longer had a beneficial interest in the property to convey to her, and that he was duty bound in Law to convey both the legal estate and beneficial interest in the property to the 1st Defendant, as he was deemed to be a Constructive Trustee of both interests? Or, that he was a constructive trustee of the legal estate, the equitable and beneficial interest therein having passed on to 1st Defendant as of 17th

June,1995. Because, it is only if these queries are answered by and in this Court in the affirmative, would the Appellant be able to obtain the reliefs the 1st Defendant sought in his Counterclaim, to wit: cancellation of the conveyance executed in favour of the Respondent, and execution of a Deed of Conveyance of the property in her favour on the basis that the contract evidenced by exhibit "L" and the earlier receipts, are specifically enforceable.

42. The LTJ agreed with the Appellant that the 1st Defendant had an enforceable right to Specific Performance of the contract for sale. Did she have a discretion to award Damages in lieu of this remedy just because it was an alternative claim made by the 1st Defendant in his Counterclaim? If, as she had found, the Respondent was not a bona fide purchaser for value without notice, was she right in granting her possession of property she had no right to buy, and of which she had never been in possession, and of which the 1st to 4th Defendants at the trial were in possession? Bearing in mind also, that the LTJ held at page 200 that the Respondent's claim for Mesne profits failed because the same had not been proved specifically, did such a Decision not amount to a tacit admission that the Respondent was never entitled to possession of the property? Ordinarily, mesne profits are awarded, however minimal or small, where the person entitled to possession of property, such as the owner, has been deprived of possession by another. Did not such a decision amount to a contradiction in terms? An examination of the authorities would show that, on the findings the LTJ made, it was clearly her duty to grant Specific Performance to the Appellant, and not to award Damages in lieu thereof. Notwithstanding the fact, and the arguments of Counsel for the Respondent, that 5th Defendant having conveyed the property by Deed to the Respondent, there was nothing for the 5th Defendant to convey to the Appellant, the true position is that if the 5th Defendant had no equitable interest to transfer to Respondent on 10th October,1996, there is something he still has which this Court could compel, him, or someone else in his stead, such as the Master and Registrar, to transfer to the Appellant. And as has been rightly pointed out by Mr Tejan-Cole in the course of arguments, the provisions of the Registration of Instruments Act, Chapter 256 of the Laws of Sierra Leone,1960 do not help the Respondent. Section 4 of that Act deals with priority of interest between two registered documents, not between an unregistered equitable right, and a registered legal instrument entitling

the owner thereof to the legal estate in real property. And as LIVESEY LUKE, CJ made clear in SEYMOUR WILSON v MUSA ABESS at page 76 of his judgment: "*Registration of an Instrument under the Act confers priority over other instruments affecting the same land which are registered. Registration of an Instrument under the Act does not confer title on the purchaser, lessee or mortgagee... nor does it render the title of the purchaser indefeasible. What confers title (if at all) in such a situation is the instrument itself and not the registration thereof. So the fact that a conveyance is registered does not, ipso facto, mean that the purchaser thereby has a good title to the land conveyed.*" What matters is the strength of the title as evidenced in the Deed itself.

43. That there was sufficient evidence in writing of the contract to convey, in order to satisfy the Statute of frauds Act,1677 which still applies in Sierra Leone, is clear. Exhibit "L" suffices for this purpose; and the LTJ did not find fault with this contention, & she agreed the Contract evidenced by "L" was indeed specifically enforceable. In the case cited by Mr Tejan-Cole, THOMPSON, SMITH and JOHNSON v G B OLLIVANT AND CO LTD [1920-36] ALR SL 69 Full Court, SAWREY-COOKSON,J citing CHITTY ON CONTRACTS 14TH Edition, 1904 at para 80, had this to say at page 72 Line 35 to page 73 Line 3, about that Statute: "*The Statute of Frauds does not require a formal contract drawn up with technical precision. The requirement is of either 'the agreement' sued upon, 'or some memorandum or note thereof,' written and signed by the party to be charged. Any memorandum under the hand of the party made before action brought ....which names or so subscribes as to identify , the contracting parties...and which contains, either expressly, or by reference to other written papers, the terms of the agreement, is sufficient.*" Exhibit "L" quoted above, amply fits this description.

CONSTRUCTIVE TRUST

44. Having held that there was an enforceable contract for sale evidenced by exhibit "L", the next question is, what is its effect? That question was answered by the great equity Judge JESSEL,MR in LYSAGHT v EDWARDS (1876) 2 Ch D 499 at page 506: "*It appears to me that the effect of a contract for sale has been settled for more than two centuries;.....it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a*

right to the purchase money.....". And at page 507: *" Valid contract means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser - a contract binding on both parties."* Once the contract has been created, the equitable interest in the land is deemed to have been transferred automatically to the purchaser of that interest. It is at this stage that the constructive trust comes into operation on the basis of the equitable principle that 'equity looks upon as done, that which ought to be done.' The vendor holds the property on constructive trust for the purchaser until completion of the sale or transfer.

45. The time at which the contract becomes enforceable, seems to have been settled in JEROME v KELLY[2004] UK HL,25 [2004] 2 All ER 835. Prior to this case, the issue had been dealt with in LLOYDS BANK PLC v CARRICK [1996] 4 All ER 630. There, the vendor had contracted with his sister-in-law, to sell a lease over a residential property to her. The transaction required the sister-in-law to sell her own home, to pay the sale proceeds to the defendant, and then to move into the property over which the defendant was lessee, at which time he would assign his interest in the lease to her. The defendant took out a charge with the Bank without informing his sister-in-law. The question turned on whether or not the sister-in-law had a right under a merely bare trust, such that her right did not require registration and so could not be enforceable against the bank for want of registration. It was held that the contract became specifically enforceable when the sister-in-law began to perform her obligations under the contract by entering into possession of the lease and paying the purchase price.

46. In JEROME v KELLY [2004] UK HL,25 [2004] 2 All ER 835 LORD WALKER at paragraph 31 cited with approval the judgment of Mason J in **Chang v Registrar of Titles (1976) 137 CLR 177, 184:** *"It has long been established that a vendor of real estate under a valid contract of sale is a trustee of the property sold for the purchaser. However, there has been controversy as to the time when the trust relationship arises and as to the character of that relationship. Lord Eldon considered that a trust arose on execution of the contract (Paine v Meller; Broome v Monck). Plumer M.R. thought that until it is known whether the agreement will be performed the vendor 'is not even in the situation of a constructive trustee; he is only a trustee sub modo, and providing nothing*

happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay' (Wall v Bright). Lord Hatherley said that the vendor becomes a trustee for the purchaser when the contract is completed, as by payment of the purchase money (Shaw v Foster). Jessel M.R. held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser (Lysaght v Edwards). Sir George Jessel's view was accepted by the Court of Appeal in Rayner v Preston. It is accepted that the availability of the remedy of specific performance is essential to the existence of the constructive trust which arises from a contract of sale". See also the judgment of Jacob J at pp189-190, concluding that, "Where there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties". At para 32 he says, inter alia, " *If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full."* In the instant case, payment had been made in full over one year before the 5th Defendant wrongfully conveyed the property to the Respondent.

47. A constructive trust could also be imposed in a land transaction where there has been *'detrimental reliance'*, as was the case in BANNER HOMES GROUP PLC v LUFF DEVELOPMENT LTD [2000] 2 WLR 772 where two companies had entered into a joint venture agreement to exploit land in Berkshire, UK. There, it was held that the defendant could establish a constructive trust even in the absence of a binding contract to the effect that the claimant and defendant would exploit the land jointly, if the defendant had refrained from exploiting any personal interests in that land in reliance on the negotiations being conducted between the claimant and the defendant. Here, the evidence which was uncontroverted at the trial was, that the 1st Defendant had made known to the 5th Defendant that he wished to purchase the property in order to continue to house his family on a more secure footing than that of being a mere tenant.

48. Notwithstanding what I have stated above, I do not think the Appellant's argument that Respondent should be held to be a constructive trustee

for the Appellant, as regards the house, holds, in the light of the authorities cited above. She is as much an injured party, as the Appellant, but her remedy lies against the 5th Defendant and not against the property. The final position is that, as at 17 June1995 when 5th Defendant received and signed for the last payment, he no longer had the power or authority to convey the property to anybody else other than the 1st Defendant. The Deed he executed in favour of the Respondent on 10 October,1996 therefore had no validity and effect in Law. So, we are not really calling on the,Respondent to divest herself of the Legal estate and beneficial interest in the property in favour of the Appellant, because, as far as we are concerned she has none to convey. What we will say is that that document has no worth, and should be cancelled and be expunged from the Books of Conveyances kept in the Office of the Registrar-General, Freetown.

JUDICIAL DISCETION

49. Having held that 5th Defendant as of 17th June,1995 held the property at Clarke Street, Tengbeh Town on Trust for the benefit of the Appellant, and that Specific Performance was the appropriate remedy for 5th Defendant's default, the next question is whether the LTJ had a discretion, and whether she exercised the same judiciously. Clearly, she had a discretion in the matter. It is our view, with the greatest respect to her, as we consider her an eminent Judge, that she erred in going on to hold that hardship dictated that she grant possession to the Respondent.

HARDSHIP

50. Of course, we do acknowledge that 'hardship' could be a ground for refusing Specific Performance. In FRY ON SPECIFIC PERFORMANCE 6TH Edition 1921 p.199 paras 417-18, cited with approval by GOULDING,J a very distinguished Chancery Judge, in PATEL v ALI [1984] 1All ER 978 at 981 paras e-f, it is stated that: " *It is a well-established doctrine that the Court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either parties to it; and this although the party seeking specific performance may be free from the least impropriety of conduct. The question of the hardship of a contract is generally to be judged of at the time at which it is entered into: if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or*

change of events, have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks the performance of the contract." In that case, the hardship pleaded by the Defendant was that she had had a leg amputated at the right hip joint, was caring for a baby, was expecting another baby, and she was also living in the house in dispute, whilst the Plaintiffs, who were man and wife, were being housed by their Local Council. In those circumstances, GOULDING,J felt hardship dictated that Specific Performance be refused. As he himself said at paras c-d on the same page: "*..the hardship which moves the court to refuse specific performance is either a hardship existing at the date of the contract or a hardship due in some way to the plaintiff";* but confessed that neither of those conditions existed in the case he was hearing; and later, at page 982 paras c-d, he said "*.....the important and true principle, in my view, is that only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immoveable property.*" Further, there was considerable delay in bringing that case to trial due to the imprisonment of the Defendant's husband, proceedings brought by her husband's Trustee in Bankruptcy, and the Defendant's own ailments.

51. None of these factors were present or subsisting in the instant case; nor was this principle canvassed by either side. There was no evidence of such hardship before her. On the contrary, the evidence led by the Defendants, was that they were in occupation of the property which was their residence. If anything, balance indicted that the Respondent, who was not, and had never been in possession, should seek a refund of the purchase price paid, from the 5th Defendant. She lived in the United States of America. At page 114 of the Record, she says, inter alia, "*..I expressed my desire to buy a house for my family to one Abu Bakarr...*" PW3, AMADU BALLAH KAMARA confirms this. But, other than this bare desire, there was nothing else before the LTJ to show that Respondent would be put to greater loss if she, lost the house, rather than the 1st Defendant. DW2 & 3, and 1st Defendant's mother-in-law now deceased, who was 3rd Defendant, also lived in the house.

52. Can we, in these circumstances interfere with the LTJ's exercise of discretion? We think we can, if we believe that, based on the evidence before her, and her own findings, she had come to the wrong conclusion.

The duties of this Court on the hearing of an appeal, have been well set out by Mr Jenkins-Johnston at pages 7-8 of his synopsis, and we agree with him. We do not intend to disturb the LTJ's findings of fact. She did find that the Contract of sale between 1st Defendant and 5th Defendant was specifically enforceable. She also found at page 199 that "*In this case it has been shown that the plaintiff , the purchaser herein did not take the reasonable care expected of a prudent purchaser to make the necessary enquiries, before making payment, and as such is held to have constructive notice,of the 1st Defendant's equitable interest in the said property. The Plaintiff therefore takes the property subject to the 1st defendant's interest therein and holds the property as trustee for the 1st Defendant.*" Having said that, the only reasonable thing the LTJ could have done was to have cancelled Respondent's Deed of Conveyance. The Respondent could not have been constructive trustee in favour of 1st Defendant, whose relatives were living in the house at his will, and at the same time be entitled to possession of the same. Such a result was a manifest absurdity, and we intend to correct the anomaly.

53. In JOINT VENTURE CONSTRUCTION COMPANY v CONTEH [1970-71] ALR SL 145 per TAMBIAH,JA at 149 Line 38 to page 50 Line 22, said, "*Although this Court is reluctant to interfere with the findings of fact of a trial Judge, this case comes within the principles under which an appellate Court can interfere with the findings of a trial Judge.....it is open to an appellate court to find that the view of a witness was ill-founded...Where the point in dispute has to be decided by the proper inferences to be drawn from the proved facts, an appeal court is in as good a position to evaluate the evidence as the trial Judge, and may form its own independent opinion.....the Learned judge, having misread the evidence, failed to evaluate the whole of the evidence led and, what is more, came to the wrong inferences on the proved facts, and, with respect, gravely misdirected himself in the law.*" We think the LTJ in this case not only misread and failed to properly evaluate the evidence, but also "*came to the wrong inferences on the proved facts,*" and thereby gravely misdirected himself in law. In such circumstances we have no alternative but to reverse the Judgment in its entirety.

54. We are indebted to Counsel on both sides for the several authorities cited to us in support of their respective contentions, and we intend no slight because we have not referred to all of them. They are relevant, but

bearing in mind the conclusion we have reached, we did not find it necessary to refer to, and to deal with all of them.

ORDERS

55.In the result, we Order as follows:

1. The Appeal of the Appellant is allowed, and the Judgment of SHOWERS,J dated 12th November,2007 is WHOLLY SET ASIDE.

2. The Appellant is entitled to, and shall remain in Possession of the property situate at, and known as 3 Clarke Street, Tengbeh Town, Freetown.

3. Deed of Conveyance dated 10th October,1996 and duly registered as No. 334/96 at Page 32 in Volume 501 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown is HEREBY CANCELLED AND THE REGISTRAR-GENERAL IS HEREBY DIRECTED TO EXPUNGE THE SAME FROM THE SAID RECORD BOOKS OF CONVEYANCES.

4. As the Respondent has prayed in her amended Writ of Summons, in the alternative, for Special Damages, (page 81 of the Record) the Respondent shall recover from HERBERT THORPE the 5th Defendant at the trial, the total sum of USD42,000 plus interest thereon at the rate of 8 % per annum with effect from 10th October,1996 to the date of this Judgment, and thereafter at the Statutory Rate. She is also entitled to the Costs of the action in the Court below, as against the said 5th Defendant, such Costs to be taxed.

5. The Master and Registrar of the High Court shall execute a Deed of Conveyance of the said property situate at and known as 3 Clarke Street, Tengbeh Town, Freetown in favour of the Appellant MRS ELIZABETH AHMED, immediately.

6. The Appellant shall, as against the Respondent, have the Costs of this appeal, and of the Court below, such Costs to be Taxed, if not agreed.

mbelle.

THE HON MR JUSTICE N C BROWNE-MARKE, Justice of Appeal

THE HON MR JUSTICE E E ROBERTS, Justice of Appeal

THE HON MR JUSTICE S A ADEMOSU, Justice of Appeal

11th February, 2010.