The Court Of Appeal For Bermuda

CIVIL APPEAL NO. 12 OF 2006

Between:

KIRK ROBERTS

Appellant

-V-

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Evans, JA
Hon. Justice Stuart-Smith, JA

Date of Hearing: **10th & 11th March 2008**
Date of Judgment: **19th March 2008**

Stuart-Smith, JA

Judgment

Introduction

1. This is an appeal from a judgment of Kawaley, J. made on 24th March 2006 on the application of the Director of Prosecutions (DPP) for an Order for confiscation pursuant to the Proceeds of Crime Act 1997 (the Act) Section 9. The Judge determined that the Appellant had benefited from drug trafficking and ordered him to pay $1,822,754.27. In default of payment he ordered that the Appellant should serve one years imprisonment for each $10,000 unpaid subject to the

statutory maximum. The default term was to be adjusted pro rata in respect of sums less than $10,000 unpaid. The appellant had been sentenced to 10 years imprisonment for this offence of Conspiracy to import controlled drugs, namely Marijuana, following his conviction on the 8th of July 2002. The Judge also made a charging Order on 15 A West Side Road Bermuda (the property) in the sum of $962,531.20.

Background facts of the Drug Trafficking

2. The evidence for the Prosecution came in the main from the affidavits sworn by Special Constable Robin Dyer. The facts relating to the Appellant's conviction were that a co-conspirator Heinz Golumbeck had made an initial trip to Bermuda with a comparatively small quantity of marijuana in March 2000. Following this the Appellant requested Golumbeck to return to Bermuda with a consignment of 200 lbs of marijuana, for which the Appellant gave him $36,000.00 as an advance. A second major shipment of 200 lbs did not go so smoothly. Eventually a Crown witness one Cabral collected the consignment at sea in his vessel, which he offloaded into an inflatable dingy manned by the Appellant. In an answer to Cabral's expression of hope that they were not handling cocaine, the appellant said "No, I don't deal with that anymore". The abandoned dingy was found by the police on the 19 December 2008. The appellant's house was searched the same day and he was arrested. No drugs from this consignment were found. When Golumbeck called the Appellant from sea, the latter said "it's cool. I haven't lost anything". Following his arrest he told the police "I've been doing this for 20years". The Appellant did not give evidence or call witness at his trial. His appeal to the Court of Appeal and Privy Counsel failed. The Conspiracy charge apparently related only to the second consignment of 200 lbs. But he subsequently pleaded guilty to a further charge of possession of 936.8 grams of cannabis found in his house when raided by the police on the day of his arrest.

Judges findings on benefit

3. The judge found that the claimant was entitled to a confiscation order under Section 9 of the Proceeds of Crime Act 1997 in the following amounts:

Deposit in BNTB account	$ 40,261.90
Deposit in the Capital G	$ 5,650.00
200 lb Marijuana	$1,400,000.00
Cash directly sent	$ 10,984.00
Cash sent by others	$ 15,795.44
Unaccounted building costs	
At 15 West Side Road	$ 350,062.40
	$1,822,754.27
Total	$1,822,754.27

4. The Judge then considered what realizable assets were owned by the Appellant. He held that the Appellant and his wife had a joint interest in the Property. The market value of the property was$1,875,000.00 which, after the deductions of the mortgage and legal costs resulted in an equity of redemption of $1,575,000.00. One half of this was $787,500. But to this had to be added one half of the unaccounted building costs, namely $175,031.20, which the judge held had been provided by way of gift to the wife. The calculation is set out in paragraph 92 of the judge's findings as follows:

Market value of Property	$1,875,000.00
Less Mortgage	$192,573.00
Less estimated legal costs	$ 7,427.00
	$1,575,000.00
Less 50% joint interest	$ 787,500.00
	$ 787,500.00
+1/2 Building Costs	$ 175,031.20
	$ 962,531.20

5. There are a number of grounds of appeal. The first two are challenges to the court's jurisdiction. The remainder of the challenges of certain of the judge's findings of fact.

6. Ground 1

The DPP has no locus standi to bring the proceedings under the Act. It is contended that the proceedings must be brought by the Attorney General and there is no statutory provision substituting the DPP for the Attorney General. This point was not argued in the Court below.

Section 9(1) of the Act provides:

> Where a defendant appears before the Supreme Court to be sentenced for one or more drug trafficking offences, the court shall proceed under this section –
>
> (a) on the application of the Attorney General,

Section 10(1) is to a similar effect

The Bermuda Constitution Order 1968 (the Constitution) provides:

Attorney-General

71 (1) There shall be an Attorney-General who shall be the principal legal adviser to the Government.

(1A) The Attorney-General shall be either a member of either House who is entitled to practice as a barrister in Bermuda, in which case he shall be appointed by the Governor in accordance with the advice of the Premier, or a public officer.

(2) The Attorney-General shall have power, in any case in which he considers it desirable so to do—

> (a) to institute and undertake criminal proceedings against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;

The Director of Public Prosecutions Sections

71A At any time when the office of Attorney-General is held by a member of either House—

> (a) there shall be a Director of Public Prosecutions whose office shall be a public office;
>
> (b) the following provisions of this Constitution shall have effect as if references therein to the Attorney-General were references to the Director of Public Prosecutions, that is to say, subsections (2) to (6) of section 71…

Although at first blush it might appear that the expression criminal proceedings are to be contrasted with civil proceedings in a civil court in Paragraph 71(2)(a), I am satisfied that Counsel are correct in submitting that the expression 'civil court' is to be contrasted with a court constituted by or under a disciplinary law (see Section 16(1) of the Constitution). Therefore criminal proceedings take place before a civil court; they do not thereby become civil proceedings. Any other construction would mean that the Attorney General, and since the institution of the Office of DPP, the DPP would have no authority to institute criminal proceedings.

7. Director of Public Prosecutions (Consequential Amendment) Act 1999 provides:
Section 4 Where a reference is made to the Attorney General in any statutory provision… that relates to criminal proceedings, the references shall be construed as a reference to the DPP.
This section, as its name suggests, is consequential upon the amendment of the constitution in Section 71 A.

8. The question therefore is whether the proceedings under Section 9 of the Act are civil proceedings, as the Appellant contends or criminal proceedings as the Respondent submits. Mr. Phipps, QC on behalf of the Appellant, submits that the formal application was commenced by Notice of Motion entitled 'In the Supreme Court of Bermuda. Civil Jurisdiction," and all subsequent proceedings and documentation is so entitled. He further relies on the provisions of Section 62 and 63 of the Act which provides:

Civil Standard of proof

62 Any question of fact to be decided by a court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on the balance of probabilities.

Appeals

63 Any decision of a court in proceedings under this Act, except proceedings in relation to any offence committed under this Act, is a judgment of a court in a civil cause or matter within section 12(1) and (2) of the Court of Appeal Act 1964 or, as the case may be, section 2 of the Civil Appeals Act 1971.

9. He further submitted that the Judge in this case held in the course of the Ruling on jurisdiction, though not on this point, that the proceedings were civil proceedings. In my judgment the judge did not go as far as this, which in any event would have been unnecessary for his decision on the point before him. What he actually said was:

> *"30 The civil standard of proof applies to applications for confiscation orders; and the matter is, for appeal purposes at least, explicitly a civil matter: section 62, 63, Proceeds of Crime Act. Certain applications under the 1997 Act are governed by the Rules of the Supreme Court, and the present application, though made orally in the criminal proceedings in which the Defendant was convicted, were subsequently formally constituted as a civil action.*
>
> *31 This is to be contrasted with the United Kingdom legislation on which the relevant statutory provisions are based, which are very clearly criminal law provisions, governed by criminal law procedural rules, notwithstanding any special standard of proof. The civil character of the proceedings may be the result of anomalous drafting rather than a deliberate decision by Parliament to take confiscation proceedings out of the criminal law domain, because section 9 does anticipate that the application must be made at the time of sentencing.*
>
> *32 Nevertheless, in light of the great extent to which the 1997 Act displaces the normal evidential bias towards the accused in criminal proceedings, it seemed to me to be of more than marginal significance that the usual rule in civil proceedings is that procedural irregularities do not result in invalidity."*

10. I do not accept Mr. Phipps' submission. In my judgment it is perfectly clear that the making of a confiscation order under the Act is still part of the criminal proceedings. Section 8 provides

(2) for the purposes of this Act –

(a) proceedings for an offence are instituted in Bermuda when an information is laid charging a person with an offence;

(b) proceedings in Bermuda for an offence are concluded on the occurrence of one of the following events—

(iv) the satisfaction of confiscation order made in the proceedings.

Section 9(1) and section 10(1) make it plain that the application for a confiscation order is part of the criminal proceedings. This view is entirely consistent with the decision of the House of Lords in McIntosh V Lord Advocate [2001] 2 ALL ER 638 where the House was dealing with the criminal legislation in Scotland. It was held that where an application is made for a confiscation order, the defendant is not thereby "charged" with or "accused" of a criminal offence, and therefore cannot claim the protection of Article 6(2) of the European Convention for the Protection of Human Rights, the proceedings were nevertheless covered by Article 6(1) being part of the criminal proceedings. See also Philips United Kingdom [2001] Criminal Law Review at 811.

Ground 10

11. That the learned judge erred in finding that the court had jurisdiction to hear the respondent's application because there had been non-compliance with the time limits set by section 11 of the Act. This section provides that where the Court considers that it needs further information, it may postpone the making of a determination for such period as it may specify, not exceeding six months from the date of the conviction (section 11(1) and (3). Where there is an appeal, the Court may postpone the making of an order for not more than three months of the determination of an appeal, unless there are exceptional circumstances (section 11 (4) and (6).

12. Much delay was caused in the present case by the appellant's appeal first to the Court of Appeal and then to the Privy Council, judgment of the Privy Council not being formally served until the 4th March 2004.

13. It is unnecessary in this judgment to set out the various steps that were taken in the proceedings. The judge traced the history in his ruling of the 20th March 2006. Suffice it to say that the judge accepted that there had been delay following the Privy Council decision (paragraphs 47-55), but he said that if a timely application had been made for postponement, it would most likely have been granted on various possible grounds (paragraph 54). And that the defendant suffered no real prejudice by the delay (paragraph 55).

14. Mr. Phipps does not submit that the time limits set by section 11 are mandatory in the sense that non-compliance deprives the Court of jurisdiction. He could not do so in the light of the decision of the House of Lords in R V Soneji [2005] 4 ALL ER 321. The judge exercised his discretion to hear the application. He said that the delay caused no real prejudice to the appellant. The delay had not been flagrant or deliberate disregard of the time limits and there was no abuse of process. How in these circumstances can the appellant challenge the exercise of the judge's discretion? As I understand Mr. Phipps' submission it is that the judge wrongly considered that the relevant event to which the time limits applied was the making of the application to postpone or proceed with the application, whereas the relevant event was the hearing of the application and the making of the order. I agree that the latter is the relevant event. But I am not persuaded that the judge took a different view. In three paragraphs of his judgments (paragraphs 49, 52, 56) the judge refers to "the need to hear the application", "the time limit to postpone the making of the relevant determination" and "the need to list the application for hearing within the relevant time." Even if the judge was in error on the point, and in my view he was not, I would not hesitate in the exercise of my discretion in the same way as the judge for the reasons that he gave.

15. I turn then to the criticisms of the judge's findings of fact. The first matter relates to the finding of the appellant benefited to the extent of $1,400,000 being either

the value of the proceeds of sale of 200 lbs of marijuana, or the value of the drug itself. Mr. Bailey submitted on behalf of the appellant that the court should not have accepted the uncorroborated evidence of Golumbeck and moreover there was no evidence that 200 lbs of marijuana was ever received by the appellant. The charge was conspiracy and not importation. Since no drugs were ever found, indeed if they had been, they would have been confiscated and the appellant would not have benefited from them—it is said that the court cannot conclude this quantity was ever received.

16. I cannot accept this submission. It is plain that the jury accepted the evidence of Golumbeck and another co-conspirator Cabral. It was Golumbeck's evidence that he could tell by the smell that it was marijuana. It is fanciful to suggest that the elaborate steps taken to get the consignment into Bermuda, for which Golumbeck was paid $24,000, related to some completely and innocuous substance. The agreement was to import 200 lbs marijuana; there is nothing to suggest that the consignment weighed less than this. If the appellant wished to say that he had been cheated and in fact that it was not marijuana that he received, he should have given evidence to this effect in the confiscation proceedings, though I doubt that he would have been believed.

17. Then Mr. Bailey submits that the judge should not have concluded that the unaccounted building costs amounted to $350, 062.40. The judge arrived at this figure by taking the undisputed evidence that the cost of building the house which had been erected on the property was $150 per spare foot and deducting the amount of the mortgage from this figure. The judge held that there was no satisfactory explanation as to the source of the remaining costs. There was no dispute that the appellant had paid for the cost of the building, though he asserted that his wife had also contributed to the costs and that he had a legitimate source of income from which the money came. But there was no evidence to support these assertions. In particular, the business which had been conducted at the boat yard was run at a loss; when it was sold the proceeds of sale were consumed by the debts. The appellant's wife's income was very modest. Although the appellant

asserted that he had done some work himself, there was no satisfactory evidence as to what this was.

18. In his skeleton argument, though not on the grounds of appeal, the complaint is made that the judge should not have accepted the evidence from a Royal Gazette edition dated the 23rd August 2004 in which it was stated that the appellant admitted that he dealt with drugs for over a twenty-year period. In my judgment, there is nothing in this point, because the evidence was that he had said the same thing to the police.

19. The remaining grounds of appeal or complaint, as they are described in the appellant's skeleton argument, relate to the judge's finding that the appellant and his wife owned the beneficial interest in the property. The complaints of the judge's findings are as follows:

(a) that he erred in accepting that the appellant was a beneficial owner of the property contrary to the evidence that it should be conveyed to the TR Trust of which the appellant and his wife were amongst twenty-one beneficiaries (4th complaint).

(b) that the judge failed to take into consideration the license agreement between the trustees of the trust and the appellant and his wife. (5th complaint)

(c) that the judge erred in taking into consideration that the appellant and his wife, together with two siblings, were guarantors, and that the appellant's parents William and Barbara Roberts were mortgagors, to a mortgage with Gibbons Deposit Company Limited (Gibbons) in 1993 to secure the sum of $85,000 (6th complaint)

(d) that the judge failed to consider the exchange of property between the appellant's parents and his brother in April 1993 (7th complaint)

(e) that the judge failed to give consideration to the fact that the appellant and his wife were guarantors of the mortgage granted by Gibbons to the Trustees of the TR Trust.

(f) that the judge erred when determining that the appellants and his wife were the beneficial owners of the property due to the contents of a letter from Ms. Hoskins dated 11th January 1997 to Gibbons.

20. It is plain that the judge did give consideration to all these matters. The problem was to make sense of all the evidence, some of which was inconsistent, when as the judge put it in paragraph 76 of his judgment

> *"In my view it is not seriously arguable based on the material before the Court that the transaction in question was consummated by all parties with the common intention that the documents should not create the legal rights and obligations they had the appearance of creating. The overt intention of the transaction was to insulate the Property from hostile claims of any nature which might be directed at it if the defendant and his wife had acquired legal as well as beneficial ownership."*

21. In his full and careful judgment the judge set out in paragraphs 56-63 the facts relating to the beneficial interest. I can do no better than to recite this part of his judgment in full.

> *"56 The property was obtained by the defendant's parents in a property swap with his brother Kevin on April 22, 1993. An $85,000 mortgage was taken out on July 9, 1993, which was reconveyed on a date uncertain. On October 23, 1999, the Defendant's parents conveyed the property to Kevin Roberts, Karen Benevides and Christine Hoskins for the purported consideration of $225,000. On a date uncertain these three purchasers were appointed as the Trustees of the T.R. Trust, settled with $50 by Geralyn Roberts. The beneficiaries of this discretionary trust were the Defendant and his wife plus "their issue, nieces and nephews, a class said to presently number 21 persons. However, it seems clear that the Property was conveyed to the Trustees in their capacity as such in October 1999, because this is recited in the Tenth Schedule to the $240,000 mortgage granted to Gibbons Deposit Company by the Trustees (guaranteed by the Defendant and wife) on January 26, 2000. The Defendant*

(and his wife) apparently is entitled to occupy the property under a license agreement which represents his only direct legal interest in the property.

57 *The Plaintiff's case on beneficial ownership is as follows. On January 11, 1997, Ms. Christine Hoskins, attorney for the Roberts family and hardly independent from the lender's perspective, opined to the deposit company that if the Defendant's parents were convicted of the drugs offences t hey had been charged with, the Property would not be liable to be confiscated under the Drug Trafficking Suppression Act 1988. The factual lynchpin of the opinion was that although "all parties acknowledge that the property has been beneficially owned by Mr. and Mrs. Kirk Roberts from 1995, no deed transferring the legal title to the property was ever executed." That the latter representation was relied upon by the deposit company is evidenced by a letter from the lender to Ms. Hoskins dated September 2, 1999. Later that year the Defendant's parents were convicted and sentenced to imprisonment and no confiscation order was in fact made. Meanwhile, the Defendant and his wife wished to obtain further financing to fund construction work already started, while the lender wished to obtain security for monies rashly advised in circumstances where a mortgage granted by the Defendant's parents was not a commercially viable option.*

58 *On January 23, 1997, the Defendant "as co-owner of" the Property granted his wife a power of attorney to borrow money on the security of the Property from the deposit company. Between then and July 18, 1997, the Defendant's wife signed seven promissory notes on their behalf as owners of the Property, undertaking to mortgage the same. The Defendant himself signed two such notes. From a witness statement provided by an official of the mortgage provider, it seems clear that the financial institution, regarded Ms. Hoskins as acting on behalf of the Roberts family generally, and between 1997 and 1998 dealt with the loan account*

on the explicit basis that the Property was beneficially owned by the Defendant and his wife, and that legal title would be conveyed to them in due course. In early 1999, however, the officer discussed with Ms. Hoskins concerns about the validity of its proposed mortgage depending on who the Property was conveyed to by the then legal owners.

59 *In July 1997 the Defendant applied for planning permission with respect to the Property, seemingly after some work had already commenced. Mr. Durant suggested that the planning application form being completed by the Defendant and his wife was inconclusive, but the July1, 1997 application names a separate agent, and the Defendant himself signs the form beneath the following caption: "If the application form is signed by anyone other than the owner of the land the application must be accompanied by a letter signed by the owner stating that he/she is aware that the application is being made, or accompanied by a certificate in accordance with section 16(2) of the Development and Planning Act 194." There is no suggestion that any such letter from another owner or certificate was ever filed.*

60 *Moreover, inconsistently with the suggestion that these representations were merely a response to financial pressure asserted by the deposit company and a desire to protect the Property from seizure in confiscation proceedings feared in 1997 after his parents arrest, the Defendant had as early as 1995 hired contractors to excavate this same Property. And on December 19, 1996, admittedly after his parents' September 1996 arrest*[12] *(but seemingly before they had been charged), the deposit company's site visit form listed in the "Name" box next to "Property": "Kirk & Gerry Roberts".*

61 *The Crown cast doubt on, and point to inconsistencies between, the March 13, 2006 Hoskins Affidavit, and the March 18, 2006 Affidavit sworn by the Defendant's mother in defence of the validity of the Trust. Hoskins, a Trustee, identifies 21 beneficiaries,*

19 in addition to Kirk and Geralyn Roberts, ten on the Benevides side of the family and nine on the Roberts side. Hoskins says the Trust was created for "legitimate estate planning purposes" (paragraph 5(c)), and that her beneficial interest representation was explicitly based only on Geralyn Roberts' instructions, while Mrs. Barbara Roberts says that her main concern was to keep the property in the Roberts family because of doubts about her son's marriage. Both affidavits are broadly consistent in substance in denying the conveyance to the Trustees was to evade any confiscation order that might be made against the Defendant. Ms. Hoskins admits to concerns about the Defendant's reputation for being involved with drug trafficking, and relief when his mother reassured her that the building was being financed from legitimate sources.

62 *It is common ground that the Settlor of the Trust is the wife of the Defendant while the Protector is his mother. As late as October 25, 1999, Ms. Hoskins forwarded (apparently by fax) a completion statement addressed to the Defendant and his wife dated October 23, 1999 to the deposit company, reflecting the conveyance of the Property to them and the grant of a first mortgage to the deposit company. Either Ms. Hoskins was unaware that the October 23, 1999 conveyance to the Trustees had already taken place, or the conveyance was executed on or after October 25, 1999 and back-dated.*

63 *It is also essentially common ground that the Property was in real terms voluntarily conveyed to the Trust for no consideration, save for the Trust's assumption of the mortgage obligations in respect of monies already lent to the Defendant and his wife. It would seem to follow that, if the latter individuals were held to have been the beneficial transferors to the Trust, full consideration was not exchanged, having regard to the fact that the alleged beneficial owners remained fully liable (albeit only contingently) for the pre-existing indebtedness as guarantors of the*

22. The judge set out his conclusions in relation to the beneficial interest in the property at paragraphs 77-80.

> ***77*** *It is clear on all the evidence, however, that the Defendant and his wife were from in or about 1995 beneficial owners of the Property. This is supported by the contemporaneous documents and conduct of the Defendant, in commencing building on the vacant land before the crisis of his parents' arrest arose in the second half of 1996, as well his conduct after this happened. In March 2006, it is for the first time suggested that the positive representation made by the family lawyer in a formal opinion letter to a financial institution in 1997, reinforced by subsequent communications to the effect that the legal owners were not beneficial owners, was simply a mistake. This suggestion, regretfully, beggars belief. The Hoskins Affidavit makes it impossible to accept that over a two year period she was mistaken about the true position; she was surely either advancing the true position or deliberately advancing a false position to a financial institution. She deserves the benefit of the doubt, in this regard.*
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> ***78*** *The Trust beneficiaries are defined as the issue, nieces and nephews of the two purported joint beneficial owners, an equal split between the Defendant and his wife (presently she has one more family member than the Defendant). This (combined with the purported joint owners being guarantors for the mortgage and occupiers of the premises) is far more consistent with the Defendant and his wife being the beneficial owners prior to the 1999 conveyance, than it is with the notion that it really belonged to the parents all along. It is true that as Protector, the Defendant's mother can influence distributions from a discretionary Trust, as Mr. Clarke contended, but a more realistic*

view of the structure suggests that no distributions of substance would likely be made in the lifetime of the present Protector in any event.

79 *It seems obvious that the Defendant, whom even his lawyer feared was involved in drug dealing in the 1990's, and who eventually admitted long-term drug dealing, was prompted to disclose the true beneficial ownership position by the unexpected crisis of his parents being at risk of the property being confiscated. Has this not happened, the need to go on record, through Ms. Hoskins, through a power of attorney, through signing promissory notes, through signing a Planning application form as owner, may not have arisen. I find it most implausible that man seemingly adept at avoiding culpability for criminal actions would have executed so many false documents, exposing himself to potential prosecution for obtaining money from the deposit company by false pretences, and possible prosecution under the Development and Planning Act.*

80 *While perhaps a master of subterfuge and concealment, the evidence suggests that dishonesty is not the Defendant's greatest weakness. On arrest he told the Police: "I've been doing this for 20 years…", and after his conviction and sentence he told the Royal Gazette the same thing. He did not give evidence at his trial, and he did not unequivocally deny ever possessing beneficial ownership in his evidence filed in the present application. I am satisfied on a balance of probabilities that the representations made as to beneficial ownership of the Property by the Defendant, his wife and the family attorney between January 1997 and October 1999 represented the true legal and factual position.*

23. As the judge pointed out, it was not until the affidavits of Ms. Hoskins and Mrs. Barbara Roberts in March 2006 that any attempt was made to repudiate the suggestion and evidence that the appellant and his wife held the beneficial interest in the property since 1995 as Ms. Hoskins stated in her letter to Gibbons of the

11th January 1997. While it may be that paragraph three of this letter, to the effect that the appellant and his wife paid for the property, i.e. his presumably paying the price of the vacant plot to his parents, is inconsistent with the deed of exchange in 1993, it is possible that the date is incorrect or alternatively that the appellant and his wife contributed to the price of the exchange land. Alternatively, although there does not appear to have been any deed of gift from the parents to the appellant and his wife, it would seem entirely likely that before financing the cost of the building, the appellant and his wife had a least a promise that the land would be given to them. This is consistent with the proposal that the legal estate should be conveyed to them, a proposal that was only changed at the last minute, so that the conveyance of the legal estate was made to the Trust, when it was feared by Ms. Hoskins that the appellant's reputation for drug dealing might result in a confiscation from him instead of from the parents.

24. The judge held that the beneficial interest in the property which was owned by the appellant and his wife was conveyed to the trust, or in some way surrendered to the trust and that this was a gift at an inadequate consideration. A possible alternative view in my judgment is that the trust took the legal estate subject to the trust of the beneficial interest of the appellant and his wife. Everyone appears to have been well aware of this interest at the time. In the result is makes no difference since the beneficial interest would be enforceable against the trustees and caught by the Act.

25. The only alternative view in my judgment, which would be consistent with the affidavits of March 2006 of Ms. Hoskins and Barbara Roberts would be that, although having no beneficial interest in the property when the building work was commenced, by expending money on the building, the appellant was entitled to a constructive trust in his favour for the full cost of the work. There would be no presumption of gift in favour of the parents. In these circumstances it would not matter what was the source of the funds which the appellant used to fund the building cost or even that he provided some of the labour himself. The constructive trust would be for the amount of the costs estimated by square footage of the building multiplied by $150 per square foot, which was the agreed

cost. But I see no reason why this view should be preferred to that of the learned judge, which was consistent with most of the contemporary documents and statements made by the appellant and his wife.

26. For these reasons, I would dismiss this appeal.

SIGNED

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Zacca, President

SIGNED

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Evans, JA

SIGNED

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Stuart-Smith, JA