IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

2017 : No 50

BETWEEN:

CINDY LAWS

Appellant

-v-

DAVID BUCHANAN

Respondent

JUDGMENT[1]

Waiver of judicial bias - Application to rely upon additional grounds of appeal out of time - Whether the test for relying upon additional grounds of appeal out of time is the same as the test for filing notice of appeal out of time - Jurisdiction of Appellate Court – Credibility of witnesses

Date of Hearing: October 20, 2017

Date of Judgment: November 20, 2017

The Appellant appeared in person

The Respondent appeared in person

Introduction

1. By an Ordinary Summons issued on 16 October 2013, the Respondent (the Plaintiff below) claimed the sum of $3,000 from the Appellant (the Defendant below) as the balance due to the Respondent for tiling work carried out at the Plaintiff's apartment.

2. On 13 July 2017, the Worshipful Magistrate Stoneham (now Justice Stoneham) entered judgement in favour of the Respondent for $2,501. The judgment was delivered to the parties on 24 July 2017. Against this decision, the Appellant appeals by Notice of Appeal dated 31 July 2017. The general thrust of the grounds of appeal is that the decision of

[1] The Judgment was circulated to the parties without a hearing to save costs.

the Learned Magistrate was against the weight of the evidence. Both parties appeared in person at the trial in the Magistrates court and the appeal hearing.

Summary

3. The Appellant's appeal is allowed to a limited extent by reducing the amount awarded to the Respondent from $2501 to $2001. The Appellant is ordered to pay the Respondent's costs of the appeal. I set out reasons for my decision below.

Waiver of Judicial Bias

4. Before I address the merits of the appeal, I raised the issue of conflict of interest with the parties. Fifteen years ago, the Appellant instructed Trott and Duncan Limited to act on her behalf. I was at the time and continue to be a partner in Trott and Duncan Limited. That retainer ended over ten years ago, since which time Trott and Duncan Limited has not represented the Appellant. After I informed the parties of the potential conflict of interest, I invited both parties to adjourn the matter to another date when the appeal could be heard before another judge. In light of the information I disclosed, I assured both parties they would not be prejudiced, and the court would not hold an unfavourable view of either party if they accepted the invitation to adjourn the appeal.

5. The Respondent urged me to hear the appeal today for five reasons. First, he had every confidence I would conduct the appeal fairly; second, the dispute between the parties was important to him but involved the modest sum of $2,501; third, he could not afford to come back to court on another occasion to participate in the appeal, he was losing time off work he could ill afford; fourth, the claim in the Ordinary Summons was filed five years ago, and he wanted the matter resolved without further delay; and fifth, he believed the Appellant was dragging the case out intentionally in the hope he would abandon the judgment awarded in his favour. The Appellant also urged me to hear the appeal today. The Appellant believed I would conduct the appeal fairly. She wanted the matter resolved and did not want to come back to court on another occasion.

In *Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142 AT 151* Cooke P, sitting as President of the New Zealand Court of Appeal, said this about waiver of judicial bias at the time of disclosure.

> *"There is much authority that a party who, in the course of a hearing, has become aware of facts which may constitute disqualification for bias or*

otherwise, will be held to have waived the objection, or refused discretionary relief, if he allows the hearing to continue without protest."

Support for the principle that judicial bias can be waived by fully informed consenting litigants is also found in *R V Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Urgate (No 2) 2000 1 A.C. 119* at pages 136 and 137 and *Millar v Dickson [2002] 3 All E.R. 1041* at 1054-1055.

6. Both parties were informed of the potential conflict of interest and acknowledged that they believed the appeal hearing would be conducted fairly. Combined with their concerns regarding the further delay of the appeal, contrary to my initial suggestion to the parties, I accepted their waiver of any potential conflict of interest and agreed to hear the appeal.

Application to Rely Upon Additional Grounds of Appeal

7. The grounds of appeal in the Notice of Appeal are as follows:

    1. The judge erred in neglecting the additional $500 paid to the Plaintiff,
    2. The judge awarded a rate to a tiler, not self-employed who didn't have his own truck to transport trash and material,
    3. The tiler changed his rate after the agreement without consultation.

    The substance of the appeal is that the Learned Magistrate was wrong to reject the Appellant's version of the agreement the parties entered into. Consequently, the decision to award the Respondent $3,000 should be quashed. Alternatively, the Appellant seeks relief in the sum of $500 as a deduction from the sum of $3,000 the Learned Magistrate awarded to the Respondent. The Appellant also advanced the argument that the sum of $500 should be deducted from any sum this court determines the Respondent is entitled to.

8. At the start of the appeal, the Appellant sought leave to rely upon three new grounds of appeal contained in a document dated 18 October 2017 entitled Additional Grounds for Appeal. The Additional Grounds of Appeal represent a broadside attack on the then, Magistrate Stoneham, now Justice Stoneham.

9. I asked the Appellant why she raised fresh grounds of appeal for the first time on the day of the hearing. I also asked the Appellant why the Additional Grounds for Appeal had not

been filed with the court and served on the Respondent. I informed the Appellant her omission to file and serve the Additional Grounds for Appeal within thirty days of the delivery date of the judgment appeared to be in breach of section 4 (2) of the Civil Appeals Act 1971, ("the 1971 Act"). Consequently, I informed the Appellant that in order to rely upon the new grounds of appeal she first had to explain why she failed to comply with the filling and service obligations in section 7 (2) of the 1971 Act. The second hurdle the Appellant would have to overcome is section 7 (1) of the 1971 Act by which she must demonstrate that she had good cause for not filing the fresh grounds of appeal within thirty days of the delivery of the judgment and was therefore entitled to an extension of time within which to file the new grounds of appeal. The Appellant responded that with the time it took her to focus on preparing the Notice of Appeal, she did not consider filing the Additional Grounds for Appeal. The Appellant continued that she reflected upon the appeal and decided to raise the new grounds of appeal today.

10. The new grounds of appeal alleging delay delivering the judgment and questioning the Magistrate's capacity to sign the judgment could not have been raised until 24 July 2017, when the judgment was delivered to the parties. However, I further enquired why the Appellant had not raised the more serious ground of appeal alleging the Magistrate was biased on any one of the five previous occasions when she had the opportunity to raise this objection. First, at the commencement of the trial in the Magistrates Court on 9 December 2015. The second occasion this ground could have been raised was at any time during the course of the trial before delivery of the judgment. Thirdly, when the Appellant filed the Notice of Appeal on 31 July 2017. The fourth opportunity was 18 October 2017, the date the Appellant signed the Additional Grounds for Appeal and the fifth instance when this ground of appeal could have been raised was 19 October 2017, the day before the appeal, when both parties appeared before the Registrar to confirm they were prepared to proceed with the appeal on 20 October 2017. In response to this enquiry, the Appellant again stated she was consumed with drafting the Notice of Appeal and, therefore, did not focus on filing the Additional Grounds for Appeal.

11. The Respondent had not seen the Additional Grounds for Appeal before the commencement of the appeal. He objected to introduction of the new grounds of appeal at this late stage. The Respondent contended that the Appellant's application to rely upon fresh grounds of appeal on the day the appeal is scheduled to be heard is another attempt to delay the proceedings in the hope he would abandon the judgment awarded in his favour. The Respondent was not prepared to agree delaying the appeal.

12. At the conclusion of arguments from both parties, I briefly adjourned the hearing to consider the application after which I resumed the hearing and gave brief reasons why I refused the application to introduce and rely upon the Additional Grounds for Appeal. I now give full reasons for my decision.

13. Sections 7 (1) and (2) of the 1971 Act read as follows:

> "*7 (1) Where it appears to a magistrate on application made in accordance with subsection (2), that the appellant has failed to give notice of appeal within the time specified in section 6(1)(a), he may for good cause direct that any such notice of appeal previously given by the appellant after the expiration of the said period, or any such notice that may be given by him within such further time as may be specified in the direction, shall be treated as if it had been given within the said period.*
>
> *(2) An application for a direction under subsection (1), if not made in open court, shall be made by summons and supported by affidavit, and such summons shall be served on the respondent or respondents at least two clear days prior to the hearing thereon."*

14. In strict terms, the application to rely upon the Additional Grounds for Appeal is not an application to file a Notice of Appeal out of time pursuant to section 7 (1) of the 1971 Act. The additional grounds of appeal raise matters totally unconnected with the existing grounds of appeal. In my view, it is appropriate to apply the legal test for an application to file Notice of Appeal out of time when considering an application to file additional grounds of appeal out of time. Particularly, where the additional grounds of appeal are not amendments to the existing grounds of appeal and raise grounds of appeal which are not connected with or reflected in the existing grounds of appeal in the Notice of Appeal.

15. The starting point in seeking to determine the merits of the Appellant's application is section 4 of the 1971 Act by which the Appellant must file her Notice of Appeal in the Magistrates court within thirty days of the delivery of the judgment. The pertinent subsections of section 4 are as follows:

> *"(1) The appellant shall file in the court of summary jurisdiction a notice of intention to appeal and he shall serve a copy thereof on any person who might be affected by the appeal.*

(2) In the case of a final judgment of a court of summary jurisdiction or an order for costs made by such court, the notice of intention to appeal shall be filed within thirty days of the delivery of the judgment or the making of the order; and in the case of an interlocutory order such notice shall be filed within fourteen days of the making of the order."

16. The Notice of Appeal dated 31 July 2017 was filed in the Magistrates Court on 1 August 2017, six days after delivery of the judgment and was subsequently served upon the Respondent. The deadline for filing Notice of Appeal was 23 August 2017. The Additional Grounds for Appeal is dated 18 October 2017, approximately two months after the thirty day deadline for lodging a Notice of Appeal had elapsed. Importantly, the Additional Grounds for Appeal has not been filed in the Magistrates Court, nor has it been served upon the Respondent. The Appellant is undoubtedly aware she is required to file in the Magistrates Court and thereafter serve upon the Respondent the Additional Grounds for Appeal.

17. In *Rayclan Limited v Keith Trott [2003] Bda L.R. 42*, the Appellant successfully appealed against the decision of the Chief Justice who exercised his discretion to grant leave to the unrepresented Respondent to file an application seeking leave to appeal the decision of the Magistrate approximately two months out of time. The following passages from the decision of the Court of Appeal provide helpful guidance in circumstances where an Appellant seeks leave to appeal out of time:

"Counsel for the appellant submitted that the only "reason" given for the delay by the respondent is that he was unaware of the time-limit for lodging his appeal. Against that, counsel submitted that the law is clear that the successful litigant is entitled to the fruits of his litigation and that there must always be an end to litigation. He also submitted that if there is no proper excuse then there will be nothing upon which the Court may exercise its discretion. This Court was referred to the legal maxim—"Ignorance of the Law is no excuse" and the decision of this Court,—Civil Appeal No. 29 of 1993. In the Matter of Waxoyl Ltd. and In the Matter of the Companies Act, 1981 where this Court stated at page 2-

"It must always be the primary factor for consideration by the Court whether the Applicant has given an explanation for the need for an extension where the time has not yet expired or for the failure to comply where, as here, the

time has expired. Unless an application is tendered, the Court will be justified in assuming that any failure to comply is contumacious and to dismiss the application without further ado."

"Counsel argued that the Chief Justice was correct in the exercise of his discretion in granting an extension of time to appeal. The factors normally taken into account in deciding whether to grant or refuse such an extension are:-

i. the length of the delay;
ii. the reasons for the delay;
iii. the chances of the appeal succeeding; and
iv. the prejudice to the respondent if the application is granted.

(C.M. Van Stillevoldt BV v El Carriers Inc. [1983] 1 WLR 297; Vaucrosson v Bank of Bermuda, Civil Appeal 14 of 1995).

In this case, the length of the delay was approximately two months after the thirty-day deadline for lodging appeals had elapsed. The explanation which the respondent gave in his affidavit for this delay is one which the law does not recognize, since everyone is presumed to know the law. No question of prejudice was raised in this case."

"The following remarks in the judgment of Lord Guest in the case of Ratnam v Cumarasamy and Another [1964] 3 ALL ER 933 do provide some useful guidelines in dealing with these matters. At page 935 he states-

"The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.""

18. Applying section 7 of the 1971 Act and the principles in the *Rayclan* case to the facts of this case, it is impossible for the Appellant to get her application off the ground. The Appellant has not filed a summons and affidavit explaining why she now seeks to file the Additional Grounds for Appeal. Therefore, I do not have before me, a valid application for leave to rely upon the additional grounds of appeal upon which I can exercise my

discretion under section 7(1) of the 1971 Act. The fact that the Appellant is unrepresented, does not explain her failure to comply with the thirty day time limit within which she is required to file the Additional Grounds for Appeal. The Appellant is aware of the time limit having complied with the statutory deadline when she filed her Notice of Appeal. The explanation the Appellant gave in court today for the delay and failure to file the new grounds of appeal is not recognised by the law.[2]

19. Both parties expressed a strong desire to have the appeal heard today. I also remind myself that a successful litigant is entitled to the fruits of his litigation and that there must always be an end to litigation. In *DeSilva V Minister of Environment, Planning and Infrastructure [2012] Bda LR 54* page 1 the Chief Justice made the following observations regarding the right of access to the court:

> *"iii. the right of access to the court which operates in favour of an applicant may only be enjoyed to the extent that it does not extinguish the corresponding right of the opposing party to a fair hearing within a reasonable time."*

20. In the absence of a properly filed application to rely upon the Additional Grounds for Appeal, I do not consider it necessary to consider the prospects of the Appellant succeeding on the new grounds of appeal. For the reasons stated above, I refuse the Appellant's application to rely upon the Additional Grounds for Appeal.

The Proceedings in the Magistrates' Court

21. The Plaintiff's Ordinary Summons claims that the Defendant agreed to pay $7 per square foot totaling 658 square feet or $4,000 for tiling which the Plaintiff completed. The Ordinary Summons continues that the Defendant paid two installments of $1,000 which left a balance of $2,000. After that, the Defendant asked the Plaintiff to tile two closets which came to 145 square feet. The Plaintiff claimed tiling the two closets amounts to $1,000 worth of work. The Ordinary Summons concludes with the Plaintiff alleging the Defendant refused to pay a balance of $3,000.

22. On 20 February 2015, Appellant filed an affidavit in which she denied the Respondent's claim for $3,000. The affidavit rejected the assertion that she agreed to pay for tiling by the square foot. The Appellant stated she agreed on a price for the whole job. The

[2] The case of *Antoine Holder v Hazel Holder And Others* [2015] Bda LR 1 was supplied to the parties for their consideration before I ruled on the matter.

Appellant further stated the Respondent did not complete tiling the bedroom and the sitting room as agreed. Consequently, the Appellant had to hire another tiler to tile the bedroom and sitting room for $1,800.

23. The Learned Magistrate heard evidence from the Appellant and the Respondent. The Respondent contended he entered into a verbal agreement with the Appellant to tile specified areas of the Appellant's apartment measuring 775 square feet at $7 per square foot. This would total $5,425 less an agreed discount of $425. The total agreed sum for the work was $5,000. The Appellant said the orally agreed price to tile the entire apartment was $4,000. The Appellant put her case on the basis that the Respondent agreed to tile four rooms at a price of $1,000 per room. The Appellant identified the rooms and their measurements as follows:

1. Kitchen	23ft x 13ft = 299 square feet
2. Bathroom floor & walls	11ft x 5ft = 55 square feet
3. Living room	12ft x 13ft = 156 square feet
4. Bedroom	20ft x 11ft = 220 square feet
TOTAL	730 square feet

The Appellant did not give evidence on the measurements of the bathroom walls but stated the Respondent agreed to tile the bathroom walls as part of the contract price of $1,000 to tile the bathroom.

24. The Learned Magistrate found there was no dispute that the Appellant paid the Respondent $2,000 comprising two instalments of $1,000 and that the Respondent commenced tiling the kitchen and the bathroom after which it became apparent tile to complete the job was running low. There was also no dispute that once the parties discovered there was insufficient tile to complete the work the Respondent measured the remaining tile and advised the Appellant that there was sufficient tile to complete tiling the following areas:

1. Foyer	10ft x 4ft = 40 square feet
2. Bedroom closet	12ft x 6ft = 72 square feet
3. Closet/laundry	3ft x 3ft = 9 square feet
4. Hallway	6ft x 6ft = 36 square feet
TOTAL	157 square feet

Importantly, the Learned Magistrate found there was no dispute between the parties that the Appellant instructed the Respondent to tile the foyer, bedroom closet, and laundry/closet and hallway areas. The Learned Magistrate identified the nub of the dispute to be the Respondent's contention that he was owed $3,000 for the tiling work both parties agreed he carried out, and the Appellant's rejection of that contention because the Respondent failed to tile the living room and bedroom.

25. The Learned Magistrate made the following findings. She found the Respondent to be both consistent and truthful in his evidence. Accepting the Appellant's evidence regarding the measurements of the various areas within the apartment, she rejected the Appellant's claim that the $2,000 she paid to the Respondent represented total payment for tiling the floor and walls in the kitchen and bathroom. Crucially, she rejected the Appellant's suggestion that the parties orally agreed on payment at $1,000 per room and accepted the Respondent's argument that tiling at the rate of $7.00 per square foot is a fair and reasonable rate given the square footage of the following undisputed areas the Respondent tiled:

1. Kitchen	23ft x 13ft = 299 square feet	$ 2,093
2. Bathroom floor	11ft x 5ft = 55 square feet	$ 385
3. Foyer	10ft x 4ft = 40 square feet	$ 280
4. Bedroom closet	12ft x 6ft = 72 square feet	$ 504
5. Closet/laundry	3ft x 3ft = 9 square feet	$ 63
6. Hallway.	6ft x 6ft = 36 square feet	$ 252
TOTAL	511 square feet	$3,577

Given the bathroom floor measurements, the Learned Magistrate was satisfied that a fair and reasonable estimate of the square footage of the bathroom walls the Respondent tiled would be 132 square feet (11ft x 4ft x 3 ft walls = 132 square feet) @ 7.00 per square foot = $924.

26. Having concluded that the Respondent's evidence was to be preferred over the Appellant's evidence, the Learned Magistrate ruled that a fair and reasonable price for all areas tiled by the Respondent is $4,501 (comprising $3,577 plus $924). From that figure, she deducted the sum of $2,000 the Appellant had previously paid to the Respondent leaving the balance of $2,501 due to the Respondent for the tiling work carried out at the Appellant's apartment.

The Appellant's Submissions

27. On 1 August 2017, the Appellant filed an Affidavit of Appeal. The Appellant relied upon her Notice of Appeal together with the Affidavit of Appeal in support of which she made the following oral submissions. The Appellant's first point was that she paid the Respondent the sum of $500 in addition to the $2,000 both parties agree she has already paid the Respondent. The Appellant contended the $500 should be a further deduction from the sum awarded to the Respondent. This point can be dealt with shortly. During the appeal, I referred the Respondent to page 22 of the Record of Appeal. On 12 March 2015, both parties appeared before the Senior Magistrate Juan Wolffe for a mention hearing. At that hearing, the Appellant paid the Respondent the further sum of $500 without admission of liability. The Respondent confirmed he was paid and accepted the additional amount of $500.

28. Secondly, the Appellant asserted that the Magistrate made an error in her judgment because the Respondent produced no evidence to confirm the agreement to tile the apartment at $7 per square foot. The Appellant provided receipts to show she paid the Respondent two tranches of $1,000. These receipts she said supported her argument that the agreement was that the Respondent would be paid $1,000 for each room he tiled. The Magistrate also failed to consider and rely upon a handwritten worksheet which appeared to indicate the agreement included tiling the sitting room and bedroom for the total price of $4,000.

29. Thirdly, the Appellant said the Respondent's claim lacked credibility because his written bill was submitted to her two and a half months after he finished working on the job.

30. The fourth point the Appellant made was that because the Respondent does not have his own tiling business and vehicle, and was not self-employed, charging at the rate of $7 per square foot was exorbitant. The Appellant buttressed this point by stating that she paid another tiler $1,800 to complete tiling the bedroom and living room.

31. The Appellant's fifth point was that there were inconsistencies in the Respondent's calculations of the square footage he agreed to tile compared with what he did in fact tile, which were both inconsistent with the tiling for which he claimed payment. The Appellant contended these inconsistencies were repeated by the Learned Magistrate in her ruling. The Appellant identified the Respondent's claim that he tiled 658 square feet in the Ordinary Summons was contradicted materially by his evidence at trial where he

asserted the verbal agreement was to tile specified areas in the apartment measuring 775 square feet.

The Respondent's Submissions

32. The Respondent accepted the Appellant's first contention that she paid him an additional $500 at the hearing before the Senior Magistrate Wolffe. In response to the Appellant's second argument, the Respondent contended there was no agreement to charge $1,000 to tile each room for a total of $4,000. He forcefully argued that charging by the room was unheard of in the local tiling industry. In this case, it would have been ridiculous because all the rooms the Appellant agreed to tile are different sizes. Charging by the square foot is the standard method used by tilers throughout Bermuda. The Appellant's fourth contention was flatly rejected by the Respondent. The Respondent protested that he has all the appropriate tools to perform tiling jobs and has conducted many small tiling contracts for the Appellant's contractor; $7 per square foot is well below the standard $12 per square foot charged by tilers in Bermuda. The Respondent said that after he finished tiling the kitchen and the dining room, the Appellant requested he tile two closets, this is why more tile was required to complete the job. He confronted the Appellant and invited the court to measure the areas he tiled by $7 per square foot as compared with the areas tiled in the bedroom and living room which would prove he is not lying.

The Court's Appellate Jurisdiction

33. Sections 13 and 14 of the 1971 Act explain the reviewing powers of the Supreme Court and govern the approach I should adopt when exercising the court's appellate jurisdiction. In *Smith v Barbosa [2003] Bda L.R.51* at pages 4 and 5 the Chief Justice explained this jurisdiction:

> *"The starting point in seeking to determine the Court's powers on entertaining an appeal against a decision of the Magistrates Court is to analyze the statutory definition of the reviewing power. The Civil Appeals Act 1971 governs civil appeals to this Court from the Magistrates Court. Section 14 provides as follows (emphasis added):*
>
> *"**Determination of appeals***

14 (1) Subject to any other provision of law, upon the hearing of an appeal the court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.

(2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.

(3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.

(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.

(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition".

Section 14(4) in my views materially qualifies the otherwise unfettered discretion of the Court under section 14 (2), (3) to re-hear the case and substitute its own view of the facts. An error of law or fact will only properly result in an appeal being allowed if in the opinion of this Court it has resulted in "substantial wrong or miscarriage of justice".

In my view the Court of Appeal's liberal re-hearing powers as articulated by Worrell, J.A. in the Lathan case in first passage on which the Appellant's Counsel relied are far broader than those vested in this Court. The Court of Appeal's statutory jurisdiction in respect of civil appeals is defined by section 13 of the Court of Appeal Act 1964 as follows:

"Determination of civil appeals
13 Upon the hearing of a civil appeal the Court may allow the appeal in whole or in part or may dismiss the appeal in whole or in part or may remit the case

to the Supreme Court to be retried in whole or in part and may make such other order as the Court may consider just."

34. On the same page of the *Smith v Barbosa* judgement the Chief Justice gave guidance on how the Supreme Court should address issues of credibility when exercising its appellate jurisdiction:

> *"However, I do accept that the more general principles governing the approach to issues of credibility articulated by Justice Worrell and relied upon by Mr. Pachai are binding on this Court, which must be governed by those principles in the context of the present appeal. In other words, firstly, the evidence of someone who is proven to have lied on oath will generally have little value, while the credibility of their evidence will generally be weakened by unexplained inconsistencies with previous statements by them. And secondly, when issues of credibility turn on matters (such as demeanour) which could only have been assessed by the trial court, the view taken at first instance will rarely be interfered with. Nevertheless, in considering an appeal based on the alleged wrongful acceptance of evidence on credibility grounds, the Appellant can only succeed if any errors made by the Learned Magistrate result in "substantial wrong or miscarriage of justice".*

35. In *Mon Tresor and Mon Desert Limited v Ministry of Housing and Lands [2008] UKPC 31,* the Privy Council identified the governing principles and limited circumstances in which an appellate court can interfere with factual findings made by the court at first instance as follows:

> *"2 … An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal …""*

Merits of the Appeal

36. The Appellant must satisfy two tests. First, she must establish the Learned Magistrate made an evidential error or misdirected herself on the law. Second, having satisfied either limb of the first test she must demonstrate that the error or misdirection has

occasioned substantial wrong or miscarriage of justice. Taking each argument raised by the Appellant in turn, I find that the Appellant did pay the Respondent an additional $500 over and above the two installments of $1,000 both parties agreed the Appellant paid. The Respondent accepts the Appellant paid him $500 at the mention hearing before the Senior Magistrate. This payment is not referred to in the judgment. Accordingly, the Learned Magistrate erred by failing to subtract this sum from the final award. I rule that the sum of $500 is to be deducted from the sum of $2,501.

37. The Appellant's second argument relied heavily upon bills she paid to her contractor in which the two payments of $1,000 to the Respondent were recorded. On examination, these bills do not support the Appellant's case. One bill contains a narrative "deposit", the narrative on the other bill suggests the payment of $1,000 is the balance owed for "tiling the kitchen and bathroom". Neither bill makes mention of tiling the other areas both parties agree were tiled. The next question on this point, is did the Magistrate make an error by not finding that the documentary evidence substantiated the Appellant's version of the agreement. The Magistrate considered the oral and written evidence of the Appellant and the Respondent and preferred the evidence of the Respondent. The Magistrate first rejected the contention that the parties agreed tiling would be carried out for $1,000 per room. Having heard both witnesses, she accepted the Respondent's explanation that $7 per square foot is the rate the parties agreed to tile the Appellant's apartment. The parties agreed the areas which the Respondent tiled. The Magistrate was then left to assess the areas both parties agreed were tiled, multiply those areas by $7 per square foot which amounts to $4,501.

38. The Appellant's third, fourth and fifth points all concern the overarching complaint that the Learned Magistrate failed to properly assess the credibility of the Respondent and his evidence. I have examined the evidence relied upon by the Magistrate and cannot say that in arriving at her conclusions on the evidence she erred, misdirected herself or made unsupportable findings. The Appellant's attack on the Magistrate's assessment of the credibility of the Respondent is based upon inconsistencies in his evidence. I do not accept the inconsistencies in the evidence the Appellant highlighted. The Magistrate emphasized her assessment of the demeanor and truthfulness of the Respondent, which formed her basis for accepting the Respondent's evidence and rejecting the Appellant's evidence on the central dispute between the parties namely whether the tiling was to be carried out at $7 per square foot or $1,000 per room. As this court made plain in the *Smith and Barbosa* case, an appellate court will rarely interfere with findings made at first instance based upon the alleged wrong acceptance of evidence on credibility

grounds unless any errors made by the learned Magistrate result in substantial wrong or miscarriage of justice.

39. In support of the Appellant's fourth point, she produced a receipt and contended that she paid another tiler $1800 to complete tiling the living room and bedroom which therefore undermines the Respondent's claim. The Appellant said this point was raised before the Magistrate, however, I could not find the argument nor the supporting documentation in the record. The fifth point appears to focus on the difference between the square footage the Respondent claimed in the Ordinary Summons as compared with the square footage referred to in paragraph 3 of the judgment. The mention of 775 square foot in paragraph 3 of the judgment is a reference to the initial verbal agreement between the parties, whereas, mention of 658 square feet in the Ordinary Summons is in respect of the Respondent's claim for unpaid work. I find this argument is also addressed by the Magistrate's assessment of the demeanor of the witnesses and the evidence adduced by the parties where she clearly preferred the evidence of the Respondent. For these reasons, I therefore reject the Appellant's third, fourth and fifth points.

Conclusion

40. In my view, save for the Magistrates' failure to deduct the $500 payment from the balance owed to the Respondent, the Appellant has failed to establish any material misdirections where the Magistrate wrongfully accepted or rejected the evidence. On the totality of the evidence before the Magistrate and the arguments I heard, I find the Appellant also failed to establish errors resulting in a substantial wrong or miscarriage of justice.

41. I accordingly allow the appeal and vary the judgment in favour of the Respondent by reducing the amount awarded from $2,501 to $2,001 ($2,501- $500 = $2,001). Unless either party applies within 28 days by letter to the Registrar to be heard as to costs, the Appellant shall pay the Respondent's cost of the appeal which I summarily assess at $100.[3]

[3] The Respondent is entitled to recover a maximum of $50 per hour for preparation and hearing time in a complicated Supreme Court case. This appeal was at the mid-level of difficulty at $25 per hour. The appeal hearing lasted 4 hours plus an hour preparation. I reduce the costs award by 20% to reflect the Appellant succeeded in reducing the award by 20%. My summary assessment is $25 x 5 = $125- 25.

Dated this 20th day of November 2017.

DELROY B. DUNCAN
Assistant Justice