

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2016/0017

BETWEEN:

[1] SHANKAR KHUSHALANI  
[2] MINA KHUSHALANI  
(Trading as DIVINE Apartments)

Appellants

and

LINDSAY MASON  
(Trading as Tropical Home Designs  
Architectural & Construction Services)

Respondent

**Before:**

The Hon. Mde. Louise Esther Blenman  
The Hon. Mr. Mario Michel  
The Hon. Mde. Gertel Thom

Justice of Appeal  
Justice of Appeal  
Justice of Appeal

**Appearances:**

Mr. Ruggles Ferguson for the Appellants  
Mr. Derick F. Sylvester and Ms. Hazel Hopkin for the Respondent

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2021: April 15;  
June 11.

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*Civil appeal — Breach of construction contracts — Appellate court review of trial judge's findings of fact — Restraint by appellate court in interfering with trial judge's findings of fact, evaluation and inference from facts — Whether learned judge properly and fairly assessed the evidence — Privity of contract — Whether the judge learned erred in determining that privity of contract was inapplicable in the totality of circumstances*

In October 2011, Shankar and Mina Khushalani ("the Khushalanis") entered into a written contract ("the October Contract") with Mr. Lindsay Mason ("Mr. Mason") for the construction

of a three-storey apartment complex ("the apartment complex") to house tenants. Mr. Mason was paid on the written contract however, during the construction, the Khushalanis entered into two oral contracts with Mr. Mason. In the first oral contract, the Khushalanis contracted Mr. Mason to adopt the Mascon Construction System for the construction of the apartment complex and the construction of a fourth storey. In the second oral contract, Mr. Mason was contracted to install, among other things, the I.T. and satellite systems. Both oral contracts were not reduced to writing.

Concerns arose in May 2012, when the project manager, Mr. Cecil Frederick, received results that the coring and compressive strength of the first-floor slab showed the compressive strength of 2165 pounds per square inch ("PSI"), below the requisite standard which was 3000 PSI. Another issue arose when a generator to be acquired for the apartment complex by Mr. Mason was not obtained. Mr. Mason then claimed that the Khushalanis refused to pay him the monies due under the oral contracts. As a result, he terminated work on the apartment complex and commenced proceedings against the Khushalanis seeking general damages for breach of contract, special damages in the sum of \$21,865.00 for the first oral contract and \$334,039.90 for the second oral contract with interests and costs. The Khushalanis counter-claimed, alleging that Mr. Mason performed substandard work. They sought general and special damages for breach of the October Contract and first oral contract as well as for negligence on the part of Mr. Mason.

The learned judge in the court below held that Mr. Mason succeeded on part of his claim in the amount of \$240,643.16 and that the Khushalanis' counterclaim succeeded on part in the amount of \$145,627.87. The Khushalanis therefore owed Mr. Mason the net sum of \$95,015.13.

The Khushalanis, being dissatisfied, filed eleven (11) grounds of appeal, challenging both the learned judge's conclusions of fact and law and his overall disposition of the matter. The three condensed issues which arose for this Court's determination are: (i) whether the decision of the learned judge went against the weight of the evidence before him; (ii) whether there was privity of contract between the Khushalanis and the supplier of the generator; and (iii) whether the learned judge properly and fairly assessed the evidence of the Project Manager.

**Held:** dismissing the appeal and ordering that the Khushalanis shall pay Mr. Mason two-thirds of the prescribed costs on the sum of \$95,015.13, that:

1. An appellate court should exercise restraint in its review of the findings of fact, evaluation and inferences that are made by a trial judge. Where an appellant seeks to impeach the factual findings of a first instance judge, he must demonstrate that the judge's factual conclusion and evaluation of those facts cannot be supported by the evidence or that the advantage which the trial judge has of being able to see and hear the witnesses and to assess the credibility of the witness or evidence does not justify the judge's findings. This is particularly critical where, as in this case, both the claim and counterclaim revolved primarily around two oral contracts which were not reduced into writing and the judge therefore had to review and evaluate not only the documentary evidence but also the oral evidence elicited at trial.

**Watt (or Thomas) v Thomas** [1947] A.C. 484 applied; **Piglowska v Pigolowski** [1999] 3 All ER 632 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** [2016] ECSCJ No. 63 (delivered 20<sup>th</sup> April 2016, unreported) followed; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116 (delivered 13<sup>th</sup> March 2019, unreported) followed; **Showa Holdings Co. Ltd v Nicholas Gronow and Joh David Ayres** BVIHCMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported) followed; **Ming Siu Hung and others v JF Ming Inc and another** [2021] UKPC 1 applied; **Khouly Construction & Engineering Limited v Edmond Mansoor** [2021] ECSCJ No. 527 (delivered 15<sup>th</sup> April 2021, unreported) followed; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26<sup>th</sup> April 2021, unreported) followed; **Sohal v Suri and another** [2012] EWCA Civ 1064 applied; **Perry v Raleys Solicitors** [2019] UKSC 5 applied.

2. It is clear from a perusal of the judgment that in treating with the issue of the compressive strength of the first-floor slab, the judge carefully considered the evidence before him and embarked upon an evaluative exercise of the facts. The judge's conclusion that Mr. Mason's evidence on this point was more credible than that of the Khushalanis', based on this evaluative exercise, was open to him as the arbiter of fact who was immersed in all aspects of the trial. A further review of the transcript also indicates that the Khushalanis, by Mr. Khushalani's own admission, were satisfied with Mr. Mason's work on the first-floor slab and therefore rendered payment to him. This lends further credence to the judge's conclusion that the Khushalanis had accepted the first-floor slab at a compressive strength of 2366 PSI and, in a haste to let the apartments to tenant, did not wait for defects to be diagnosed and cured. Accordingly, based on the totality of the evidence deployed, the judge's findings in these respects cannot be impugned.

**Watt (or Thomas) v Thomas** [1947] A.C. 484 applied; **Piglowska v Pigolowski** [1999] 3 All ER 632 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** [2016] ECSCJ No. 63 (delivered 20<sup>th</sup> April 2016, unreported) followed; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116 (delivered 13<sup>th</sup> March 2019, unreported) followed; **Showa Holdings Co. Ltd v Nicholas Gronow and Joh David Ayres** BVIHCMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported) followed; **Ming Siu Hung and others v JF Ming Inc and another** [2021] UKPC 1 applied; **Khouly Construction & Engineering Limited v Edmond Mansoor** [2021] ECSCJ No. 527 (delivered 15<sup>th</sup> April 2021, unreported) followed; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26<sup>th</sup> April 2021, unreported) followed; **Sohal v Suri and another** [2012] EWCA Civ 1064 applied; **Perry v Raleys Solicitors** [2019] UKSC 5 applied.

3. A close review of the judgment elucidates that the judge dedicated specific, well-reasons sections in addressing the complaints in relation to matters such as the generator, the IT and Satellite systems and the septic system. The judge was cognisant of the entirety of the evidence before him and was entitled to determine its credibility and what weight ought to be attached, a matter which falls within his

exclusive purview. This included his assessment of the evidence of the project manager in relation to the complaints made by the Khushalanis. Accordingly, there is no discernible error in the judge's findings and consequently, no merit to the argument that the findings were against the weight of the evidence and further, that he erred in his assessment of the project manager's evidence.

**Watt (or Thomas) v Thomas** [1947] A.C. 484 applied; **Piglowska v Pigolowski** [1999] 3 All ER 632 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** [2016] ECSCJ No. 63 (delivered 20<sup>th</sup> April 2016, unreported) followed; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116 (delivered 13<sup>th</sup> March 2019, unreported) followed; **Showa Holdings Co. Ltd v Nicholas Gronow and Joh David Ayres** BVIHCPMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported) followed; **Ming Siu Hung and others v JF Ming Inc and another** [2021] UKPC 1 applied; **Khouly Construction & Engineering Limited v Edmond Mansoor** [2021] ECSCJ No. 527 (delivered 15<sup>th</sup> April 2021, unreported) followed; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26<sup>th</sup> April 2021, unreported) followed; **Sohal v Suri and another** [2012] EWCA Civ 1064 applied; **Perry v Raleys Solicitors** [2019] UKSC 5 applied.

4. The well-known principles of privity of contract are of no relevance to the case at bar in view of the judge's findings of fact. Accordingly, the established principles governing appellate intervention in the review of factual findings and the evaluation of those facts are equally applicable. The learned judge made a finding that the Khushalanis had direct contact and involvement with the supplier of the generator was open to him based on the evidence before him and his fair and proper assessment of same. Additionally, the challenge that there was no privity of contract between the Khushalanis and the supplier and that the learned judge therefore erred in his findings of law falls away as the learned judge's findings of fact that they had taken over the dealings trump any argument on privity of contract.

**Watt (or Thomas) v Thomas** [1947] A.C. 484 applied; **Piglowska v Pigolowski** [1999] 3 All ER 632 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited Limited** [2016] ECSCJ No. 63 (delivered 20<sup>th</sup> April 2016, unreported) followed; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116 (delivered 13<sup>th</sup> March 2019, unreported) followed; **Showa Holdings Co. Ltd v Nicholas Gronow and Joh David Ayres** BVIHCPMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported) followed; **Ming Siu Hung and others v JF Ming Inc and another** [2021] UKPC 1 applied; ; **Khouly Construction & Engineering Limited v Edmond Mansoor** [2021] ECSCJ No. 527 (delivered 15<sup>th</sup> April 2021, unreported,) followed; **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd** [2021] ECSCJ No. 534 (delivered 26<sup>th</sup> April 2021, unreported) followed; **Sohal v Suri and another** [2012] EWCA Civ 1064 applied; **Perry v Raleys Solicitors** [2019] UKSC 5 applied.

## JUDGMENT

### Introduction

[1] **BLENMAN JA:** This is an appeal by Shankar Khushalani and Mina Khushalani (Trading as Divine Apartments) (“the Khushalanis”), against the decision of learned Wallbank J [Ag.], in so far as he held that, the Khushalanis were liable to pay to Mr. Lindsay Mason (“Mr. Mason”), the sum of \$95,015.13 on a claim arising out of a contract to construct an apartment complex. The Khushalanis’ appeal against this aspect of the learned judge’s decision is resisted by Mr. Mason. He contends that the learned judge was correct in his findings of fact and that the judge made appropriate findings of facts and inferences based on the evidence. He urges this Court to dismiss the appeal on the basis that the judge committed no errors of fact or law and his conclusion should not be impugned.

[2] It is necessary to set out the relevant background in some detail in order to provide the requisite context. I do so now.

### Background

[3] On 11<sup>th</sup> October 2011, the Khushalanis and Mr. Mason entered into a written contract (“October Contract”) for Mr. Mason to construct a three-storey apartment complex in St. George’s, Grenada (“the apartment complex”). It was intended to house students attending the nearby St. George’s University. The agreed cost of labour and materials under the October Contract was \$5,056,174.04.

[4] The completion of the apartment complex was agreed to have been completed in nine (9) phases, with the Khushalanis undertaking to make payments in advance of each phase and to make a final payment upon satisfactory completion of the ninth phase. The ninth phase included, among other things, the construction of a parking lot, completion of a septic system, and plumbing and painting. Construction of each of these nine phases, was to be supervised by Mr. Cecil Frederick, an architect and

urban designer with 17 years' experience, who was hired as a project manager ("the Project Manager").

- [5] During the construction of the apartment complex, the Khushalanis entered into two oral contracts with Mr. Mason. In the first oral contract, the Khushalanis agreed that Mr. Mason adopt the Mascon Construction System instead of the more traditional building method for the construction of the apartment complex and to construct a fourth storey, also using the Mascon Construction System. This additional storey was to house a master bedroom suite, gym, bar and a room for security and maintenance. In the second oral contract, the Khushalanis contracted Mr. Mason to install, among other things, the I.T. and satellite systems. Both contracts were not reduced into writing and are primarily at the heart of the dispute between the parties.
- [6] Concerns arose in May 2012, when the Project Manager received results that the coring and compressive strength of the first-floor slab showed the compressive strength of 2165 pounds per square inch ("PSI"). This was below the requisite standard which was 3000 PSI. This was later adjusted in the cross-examination of the Project Manager, who asserted that the updated figure of the first-floor concrete slab was 2366 PSI. Later, another issue arose when a generator to be acquired for the apartment complex, by Mr. Mason by a third-party supplier, at the cost of \$100,000.00, was not obtained. Mr. Mason, having been contracted for additional work under the first and second oral contracts also found life operating under the arrangement difficult, as he claimed the Khushalanis refused to pay him the monies due under these contracts. As a result of these and other difficulties between the parties, Mr. Mason terminated work on the apartment complex and instituted proceedings against the Khushalanis. Mr. Mason claimed general damages for breach of contract, and special damages in the sum of \$21,865.00 for the first oral contract and \$334,039.90 for the second oral contract with interests and costs.
- [7] In turn, the Khushalanis counter-claimed, accusing Mr. Mason of a catalogue of defective and substandard work as it related to the septic system, plumbing, the I.T.

and Satellite systems, roofing, painting, and the generator. The Khushalanis claimed general damages for breach of contract, special damages under the October Contract in the sum of \$947,100.14, general damages under the first oral contract, special damages under the first oral contract in the sum of \$26,100.00, monies due and owing in the sum of \$423,685.54, general damages for negligence and special damages for negligence in the sum of \$48,231.00.

### **Issues in the court below**

- [8] These are the four (4) issues that were dealt with by the court below:
- (i) whether the Khushalanis were in breach of contract as pleaded by Mr. Mason and if so what was the measure of damages;
  - (ii) whether the Khushalanis were liable for monies due and owing as pleaded by Mr. Mason;
  - (iii) whether Mr. Mason was in breach of contract as pleaded by the Khushalanis and if so what was the measure of damages; and
  - (iv) whether Mr. Mason was liable for monies due and owing as pleaded by the Khushalanis.

### **Judgment in the Court Below**

- [9] On 8<sup>th</sup> March 2020, the learned judge, having given deliberate consideration to the evidence that was deployed and the competing submissions of the parties, delivered his closely reasoned judgment and held that Mr. Mason succeeded on part of his claim in the amount of \$240,643.16 and that the Khushalanis' counterclaim succeeded on part in the amount of \$145,627.87. The net result of this was that the Khushalanis owed Mr. Mason the sum of \$95,015.13. The learned judge in his comprehensive judgment, made important findings on credibility and the quality of evidence which buttressed the oral contracts. He focused mainly on the first and second oral contracts, the rental of the Mascon Construction System, the generator, and the septic system. As it related to the first and second oral contracts, the

learned judge stated that as a result of there being no documentary proof of what was agreed between the parties, he had no choice but to rely on the evidence of both Mr. Mason and the Khushalanis. He found that on a balance of probabilities, he preferred the testimony of Mr. Mason. In relation to the rental of the Mascon Construction System, when faced with competing evidence, the learned judge was of the view that Mr. Mason's 'version had a greater ring of truth to it'. In terms of the generator, the judge was satisfied that the Khushalanis undertook to deal directly with the supplier, cutting out Mr. Mason's involvement. Lastly, as it related to the construction of the septic system, the learned judge held that he was not persuaded on a balance of probabilities that, Mr. Mason had used inferior materials in the construction of the septic system and that his approach to construction of the same was deficient.

### **Grounds of Appeal**

- [10] The Khushalanis, being dissatisfied with the learned judge's decision have appealed against part of the judgment and order of the learned judge. The Khushalanis have filed eleven (11) grounds of appeal, challenging both the learned judge's conclusions of fact and law and his overall disposition of the matter. I do not propose to recite the grounds of appeal in their entirety but to state that they mainly challenge his findings of law, the judge's evaluation of the evidence, findings of facts, and the inferences drawn from those findings in relation to certain aspects of the judgment. Learned counsel for the Khushalanis, Mr. Ferguson, has helpfully set out condensed grounds of appeal. In his oral arguments he even further narrowed the issues to three (3) issues. I accept these and shall adopt them with some modifications.

### **Condensed issues on Appeal**

- [11] The following are the three (3) condensed issues, which arise to be resolved as a consequence of the refined arguments of counsel during oral submissions and a careful reading of the written submissions filed by both parties:

- (i) whether the decision of the learned judge went against the weight of the evidence before him ("the Weight of Evidence Issue");

- (ii) whether there was privity of contract between the Khushalanis and the supplier of the generator (“the Privity Issue”); and
- (iii) whether the learned judge properly and fairly assessed the evidence of the Project Manager (“the Fair Assessment Issue”).

### **The Khushalanis’ submissions**

- [12] The gravamen of Mr. Ferguson’s complaint was in relation to the weight that the judge attached to the evidence. He argued that the learned judge went against the weight of the evidence before him with respect to three aspects, which the Khushalanis have claimed to be: (i) the substandard work provided by Mr. Mason; (ii) services paid for by the Khushalanis but not rendered by Mr. Mason; and (iii) overpayments made by the Khushalanis. Mr. Ferguson acknowledged that this submission sought to challenge several findings of fact made by the learned judge and as such, the principles that govern the appellate court’s intervention with respect to the review of findings of fact, the evaluation of those facts and the inferences drawn from them by the trial judge, first had to be satisfied. Mr. Ferguson purported to rely on **Margaret Blackburn v James A.L Bristol**,<sup>1</sup> and submitted that the Khushalanis had satisfied the principles which emanate from **Blackburn** and that this Court was entitled to intervene.
- [13] Moving to the first aspect, Mr. Ferguson complained that there was overwhelming evidence, which confirmed that there was substandard work produced on the part of Mr. Mason, in relation to: the concrete strength of the first floor of the apartment complex; inadequate, sewage system; the faulty wiring of the I.T and Satellite systems; and substandard plastering, tiling, carpentry and walls. In his complaint, Mr. Ferguson pointed out the following instances in which he said that the learned judge went against the weight of evidence: (i) the learned judge finding that there was ‘considerable debate’ on the reduction of the lifespan of the building, despite the evidence of John Adams, a civil engineer, who concluded that the

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<sup>1</sup> [2015] ECSCJ No. 213 (delivered 12<sup>th</sup> October 2015).

comprehensive strength of 2165 PSI of the first-floor slab, would shorten the longevity of the apartment complex. Additionally, the learned judge concluding that the Khushalanis elected to leave the first-floor with a comprehensive strength of 2165 PSI, which was below the intended strength; (ii) the learned judge accepting that materials used by Mr. Mason in the installation of the septic system, and his approach in the construction of the septic system were not defective, in spite of the uncontroverted evidence of Floyd Sealy, who confirmed that Mr. Mason's approach and the materials used, did not accord with any professional standard of sewage design or construction; (iii) the learned judge failing to give weight to the networking defects within the I.T. and Satellite systems, as confirmed by Shevon Williams, a Network Engineer; and (iv) the learned judge failing to give weight to the overwhelming uncontroverted evidence of Fitzroy Charles who concluded that the plastering, tiling, carpentry and walls were of "poor quality" and did not meet "professional construction standards".

- [14] Turning to the second and third aspects, Mr. Ferguson asserted that, the learned judge in arriving at the set off sum of \$95,015.13, failed to take into consideration the following payments made by the Khushalanis to Mr. Mason, for which neither the required service was provided nor any refund made: (i) payment in the sum of \$14,235.84 by the Khushalanis to Mr. Mason for GacoRoof compound, to be used as a coating on the roof of the apartment complex; (ii) payment by the Khushalanis for installation of electrical fixtures by Mr. Mason; (iii) payment in the sum of \$11,600.71 by the Khushalanis to Mr. Mason for installation of down pipes; (iv) Common External Tariff refund in the sum of \$31,582.49 due to the Khushalanis by Mr. Mason; and (v) payment in the sum of \$434,378.07 representing monies saved by Mr. Mason by renting a used Mascon Construction System at the cost of \$300,000.00, instead of purchasing a new system as originally budgeted for at \$734,378.07.

- [15] On the issue of privity, Mr. Ferguson took issue with the judge's findings of fact. In so doing, he strenuously submitted that learned judge had no proper basis upon which to determine that the Khushalanis had direct contact and involvement with the supplier of the generator. To support this point, he further submitted that the Khushalanis paid to Mr. Mason \$100,000.00 to acquire a generator for the apartment complex and a further fee of \$7,000.00 for the purpose of shipping the generator. This generator was to be obtained by Mr. Mason by a third-party supplier, however, Mr. Mason never received the generator from the supplier. Mr. Ferguson maintained that the obligation lay on the Mr. Mason to supply the generator and that the Khushalanis had no contract with the supplier of the generator. Further, in so far as the supplier made an error in not delivering the generator, Mr. Ferguson was of the firm view that Mr. Mason was responsible, as there was no privity of contract between the Khushalanis and the supplier. As such, he argued, there was no proper basis for the learned judge to conclude that the Khushalanis took it upon themselves to deal directly with the supplier of the generator.
- [16] Finally, Mr. Ferguson submitted that the learned judge failed to properly and fairly assess the following evidence of the Project Manager, Mr. Frederick and therefore arrived at wrong conclusions: (i) that the strength of the concrete first-floor slab was poor; (ii) that Mr. Mason agreed to the first-floor slab being retrofitted by July 2013 to improve its strength; (iii) that a builder estimated a cost of \$100,000.00 to fix the first-floor slab in accordance with the engineer's plan; (iv) that he observed several defects with the building including poor quality painting, plumbing issues, issues with the septic system and hairline cracks around the beams of the 4<sup>th</sup> floor; (v) that Mr. Mason agreed to build the 4<sup>th</sup> floor using the Mascon System of Construction; (vi) Mr. Mason's lack of refund of the sum of \$437,378.07 by using a rented Mascon Construction System.

#### **Mr. Mason's submissions**

- [17] Mr. Sylvester was adamant that there was no basis upon which this Court should interfere with the judge's findings of facts and law. He maintained that the judge was generous to the Khushalanis despite the poor quality of evidence that they deployed. Mr. Sylvester, in his oral arguments before the Court, countered that the Khushalanis were in fact satisfied with the first phase of construction, particularly, the PSI of the first-floor slab. He advanced this argument by firstly drawing reference to Mr. Khushalani's cross-examination, where he positively asserted his satisfaction with the first phase of construction of the apartment complex. Further, Mr. Sylvester stated that had the Khushalanis not been satisfied with the first phase of construction, more specifically, the PSI of the first-floor slab, the Khushalanis would not have paid for phase one and continued to rest of the construction of the apartment complex.
- [18] In addition, Mr. Sylvester maintained that the PSI of the first-floor slab was not 2165 PSI as argued by Mr. Ferguson. He submitted that in accordance the report of Cecil Frederick dated 10<sup>th</sup> August 2012, it was admitted that the PSI was 2366 after testing and not 2165 PSI as initially thought. Additionally, in the report of Mr. Frederick detailing a meeting dated 31<sup>st</sup> July 2012, it was admitted by Dr. Braveboy, Senior Engineer, that the apartment complex was safe as there were no large spans in the building and that the cracks were superficial.
- [19] Next, Mr. Sylvester dealt in detail with the Khushalanis' complaints that the learned judge went against the weight of evidence and that he failed to take into consideration certain payments made by the Khushalanis to Mr. Mason for which neither the required service was provided nor any refund made. Mr. Sylvester resisted these assertions, submitting that the judge dealt with the evidence accurately and correctly as: (i) the learned judge properly found that the materials used for the septic tank were approved by the engineer and that the engineer ensured that the phased job was completed satisfactorily before any money was disbursed; (ii) there was no evidence placed before the court in relation the down pipe; (iii) there was no documentation or proof presented in the lower court to justify

the claims that the I.T. and Satellite systems were defective. In any event, the learned judge awarded a lump sum of \$34,088.13 for all latent problems; (iv) there was no evidence of any agreement that the GacoRoof Compound should have been used. It was only agreed that the apartment complex was to be painted with two coats of paint; (v) there was no documentary evidence before the court in relation to any agreement that the CET exemption should be reimbursed to the Khushalanis. Further, the CET sum did not have to be reimbursed as it had already been accounted for in the original contract price; (vi) the Khushalanis provided no building plans nor documentary evidence to the court, so as to prove that they were owed the payments sought for works that they allegedly contracted Mr. Mason to do.

[20] Mr. Sylvester highlighted the fact that the judge in his judgment specifically questioned Mr. Khushalanis' credibility. He stated that the Khushalanis were discredited in every material particular before the lower court and that the judge found them to lack credibility. He highlighted to the Court several instances in which the Khushalanis were discredited in the court below, which included their allegations that (i) the contract price had been \$4,000,000.00 and that Mr. Mason had changed the wording of the contract; (ii) Mr. Khushalani had not read the October Contract prior to its execution; (iii) Mr. Mason had a particular timeline to complete the contract, however he had delayed the completion. He reiterated that all of the above had been discredited by the learned judge as the evidence showed that all the delays were as a result of the Khushalanis and their failure to pay Mr. Mason in accordance with the contract. In contrast the judge accepted that Mr. Mason was credible. He pointed out that the judge's findings of fact were clearly open to him on the evidence and so too were the inferences to be drawn from those findings of fact. He therefore urged the Court not to interfere with the trial court's findings of fact and to exercise the appellate court's usual restraint in relation to the same.

[21] In relation to the privity issue, Mr. Sylvester, resisted the submissions of Mr. Ferguson, presenting an alternative argument that the learned judge adequately dealt with the issue of privity of contract. He argued that the learned judge was

entitled to accept the evidence of Mr. Mason which indicated that he was merely the go between. Further, the learned judge was entitled to accept that the Khushalanis had taken it upon themselves to contact the supplier directly and arranged the shipping arrangements. Mr. Sylvester submitted that Mr. Mason paid \$75,000.00 of his own money to the generator supplier upfront, subsequently using the \$100,000.00 received from the Khushalanis to reimburse himself. He maintained that in the totality of the circumstances, the learned judge was correct in his findings that the Khushalanis' assertion that there was no privity of contract between themselves and the supplier should not be entertained.

- [22] Further, he urged the Court to dismiss the appeal and asserted that the learned judge did not fail to properly and fairly assess the evidence of the Project Manager. Instead, he maintained, the learned judge exercised his judicial task with 'punctilious incision' coupled with a thorough factual assessment of the task before him. He argued that the evidence presented by the Project Manager in his reports, went against the Khushalanis' claims and that the judge gave due weight to them to make the findings of fact and to draw the inferences that he did. In any event, he said that it was open to the judge to make the findings of fact that he did since the judge had made adverse observations against the Khushalanis based on the evidence.

## **Discussion and Conclusion**

### **The Weight of the Evidence and Fair Assessment Issues**

- [23] I propose to address issues (i) and (iii) together since they are inextricably linked, and both revolve around the Khushalanis' challenge of several findings of fact, the assessment of those facts and the inferences drawn from those findings, by the learned judge. The critical issue that this Court has to resolve is whether it is open to the appellate court to interfere with the findings of fact and the inferences drawn from those findings made by the judge. Inextricably linked to this matter is the approach that an appellate court should take in relation to the judge's evaluation of the evidence which forms the main complaints that permeate throughout the Khushalanis' appeal. Also brought into sharp focus is the approach of appellate courts to the inferences that are drawn by judges to the facts as they find them.

[24] It is settled that the starting point of such a discussion must pay 15ognizance to the principles governing appellate intervention with respect to the review of findings of facts, the evaluation of those facts and the inferences drawn from them by a trial judge. These principles have been well-established, having been enunciated in **Watt (or Thomas) v Thomas**.<sup>2</sup> In **Watt (or Thomas) v Thomas**, Viscount Simon stated, ‘...the decision of an appellant court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.’<sup>3</sup>

[25] In **Piglowska v Pigolowski**,<sup>4</sup> a House of Lords decision, Lord Hoffman explained the rationale undergirding the need for appellate restraint when reviewing findings of fact. He explained that:

“[T]he appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge’s evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Ltd.* [1997] R.P.C. 1:

“The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.””

[26] There is also a consistent stream of jurisprudence in which this Court has applied the above well-known principles of appellate court restraint in its review of a trial judge’s findings of facts and the inferences drawn from them. This Court has applied those principles in cases such as, **Yates Associates Construction Company Ltd v Blue**

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<sup>2</sup> [1947] A.C. 484.

<sup>3</sup> Ibid at p.487.

<sup>4</sup> [1999] 3 All ER 632.

**Sand Investments Limited,<sup>5</sup> Flat Point Development Limited v Mary Dooley<sup>6</sup> and Showa Holdings Co. Ltd v Nicholas Gronow and Joh David Ayres.<sup>7</sup>**

[27] In delivering the judgment of the Court in **Yates Associates Construction Company Ltd**, I applied several cases including **Margaret Blackburn v James A.L. Bristol**, and stated that:

“[46] The Court of Appeal should apply restraint not only to the judge’s findings of fact but also the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether on the evidence the reliability of which it was for her to assess, she was plainly wrong.”

...

“[59] The learned trial judge undoubtedly had the advantage of seeing and hearing the witnesses give their evidence. She would have observed their demeanor and on that basis she came to particular findings of fact. Taking this into consideration, this Court should be slow to interfere with her findings and conclusions unless it appears clear that she failed to make proper use of the advantage she had. As stated in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**, this Court must consider whether it was permissible for the judge at first instance to make the findings of fact which she did on the face of the evidence as a whole. Yates must show that the learned trial judge misapprehended the evidence or came to a conclusion or finding which cannot be supported on the evidence or which was not open to her.”

[28] Further, in **Flat Point Development Limited v Mary Dooley**, I held that:

“[38] ...It is not open to this Court to seek to have a re-run of the trial and to determine who is to be believed. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to an appellate court.

[39] It is the function of the appellate court to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle.

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<sup>5</sup> [2016] ECSCJ No. 63 (delivered 20<sup>th</sup> April 2016, unreported).

<sup>6</sup> [2019] ECSCJ No. 116 (delivered 13<sup>th</sup> March 2019, unreported).

<sup>7</sup> BVIHCPMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported).

After this has been determined, the appellate court has to stand back and determine whether the findings of fact were open to the judge to make. If they were, the appellate court should not interfere.”

[29] I later adopted this principle in **Showa Holdings Co. Ltd.** At paragraph 53 of the judgment, I stated:

“It is not now for the appellate court to go trawling through the evidence in the manner that a first instance judge is required to do in order to making findings of fact. This has been the Court’s position as seen in **Flat Point Development Limited v Mary Dooley.**”

[30] I remain resolute in this view, that the appellate court should show restraint in review of findings of facts of the learned trial judge.

[31] Most recently, this principle has been confirmed by the Privy Council in **Ming Siu Hung and others v JF Ming Inc and another.**<sup>8</sup> In **Ming Siu Hung**, Lord Briggs delivering the judgment of the Board stated:

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013]

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<sup>8</sup> [2021] UKPC 1.

1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court...”<sup>9</sup>

[32] This Court has also adopted the principle as laid out in **Ming Siu Hung and others** restating such in **Khouly Construction & Engineering Limited v Edmond Mansoor**<sup>10</sup> and **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd.**<sup>11</sup>

[33] Also, in **Shaista Trading Company Limited v First Caribbean International Bank (Barbados) Ltd**, the learned Pereira CJ in her judgment, adopted the principles of **Ming Siu Hung** as follows:

“As Lord Briggs stated quite recently in the decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc** and another:

“It is necessary...to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism.”

[34] In sum, based on the above cases, the main principle to be extrapolated is that the appellate court should exercise caution in its review of the findings of facts and inferences that are drawn by trial judges. Put another way, a trial judge’s findings of fact and the inferences to be drawn from those findings should not be interfered with by an appellate court simply because the appellate court would have found them differently. In **Perry v Raleys Solicitors**,<sup>12</sup> the United Kingdom Supreme Court held:

“In the Henderson case the Supreme Court had said, at para 62:  
‘It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.’”<sup>13</sup>

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<sup>9</sup> Ibid at paragraph 20.

<sup>10</sup> [2021] ECSCJ No. 527 (delivered 15<sup>th</sup> April 2021, unreported).

<sup>11</sup> [2021] ECSCJ No. 534 (delivered 26<sup>th</sup> April 2021, unreported).

<sup>12</sup> [2019] UKSC 5.

<sup>13</sup> Ibid at paragraph 49.

- [35] As was expressed in **Flat Point** and **Showa Holdings**, it is not open to the appellate court to overturn the learned trial judge's findings of facts and evaluations of those facts, unless those facts were not open to the judge on the evidence. An appellant must show that the trial judge fundamentally misunderstood the issue or the evidence or that he plainly failed to take the evidence into account or that he arrived at a conclusion which the evidence could not support. This is because the trial judge, as the initial factfinder, would have been exposed to a wider range of impressions that influenced a decision on factual matters than would not be available to an appellate court. These impressions cannot be replicated by an analysis of the transcript of the evidence. It is for this reason that the appellate court exercises restraint and gives some measure of deference to the conclusions reached by the trial judge.
- [36] Having set out the principles which will in turn guide the determination of this issue, I will now approach the task of evaluating the learned judge's judgment with the caution imposed by the above-mentioned authorities firmly in mind.
- [37] It is clear, that in order for the Khushalanis to succeed on this issue, they must show the Court that the learned judge misapprehended the evidence or came to a conclusion which cannot be supported by the evidence or which was not open to him to make. Having perused the evidence and applied the above principle to the case at bar, I am of the strong view that it was clearly open to the judge to make the conclusions that he did as it related to the concrete strength of the first-floor slab, the sewage system, the I.T and Satellite systems, the CET exemption, the plastering, tiling, carpentry and walls and the Project Manager's evidence.
- [38] It is clear from the learned judge's treatment of the issue of the compressive strength of the first-floor concrete slab, that he in coming to his conclusions on this point, considered the evidence before him and embarked on an evaluative exercise of the facts. This is evident in paragraphs 18 and 19 his judgment which state:

"[18] Problems of any real significance appear to have started in around May 2012, when the project manager received results of coring and

compressive strength on the first-floor slab. This showed that the concrete of the slab had a compressive strength of 2164 PSI, which was below the intended strength. What the contractual specifications in fact were is unclear, because the specifications were not disclosed in the proceedings. There is reference to the requisite strength being 3000 PSI in a number of contemporaneous meeting reports prepared by the project manager. He wished to correct that figure in his oral evidence at trial to a higher figure...

[19] There was considerable debate in the witness evidence before the court, none of which was expert evidence, that the lifespan of the building could be reduced if the first-floor slab was not retrofitted. Without the benefit of a proper expert study by expert witnesses, which would have to take into account the entire construction integrity and design of the building and the physical characteristics of the site, this debate calls for speculation which I decline to attempt."

[39] Further, it is pellucid that the learned judge as a result of conducting this evaluative exercise on the facts, found Mr. Mason's evidence to be credible, as in paragraph 18 he stated:

"...[Mr. Mason] accepts that the compressive strength of the slab was below specification. [Mr. Mason] suggested, credibly, in oral evidence that there were three options in those circumstances: to breakdown the defective construction and start again, to retrofit the first floor slab with additional structural supports, or to leave it as it was if the overall safety margin for the building had not been compromised. The [Khushalanis] elected to leave it as it was."

[40] There is no requirement of the judge to state all the evidence that he has taken into account once he is able to demonstrate that care has been taken and that the evidence as a whole has been considered. By way of emphasis, as the initial factfinder, it was open to the judge to reject the evidence of the Khushalanis, in favour of evidence that he believed to be credible. The learned judge immersed in the trial over the course of three (3) days, had a firsthand opportunity to hear the oral evidence of each witness, including the Project Manager, observe their demeanor and determine which witnesses he deemed credible. At the end of the trial, the judge found the evidence of Mr. Mason to be credible on this point of contention. This was entirely open to the learned judge and I am of the firm view that the judge performed this task faithfully. The weight of the evidence is a matter that falls within the exclusive purview of the trial judge, who hears all of the evidence. In **Showa Holdings Co. Ltd v**

**Nicholas James Gronow and John David Ayres**, I expressed this sentiment and stated that:

“Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all aspects of the case and as such he would be able to better assess the evidence and has advantages which the appellate court does not have. It was open to the judge to conclude that there was urgency in hearing the adjournment application; it was left to the judge to decide how to express his conclusions.”

[41] Cognisance must be paid to the fact that, at lines 7 to 25 of the Transcript of Proceedings of the trial held on 10<sup>th</sup> February 2016 at page 169, Mr. Khushalani in his cross-examination made the following admission:

**“Mr. Sylvester:** Okay. The method of paying Mr. Mason, before you disburse any monies, is it that the bank had an engineer who would certify the work before he is paid?

**Mr. Khushalani:** Yes, Mr. Cecil Frederick, project manager.

**Mr. Sylvester:** The project manager –

**Mr. Khushalani:** Yeah.

**Mr. Sylvester:** --would certify the work –

**Mr. Khushalani:** Before.

**Mr. Sylvester:** --before Mr. Mason is paid—

**Mr. Khushalani:** Right.

**Mr. Sylvester:** So, when you paid him for the first phase, you were satisfied that the first phase was completed?

**Mr. Khushalani:** Yes,

**Mr. Sylvester:** Satisfactory.

**Mr. Khushalani:** Yes.

**Mr. Sylvester:** So, as it stands now, you have no issue with the construction of the first phase of the project?

**Mr. Khushalani:** No.”

[42] In my judgment, the above admission would have been damning to the Khushalanis’ counterclaim. Mr. Khushalani’s admission that he was satisfied with the work done on the first floor, and that further, payment was only rendered to Mr. Mason upon the satisfaction of the Project Manager, leads one to the reasonable conclusion that, the Khushalanis were pleased with the work done by Mr. Mason on the first-floor concrete slab and as such disbursed monies to him. Indeed, this was also the view formed by the learned judge who stated that:

“[22] It is beyond any doubt the case that the [Khushalanis] were in a great hurry to start letting out the building, in order to generate money with which to prepay the mortgagee bank. Understandable though this is, it is this, in my view, which is at the root of many of the problems that ensued.

...

[25] It is very telling in my view that the [Khushalanis] paid [Mr. Mason] essentially the full amount for both stages of the building. Had the [Khushalanis], and their project manager, been significantly unhappy with any of the work they would not have allowed him to build out the project to the stage where he reached, or allow the bank to disburse further funds.”

- [43] The above quotation exemplifies the care with which the judge approached his task. This underscores the need for the appellate court to exercise the requisite restraint in interfering with the judge’s findings of fact. The learned judge also drew the conclusion that the Khushalanis had accepted the first-floor slab at the compressive strength of 2366 PSI as, electing not to wait for defects to be diagnosed and cured because they were in a haste to complete the apartment complex to house tenants. At paragraph 24 of the judgment, the learned judge said:

“[24] The [Khushalanis] also maintain that the tenants began to be dissatisfied over a host of problems and defects that showed themselves. It appears to me highly probable that the [Khushalanis] were in too great a haste to let out the apartments before finishing snags had been diagnosed and cured, and also that the [Khushalanis] were prepared to accept less than perfect work give both their desire to start earning from the building and the student, not tourist, market the buildings was aimed at.”

- [44] It is no part of the trial judge’s function to comment on every bit of evidence that is deployed. Neither is a trial judge required to make findings of fact on every issue if he is satisfied that the findings that he makes enable him to come to a just conclusion. The appellate court should not interfere with the judge’s evaluation of the evidence unless it is perverse. In **Sohal v Suri and another**,<sup>14</sup> the English Court of Appeal expressed this sentiment, holding that:

“Consistently with the independence of the judiciary, it is left to the judge to decide how to express his conclusions, subject to review on appeal in accordance with what are for the most part well-established principles. It is not for this court to retry the case: our task is to review the judgment of the

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<sup>14</sup> [2012] EWCA Civ 1064.

judge for error. The judge does not have to make a finding on every disputed item of evidence. It is enough if he makes findings on matters which he needs to resolve before coming to his conclusion. Likewise, there is no obligation on the judge to make findings if, after having considered the matter conscientiously, he forms the view that it is not possible to make a particular finding.”<sup>15</sup>

[45] The conclusion that the Khushalanis were in great haste was one indeed open to the learned judge to make, especially when considering that Mr. Khushalani and his son Kamal Khushalani in their cross-examinations, admitted that the completion of the fourth storey, which would mark the completion of the entire apartment complex, was expected to be in October 2012. However, the Khushalanis had already begun signing leases with tenants for occupation of the apartments by July 2012, the latter who then begun to occupy the apartment complex in August 2012. This was due to ‘market research’ conducted by the Khushalanis that showed that prospective tenants/students would be arriving in the month of August.<sup>16</sup> Therefore, I am drawn to the ineluctable conclusion that, it was clearly open to the judge to arrive at the conclusions that he did based on the totality of the evidence that was deployed in the case.

[46] In relation to the Khushalanis’ complaints that the learned judge went against the weight of the evidence in relation to the generator, the septic system, the CET refund, the I.T. and Satellite systems, and the plastering, tiling, carpentry and painting, I remain fortified in my view that the view to which the learned judge arrived was clearly open to the learned judge. The learned judge, dedicated specific, well-reasoned sections within his judgment to deal with these particulars adequately. Even on the point of the CET exemption, the learned judge dealt extensively with those items that made up the Bill of Quantities, which he implicitly determined the CET did not form part of it. As both the claim and counterclaim revolved primarily around two oral contracts, which were not memorialised, the learned judge had the herculean task of not only reviewing the documentary evidence that did exist, but also the oral evidence

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<sup>15</sup> Ibid at at paragraph 6.

<sup>16</sup> Lines 24 and 25 of the Transcript of Proceedings of trial held 12<sup>th</sup> February 2016 at page 212 of Bundle 3 of the Record of Appeal.

presented during the trial. In some instances, as it related to the I.T. and Satellite systems and the CET refund, there was no documentation or proof presented to the lower court by the Khushalanis to substantiate their claims. The learned judge was fully cognisant of all of the evidence that was launched and was entitled to determine what was credible and what weight was to be given to the evidence. This included him being entitled to assess the evidence of the Project Manager, which comprised of numerous reports and oral evidence given, in relation to all of the complaints put forward by the Khushalanis. It was therefore open to judge to find that Mr. Mason had been a junior contractor doing his best to balance the expectations of the Khushalanis and the realities of the project and that his evidence was to be believed.

[47] By way of emphasis, it is not for this Court to trawl through the evidence in the manner that a first instance judge is required to do in order to making findings of fact. The appellate court ought not to second guess the trial judge unless the findings of fact were not open to the judge to make. The Khushalanis have not shown in either their oral or written submissions before this Court, any basis which shows that these findings of fact made by the judge were not open to him, so that the appellate court could interfere. Instead, I agree with the submissions of Mr. Sylvester that the learned judge exercised his judicial task with the requisite care. In my view, the oral submissions that were advanced by Mr. Sylvester are attractive and persuasive. They accord with my view in relation to the judge's findings of fact and the inferences drawn from those findings of fact. There is a very high threshold which an appellant has to attain to successfully challenge findings of fact and inferences. In the appeal at bar, there is no basis to assert that the judge's decision was perverse. His findings did not go against the weight of the evidence.

[48] I am therefore fortified in my view that there is no discernible error in the judge's findings of facts, evaluation and inferences. Also, in my opinion there is no merit to the complaint that the learned judge went against the weight of the evidence before him with respect to the work and payments under the October Contract, the first and second oral contracts and erred in the assessment of the Project Manager's evidence.

Further, in my considered view, the findings of facts, evaluation and inferences made by the learned judge are not one which no reasonable judge could reach.

[49] The Khushalanis' appeal on this issue is therefore unmeritorious and accordingly fails.

[50] I turn now to the Privity Issue.

### **Privity Issue**

By way of emphasis on the privity issue, the Khushalanis' main criticism is that the learned judge had no proper basis upon which to determine that the Khushalanis had direct contact and involvement with the supplier of the generator. They also complain that there was no privity of contract between them and the supplier and therefore Mr. Mason was responsible for the non-delivery of the generator. However, these were clearly findings of facts that the judge made.

[51] In the interest of the efficient consideration and disposition of this issue, I underscore that the legal principles are to be applied here with equal force in relation to the appellate court's approach to reviewing the findings of fact of the learned judge. As such, to resolve this issue, it must be determined whether it was open to the learned judge to make that finding of fact. As above, it is evident that I am of the view that it was.

[52] I am fortified in the above view and find comfort in the fact that in the signed report of the Project Manager dated 6<sup>th</sup> February 2013, it was acknowledged and confirmed that Mr. Khushalani had direct involvement with the supplier of the generator. In the report, the Project Manager details:

“[Mr. Khushalani] stated that his son has spoke to the Agent and it was agreed that the Agent can arrange for the generator to be shipped to Grenada and upon arrival [Mr. Khushalani] will pay the Agent the landed fee of \$7000.00. [Mr. Mason] said that he had no knowledge of this but he will have no problem with this arrangement.”

[53] This was in fact consistent with the evidence of Mr. Mason in his witness statement, in which he stated:

- “a) I am aware that the [Khushalanis] contracted one Everton Conner, Electrical Engineer, to order and import a custom-made generator for the apartment building.
- b) I admit that the [Khushalanis] gave to me the sum of \$100,000.00, but same was to be forwarded to the said Everton Conner as part payment for the said custom-made generator, which I did.
- c) The delivery of the said \$100,000.00 to the said Everton Conner represents the full extent of my involvement in the said agreement between the [Khushalanis] and the said Everton Conner.
- d) ...
- e) I do not accept responsibility for the non-delivery of the generator, since I was a stranger to the agreement between the [Khushalanis] and the said Everton Conner. Further, I deny that I was paid the sum of \$100,000.00 to provide a generator as alleged.”

[54] In my view, the evidence above paints nothing but a clear picture that there was direct involvement between Mr. Khushalani, his son and the supplier of the generator. Indubitably, these facts have undergirded the learned judge’s conclusion of the same, where at paragraph 77 and 78 of his judgment he stated:

“[77] Whatever was the strict legal relationship between [Mr. Mason], the [Khushalanis] and the generator supplier, I am satisfied that the [Khushalanis] undertook to deal directly with the shipping agent to obtain the generator, cutting out [Mr. Mason’s] further involvement. I am fortified in this view because [Mr. Khushalani] says that by this time relations between [themselves] and [Mr. Mason] had soured, so it makes sense to me that the [Khushalanis] took it upon themselves to deal directly with those responsible for bringing in the generator.

[78] Consequently I do not consider that the contract for the supply of the generator was frustrated or unlawfully interfered with by [Mr. Mason]. I see no reason, upon the evidence before the court, to unwind the transaction.”

[55] Based on the above, it is clear that the judge was alive to the legal issues and made specific findings of fact and inferences upon those findings. The learned judge made a fair and proper assessment of the evidence before him and thus arrived at a conclusion that was clearly open to him. Once more, the Khushalanis have failed to show this Court that, the judge arrived at a conclusion which the evidence could not support. I remain fortified in my view that the learned judge’s findings of facts, his

evaluation of the same and the inferences he drew cannot be impugned since there was clear evidence which undergirded his conclusions.

[56] This would effectively dispose of the privity issue.

[57] However, out of deference for the fact that the Khushalanis' have also mounted the additional challenge that there was no privity of contract between them and the supplier, and as such, the learned judge erred in his findings of law, I will briefly make some comments. It is apparent that I am of the opinion that this is of no moment given the clear and unequivocal findings of the judge. The judge's findings of fact that the Khushalanis had taken over the dealings must trump any argument on privity of contract. The learned judge having made that specific finding and having drawn inferences from same, was not required to address in detail, the settled principles of privity of contract. Indeed, he cannot be faulted for not doing so. In my view, the issue of privity of contract naturally fell away.

[58] Given the totality of the circumstances, I remain of the clear view that there is no basis for overturning the learned judge's decision. Accordingly, I would dismiss the Khushalanis' appeal in its entirety.

### **Costs**

[59] The Khushalanis having failed in prosecuting its appeal, shall pay Mr. Mason two-thirds of the prescribed costs on the sum of \$95,015.13.

### **Conclusion**

[60] For all the reasons which I have given, I would make the following orders:

- (i) The Khushalanis' appeal against the learned judge's judgment in relation to the sum of \$95,015.13 is dismissed, and the orders of the learned judge are affirmed in their entirety.

- (ii) The Khushalanis shall pay Mr. Mason two-thirds of the prescribed costs on the sum of \$95,015.13.

[61] I gratefully acknowledge the helpful oral and written submissions of all counsel.

I concur.  
**Mario Michel**  
Justice of Appeal

I concur.  
**Gertel Thom**  
Justice of Appeal

**By the Court**

**Chief Registrar**