REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE COURT OF APPEAL**

Civil Appeal No. P-297 of 2016

Claim CV No. 2014-02595

BETWEEN

(1) **JAPS FRIED CHICKEN LIMITED**

First Appellant/Claimant

(2) **ROMARIO MAHABIR,** the administrator

*ad litem* of BHAGWATEE MARAJ, deceased

(pursuant to the order of the Court

of Appeal of 28 September 2022)

Second Appellant/Third Party

And

**NICHOLAS THOMAS**

Respondent/Defendant

**PANEL:** Mr Justice Allan Mendonça JA

Mme Justice Charmaine Pemberton JA

Mr Justice JC Aboud JA

**Date:** 28 September 2022

**Representation:**

- Anand Beharrylal KC leading Yaseen Ahmed, instructed by Tara Lutchman for the appellants
- The respondent appeared in person.

I have read the judgment of Mr Justice JC Aboud JA. I agree with it and have nothing to add.

**Mr Justice Allan Mendonça JA**

I, too, have read the judgement of Mr Justice JC Aboud JA and I also agree with it.

**Madam Justice Charmaine Pemberton JA**

**Judgment**

[1] I uphold the appellants' appeal and set aside the orders of the learned trial judge. I would also dismiss the respondent's Counter Notice of Appeal. Before giving my reasons for doing so, I must record that the panel today granted the application of Romario Mahabir, filed on 13 September 2022, to be appointed the Administrator *ad litem* of his mother, Bhagwatee Maraj, the second Appellant/ Third Party, who died on 5 December 2021 after the hearing of the appeal but before the delivery of the judgment. Delays in the delivery of this judgment were occasioned by issues among the parties as to who should be selected to represent the estate for the limited purpose of continuing these proceedings. Those issues were resolved today.

[2]This is an appeal involving a trademark dispute. The two appellants are Japs Fried Chicken Ltd ('the company') and Bhagwatee Maraj ('Ms Maraj'). The respondent is Mr Nicholas Thomas ('Mr Thomas'). The dispute arose when

the company attempted to register the trademark "Japs Fried Chicken…De Best Taste Around!" and device on 12 February 2010 at the Intellectual Property Office ('IPO'). The application was advertised in the newspapers. Around 5 months later, on 1 July 2011, Mr Thomas formally sought the IPO's refusal of the company's application on the ground that that he was the owner of a common law or unregistered trademark, namely, "Japs Fried Chicken". He asserted that the specific trademark was used extensively by him in Trinidad and Tobago. In its counter notice before the IPO the company asserted that Mr Thomas does not and has never operated a business under the name "Japs Fried Chicken".

[3]There was a hearing at the IPO. On 18 June 2014 the IPO's Deputy Registrar ruled that the company's application was "stayed until the right to the use of the trademark was determined by the High Court". His authority to stay competing IPO applications rather than refuse one or both of them was questioned by the company which, in part, sued in the High Court to "appeal the Deputy Registrar's decision to stay".

[4] Its claim was, in part, that he had no authority to stay the company's application. However, section 14(3) of the Trade Marks Act Chap. 82:81 says that "where separate applications are made by different persons to be registered as proprietors respectively of trade marks that are identical or nearly resemble each other . . . the Comptroller may refuse to register any of them until their rights have been determined by the Court".

[5] It is a semantical argument to complain that the Deputy Registrar's "stay" of the applications pending the decision of the High Court amounted to a "refusal" and thus triggered the company's statutory appeal to the High Court from a "decision to refuse". The effect of the Deputy Registrar's decision, despite his imprecise language, amounted to a referral. The trial judge was therefore right in my opinion to treat the company's claim before her as a referral for the purposes of determining the rights of the parties to the trademark application made by the company and Mr Thomas.

[6] On 21 July 2014 the company filed its High Court claim for exclusive use of the trademark "Jap's Fried Chicken . . . de best taste around!" and device. It sought other orders of the High Court directing the Registrar to grant the company's IPO trademark application. The claim was mounted, in the main, as an appeal from the Deputy Registrar's decision. These are the material reliefs in the company's claim:

> (a) A declaration that the claimant is the sole proprietor of the trademark 'Japs fried chicken …. De best taste around!" and device.
>
> (b) A declaration that the defendant is not entitled to the use of the unregistered trademark "Japs fried chicken …. De best taste around!" or "Japs".
>
> (c) An order directing the IPO Registrar to grant the claimant's trademark application and to refuse the defendant's trademark application.

[7] Mr Thomas defended the High Court action and counterclaimed against the company, seeking the refusal of the company's trademark application

and the grant of his own IPO application. He also joined Ms Maraj as a defendant to the counterclaim and, additionally, as a third party.

*Background facts and findings of the trial judge in outline*

[8] The trial Judge correctly, in my view, found that Ms Maraj had had a personal relationship with Mr Thomas beginning sometime in the 1970s and bore two sons for him in the 1980s. Alvin Thomas was born in January 1987 and his brother Kevin Thomas was born on 1 February 1990. It is important for me to interject now (for reasons I will return to later) that Kevin became 18 years old on 1 February 2008.

[9] She further found that Ms Maraj and Mr Thomas participated in the operation of a certain bar and restaurant business in the late 1970s or early 1980s. At that time, it was called "First Court", near to a magistrates' court, and sold Chinese and Creole food.

[10] In 1984 the business was relocated to a building at the corner of Foster and Brierly Streets, Sangre Grande ('the Foster Street property') that was legally owned by Mr Thomas's aunt. The trial judge correctly found that the aunt had invited them both to relocate to the Foster Street property and that they both expended monies to build a suitable structure and to outfit it as a restaurant. At that time, as the trial judge, in my opinion correctly found, it was called "Japs Fast Food", not "Japs Fried Chicken", and sold a variety of cooked foods, including fried chicken. (I will hereafter

refer to the restaurant business at the Foster Street property as 'the business'.)

[11] According to the trial judge, Ms Maraj began her relationship with Mr Thomas many years before the construction of the Foster Street property and the establishment of the business within it. There is no reason on the printed record to doubt the trial judge's finding. Ms Maraj had earlier left her job as an insurance agent and began working full-time in the business.

[12] The trial judge correctly found that Mr Thomas's aunt had given permission to both of them in 1984 to occupy and renovate the Foster Street property to establish a new location for the business. They closed "First Court" and relocated to the Foster Street property under a new name: "Japs Fast Food" (not "Japs Fried Chicken"). Mr Thomas said that the exclusive right to use the trademark belonged to him as the business "Japs Fast Food" carried his nickname "Japs". It was not disputed at the trial that Mr Thomas was known by the nickname "Jap" or "Japs". There was no evidence to dispute that Ms Maraj, as his companion/partner, was known as "Madam Japs".

[13] Mr Thomas completely ceased his association with the business in 1989. His relationship with Ms Maraj broke down in that year and he suddenly departed. Ms Maraj describes it as an abandonment. It appears to me to have all the features of an abandonment. He accused her of infidelity and

untruthfulness, among other deceitful things, which he explained in his witness statement.

[14] According to Mr Thomas, before he left her and the business, he and Ms Maraj mutually entered into an oral agreement that created a trust ('the trust agreement') whereby she agreed that she would hold his 50 percent interest in the business, and in the Foster Street property (on which its first branch was located), on trust for their two sons until the youngest of them was 18 years old. The youngest child, who was unborn at the time, was Kevin, and he became 18 years old on 1 February 2008, some 19 years after Mr Thomas left.

[15] It was not contested at the trial that Mr Thomas left Ms Maraj and ended his involvement in the business suddenly and without any advance notice to her. The circumstances surrounding his departure were, however, contested. Evidence was led in chief before the trial judge by a truck driver and former carpenter, Mr Thomas Hoyte ('Mr Hoyte'), that upon their separation in 1989, Mr Thomas hired him to remove and transport "all equipment, appliances, bar counters, kitchen utensils, food, and drink stock" from the business and relocate them to another restaurant location on Edward Street, Port of Spain.

[16] Ms Maraj and her son from a previous relationship, Mr Darryl Mahabir, (Mr Mahabir') also testified about the unanticipated removal of this restaurant equipment. Mr Mahabir assisted his mother in the business.

He is also the principal shareholder in the company. According to Ms Maraj during her cross-examination, in dismantling and removing the restaurant's equipment Mr Thomas had, in effect, taken his 50% interest with him when he left. Mr Thomas denied that he removed any items from the business. He said that he left his half interest with Ms Maraj on trust for his two children, one of which was unborn.

[17] Ms Maraj completely rejected the existence of the trust agreement at the trial. She testified that Mr Thomas unconditionally abandoned her, the business, and the Foster Street property. She said that he left her in sole and exclusive possession, that he never returned or assisted in the expansion of the business, and that she and her son expended substantial sums to refurbish the restaurant and to replace the items that he had dismantled and or removed.

[18] It was not disputed that after their separation in 1989 Ms Maraj and Mr Mahabir financed and expanded the business at various locations throughout Trinidad and, later, in 2007, incorporated the company in which they both held shares to hold its assets. Her case is that she was known as "Madam Jap" prior to Mr Thomas's departure in 1989, a name that she admitted was derived from his nickname. She said that Mr Mahabir was also called "Japs" on account of her being known as "Madam Jap". Ms Maraj and Mr Mahabir and, since its incorporation, the company, had from the date of the separation in 1989 until the trial, established and

profitably operated some 13 outlets throughout Trinidad. The company was incorporated 18 years after Mr Thomas abandoned the business.

[19] For about a year after their 1989 separation, several different cuisines and restaurant names were used at the Foster Street property. Eventually, around 1990 they began using the now-disputed unregistered trademark, "Japs Fried Chicken". Ms Maraj and Mr Mahabir did not use the previous name "Japs Fast Food". According to his own testimony the expansion and growth of the "Japs Fried Chicken" business from 1989 throughout Trinidad and Tobago was not unknown to Mr Thomas. He took no part in that expansion, nor is there any documentary evidence that he ever reminded Ms Maraj of the alleged trust agreement.

[20] In 2006, an action was filed by Ms Maraj and Mr Thomas against one Winston Cooper ('Mr Cooper') over possession of the Foster Street property ('the 2006 Claim'). Mr Cooper claimed to be the legal owner of the property by way of a deed of conveyance from Mr Thomas's aunt, who had since died. He issued a Notice to Quit to Ms Maraj as the sole occupier and threatened to dispossess her. This was 17 years after Mr Thomas had departed, during which time she had been in exclusive possession of the Foster Street property. In response to the notice to quit an action was filed seeking a declaration of adverse possession against Mr Cooper.

[21] The evidence before the trial judge reveals that Ms Maraj approached Mr Thomas and asked him to be the second claimant in the 2006 Claim. She said that she did so because the property was legally owned by Mr Thomas's aunt in 1984 and because it was his aunt that gave both of them permission to enter into possession and expend monies and to remain there as long as they wished.

[22] Witness statements were filed and exchanged by all parties. Gobin J determined the claim on 13 November 2008 on the basis only of the undisputed facts on the witness statements.

[23] She ordered that Ms Maraj had extinguished the legal title of Mr Cooper by virtue of her sole, exclusive, and uninterrupted possession for over 17 years. She refused to make any declaration in favour of Mr Thomas who, by his evidence in that case, conceded that he vacated the Foster Street property in 1989 and had never returned. He was therefore not in possession of the Foster Street property for the requisite period of 16 years. Mr Thomas, who had made a claim for a declaration that he was jointly entitled to a possessory title, did not appeal Gobin J's judgment.

[24] There were several key and material discrepancies between what Mr Thomas testified in the 2006 Claim and what he testified in the instant claim. The trial Judge disparagingly noted most of them. For example, in the instant claim he testified that he alone started the original restaurant,

"First Court", in the 1970s. He testified that he alone established the business, "Japs Fast Food". And he testified that he alone financed the construction of the Foster Street Property. However, in the 2006 Claim, all of these activities were said to have been jointly undertaken. The trial judge, in very strong language, drew attention to the fact that Mr Thomas was deliberately untruthful in the 2006 Claim.

[25] Mr Thomas testified in the instant claim that he was misled into giving false evidence in 2006 that favoured Ms Maraj. The trial judge didn't buy that explanation. Surprisingly, she was nonetheless not prepared to doubt the veracity of his other evidence in the instant claim, particularly on the creation of the trust, because she also felt that Ms Maraj's evidence "was discredited on other issues" (para 39). These "other issues" related to the differences between her 2006 witness statement and her evidence at the trial now before us on appeal. Her demeanour was not identified as one of the "other issues".

[26] Ms Maraj, for example, had testified in the 2006 claim (at paras 44, 48, 56, 57, 74, and 77 of her witness statement) that she was solely operating "Japs Fried Chicken". According to the trial judge she used possessive pronouns (such as "our") in these paragraphs. This was felt to be vital to the trial judge. She set out the paragraphs that included the possessive pronouns in her judgment. In only two places in the 2006 claim, among

these six cited paragraphs, Ms Maraj used the possessive pronoun "our" to describe the business.

[27] In my opinion, the trial judge disproportionately focussed on the use of these two possessive pronouns in these two places among the six paragraphs to ground her finding that in 2006 Ms Maraj acknowledged joint ownership of the business after 1989.

[28] The trial judge made no note of the numerous other places in those paragraphs where Ms Maraj used personal, and not possessive pronouns, to describe herself as the sole owner of the business. There is no reference anywhere in her or in Mr Thomas's witness statement to any trust agreement. He did not assert the existence of any such trust agreement.

[29] There were other discrepancies that the trial judge also overlooked.

[30] For example, in the 2006 Claim Mr Thomas never mentioned that he left Ms Maraj in possession in 1989 but retained a one-half beneficial interest in the property or the business. He said nothing about a trust agreement. Such evidence might reasonably have influenced the formulation of Gobin J's orders. Gobin J would, naturally, in light of undisputed evidence of a trust, have declared its existence at the same time that she made an order of adverse possession, assuming that Ms Maraj conceded it as a fact, and it was included as a relief by Mr Thomas as the co-claimant.

[31] Why did he not request that it be included in his witness statement and/or as a relief? The evidence in the appeal before us is that there was nothing in writing declaratory of the alleged trust. There is no written agreement, no letter, no text message. There is no corroborative witness testimony by anyone to the spoken words of its declaration. There is no evidence of conduct by either or both of them that might satisfactorily prove a trust (in fact, as I will come to explain below, the conduct of both parties unquestionably belies its existence). Insofar as evidence of conduct was concerned, the trial judge grounded her judgment solely on Mr Thomas's agreement to participate in the 2006 Claim.

[32] Would it not have been sensible for Mr Thomas to get the beneficial interest formally recognised in court proceedings that concerned the trust property, especially since there was no other written proof of its existence, and the business had, by then, been greatly expanded?

[33] Alvin was already aged 19 and it was less than two years before Kevin, the youngest son, turned 18 (which would allegedly trigger the oral trust). The trial judge appears to have accepted that Mr Thomas was tricked into signing a witness statement that was a lie. She instead concentrated on his decision to participate in the 2006 Claim. If, as he told her court, he was tricked into perjuring himself in the 2006 claim, he had every right to apply to set aside Gobin J's judgment. He did no such thing.

*Further analysis of the trial judge's judgment and her orders*

[34] In her written judgment, the trial judge held that the trademark was not exclusively owned by either party. Instead, it was the property of the business, which was, according to her, the jointly owned restaurant business with the unregistered trademark, "Japs Fast Food" (not "Japs Fried Chicken"), that Mr Thomas and Ms Maraj once operated prior to his sudden departure in 1989.

[35] The trial judge ordered Ms Maraj (not the company) to account to Mr Thomas for one half of the profits of the business from 1989 to the date of the judgment in 2016. It is not clear whether the account includes an account of the profits of the company which had been incorporated in 2007 under the name of "Japs Fried Chicken Limited" to operate the restaurants. The trial judge declared the existence of the trust agreement and, further, that Mr Thomas's share had, as a result of the continued existence of the trust, never been abandoned or withdrawn. The appellants' application to the Court of Appeal for a stay of execution was dismissed on 19 December 2016.

*The issues before the trial judge*

[36] This appeal revolves around the trial judge's assessment and findings of fact presented at the trial. In large part, the findings were based on inferences of fact.

[37] The critical issue of fact that she determined was whether Mr Thomas successfully proved the existence of the trust agreement, the onus being squarely on him to do so. The case for Ms Maraj and the company at the trial was that there was no trust agreement and that, when he departed in 1989, he had abandoned and relinquished his interest in the business and in the unregistered trademark. The trial judge made the finding that he had proved the trust agreement on a balance of probabilities.

[38] The question whether Mr Thomas relinquished his interest in the business, or the Foster Street property, was therefore caught in the net of that finding. The trial judge relied on her assessment of the primary facts presented before her and, relevantly, on inferences based on those facts, some of which were facts testified by Ms Maraj and her witnesses that were not challenged in cross-examination (for example, Mr Hoyte's evidence of stripping the Foster Street property of its restaurant equipment and furniture and appliances).

[22] From this finding of the existence of a trust the following sub-issues were determined as a matter of unavoidable forensic logic, and were reflected in the orders of the trial judge:

(a) that Mr Thomas's interest in the business continued after 1989 and is still ongoing;

(b) that his one-half ownership of the goodwill in the name "Japs" used in the business was never abandoned;

(c) that Ms Maraj did not acquire a separate goodwill in the name "Japs" and neither did the company; and

(d) that Ms Maraj, through the company, is not entitled to register that trademark because Mr Thomas owns a one-half interest in it. This last finding was also based on the trial judge's conclusion of fact that the company's trademark application for "Japs Fried Chicken" and device is "strikingly similar" to the unregistered trademark that Mr Thomas now trades under, namely, "Japs Auto" or "Japs" and also "strikingly similar" to the application for a trademark made to the IPO [see page 56, Record, Vol 1]. That application contains the word "Japs" in the circumference of a circle that surrounds a drawing of a man's face, which is not the face of Mr Mahabir (as in the company's application), and which contains no words relating to the sale or the taste of fried chicken (as in the company's application).

[39] Ms Maraj and the company filed a Notice of Appeal contesting the orders of the trial judge. In addition, Mr Thomas filed a Counter Notice of Appeal contesting the trial judge's finding that Ms Maraj and himself "are joint proprietors of the 'Japs' name and have exclusive rights to it." According to him, he is solely entitled to use the trademark "Japs Fried Chicken", notwithstanding that he never had a food business under that name.

*Interfering with a trial judge's findings of fact or inferences of fact*

[40] The limitations on the scope of an appellate court's powers to interfere with a trial judge's findings of fact are well-known. A useful summary is found in the judgment of Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, para 67:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstratable misunderstanding of relevant evidence, or a demonstratable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[41] A comprehensive statement of the law is also found in the judgment of Lord Hodge, on behalf of the Board, in an appeal from this jurisdiction in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21. At para [12], Lord Hodge cited the passage of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 at pp 487-488:

> " I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[42] As Lord Hodge at para [12] pointed out, "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'". However, he went on to helpfully qualify the meaning of that familiar expression by cautioning that

> "[t]his phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggot Brothers & Co Ltd v Jackson* [1991] IRLR 309, per Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it only has the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.

[43] The issues on appeal are based on findings of primary fact and, relevantly, on inferences of fact drawn from those findings. At para [17] of *Beacon Insurance* Lord Hodge analysed the proper approach of appellate courts in reviewing a trial judge's inferences of fact. This is what he said:

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In *re B (a Child)* [2013 UKSC 33, Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether the evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 All ER 267, 269-270:
>
> > '[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'

[44] In her written judgment the trial judge relied heavily on a comparative assessment between the Statement of Case and the witness statements of Mr Thomas and Ms Maraj in the 2006 Claim on the one hand, and the

written and oral testimony elicited in the claim before her on the other. She did this in order to check her impressions of the credibility of the witnesses before her in light of this comparative assessment. Relevantly, nothing is said in the written judgment about her assessment of the demeanour of either Mr Thomas or Ms Maraj as forming any part of her impression of the truthfulness of their evidence.

[45] It is useful to an appellate court, in deciding questions of fact, to make a comparative analysis of the sworn testimony elicited in the action on appeal, and to check it against the pleaded case, the witness statements, and the documentary evidence together with the other yardsticks set out in the well-known case of *Horace Reid v Dowling Charles and Percival Bain* [1989] UKPC 24.

[46] In circumstances where a comparable fact situation has been traversed in an earlier civil action an analogous assessment can also be a very useful method to determine the credibility of the evidence or of the witnesses in the later action before a trial judge. Variances in the evidence in both actions may obviously be critical, insofar as the credibility of the witnesses in the later action is concerned. It is not often that the same or similar evidence is traversed in the testimony in a previous action.

[47] The trial judge approvingly cited the insightful statements of the late Lord Bingham in *The Business of Judging, Selected Essays and Speeches, 1985-*

*1999*, Oxford University Press, 2000. Lord Bingham identified five main tests needed to determine whether a witness is being truthful, with the proviso that the relative importance of each test will vary widely from case to case:

> (a) The consistency with the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
> (b) the internal consistency of the witness's evidence;
> (c) the consistency with what the witness has said or deposed on other occasions;
> (d) the credit of the witness in relation to matters not germane to the litigation; and
> (e) the demeanour of the witness.

[48] However, in making this comparative assessment of the witness statements in the 2006 Claim with the witness statements and cross-examination in the instant claim, the trial judge, in my opinion, lost sight of the declared purposes and aims of both actions, which were plainly dissimilar.

[49] The claimants in the 2006 claim (Ms Maraj and Mr Thomas) were, it seems to me, on the printed evidence in the 2006 Claim, actuated by the desire to resist Mr Cooper's Notice to Quit that plainly sought to nullify Ms Maraj's (and not Mr Thomas's) possessory rights to the Foster Street property. Mr Thomas's witness statement did not even obliquely advance that he had any possessory rights. He openly admitted that he permanently vacated in 1989, a fact that is not in dispute, even in the instant action.

[50] However, in the Claim Form he nonetheless sought declarations in his favour for adverse possession, jointly with Ms Maraj.

[51] Therefore, as a first observation, since he admitted in his 2006 witness statement that he had not been in possession for the requisite period for a claim for adverse possession, it could not be said that he was seriously asserting any viable entitlement to a possessory title. Of course, his failure to obtain any possessory right to the Foster Street property does not mean that Ms Maraj's sole possessory rights nullified any interest Mr Thomas's two sons might have under a trust.

[52] Clearly, the 2006 claim had nothing to do with anyone's trademark rights. Instead, it dealt with Ms Maraj's right to a possessory title. According to the trial judge the parties had "happily joined forces" to defeat Mr Cooper's legal title (para 22 of her judgment). But why had they done so?

[53] The trial judge found that Mr Thomas was motivated to participate in the 2006 Claim because he wanted to protect the property comprised in the oral trust in favour of their two children (one unborn at the time of his abandonment). This finding is partially based on his testimony in his witness statement in the instant Claim. At para 19, Record, Vol 2, p 248 he said this:

> "I regret to say that I allowed myself to be used in a deception to the Court when I signed that [2006 witness] statement . . . I went along with them in good faith and signed that witness statement because

I wanted to help her, and I trusted that she and those advising her would do what was right for the boys' sake."

[54] He also conceded in para 19 that parts of his 2006 witness statement "are lies". At para 23, ibid., p 250, he said this: ". . . I did as [Ms Maraj's] lawyer provided because I felt [that she] should be able to stay in the premises which, we had agreed, would pass on to our two sons. This also explains why I did not ask for the property to be put in our names jointly and why I raised no objection when the court made an order declaring her to be the owner of the property."

[55] Here are some prefatory observations about this evidence that the trial judge did not consider. (a) It cannot be underemphasized that, in his 2006 witness statement, there was no mention of any trust agreement relative to the Foster Street property, and (b) that Mr Thomas, contrary to what he said in the instant claim, actually sought a declaration in the 2006 Claim that he was jointly entitled to a possessory title. The trial judge correctly observed that he did not appeal Gobin J's order refusing him a joint possessory title. His decision not to raise "an objection" is therefore immaterial, as the trial judge correctly observed.

[56] Further, insofar as Ms Maraj's initial involvement and joint expenditure was concerned, everything that he said in his 2006 witness statement was entirely contradicted in his later witness statement (as the trial judge herself outspokenly deprecated).

[57] Finally, it should be noted that according to his witness statement in the instant action, the reason why he said nothing about a trust agreement in the 2006 witness statement was because he had faith that Ms Maraj, a woman whose trustworthiness he described in the most reproachful terms in the instant witness statement, would "do what was right for the boys' sake"—boys whose custody, it should be noted, was taken away from her at a young age.

[58] The trial judge's finding of the existence of a trust importantly disregards (a) her other findings on the reliability of Mr Thomas's evidence in both claims and (b) critical uncontradicted evidence in the instant claim which the trial judge appears to have overlooked. Here are two.

*(a) Mr Thomas as a witness of truth: comparison of evidence in both claims*

[59] Firstly, the trial judge condemned Mr Thomas's credibility as a witness of truth in the strongest possible language for the variance between his testimony in the 2006 Claim and in the instant claim. She did not accept his explanation under cross-examination that he was "tricked" into telling lies to Gobin J. She reprimanded him for saying that he consented to the order when Gobin J's order was not a Consent Order, and she pointed out that he did not appeal her order.

[60] Further, the trial judge entirely rejected Mr Thomas's evidence in the instant claim that (a) he alone was the owner of the "Japs" brand since the

1970s, (b) that he alone built the Foster Street property to house the business and operated it on his own during the 1970s into the early 1980s, (c) that the recipe for the fried chicken was secret to his family (not Ms Maraj) and (d) that he had only met Ms Maraj sometime after 1986. These are significant contradictions.

[61] The trial judge was emphatic in her condemnation because Mr Thomas's testimony in her court, in his witness statement, and under cross-examination was starkly contradicted by his testimony in the 2006 Claim that asserted something completely different.

[62] Further, the trial judge found no inconsistencies between Ms Maraj's evidence on these issues in the 2006 Claim and in the instant claim. Unlike Mr Thomas, she described Ms Maraj as a witness of truth with respect to the hotly contested issues of her long involvement in the business from the 1970s, her investments in the construction of the Foster Street property, and her co-proprietorship and development of the business up until Mr Thomas's sudden departure in 1989. Her credibility was therefore not impugned.

[63] Despite these detrimental findings of Mr Thomas's credibility as a witness, the trial judge said this at para 39: "However, while I was not prepared to accept [Mr Thomas's] evidence on this issue [referring to the several findings I have listed above] I could not totally disregard all his

evidence since as I said previously [Ms Maraj's] evidence was also discredited *on other issues*." (Emphasis added). These "other issues" caused the trial judge to treat Ms Maraj's evidence as less credible than that of Mr Thomas. I have already expressed the view that these "other issues" were, having regard to the evidence as a whole, incapable of justifying a finding that a trust agreement was created.

(b) *Findings of fact in the instant claim alone, independent of the 2006 Claim*

[64] Secondly, insofar as the findings of fact based on the evidence adduced in the instant case (and not the 2006 Claim) are concerned, the trial judge did not, in my view, pay sufficient, or any regard, to the evidence of the events surrounding Mr Thomas's sudden abandonment of the business and Ms Maraj in 1989.

[65] It is not in dispute that he acted unilaterally, and without notice to Ms Maraj. There is no evidence of a jointly planned separation. Quite to the contrary, the undisputed evidence of Mr Hoyte, the carpenter/truck driver, (which evidence was corroborated by the evidence of both Ms Maraj and Mr Mahabir) was that Mr Thomas surreptitiously stripped the restaurant upon his departure in 1989. The important question that the trial judge should have asked is this: is the dismantling and removal of vital restaurant equipment and furniture indicative of the existence of a trust meant to financially profit the alleged beneficiaries?

*What were "the other issues" that the judge relied on to discredit Ms Maraj*

[66] It is necessary to scrutinise the rationale of the trial judge's criticisms of Ms Maraj's evidence to see (a) whether the criticisms are reasonable or justifiable, and (b) whether the trial judge fell into error in her analysis of Ms Maraj's creditworthiness based on these "other issues". Of course, an appellate court must conduct this examination by taking a proper account of the totality of the printed record and must bear in mind that the trial judge had the benefit of hearing the testimony.

[67] The trial judge correctly noted the stark inconsistencies in the evidence of Mr Thomas in both claims and, in my opinion, to a much lesser extent, matters she disproportionately deemed as inconsistent with the evidence of Ms Maraj in the instant claim (notably, the trial judge's tabulation of possessive pronouns). The trial judge's measurement of the difference between the evidence of both witnesses in the 2006 action and in the action before her unfairly condemned Ms Maraj, in my opinion, as untruthful on the essential issue of the creation of the trust.

[68] As I see it, the few times that Ms Maraj used the possessive pronoun "our" compared to the numerous times she used the personal pronouns "me" or "I" to describe the management and operation of the business in the years after 1989 is not, taken by itself, a reliable method of evaluating the credibility of each party's evidence on the creation of the trust. I have set

out this evidence of the use of pronouns at para [26] to [28] above. In any event, the burden of proof rested on Mr Thomas to prove the alleged trust.

[69] In my opinion, the fundamental finding of fact upon which the whole appeal turns was whether a trust agreement was created in 1989 when Mr Thomas suddenly separated from Ms Maraj and cut all his ties with the business (as it then existed).

[70] The trial judge's finding was based upon (a) findings of primary facts, most (but not all) of which were undisputed, and (b) inferences of fact based upon the trial judge's favourable deductions as to why Mr Thomas joined in the 2006 Claim, despite her stated misgivings about his credibility in that action.

[71] Inferences of fact that are grounded in assessments of credibility at a trial are less open to reversal than those based on undisputed evidence: Lord Bridge of Harwich, *Whitehouse v Jordan,* approved by Lord Hodge in *Beacon Insurance at [43]*.

*Did Mr Thomas prove a trust on a balance of probabilities?*

[72] In my view, the trial judge was plainly wrong to make a finding that a trust was created in 1989. I say so having studied the undisputed printed record as a whole. This is because the key findings of the trial judge were not based upon her impression of the credibility of specific witnesses but upon her mistaken assessment of undisputed facts in the documentary record before

her (including the witness statements). In some cases, and with all respect to her, her assessment of the totality of the undisputed facts was plainly wrong. In other cases, she failed to take account of additional undisputed facts and their relevance was therefore not properly evaluated.

[73] A critical case in point is the stripping of the business of most of its furniture, appliances, and utensils by Mr Thomas upon his abandonment and Ms Maraj's substantial costs in refitting the business shortly thereafter, an issue to which I will return below.

[74] With respect to the existence of the trust a revealing encapsulation of the trial judge's assessment of primary facts, and the mistaken inferences that she made based on those findings of primary fact, is found in para 68 of her written judgment:

> ". . . In my view, the conduct of [Ms Maraj] and [Mr Thomas] during and after their separation demonstrated that there was certainty of words. It was not in dispute that both [Ms Maraj] and [Mr Thomas] have other children apart from Alvin and Kevin. They are the only children who were borne (sic) out of that relationship . . . and are products (sic) of the "Japs" business. It is therefore reasonable to infer that when [Mr Thomas] passes on the only children who would be entitled to his share in the business are Alvin and Kevin and not his other children. In such circumstances it is also reasonable to infer that [Mr Thomas's] decision to join with [Ms Maraj] in the 2006 matter, some 17 years after his separation from [Ms Maraj] was because he was interested in preserving his interest in the Foster Street property where the business is situated; he was also

> interested in preserving his interest in the business for his two sons, Alvin and Kevin who were borne (sic) out of the relationship. . .while they were working as a joint unit in the business; and the only reason he did not object to [Ms Maraj] operating the business alone was because he believed that his interest in the business was being looked after by [Ms Maraj]. Apart from denying [Mr Thomas's] assertion, and in circumstances where such inferences can be made, [Ms Maraj] did not put forward any plausible explanation to contradict them. In my view, [Mr Thomas's] actions by leaving his share in the business with [Ms Maraj] and permitting her to continue to use his name "Japs' in the business after he separated from her demonstrated his intention that he only did so because he wanted her to hold his share in the business for their two sons which is inconsistent with him abandoning his rights altogether."

[75] Apart from the trial judge's unfounded view that a settlor's intention to create a trust can be "proven by conduct" *simpliciter*, this paragraph of the judgment contains several suppositions of fact that are not supported by the written record and the record of the oral evidence.

[76] Firstly, to be operative, a trust must, of course, be declared and proven to have been declared, preferably by primary and not secondary evidence. The intention to create it must be evidenced by the certainty of the words used in its creation. In the usual case, there is either a document or one or more witnesses that unequivocally certify that a declaration was made, and which verify the certainty of the language used. *Knight v Knight* (1840) 49 ER 58 *per* Langdale MR is authority for the proposition that three certainties are required, one of which is the certainty of intention: there must be an

intention to create a trust. An intention must be articulated. It can never be proven by a thought within the mind of the alleged settlor.

[77] In my opinion, the trial judge fell into error, in the absence of a written declaration or unequivocal or corroborated evidence that a trust was declared in precise terms, or, more importantly—on the basis of the evidence taken as a whole—to hold that there was certainty of intention solely on the basis of the conduct of the putative settlor and the putative trustee in the 2006 Claim (some 17 years after the trust was allegedly orally declared).

[78] Too much weight was placed on the untested witness statements of Ms Maraj and Mr Thomas in the 2006 Claim.

[79] The 2006 Claim was decided by Gobin J on the basis of the filed evidence without cross-examination. That fact should not be overlooked. The witness statements were therefore never tested. The trial judge's reliance on the witness statements in the 2006 action should therefore be analysed with caution by an appellate court.

*Was a trust declared in 1989?*

[80] Before examining the trial judge's assessment of the parties' post-1989 conduct as evidence of a trust (or of evidencing one of its legally required certainties), I should first scrutinise the trial judge's finding that a trust was

orally agreed or declared on the day that Mr Thomas abandoned the business (and Ms Maraj) in 1989.

[81] There was no unequivocal evidence to prove the oral agreement or the declaration. The only two witnesses to the alleged oral declaration (Mr Thomas and Ms Maraj) gave diametrically different versions of the events surrounding the night of their separation. Mr Thomas testified that the trust was created when he and Ms Maraj agreed that she would hold his half-share on trust for their two sons.

[82] Ms Maraj said that Mr Thomas abandoned her and the business without any declaration or agreement. She denied that she agreed to operate the business on her own and that she would hold his half share on trust for their sons. The trial judge preferred the evidence of Mr Thomas, and I think, taking the evidence as a whole and her reasons for doing so, (which did not include her assessment of their demeanour), she was plainly wrong. I will explain why.

[83] Firstly, the trial judge's adverse remarks about Mr Thomas's lack of credibility and his truthfulness in the 2006 Claim were not properly considered when assessing the truthfulness of his evidence that he declared a trust on the night of his unannounced departure. Secondly, the reasoning for doubting Ms Maraj's testimony, which boiled down to a flawed arithmetic in the trial judge's calculation of pronouns in her 2006 untested

witness statement is faulty and not reliable. Thirdly, the written record of their cross-examination does not reveal any significant breakdowns, reversals, or collapses in their testimony. Most importantly, adverse appraisals of their demeanour as witnesses are not given as a factor in any finding as to the declaration of the trust on the day that Mr Thomas suddenly departed.

[84] It is therefore not unsurprising that the trial judge was forced to look elsewhere in time (notably, during the 2006 proceedings) to determine whether a trust was created.

[85] In deciding to do so, I think that she paid undue attention to the evidence of events in 2006 and lost sight of the events immediately surrounding their separation in 1989.

[86] Further, the written record includes the following undisputed allegations of fact that the trial judge failed to properly consider in arriving at her findings.

*(a) Mr Thomas removed the restaurant equipment and set up another restaurant on Edward Street, Port of Spain.*

[87] Mr Hoyte, a former employee of Mr Thomas, and an occasional woodworker, testified in two paragraphs of his witness statement, that he was hired by Mr Thomas in 1989 to remove "all equipment, appliances, bar counters, kitchen utensils, food warmers, the furniture, the stove, the fryer, drink stock, and partitions [from the Foster Street property] [and] to take [them] to Port of Spain since Mr Thomas had plans to use all these items for a new business in Port of Spain". He went on to describe in detail

which workers assisted him, how long the process of dismantling and removal took, and where Mr Thomas directed him to deliver them. Further, he testified that Ms Maraj hired him about one week later to build a bar, kitchen counters, and partitions at the Foster Street property and that she re-opened the business a short while later.

[88] There was no cross-examination on any of Mr Hoyte's testimony by Mr Thomas's Attorney, save to seek his confirmation that he did building works for Ms Maraj in 1989. It was not even put to him that any of the testimony set out above was false.

[89] The trial judge also heard Ms Maraj testify several times in cross-examination that Mr Thomas did not entrust her with his 50% share. According to her clear words, "he took his 50% share with him when he left" and unilaterally and forcibly removed all the cabinetry, stock, appliances, and partitions. She testified that she was put to great expense in refurbishing the business and that she faced harsh economic challenges in re-starting the business. Relevantly, Mr Hoyte's evidence-in-chief of Mr Thomas's evisceration of the restaurant, which was not contradicted in cross-examination, was corroborated by Ms Maraj and Mr Mahabir.

[90] It seems to me that this uncontested evidence was not fully or properly considered when the trial judge determined that a trust was created on the day that Mr Thomas departed. The omission was an error, in my view. The trial judge certainly noted Ms Maraj's testimony at para 69 of her judgment that there was no declaration of trust, that there was an abandonment and a stripping of the restaurant equipment and furniture, but she did not, in my opinion, pay sufficient regard to the uncontradicted evidence of Mr Hoyte that he dismantled and removed the jointly owned restaurant appliances and cabinetry. Mr Hoyte's uncontradicted evidence ought properly to have given weight to Ms Maraj's evidence that he "took his 50 per cent share with him" when he left.

[91] As a woman with uncontradicted know-how as an insurance salesperson, and the co-proprietor of a successful restaurant and bar business for many years, the trial judge should have properly asked herself the question whether Ms Maraj would have voluntarily agreed with Mr Thomas on the night of his unannounced and sudden departure to (a) provide 100% of the finance to reconstruct the suddenly denuded restaurant and bar, (b) to provide 100% of the labour and capital to operate it for a lengthy period in excess of 18 years (their youngest son was as yet unborn), and, at the end of the period to give up 50% of the profit of the business together with ownership of the Foster Street property to the man who had acrimoniously and spitefully abandoned her and their infant son, she being, at the time, in the third trimester of her pregnancy with their second child.

[92] She was pregnant and abandoned. Is it reasonably probable that she would have agreed to this?

[93] According to Mr Thomas, during his cross-examination, he testified that he was fully entitled to 100% of the Foster Street property, notwithstanding the judgment of Gobin J in the 2006 action. It seems to me that if the Foster Street property formed part of the declaration of the trust, then it makes the evidence of the events surrounding his departure, namely, the stripping of the restaurant, even more unlikely or improbable. I can see no reasonableness in the trial judge excluding the important evidence set out above.

[94] It also seems unreasonable for the trial judge to hold that a man who was suddenly abandoning his wife (because he discovered that she was having sex with another man), a man who clandestinely stripped their jointly owned business of critical operational assets to set up another restaurant in Port of Spain would reasonably have any interest in making a future

provision for an infant and an unborn son or of being interested in their mother's ability to support herself or them.

[95] Such behaviour is, in my opinion, more indicative of an intention to deliberately sabotage the business that was plainly intended to inflict the maximum financial damage on Ms Maraj and Mr Thomas's infant and his unborn son.

[96] The fact that he removed the infants from her care at a young age does not dovetail with his assertion that the agreement was designed to benefit them. She was basically left alone for over 18 years to grow and expand the business into a chain of 13 nationwide outlets in plain sight of Mr Thomas, who said nothing about this rampant business expansion under the well-publicised name of "Japs Fried Chicken", and who contributed no capital, no business advice, and no labour.

[97] In short, I find that he had no interest for all those years, and he showed no interest until some two years after his youngest son was 18 years old, two years after the trust was ostensibly supposed to be activated, and only after the company was incorporated with the name "Japs" and the trademark application was made.

[98] To be clear, an application was made by the company to register the trademark on 12 February 2010. It was only on 28 May 2010 (some three months later) that he caused a pre-action letter to be sent to the company. This was the first time that a trust was alleged in any document. There is no documentary evidence during this remarkable business expansion of "Japs Fried Chicken" from the date of his abandonment in 1989 to his pre-action letter in 2010 of Mr Thomas making any assertion or, importantly, seeking any re-assurance that Ms Maraj, a woman that he profoundly distrusted, was a trustee of the vastly expanded business or of the Foster

Street property other than his own evidence, which had been discredited on other grounds by the trial judge.

*(b) Mr Thomas distrusted Ms Maraj*

[99] Mr Thomas's evidence in chief revealed the extent of his profound disaffection and distrust of Ms Maraj. This is what he said at paras 12, 13, and 15 of his witness statement:

> "When I met [Ms Maraj], she was a limer [meaning she enjoyed relaxing with friends]; she loved to eat, drink, and have a good time. But she was a horning wife [meaning an unfaithful wife], and that was the major problem. I would not have abandoned a good wife, but I found [that she] was very dishonest and not fair to me. One day I left [her] in the business supposedly to go watch football, but I made a tack back as I had certain suspicions. . .I went to a certain place and waited there for her . . . [she] came out of a car. . .the man she was with was a forest ranger. . .[she] was also involved with other men. . . I tired talk with her; but in the end I felt she was unfair in the relationship and bad like 'yaz' [meaning very bad] . . .I found [her] to be an irresponsible mother to our two boys, and so I had them grow up with their grandmother. . ."

[100] Evidence like this flies in the face of Mr Thomas's assertion that he trusted Ms Maraj to keep her end of the alleged trust bargain. It seems unreasonable for the trial judge to believe that Mr Thomas had any confidence in Ms Maraj as a reliable or honourable person such as would cause him not to put their alleged agreement into writing or believe that she would honour the alleged declaration of trust.

[101] The trial judge having failed to take account of this important evidence of the circumstances surrounding his 1989 abandonment instead anchored her finding of the existence of a trust in the events surrounding the 2006 Claim.

*Fuller analysis of the 2006 action against Mr Cooper*

[102] This was an action that was triggered by Mr Cooper's Notice to Quit. It was served on Ms Maraj in 2006 as the occupant of the Foster Street property. Mr Cooper held the legal title to the property derived from Mr Thomas's aunt. The aunt had, unknown to Ms Maraj and Mr Thomas, conveyed her title to another person in 1994, five years after Mr Thomas abandoned the business and Ms Maraj. That person conveyed the legal title to Mr Cooper in 2006. From 1989 to 2006, a period of 17 years, Ms Maraj was in sole possession of the property and had expanded the business to other locations. She hired a lawyer to sue Mr Cooper for a declaration that she had a possessory title. She approached Mr Thomas to join as a co-claimant and he agreed. In his witness statement Mr. Thomas did not dispute the fact that Ms Maraj had been in sole occupation and possession of the Foster Street property. He did not say a single word about the alleged trust. The omissions should reasonably have created, in the mind of the trial judge, sufficient disconnections between Mr Thomas's 2006 testimony and his evidence at the trial on appeal of the existence of a trust. They did not.

[103] Although the trial judge was aware of the divergence of evidence, she was still nonetheless prepared to hold that the trust had been proved. She did this on secondary evidence, namely her assessment of his reason for joining in the 2006 Claim. The trial judge relied on a couple of pronouns in Ms Maraj's 2006 witness statement. As indicated above, the use of these pronouns was rare. In most important respects, she testified that she was solely in possession after the abandonment. This assertion of sole possession was completely in line with the evidence of both Ms Maraj and Mr Thomas in the action on appeal.

[104] Of course, sole possession of trust property by a trustee cannot negate the operation of a trust over that property in favour of the beneficiaries.

[105] However, this proposition must be taken together with the other uncontested facts in the trial: (a) that Mr Thomas did not mention or hint that there was an arrangement between him and Ms Maraj in the 2006 action that involved his 50% interest in the title (which, in real terms, was what that action was about) ; (b) that Mr Thomas had an ideal opportunity in his 2006 witness statement to have the alleged trust form part of the legal record with respect to a trustee who he plainly distrusted; (c) that Mr Thomas did not assert the trust until 12 February 2010 when the trademark application was filed, which was two years and nine days after Kevin turned 18; (d) that the alleged trust was intended to take effect just over two years before it was, for the first time, asserted in writing; (e) that Mr Thomas

remained silent and inactive as "Japs Fried Chicken" vastly expanded throughout Trinidad in the decade of the 1990s, and finally, and most importantly, (f) that Mr Thomas unilaterally gutted their jointly owned restaurant in 1989. These facts on the printed record cast serious doubt on the reasonableness of the trial judge's finding of the existence of a trust.

[106] If there was a declared trust of his 50% interest in the business and (as he testified at the trial) of the Foster Street property, it is reasonable to assume that he would, even obliquely, have mentioned that fact in his sworn evidence in the 2006 claim, to protect the existence of a trust.

[107] The fact that he removed the infants from her care at a young age does not merge with his assertion that the agreement was designed to benefit them. She was basically left alone for over 18 years to grow and expand the business into a chain of 13 nationwide outlets in plain sight of Mr Thomas, who said nothing about this rampant business expansion under the well-publicised name of "Japs Fried Chicken", and who contributed no capital, no business advice, or no labour.

[108] In short, he had no interest for all those years, and he showed no interest until some two years after his youngest son was 18 years old and only after the company was incorporated with the name "Japs Fried Chicken Limited" and the trademark application was made. At paragraph 69 of her judgment the trial judge said this: "Despite her evidence to the contrary, [Ms Maraj] knew that when [Mr Thomas] left her, he left his share with her to run the

business for the benefit of their two sons, since, if she thought otherwise, she would have taken steps to obtain maintenance [for them from him] . . . She would not have sought his assistance . . .to defeat the claim for ownership. . . She would have taken steps to ensure that she distanced the business from any association with [him]. She would not have sought his assistance in joining her with the 2006 action."

[109] At paragraph 70 of the trial judge's judgment she stated, "In my view, there is no other reasonable explanation for [Mr Thomas] joining with [Ms Maraj] in the 2006 action since he did not seek an order nor obtain an order for the property to be vested jointly with her". I do not agree with this for the following reasons.

[110] Firstly, the issue of her not asking for maintenance for the children (one unborn at the time of his departure) is not significant, as both children were removed from her care at a young age. This is stated at para 15 of Mr Thomas's witness statement where he testified: "I found [Ms Maraj] to be an irresponsible mother to our two boys, and so I had them grow up with their grandmother, Irene Thomas, at Valencia". There was no cross-examination on this, either of Mr Thomas or Ms Maraj, but the language quoted above suggests that the children were taken from her at a young age. This casts doubt on the finding that a trust existed on the partial basis that she did not seek maintenance from Mr Thomas. Why would she seek maintenance if she did not have actual custody?

[111] Secondly, her request to him to participate in the 2006 claim is logically explained on the basis of her genuine belief that there was no trust and no danger or risk by inviting his participation in a claim to extinguish a legal title. In that sense, the inference that, in Ms Maraj's mind, she felt that no trust existed is an equally possible explanation of her request to hm.

[112] Was it reasonable and necessary for the trial judge not to have asked the question why, during the course of the 2006 proceedings, Mr Thomas never wrote Ms Maraj to remind her, a woman who was supposedly unfaithful and untrustworthy (and therefore more in need of a formal reminder) words such as these: "By the way, Bhagwatee, you do recall that 50% of the business and the Foster Street property is still held on trust by you in favour of our sons?". There is no evidence of him doing this formally or informally during the course of the 2006 Claim, or before.

[113] This question seems to me all the more reasonable and necessary when one considers that the 2006 Claim was launched 17 years after his 1989 departure. It was only belatedly, in 2014, that a formal legal plea of the trust was launched in his Defence to the action on appeal, 25 years after his departure, and six years after their youngest son turned 18.

[114] In my view, insofar as the trial judge was relying on inferences based on her assessment of the state of mind of the parties, she ought to have taken into account, when inferring Ms Maraj's state of mind, the entirety of the

evidence, namely, the corroborated evidence of the business having been stripped in 1989, the children having been removed from her care at a young age , the 17 uninterrupted years of her sole possession of the Foster Street property, and the undisputed fact that the property was originally owned by Mr Thomas's aunt who had put them both into possession. Likewise, in making inferences as to Mr Thomas's state of mind in participating in the 2006 Claim, the trial judge should have taken into account the fact that Mr Thomas never mentioned, even obliquely, the existence of any arrangement with Ms Maraj in his 2006 witness statement, and that he was held by the trial judge to have been untruthful in his 2006 testimony (which should have, properly, damaged his credibility).

[115] Further, the trial judge's inference that Mr Thomas was participating in the 2006 action because he was protecting trust property is not supported by the accepted primary evidence for these reasons: (a) the Foster Street property had been gifted to both parties; (b) both of them invested in setting up the business there; and (c) Mr Thomas testified to this in the 2006 action. The trial judge ought to have properly inferred (insofar as the state of mind of Mr Thomas was concerned) that he was hoping for a declaration that he too had an interest in the property.

[116] It seems to me that the trial judge failed to properly assess the meaning of the 2006 action.

[117] The goal or purpose of that action was entirely different from the goal or purpose of the action on appeal. In the 2006 action Ms Maraj and Mr Thomas joined forces to protect Ms Maraj's and Mr Thomas's possessory title. There are any number of possible reasons why Mr Thomas would agree to do so. One of them is that he already believed that there was a trust in existence and that the right to possession sought in the 2006 action by the alleged trustee had nothing to do with her legal duties to the alleged beneficiaries. The trial judge apparently accepted this as the reason for his participation but this is not reasonable or probable on a proper analysis of the evidence.

[118] It seems unusual that the settlor of a trust involving real estate that is the subject of an action seeking a declaration of possessory rights would not include even an indirect mention or some limited evidence of its existence at a trial involving a wholly untrustworthy woman.

[119] Something as important as the alleged trust would normally form part of a prudent settlor's historical narrative of the use and occupation of the property prior to 2006. This is even more so in light of the expressed and profound distrust Mr Thomas had for Ms Maraj, and the fact that there was no document in writing to prove its existence.

[120] At the end of the day, in my opinion, the evidence should have been assessed on a balance of probabilities as to which of the competing versions of the events is more probable than the other.

[121] There are, of course, other reasons why Mr Thomas would agree by his testimony to protect Ms Maraj's possessory title. One of them is that he was protecting the estate of the mother of two of his children who would have a share on an intestacy. This has nothing to do with the law of trusts but of succession. There may be other reasons, but the trial judge did not consider them. The evidence as a whole was not properly evaluated.

[122] The trial judge closely examined the testimony of Ms Maraj and Mr Thomas in the 2006 action and made the inferences to which I earlier referred.

[123] The inferences were primarily based on findings of primary fact, which, in all material respects, were undisputed, unequivocal, or not contradicted in cross-examination. It cannot be said that the decision boiled down to the trial judge's assessment of the credibility of the witnesses. If that were so, an appellate court would be very hard pressed to come to a different conclusion: *Beacon Insurance*, at para [23] *infra*.

[124] But where, as in this appeal, the trial judge's decision is based on inferences of fact that are drawn from undisputed primary facts the appellate court is in just as good a position to make the decision: *Whitehouse v Jordan,* at para [23] *infra*.

[125] An appellate court must ask itself if it was permissible for the trial judge to make his or her findings of fact in the face of the evidence as a whole: *Thomas v Thomas, infra.* In my view, the trial judge failed to properly analyse the entirety of the evidence, and this led to a mistake in her evaluation of it in such a way as to undermine the rationality of her conclusions.

[126] In all the circumstances I have decided that the trial judge was plainly wrong to hold that a trust was created when Mr Thomas stripped the restaurant of its equipment and abandoned it and his pregnant partner in 1989. It follows from this that the trial judge's finding of a trust must be set aside and the appeal allowed. Other orders that were made by the trial judge and which flow from this finding of a trust must also, as a matter of consequence, be set aside. I will particularise them below.

[127] Insofar as the right of the company to register the trademark "Japs Fried Chicken" is concerned the trial judge held that the mark was jointly owned as it was part of the goodwill of the jointly owned business prior to 1989 and, after Mr Thomas departed, became subject to the alleged trust.

[128] Having regard to the evidence as a whole and, in particular, (a) the corroborated and uncontradicted evidence of Mr Hoyte that Mr Thomas stripped the business of essential appliances, cabinets, and utensils; (b) that Mr Thomas had absolutely nothing to do with the operation or tremendous

growth of “Japs Fried Chicken” from 1989 onwards or the development of its goodwill for 25 years before the claim was formally made in 2014; and (c) that to the date of the appealed judgment Mr Thomas carried out no business under the name or style of “Japs Fried Chicken”, it is, in my view, plainly wrong for the trial judge to have refused the company’s application to register the trademark “Japs Fried Chicken.

[129] A trademark is certainly capable of being abandoned, although, if it is registered, a greater degree of proof is required. “Japs Fried Chicken” was never registered. In my view there is satisfactory factual evidence of its abandonment by Mr Thomas, which the trial judge did not properly evaluate.

[130] *Star Industrial v Yap Kwee Kor* [1976] FSR 256 is a decision that concerned the tort of passing off in a situation involving the abandonment of a trademark. In that case the goodwill in the name was held to have been abandoned. Section 35 of the Trade Marks Act certainly recognises that a registered trademark is capable of being abandoned. It seems to me, having regard to the evidence as a whole, which in my opinion, the trial judge overlooked, that the unregistered trademark “Japs Fried Chicken” was abandoned by Mr Thomas from 1989 to 2010 (when the company filed its trademark application) a lengthy period of 21 years.

[131] Accordingly, I would allow the appeal.

[132] All the trial judge's orders are set aside, save for her decision to treat the Appellants' claim as a reference to the High Court for a determination of rights under section 14(3) rather than as an appeal under section 22(1) of the Trade Marks Act. It follows that the company is entitled to register the trademark "Japs Fried Chicken" and an order is granted directing the Registrar of the IPO to register the mark in the name of the company and to refuse Mr Thomas's application to have the similar (but never used) mark "Japs" registered in his name. The reliefs sought in the company's amended Statement of Case are therefore granted.

[133] In so far as the Counter Notice of Appeal is concerned, it follows from what I have said above that the trial judge was incorrect to have held that the business was jointly owned. The Counter Notice of Appeal is therefore dismissed.

[134] In the circumstances, the following orders are made:

1. The trial judge's orders, inclusive of the order as to costs below, are set aside.
2. A declaration is granted that the first appellant is the sole proprietor of the trademark "Japs Fried Chicken: De Best Taste Around! and Device".
3. A declaration is granted that the respondent is not entitled to the use of the trademark "JAPS FRIED CHICKEN" or "JAPS FAST FOOD" or "JAPS" in Class 42: Restaurant Services pursuant to the Trademark Act Chap 82:81.
4. An order is made directing the Comptroller and/or Registrar of the Intellectual Property Office to register and cause to be entered on the register of

trademarks, Trademark Application Number 41938 in the name of Japs Fried Chicken Limited namely "Japs Fried Chicken: De Best Taste Around! and Device" in Class 42: Restaurant Services, pursuant to the Trademark Act.

5. An order is granted directing the Comptroller of the Intellectual Property Office to refuse the registration of Trade Mark Application Number 44007, namely "JAPS and Device" in Class 42: Restaurant Services in the name of the respondent.

6. Save for para 1, the Counter Claim is dismissed.

7. The respondent's Counter Notice of Appeal is dismissed.

[135] The parties are now invited to make submissions on the appropriate order as to the costs of the appeal.

**James Christopher Aboud**
**Justice of Appeal**