

174 Nfld. & P.E.I.R. 136

Chandra v. Chandra

Newfoundland Court of Appeal

Wells C.J.N., Gushue, Neill JJ.A.

Judgment: April 7, 1999

Chandra v. Chandra

Ranjit Kumar Chandra, Appellant and Shakti Chandra, Respondent

Newfoundland Court of Appeal

Wells C.J.N., Gushue, Neill JJ.A.

Heard: October 8, 1998

Judgment: April 7, 1999

Docket: 97/31

Counsel: *Glenda Best*, for Appellant.

*David Day, Q.C.*, for Respondent.

**Cases considered by *Gushue J.A.*:**

*Campbell v. Campbell* (1990), (sub nom. *Campbell v. Campbell (No. 2)*) 83 Nfld. & P.E.I.R. 340, (sub nom. *Campbell v. Campbell (No. 2)*) 260 A.P.R. 340 (Nfld. U.F.C.) -- considered

*Fanning (Christian) v. Fanning* (1989), 94 N.S.R. (2d) 327, 247 A.P.R. 327, 24 R.F.L. (3d) 135 (N.S. T.D.) -- referred to

*Magee v. Magee* (1987), 6 R.F.L. (3d) 453 (Ont. U.F.C.) -- referred to

*Mundinger v. Mundinger* (1968), [1969] 1 O.R. 606, 3 D.L.R. (3d) 338 (Ont. C.A.) -- considered

*Mundinger v. Mundinger* (1970), 14 D.L.R. (3d) 256 (S.C.C.) -- referred to

*Mushrow v. Mushrow* (1986), 4 R.F.L. (3d) 82, 60 Nfld. & P.E.I.R. 305, 181 A.P.R. 305 (Nfld. C.A.) -- considered

*Sullivan v. Sullivan* (1986), 5 R.F.L. (3d) 28 (Ont. U.F.C.) -- considered

*Wachtel v. Wachtel*, [1973] 1 All E.R. 829, Fam. 72 (Eng. C.A.) -- referred to

**Statutes considered:**

*Family Law Act*, R.S.N. 1990, c. F-2

s. 2 "domestic contract" -- considered

s. 66(4) -- considered

s. 66(4)(a) -- considered

s. 66(4)(b) -- considered

s. 66(4)(c) -- considered

*Matrimonial Property Act*, S.N. 1979, c. 32

Generally -- considered

APPEAL by husband from judgment setting aside domestic contract, reported at (1997), 27 R.F.L. (4th) 114, 150 Nfld. & P.E.I.R. 333, 470 A.P.R. 333 (Nfld. U.F.C.).

**The judgment of the court was delivered by *Gushue J.A.*:**

1 This appeal is taken by Ranjit Kumar Chandra against a Trial Division decision which set aside a marriage contract alleged to have been entered into by the parties. There are two actions in process between the appellant and the respondent, his former wife, and the application to assess the legality of the marriage contract was taken as a preliminary issue to the proceedings in both matters.

2 The issue now before this Court is unquestionably one which should be pre-determined. While the appellant did not make a formal application for leave, the Court is of the view that, while the appeal is an interlocutory one, it is one where leave ought to be given and we do so.

**Facts**

3 The appellant and the respondent were married in the city of Delhi, India on the 14th day of October 1972. At that time, the appellant was a widower and had two small children from his previous marriage. The parties have two children of their own, born in 1974 and 1980 respectively.

4 The parties lived in India until March 1974 when they emigrated to Canada, and specifically to St. John's, Newfoundland. Other than the period from September 1979 to August 1980 when they lived in Massachusetts, the husband and wife resided together with their children from

March 1974 to November 1993 in St. John's. On November 24, 1993, the respondent vacated the matrimonial home in St. John's and currently resides elsewhere in the city.

5 Both parties are medical doctors and both are actively engaged in their profession. It would appear from the evidence generally that, from the beginning, the marriage was beset with difficulties, the reasons for which are essentially not relevant here. The sole issue before this Court is the validity of a marriage contract document, prepared by the appellant, entitled "Mutual Domestic Agreement", alleged to have been executed by both parties on December 10, 1982. The document was introduced into evidence by the appellant. It reads as follows:

### **Mutual Domestic Agreement**

We, Shakti Chandra and Ranjit Kumar Chandra, keeping in view our deep love for each other, freely agree to the following, without any undue influence or coercion:

1. We love each other and in keeping with our culture and tradition, shall not leave home or ask the other person to leave home without sincere discussion and specific mutual consent.
2. If one of us leaves home without discussion and specific agreement, then that person shall not be entitled to his/her share of the (i) matrimonial home, (ii) household contents, (iii) other jointly held assets.
3. In the event of irretrievable marriage breakdown, we would not be entitled to the other person's (i) pension and RRSP, (ii) bank deposits and certificates, (iii) shares and securities, (iv) jewellery (sic).
4. In the event of marriage breakdown, the division of assets will not in any case exceed our proportionate individual earnings and input into matrimonial assets.
5. I, Shakti, (i) will treat Sujata and Amrita as Aruna's amaanat to me and look after them as well as my own children, (ii) wish to leave home only when I die, (iii) wish Ranjit to carry my arthi on his shoulders.
6. I, Ranjit, will give Shakti as much or more love as I gave Aruna.

This agreement supersedes and takes precedent over any other previous documents and is made in accordance with Family Act/other laws of the land; we have full knowledge of its contents, having taken independent legal advice, and paid \$1 to each other, and the agreement shall not be invalid if any part (clause or subclause) of it is invalid.

In witness and with deep love, we have set our signatures, this 10th day of December, 1982.

Ranjit Chandra

Shakti Chandra

Witnessed and signed by

6 The document appears to have the signatures of both parties affixed to it (although the respondent claims that she did not utilize this form of signature in 1982). The signatures of two witnesses also appear on the document, one being Pratibha Chandra (sister-in-law of the appellant) and that of Tapan Kumar Bhattacharya (a friend of Pratibha Chandra who was visiting her house, where the document was allegedly executed, at the time). Pratibha Chandra gave evidence by way of deposition that the signature was hers, and that she witnessed both the appellant and the respondent sign the document; she also witnessed the signature of Mr. Bhattacharya. An affidavit of Mr. Bhattacharya to the same effect was attempted to be filed, but was rejected on procedural grounds.

7 The appellant testified at trial that his wife was insecure in the marriage and feared that he would leave her. He filed in evidence several notes in the handwriting of the respondent in support of this position. He claimed that the respondent requested from him written assurances as to the stability of the marriage which led him in 1981 or 1982 to draft the "Mutual Domestic Agreement". This, he stated, was done by him personally after consulting various legal texts, etc. As to the actual signing, he testified that he, the respondent, and their family were in Delhi for the purpose of attending a family wedding and he and the respondent were visiting the home of Pratibha Chandra, where their children were staying. This was on the day prior to the wedding. While there, he produced the document, he and the respondent signed it and it was witnessed by Mrs. Chandra and Mr. Bhattacharya.

8 The appellant testified that while the agreement was "not a priority" to him, he chose this occasion for its execution because he "was going to leave all my papers ... (in his sister-in-law's house), as I always do, ..." The document was produced, without prior discussion with either the respondent or his sister-in-law of his intention to do so; the signing was "not a planned ... event". After the document was signed and witnessed, he stored it with other papers belonging to him in the closet of a room adjoining the sitting room in his sister-in-law's residence. That was the only copy of the signed agreement; the respondent was not furnished with a duplicate.

9 The respondent, while acknowledging that the signature on the document was hers, testified that it could not have been affixed to the agreement in 1982 because at that time she did not utilize that manner of signature. She testified that she had no recollection of any discussions at any time about any form of agreement, contract or understanding of this nature. Indeed, she did not know what a Domestic Agreement was and at no time consulted a lawyer with respect to a marriage contract. She also stated that she had no recollection of signing the document or of the witness, Bhattacharya. Further, she noted that it was her habit to keep a diary and that there were no entries on that date with respect to the signing of any agreement. She also produced various other diaries of that general time period for examination by the court, where no reference was

made to domestic agreements or to consultations with lawyers. To her recollection, the only time a marriage contract was mentioned to her was three years later in June 1985, and then by a solicitor who was consulted by her and her husband with respect to the execution of wills. She said her husband informed the lawyer, as did she, that there was no marriage contract. She stated also that, had she known of the existence of this document, she would not have acted as she did in her separation from the appellant.

### **The Trial Judgment**

10 In his judgment the trial judge firstly expressed "concern" as to why the appellant produced the document for signature, without any notice, some seven months after its preparation and at such a busy, event-filled time. The judge then went on to express further doubts as to whether the document was actually executed at the time and place specified in it and claimed by the appellant. He raised the issue of the nature of the respondent's signature and the reference in the document to the term "Family Act", when in 1982 the relevant act was the Matrimonial Property Act. Its successor, the Family Law Act, was not passed and proclaimed until the late 1980's. However, having expressed these concerns and as well noting the respondent's evidence in that regard, the trial judge made no express finding as to the document's validity.

11 The judge then proceeded to deal with the issue of independent legal advice. He stated:

The authorities are clear on the matter of independent legal advice, not only vis-a-vis domestic agreements but also in respect of other transactions such as banking documents executed by spouses. Independent legal advice means serious and thorough advice which directly addresses the issues, it does not mean simply conversing with a lawyer on the subject generally. It requires a serious consultation and a full review of the problems which are posed by any contemplated document and the course of action which is contemplated together with all of its implications. It means a serious evaluation with advice, usually in writing, as to whether or not it is advisable in the spouse's best interest to execute the document. Such advice is normally given in writing, not only for the protection of the client, but as a protection also for the lawyer involved should a misinterpretation of the advice follow.

12 The judge noted that neither the appellant, nor the respondent, at any time consulted a lawyer for advice on this agreement. (This, it must be noted, is contrary to an assertion in the agreement that there was such consultation). That the respondent was not given this opportunity was corroborated by the evidence of the appellant who testified that he had not provided the respondent with a copy of the agreement. The judge therefore concluded that there was no independent legal advice taken by the respondent at all. He notes that "the absence of independent legal advice goes to the matter of inequality of bargaining power and thus to the validity of the agreement". Shortly thereafter in the judgment, the judge states:

When I take all of these factors into consideration together with the inequality of bargaining power in the absence of legal advice, it is very clear that independent legal advice should have been a vital component of any domestic agreement between these

parties. On its face the draft agreement placed both parties in the position of taking a serious risk.

13 The trial judge then concluded on this point that the "purported domestic agreement" should not be validated by him unless he was satisfied by the evidence that its implications had been fully canvassed with a "qualified and competent solicitor who had given clear and unequivocal advice". Because such did not happen here and because as well of the "concept of inequality of bargaining power as it applies to this case ... (both go) to the root of the validity of the purported domestic agreement and (are) sufficient to render it invalid and unenforceable". In final summary, the judge stated that:

The relinquishing of rights by way of a domestic agreement can be effected only after clear and demonstrable prior knowledge and understanding of the law and the consequences of the particular agreement.

and, further, that:

Clause 2 of the agreement, if invoked would invite an unconscionable result ...

He cited no authorities in support of his conclusion.

14 As noted, while he obviously continued to harbour doubts with respect to the validity of the Agreement, or at least that it was indeed executed in December, 1982, the trial judge found that, as he put it:

[A] decision as to whether or not the agreement was knowingly executed by Dr. Shakti Chandra would be a difficult one on a balance of probabilities but there must also be reference to another important factor namely independent legal advice.

15 One can only take from the above that, on balance, the judge found that the evidence did not support an invalidation of the Agreement as not having been entered into on December 10, 1982. This, in my view, would be a proper and correct conclusion. To do otherwise would necessitate a finding that the appellant acted fraudulently. The trial judge was apparently not prepared to go that far, and neither should he have done so.

16 Yet one is left in some doubt as to whether the judge was referring, by the above, to whether the document was executed on the date in question, or whether, while it was indeed executed by the parties, such occurred without the respondent being aware of what she was signing. Further, in light of his reference to independent legal advice, it is arguable that he is making no finding on either authenticity or awareness, but is rather propounding that he need not do so because the failure to ensure independent legal advice was of itself sufficient in any event to avoid the agreement.

17 There is no question that the decision to invalidate the Agreement was made on the basis of

the lack of independent legal advice and, thus, the issue before this Court is (a) whether the trial judge was correct, or (b) if not, whether other reasons exist for setting aside the Agreement.

### **The Law**

18 The Agreement here, being a marriage contract, is a "domestic contract" within the meaning given such contracts by s. 2 of the *Family Law Act*, R.S.N. 1990, Ch. F-2, and is governed by that Act. For the purposes of this matter, the relevant provisions are to be found in s. 66(4), which reads:

66. (4) A court may, on application, set aside a domestic contract or provision in it

(a) where a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) where a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

It will be seen that while common law remedies of variation or rescission are preserved by s-s. 4(c), significant further powers are granted a reviewing judge by the section. It is noteworthy that those powers are to be exercised within the discretion of the trial judge. It may also be noted here that s-s. 4(a) does not appear to be relevant to the case at bar.

### **The Law of Contract**

19 Generally, and before one considers the additional effects of the legislation, it must be noted that domestic contracts, as any other contract, are governed by the law of contract. Under the principles of the law of contract, it might be possible to repudiate an otherwise valid contract on the grounds of mistake, misrepresentation, illegality, duress or undue influence. Duress or undue influence might result in a finding of unconscionability, even though the party seeking rescission may have consented to a contract. Neither, it would appear, is relevant here because, essentially, the appellant is maintaining that she had no knowledge of the impugned document at all-not before, during or after its execution.

20 Thus, what we are concerned with, following on the above, is a claimed, unconscionable result; in other words, a reliance on s. 66(4)(b) of the Act to set aside the Agreement because of the devastating consequences to the respondent.

21 'Unconscionable' is of course a strong word. It is defined in the Shorter Oxford English Dictionary as (inter alia): harsh; unscrupulous; excessive; immoderate, inordinate; unreconcilable with what is right and reasonable. In the family law context, it has been equated with being "unduly harsh", (per Glube, C.J.T.D., in *Fanning (Christian) v. Fanning* (1989), 94 N.S.R. (2d)

[327](#) (N.S. T.D.)). Indeed, some courts have gone even further and equated unconscionability with being "repugnant to anyone's sense of justice" (per Lord Denning in *Wachtel v. Wachtel*, [\[1973\] 1 All E.R. 829](#) (Eng. C.A.)) and as an imbalance which is "shockingly unfair" (per Goodearle J. in *Magee v. Magee* [\(1987\), 6 R.F.L. \(3d\) 453](#) (Ont. U.F.C.)).

22 The term unquestionably means something considerably more than "inequitable". Many contracts may ultimately turn out to be inequitable to one or other of the parties, but that is obviously insufficient for a court to set them aside. As stated by Schroeder J.A. in *Mundinger v. Mundinger* [\(1968\), \[1969\] 1 O.R. 606](#) (Ont. C.A.):

... if one (party) was not preyed upon by the other, an improvident ... consideration is no ground upon which to set aside a contract freely entered into.

I think that it is unnecessary to resort to extreme examples of the definition of what is unconscionable. For my part, I tend to the view espoused by Goodearle U.F.C.J. in *Sullivan v. Sullivan* [\(1986\), 5 R.F.L. \(3d\) 28](#) (Ont. U.F.C.) that judicial interference would be justified "where to do otherwise would be patently unfair and inordinately inequitable". He was speaking there in the context of an unequal division of matrimonial assets, but the principle is the same.

23 As seen, for the purposes of this matter the relevant legislative provisions are to be found in s. 66(4) of the *Family Law Act*, and specifically in s. 66(4)(b). Subsection (4)(a) is not relevant and we have already dealt with contracts under common law and equity. For ease of reference, I repeat sub-subsection (b) here:

66. (4) A court may, on application, set aside a domestic contract or a provision in it

(b) where a party did not understand the nature or consequences of the domestic contract;

24 As noted, the court's powers are discretionary. Secondly, it goes without saying that the domestic contract must have created a situation which operates to the prejudice of the party seeking variation or rescission. Thirdly, once the judge is satisfied that the applicant did not, at the time the contract was executed, comprehend its nature or its consequences to him or her, there are many factors which could lead the judge to alter such contract. In other words, the threshold is not necessarily so high as to necessitate a finding of unconscionability. Once an absence of comprehension or understanding is established, the judge's power to alter the contract must be deemed to be a broad one. One might even term it to be an expanding notion of the principle of 'non est factum'.

25 That is not to say of course that the basic principle that an agreement voluntarily entered into is a contract, and that the validity of such contract should be maintained if possible, is not still good law. In *Mundinger v. Mundinger* (supra), Schroeder, J.A. adopted the following statement of Professor Bradley Crawford in 44 Canadian Bar Review, at page 143 as a correct one:

If the bargain is fair, the fact that the parties were not equally vigilant of their interest is immaterial. Likewise, if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is a combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to avoid the contract to show that his conduct throughout was scrupulously considerate of the other's interest.

(Decision affirmed by the Supreme Court of Canada on the basis of undue influence [\(1970\), 14 D.L.R. \(3d\) 256](#) (S.C.C.).)

26 This Court, in *Mushrow v. Mushrow* [\(1986\), 60 Nfld. & P.E.I.R. 305](#) (Nfld. C.A.), had this to say with respect to the meaning of the phrase being "scrupulously considerate of the other's interest":

... The extent of the burden of proof placed upon the respondent ... can be no more than to show that, in entering into the agreement, there was no duress, undue influence, subterfuge, etc. of the nature alleged and that the appellant was not "preyed upon" in any manner, but entered into the contract of her own free will with full knowledge of all relevant facts.

27 Counsel for the appellant contends that, contrary to the position which he asserts was taken by the trial judge, there is no statutory provision or common law requirement that requires the party to a domestic contract to obtain independent legal advice, or that such advice be clear and unequivocal and be provided by a qualified and competent solicitor. Counsel relies on the decision of Barry J. in *Campbell v. Campbell* [\(1990\), 83 Nfld. & P.E.I.R. 340](#) (Nfld. U.F.C.), where the facts have some similarity to the case at bar. In that matter, the parties had executed a marriage contract shortly before the *Matrimonial Property Act* came into force. The agreement provided that in the event of their separation, their matrimonial assets would be divided equally, but business assets and real property would be retained by the person in whose name the same was held-despite any contribution by the other spouse. The parties separated and divorced and the wife made application to the court to set aside the agreement.

28 In his decision, Barry J. discusses, amongst other things, the validity of a marriage contract and the burden of proof where the validity of a domestic agreement is brought into question. The judge upheld the agreement and concluded:

... Where an agreement is unequal and improvident, the onus lies upon the party seeking to uphold it to show an absence of duress, undue influence and so forth. It would seem that the mere presence of an inequality of bargaining power would not impose any special burden on the one seeking to uphold an agreement if there is no inequality in terms of sharing under the agreement. In other words, if the bargain is fair, that ends it.

29 Barry J. proceeded to deal with the matter as if the bargain in *Campbell* was unfair and improvident. He found on the evidence that there was no duress or undue influence which would

prevent the wife from exercising an independent judgment or to demonstrate that an unfair advantage had been taken of the plaintiff by the defendant. He dealt then with the issue of unconscionability, but concluded that while there was "substantial unfairness" in the marriage contract, there did not exist "such inequality in the position of the parties as to leave the plaintiff in the power of the defendant". His reason for reaching this conclusion was that there was a clear statement in the marriage contract that independent legal advice had been taken by both parties, which statement was confirmed by the evidence. Indeed, the wife had taken the marriage contract to her solicitor and negotiated changes in the contract to her advantage. The wife made a conscious decision to enter into the agreement for the purpose of attempting to save her marriage and took legal advice in the course of doing so. Hence, the marriage contract was upheld.

30 Obviously, as already alluded to above, what must first be looked at is the effective or potential result of the unequal provisions of the marriage contract. (In the case at bar, while in one sense it could be said that there was no inequality because the provisions of the agreement and specifically clause 2 applied equally to both parties, there was a *de facto* inequality because the respondent was unaware of the existence of clause 2). If such is found to be contrary to the principles of property division as contemplated and stated by the appropriate legislation, then the failure to obtain independent legal advice by the party adversely affected may become relevant—depending always on the surrounding circumstances. Those circumstances include many factors, such as the nature and extent of the inequity combined with factors already mentioned such as duress, undue influence, imbalance of bargaining power, non-disclosure, etc. However, if proper independent legal advice was obtained by the party seeking rescission, then the onus on the other spouse to demonstrate that he or she was "scrupulously considerate of the other's interest", becomes much less burdensome. On the other hand, the absence of such advice would raise the threshold considerably, with respect to both the circumstances and the extent of the inequity. Section 66(4) of the *Family Law Act*, it must always be remembered, grants the presiding judge discretionary powers in this regard.

31 Further, there can be no doubt that the absence of independent legal advice will make a judge look very carefully and fully at any application for rescission. Counsel for the appellant says that the trial judge in the case at bar in effect states that, in such an instance, it must be taken that the aggrieved party could "not understand the nature or consequences of the domestic contract". As a statement of law, that would not be correct and more will be said on this below, but such absence should certainly alert a judge that a lack of understanding is a possible consequence. Unquestionably, the existence or non-existence of independent legal advice may be a highly significant factor.

32 While appellant's counsel in the present case argues that the evidence was insufficient to make a determination that the marriage contract was either improvident or unequal because no figures have as yet been placed before the court, there can be little doubt but that the result, if the contract were deemed to be valid, would be to place the respondent in what would appear to be a most inequitable and unfair position in that she would be deprived of all assets which were deemed to be joint or matrimonial assets. This does not mean, as suggested by the appellant, that the trial judge is stating that the respondent's inability to obtain legal advice was sufficient of itself to invalidate the contract. What the judge does conclude is that the result to the respondent

would be a grossly inequitable one and that all of the circumstances leading up to the execution of the agreement, the signing itself and subsequent events, all support the proposition that, without independent legal advice, the viability of a contract such as this one could not be maintained. While certain statements made by the trial judge as to independent legal advice may give the impression that such requirement is a necessity in every such matter, whatever the circumstances and whatever the result, a reading of the judgment as a whole does not support this allegation by counsel for the appellant. Further, while the trial judge does refer to the result to the respondent as being 'unconscionable', such a finding would not be necessary under, and thus should not be imported into, s. 66(4).

### **Disposition**

33 Certain findings of fact were made, either expressly or impliedly, by the trial judge. These include:

- In the period leading up to 1982 there were marital difficulties and the respondent in particular was troubled and unsure within the marriage;
- the appellant was aware of the respondent's problems;
- the appellant drafted the "Mutual Domestic Agreement";
- there was only one copy (the original) of the Agreement;
- no copy of the Agreement was provided to the respondent at any time;
- the Agreement provided that the spouse who left the marriage without the consent of the other party forfeited the right to all matrimonial assets, including the matrimonial home;
- the respondent was never afforded the opportunity to obtain independent legal advice with respect to the Agreement because she at no time had a copy;
- the appellant did not consult a solicitor concerning the Agreement;
- the appellant personally prepared the document, some seven months before it was signed. There was no discussion with respect to the document with the respondent during that period;
- the appellant stored the document in his sister-in-law's house in Delhi immediately after it was signed;
- the Agreement had serious implications for the spouse who vacated the marriage without consent;
- the respondent was unaware of the contents of the Agreement;

- the evidence as a whole contradicted the statement in the Agreement that the respondent had "full knowledge of its contents, having taken independent legal advice...".

No exception can be taken to these findings.

### **Summary**

34 Although the document asserts full knowledge of its contents, as well as the taking of legal advice by the parties, this was manifestly not correct in respect of the respondent. This is confirmed by the testimony of the appellant himself. The appellant, on his own evidence, prepared the document himself, did not discuss it with the respondent, held it unsigned for some seven months without any knowledge by the respondent of its existence, and then suddenly produced it for execution in circumstances where one would not normally expect such a significant event to take place. Further, he did not even then provide the respondent with a copy, further depriving her of any means of considering its provisions. In all these circumstances, the setting aside of the Agreement was within the discretionary powers of the trial judge, as granted him by s. 66(4) of the *Family Law Act*. That being so, this Court has no right to interfere and the judge's decision will stand.

35 Further, and obviously, the point must clearly be made that the decision in this matter cannot be taken as espousing a proposition that a party to a domestic contract may avoid the provisions of such contract by establishing that he or she was unaware of its contents. Generally, if a party to a contract executes it without reading the contract, or part of it, he or she is nonetheless bound by its provisions. However, for the above reasons, the situation in this matter is a different and unusual one which led the trial judge to his stated conclusion.

36 In the result, the appeal is dismissed, with costs.

*Appeal dismissed.*

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