

## THE COMMISSIONER OF INLAND REVENUE

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v.

## GEORGE ALEXANDER THOMPSON

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[SUPREME COURT Tuivaga, J.—8th February 1979]

## Appellate Jurisdiction

*Income Tax—Profit on sale of asset—whether acquired for development a question of fact*

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*M. J. Scott* for Appellant  
*M. Benefield* for Respondent

This was an appeal against a decision by the Court of Review which had upheld an appeal by the respondent taxpayer against an assessment for income tax of \$22,500 for the year ended June 1974. The said sum was alleged to be assessable income derived by the respondent from the sale of shares in a company being the realisation, so the respondent said, acquired for the purpose of investment and not profit making. The Court of Review had accepted that certain shares had been required by the taxpayer for investment and not for resale.

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*Held:* An appellate court should be reluctant to interfere with findings of fact by a lower Court particularly on a question of credibility. Where inferences are to be drawn from proved or admitted facts, a court may be less reluctant, subject however, to the weight to be given to the opinion of the court below.

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Appeal dismissed with costs.

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## Cases referred to:

*Benmax v. Austin Motor Co. Ltd.* (1955) 1 All E.R. 326  
*Adelaide Olive Co. v. Federal Commissioner at Taxation* 74 A.T.C. 4043  
*Watt (or Thomas) v. Thomas* (1947) 1 All E.R. 582  
*Piper v. Federal Commissioner of Taxation* (1974) 4 A.T.R. 359

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TUIVAGA J.:

## Judgment

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The circumstances which gave rise to this appeal by the Commissioner of Inland Revenue were as follows. During the year ended December 1972, taxpayer George Alexander Thompson, respondent and hereinafter referred to as "Thompson", was assessed for an additional sum of \$22,500 with respect to his chargeable income for that year. The Commissioner claims that the amount is taxable being profits derived from the sale of Thompson's shareholding in Naigani Resorts Limited. Thompson objected to this saying the amount does not attract tax because the amount was in fact derived from realisation of an asset which was acquired not for the purpose of resale but for the purpose of investment and was not part of an undertaking or scheme entered into or devised by him for the purpose of making a profit.

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Thompson's objection against the assessment was conveyed in a letter to the Commissioner who wholly disallowed the objection.

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An appeal was lodged by Thompson to the Court of Review in accordance with the provisions of the Income Tax Act 1974. The Court of Review allowed Thompson's appeal. The Court held that Thompson acquired his interest in Naiganilailai with a view to developing it and retaining it, and not with a view to resale with the consequence that the profits obtained by Thompson subsequently from the sale of his interest are not liable to tax.

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The Commissioner now appeals to this Court against the decision of the Court of Review. Twenty-six grounds of appeal have formulated in the Notice of Appeal though I think these could well have been very much reduced in number because most of them concern purely evidentiary matters of which detailed particulars need not be given. I do not therefore propose to set out the grounds of appeal in seriatim. The basic contention underlying them all is clear enough which is that the conclusion reached by the Court of Review as to Thompson's main or dominant purpose in buying the land in question, namely to develop it as a holiday resort could not fairly and reasonably be supported having regard to the evidence adduced at the trial.

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However, there is one procedural point raised in the grounds of appeal upon which much reliance is also placed by counsel for the Commissioner and must be set out in full. It is Ground 5 and reads as follows:

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"5. The Court of Review erred in law and failed to comply with section 61 (6) of the Income Tax Act in giving judgment in favour of the respondent (inter alia) upon certain grounds not specified in the notice of objection lodged by him—namely, that sale of the land was caused by knowledge allegedly acquired by him of development costs after purchase, notably those relating to Public Health requirements, and by alleged concern over the possible departure overseas of one Williams, and also erred in failing to limit the respondent to his grounds of appeal."

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The argument in support of this ground of appeal is that by virtue of section 61 (6) of the Income Tax Act, 1974 the Court of Review was strictly precluded from basing its decision on any ground not raised in the taxpayer's notice of objection to the Commissioner. It is said that a departure from this rule would only be permitted if leave of the Court of Review was first sought and granted before a ground not stated in the notice of objection could be used as a basis for decision in the Court of Review. In

agreement with counsel for the respondent I accept as correct his contention as to the effect of section 61 (6) which is in these terms:

“(6) Any person objecting to the decision of the Commissioner under subsection (4) of this section may within the time determined under the last preceding subsection appeal to the Court of Review and such appeal shall be heard and determined as hereinafter provided. Save with the leave of the Court of Review no person may appeal to the Court of Review upon any ground other than a ground stated in the objection to the Commissioner.”

The question of leave does not arise in this case. What is to be determined therefore is whether the Court of Review in giving its decision in favour of Thompson based it, as alleged, on matters extraneous to the grounds specifically set out in the notice of objection to the assessment in question.

The material parts of the notice of objection read as follows:

“GEORGE ALEXANDER THOMPSON aforesaid is not liable to taxation under Income Tax Act 1974 or under Land Sales Act 1974 in respect of profit amounting to \$22,500 derived from sale of his interest in Naigani Resorts Limited included in your assessment for 1972 dated 17th March 1976 for the following reasons:

- (a) The property was acquired with the intention of developing it into a holiday resort. In fact, there is evidence to prove that several discussions were held over a period of time for the development of the island. However, during the period of planning further complications were caused by an amendment to the Town Planning Ordinance, which required fully serviced reservoir. This would have entailed substantial capital outlay and the partners were forced to seek someone with substantial capital backing. However, admission of a prospective financier resulted in personality clashes and the original partners decided to sell their interests in the island. The profit which was acquired for the purpose of investment, and was not part of an undertaking or scheme entered into or devised for the purpose of making a profit.
- (b) Mr George Alexander Thompson was not previously involved in acquisition and sale of shares or land.”

It seems to me that it is clear from the particular wording of the objection, although perhaps it could have been expressed a little more aptly, why Thompson was objecting to the assessment raised by the Commissioner on his income for 1972. I do not think that the wording was so inapt that the Commissioner could possibly be misled as to the ground upon which Thompson was objecting. It is clear that the ground was that the amount assessed against him was a class of capital gain which is not taxable by virtue of the provisions of section 15 (a) of the Income Tax Ordinance (Cap. 176). If that is the true object behind the wording in the notice of objection, as I have no reason to doubt it, then it would be hard to find any ground for saying that there was a variance, serious enough to amount to a breach to section 61 (6) of the Income Tax Act between the ground adumbrated in the notice of objection and the

A Court of Review which, as is apparent from the record, based its adjudication on the provisions of section 15 (a) of the Income Tax Ordinance. Thus at page 3 of the Decision (last paragraph) the Court states:

“To determine whether the provisions of paragraph (a) of the proviso to section 15 are applicable, it is necessary to establish the purpose for which the property was acquired.”

B For these reasons I am satisfied that the contention on behalf of the Commissioner on this aspect of the appeal has no merit and must be rejected.

Before I go on to discuss the findings of fact in this case towards which the main arguments on appeal have been directed, it is necessary to set out (so far as material) section 15 (a) of the Income Tax Ordinance (Cap. 176):

C “15.....  
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Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Ordinance, shall include—

D (a) all profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit; but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded.”

E It is clear that under the provisions of section 15 (a) of the Income Tax Ordinance profits derived from sale of real or personal property are taxable as income—

F (i) if the business of the taxpayer comprises dealing in such property;  
(ii) if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it;  
(iii) if profits or gains were derived from the carrying on or out of any undertaking or scheme entered into or devised for the purpose of making a profit.

G On the hearing before the Court of Review the case was mainly contested on the basis of (ii) above, that is to say, whether or not Thompson’s main or dominant purpose in acquiring an interest in the property in question was to resell it at a profit. Thompson claimed that his main purpose was to develop the land with his associates as a small holiday resort to which he would retire to work when he decided to leave his employment in Government service from which he could, because of his age at the time, retire at his own election. The Court of Review accep-

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ted his explanation and made its findings accordingly. The findings of the Court and the reasons therefor are stated at pages 12 and 13 of the Decision as follows—

“I find as a fact, after giving every consideration to the submissions of the respondent, that the appellant acquired his interest in Naiganilailai with a view to developing it and retaining it, and not with a view to resale.

My main reasons for reaching this conclusion are—

- (1) I believe that the appellant, who steadfastly maintained that his purpose in acquiring an interest in Naiganilailai was to participate in a development to be retained as an investment, was substantially a truthful witness;
- (2) The evidence of the appellant was corroborated by his three colleagues, one of whom has no financial interest in the outcome of the case, and their evidence I consider to be substantially truthful;
- (3) I accept the reasons for the appellant changing his mind about development with the result that in 1972 he decided to sell his interest;
- (4) Mr E. Emberson, a Suva design consultant, Mr G. King, a Government architect and Mr J. Pattie, an employee of Messrs D. L. and A. W. Wood, referred to earlier in this decision, all gave evidence of some discussion with the appellant or his colleagues regarding the possibility of developing Naiganilailai;
- (5) Evidence was given by the appellant, Whippy and Williams that they had formulated the idea of a similar development in relation to another island some years before they entered into an agreement to buy Naiganilailai.

In reaching the conclusion I take into account the totality of the evidence rather than specific answers to specific questions, as many of such answers must be looked at in a wider context.”

Counsel for Thompson submits quite rightly I think that the issues under considerations in this appeal are essentially one of fact. Counsel says this Court in exercising its appellate jurisdiction should therefore be rather reluctant to interfere with the findings of fact by the Court of Review, a court of first instance. According to counsel this Court should only interfere if the findings were unreasonable or could not be supported on the evidence. Counsel submits that such was clearly not the case here as there was ample evidence to support the decision of the Court of Review. Counsel cited *Benmax v. Austin Motor Co. Ltd. (1955)* 1 All E.R. 326 where the role of an appellate court on appeal was discussed. There it was said an appellate court would not lightly differ from the findings of a trial judge on a question of fact especially where the finding turns solely on the point that confusion has arisen from a failure to distinguish from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. Where inferences are to be drawn from proved or admitted facts an appellate court would be less reluctant to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the trial judge.

A The position of an appellate court was also explained succinctly in the following passage from the speech of Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] 1 All E.R. 582 at 587:

B 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.

C III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably 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.

It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case."

D It is with these considerations in mind as to the proper functions of an appellate court that this Court must review the case.

There is no dispute as to the basic facts which are as follows—

- E (1) Thompson who is aged 57 years has lived in Fiji throughout his life and was at all material times working as a civil servant.
- F (2) On 18th December 1969 Thompson agreed with Walter Whippy, Charles John Williams to purchase for a sum of \$20,000 (each contributing a share to the total cost) a copra plantation, known as Naiganilailai which is on the island of Naigani, a freehold property owned by one Jack Riley. On the same day an option was granted to Jack Riley to purchase for \$5,000 a quarter interest in the property. The option was subsequently exercised with the result that Jack Riley became with Thompson, Walter Whippy and Charles Riley John Williams tenants in common of the property in equal shares.
- G (3) On 20th April 1971 Thompson and the other three co-owners of the property gave Adrian Thaggard and Gaylord Buch an option to purchase the property for a sum of \$90,000. The option was never exercised.
- H (4) On 6th January 1982 Thompson and the other three co-owners and one Ronald Leslie Marden, an Australian citizen who was also interested in developing the property in question as a tourist attraction, gave R. I. Kapadia, solicitor instructions that a company be formed and incorporated known as Naigani Resorts Limited with a share capital of \$250,000 divided into 250,000 shares of \$1.00 each.
- (5) On 2nd March 1972 Ronald Leslie Marden entered into an agreement with Thompson and his co-owners to transfer all their interests in the land to him for a total price of \$110,000. Between 18th December 1969 and 2nd March 1972 no development had been carried out on the property by or on behalf of the owners or any of them.

- (6) On 21st April 1972 a company named Naigani Resorts Limited, a private company with limited liability, was incorporated and on 28th April 1972 Thompson and his co-owners sold their interest in the property to Naigani Resorts Limited in exchange for 20,000 \$1 shares in the company to be divided equally among Thompson and his co-owners. On the same day Thompson entered into an agreement with Ronald Leslie Marden for the latter to purchase his 5,000 shares in the company for a sum of \$27,500 and this has resulted in Thompson making a net profit of \$22,500 on the sale of his interest in Naiganilailai.

Such is the factual framework of this case which by itself does not resolve the problem at hand, namely what was Thompson's main or dominant purpose when he acquired his interest in the property in question. One must therefore look elsewhere in the evidence particularly to Thompson himself and his witnesses. So far as Thompson's evidence is concerned, the proper approach to be adopted was explained rather well by Mahoney J. in *Piper v. Federal Commissioner of Taxation* [1974] 4 A.T.R. 359 at pages 360 and 361 in these words:

"In a case such as the present, where the essential question is the dominant intention with which an asset was acquired, the statements of the taxpayer must be given due weight. A taxpayer has, in such a case, both the advantage and disadvantage that such an intention is, in essence, a subjective matter. He has the advantage that normally he alone is able to say what was his dominant intention and that normally there is no person able to give a direct contradiction to what he says; that against his evidence as to his intention is to be weighed is normally collateral matter from which his intention may be derived only indirectly and by way of inference.

Correspondingly, the taxpayer has the disadvantage that there is sometimes the tendency in the course of a case to discount positive statements by a taxpayer as to his intention at the relevant time, over heavily against the objective facts and to regard things which were said and done by him, then or subsequently as being of a self-serving nature.

It is important, in my opinion, that the correct approach be adopted to evidence of this kind. Evidence given by the taxpayer in this regard is, as has been said, to be scrutinized with care and to be weighed against the objective facts and the inferences to be drawn from his activities generally."

The factual position as it relates to Thompson may conveniently be summarised as follow—

- (1) Thompson has known John Charles Williams, a businessman, and Walter Whippy for many years. Since the War he has been a close friend of Walter Whippy with whom he had often talked of fishing and boating, their favourite pastimes, and often talked about developing a small holiday resort to which they could retire and devote more time to fishing and boating.
- (2) Sometime between 1961 and 1963 Thompson along with others sought to buy an interest in Namuka Island of which Walter Whippy owned a half share and one Tom Cavender owned the other half. Thompson was keen then to build a holiday resort on the island. The matter fell through because Cavender kept shifting his price until it reached \$10,000 which was thought to be too high.

- A (3) In 1969 Thompson learned through Walter Whippy that 60 acres of land at Naigani island was for sale and he became immediately interested in buying an interest in it. Riley was asking for \$20,000 for the property. By 18th December 1969 the purchase of the property was completed in a manner resulting in Thompson, Williams, Whippy and Riley sharing the ownership thereof each being assigned a quarter interest.
- B (4) It was planned to put up one or two bures on the property in the first instance. Thompson and his associates knew that the Local Rural Authority would have to approve it. The question of finance was also being closely considered by Thompson and his associates. Thompson understood he would be made managing director when he retired from Government service which he was in fact planning to do sooner or later.
- C (5) It was estimated that a holiday resort such as was being envisaged could be developed at a cost of about \$100,000 and the development work was to be done in two or three stages. Thompson planned to contribute his share of the capital required from his retirement gratuity, a modest amount, and from his life insurance policies and from the money he would save from discharging the mortgage on his house which would soon be paid up. He would also have a pension on retirement from Government service.
- D (6) Thompson obtained much expert advice by virtue of his senior position in the Public Works Department on the type of buildings to construct and use of materials on the island. Thompson did much of the exploratory work mostly in seeking professional advice from friends. Many specialists at the Public Works Department were consulted by Thompson. Thompson and his associates did not wish to incur unnecessary cost on the buildings to construct on the resort site and had felt it necessary to move cautiously on expenditure otherwise they would find themselves paying off the debt on the property for the rest of their lives—Whippy and Riley were then over 60 years of age.
- E (7) At sometime or other during this period it was realised with a certain amount of concern that even in the development of a resort with bure type accommodation it would be necessary to put in a sewage scheme.
- F (8) It was realised that someone with capital was needed to participate in the development of the project and it was hoped that Ronald Leslie Marden who was much interested in the projected development of Naiganilailai would provide the bulk of the capital needed. He was introduced to the group in the latter half in 1971.
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- (9) On 29th September 1971 Mr Wood of D. L. & A. W. Wood, Consulting Engineers and Surveyors and Town Planning Consultants wrote to Thompson as follows— A

“Dear Sir,

Re: NAIGANI

We have looked at the photos and plan of the above land and consider that there are obviously some excellent development opportunities. B

Before making any suggestions it is necessary to determine:

- (i) topographical data, to determine such areas suitable for building, areas best left untouched, etc.
- (ii) yours and your partners intentions in development.

The current town planning and government attitude towards developments such as this, is to avoid or prevent speculators and developers making sizeable profits at the expense of the community. If, for instance, you were to closely subdivide the land, and to sell on an overseas market, then the standard of facilities you would have to provide would probably be increased. Questions would be asked about water supply, electricity, refuse and sewage disposal, etc. C

If, on the other hand, a well conceived scheme, aimed at the local market was put up, this would probably receive better consideration. D

We have not seen the site, but if it is possible, a subdivision could be arranged with the following features:

- (1) large lots, each having good building sites and remote or screened from others.
- (2) minimal provision of services—i.e. roads could be private roads and unformed other than footpaths or tracks. E

This form of subdivision obviously requires a minimum of development capital. At the same time, however, it would not yield as large a profit as an intensive development.

The writer's personal view is: F

- (1) It would be a shame to intensively develop another island and render it tourist and commercially oriented.
- (2) There would surely be enough locals who would be interested in purchasing a retirement or holiday home site, knowing that it will not crowded or fished out by tourists.
- (3) Any holiday homes or bures could be rented when ~~not~~ in use, mainly to locals. G
- (4) If this were to be done in gradual stages a very pleasant community could result.

There are obviously other development alternatives, each giving a different profit and end product. H

A We would welcome the opportunity to discuss the development further and a trip to the site is obviously essential.

Our fee for visiting the site with you and having a general discussion could well be offset by the fish caught. Thereafter, we can explain our charges.

Thanking you,

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Yours faithfully,  
D. L. & A. W. WOOD

Sgd.  
A. W. WOOD"

C (10) In 1972 serious differences of opinion occurred between Thompson and Marden regarding the development of Naiganilailai and this culminated in Marden buying out Thompson and his associates on 21st April 1972.

D Looking at all the facts and circumstances of the case objectively and fairly I find it impossible to say that the evidence could not reasonably support the conclusion reached by the Court of Review that Thompson's main or dominant purpose when he acquired his interest in the property in question was to operate it as an investment project. It is true, as counsel for the Commissioner has argued with some force, that not an iota of development towards a holiday resort has ever been carried out on Naiganilailai and that Thompson and his associates had not taken any positive or effective steps to advance the idea of a holiday resort which Thompson claimed to have been uppermost in his mind when he bought an interest in Naiganilailai. However, I do not think it is right in a case like this to spotlight or emphasize unduly certain aspects of the evidence only without regard to their overall effect on the case as a whole. The facts must be seen as a composite whole along with other circumstances of the case. If the matter is seen in this wider context one cannot resist the inference that Thompson must have genuinely believed that he could make a success of the type of development scheme which he had his associates had conceived. They failed of course because of difficulties not fully apprehended at the time of purchase of the property, and which turned out in fact to be beyond his and his associates' ability to overcome. The handsome profit Thompson made on resale of the property was a windfall which was the direct result of unexpected general rise in property values during the early seventies. Thompson had obviously not bargained on making such a profit from a single property transaction. Thompson has never had occasion before to buy and sell real property with the principal objective of making a profit therefrom and this probably explains his amateurish approach to the whole matter. Although Thompson lacked necessary experience and knowledge it did not dampen his avowed desire to develop Naiganilailai as a holiday resort. Indeed the evidence shows he did seriously think he would be able to pull it off. As I see it that was the situation from the outset until circumstances beyond his control forced Thompson's hand to sell out. Thompson's position in relation to this matter is I think a little stronger than the situation epitomised in the case referred to by the Court of Review, namely that of *Adelaide Olive Co. v. Federal Commissioner of Taxation* 74 A.T.C. 4043 where Wells J. stated:

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"A taxpayer may bona fide have a purpose (other than the making of a profit on resale) for which he acquires property, even though the chances of fulfilling it may appear uncertain or even remote."

Thompson was at the outset fairly confident that the development of Naiganilailai in the manner he had envisaged would be feasible. Counsel for the Commissioner has referred to numerous factual items all of which he claims clearly show that Thompson contrary to his utterances in the matter acquired his interest solely and predominantly for the purpose of resale at a profit. I accept with respect the proposition that where a decision of a trial court is based mainly on inferences from specific facts, as much as this case is about, an appellate court is just as qualified, as a trial court to form its own independent opinion as to what inference to draw. However, much as I tried to evaluate the evidence telescopically from the Commissioner's standpoint taking all the arguments, numerous as they were, which were put forward by counsel on his behalf, I am at the end of it all unable to accept his contention that Thompson's dominant purpose in acquiring the property in question was to resell his interest therein at a profit. I think it is clear from the evidence that Thompson had no speculative intent as such when he acquired the property. To argue that he had is to ignore the true weight of the evidence which in my view was correctly assessed by the Court of Review. In this case it is fair to say that whichever way one looks at the matter either subjectively from Thompson's viewpoint or objectively from the circumstances of the case as a whole, the same result is arrived at, namely that Thompson's dominant intention when he acquired an interest in Naiganilailai was to develop the land and not to resell it at a profit as soon as he could get a buyer. The thought of reselling at a profit appeared far removed from his thinking when he bought the property.

Certain factual issues were particularly highlighted by counsel for the Commissioner in his submissions to the Court of Review and again to this Court asserting that they were conclusively indicative of Thompson's speculative intent when acquiring the property. In my view the Court of Review has adequately considered these matters and has found satisfactory explanations for them. For my part I cannot find any proper or compelling grounds for taking a different view on these matters. I am satisfied that given the totality and nature of the evidence adduced during the trial of the case the Court of Review came to the right conclusion as to Thompson's dominant intention when he acquired the property.

In these circumstances the appeal must fail and is dismissed with costs.

*Appeal dismissed.*