

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB REGISTRY, SAN FERNANDO

H.C.A. No. S-1649 of 2001

BETWEEN

TARAN MAHARAJ

Plaintiff

AND

SHIRLEY NEEMAH

(as Legal Personal Representative
of Robert Neemah, Deceased)

GERALD NEEMAH

Defendants

Before: The Honourable Mr. Justice Henderson

Appearances:

Mr. A. Ashraph for the Plaintiff.

Mr. H. Ramnath for the Defendants.

REASONS

INTRODUCTION

1. In these proceedings, the Plaintiff seeks, inter alia, specific performance of a written agreement dated 21st November, 1997 for the sale of land situate at 50 Circular Road, San Fernando (hereinafter referred to as “the property”). The first named Defendant is the daughter and executrix of the Estate of Robert Neemah, (“the Vendor”) who died on 22nd November, 1997. The second named Defendant is the son of the Vendor and the beneficiary of the subject property pursuant to the Will of the Vendor dated 17th November, 1997. On 3rd April, 2009, I dismissed the Plaintiff’s action for specific

performance and ordered the Plaintiff to pay the Defendant's cost certified fit for Counsel to be taxed in default of agreement. I said then that I would give my written decision. I do so now.

THE PLAINTIFF'S CASE AS PLEADED

2. The Plaintiff (by his Statement of Claim) contends that:
 - (a) by an agreement in writing dated the 21st November, 1997 made between the Plaintiff and the Vendor, it was agreed that the Plaintiff would buy and the Vendor would sell the property at the price of One hundred thousand dollars (\$100,000.00).
 - (b) the Vendor died on the 22nd November, 1997 leaving a Will dated 17th November, 1997 in which he purported to devise the property to the Second Defendant;
 - (c) the First Defendant obtained a Grant of Probate of the Vendor's Will;
 - (d) subsequent to the Vendor's death, the First Defendant agreed that upon obtaining the Grant of Probate and upon receipt of the purchase price of One hundred thousand dollars (\$100,000.00), she would convey the property to the Plaintiff;
 - (e) the First Defendant was bound by the agreement;
 - (f) on the 9th May, 2000, by Deed of Assent number 10903 of 2000 ("Deed of Assent") the First Defendant as the Executrix, purported to convey the property to the Second Defendant as a beneficiary under the Will;
 - (g) the Deed of Assent is null, void and of no effect;
 - (h) the Plaintiff as a businessman and real estate agent has suffered loss and damages.

THE DEFENDANT'S CASE AS PLEADED

3. In its amended Defence, the Defendants inter alia;
 - (i) admits execution of an agreement on 21st November, 1997 but; contends that at the time of the transaction, and in particular on the date of its execution (which took place in the Vendor's bedroom), the Vendor who died the following day was not of sound mind, memory and understanding, was

feeble and in failing health and that the agreement was executed without his knowledge or his appreciating its contents.

In particular the Defendants pleaded, inter alia;

- (a) the Vendor's considerable age and condition robbed him of the requisite capacity;
 - (b) the Vendor had undergone two (2) operations, was bedridden and unable to communicate fluently;
 - (c) the consideration was a gross undervalue of the prevailing market value of the property and that the price was inequitable and unconscionable;
 - (d) the Vendor executed the agreement without any separate or independent legal advice;
- (ii) that no consideration existed in the agreement, as the deposit was held by the Attorney at Law and not given to the Vendor notwithstanding Clause 3 of the agreement;
 - (iii) maintained that the Vendor's signature was not placed voluntarily and of his own free will;
 - (iv) that while discussions took place with the Plaintiff, no agreement was made or confirmed for the sale of the property for one hundred thousand dollars (\$100,000.00);
 - (v) that the Vendor knew the Plaintiff from previous dealings and that the Plaintiff was in a position of influence and dominance, which he exercised over the Vendor;
 - (vi) (a) that while the Second Defendant was present when the agreement was executed, he denied negotiating with the Plaintiff for the sale of land and by reason of his understanding could not comprehend the nature of this transaction;
 - (b) the Second Defendant admits to being present when the agreement was executed but denies negotiating with the Plaintiff for the sale of the property, the First Defendant was unaware of any negotiations between the Second Defendant and the Plaintiff.

THE PLAINTIFF'S REPLY

4. In his Reply, the Plaintiff joined issue with the Defendants on their defence and further contended that:
- (a) (i) the Vendor understood the nature of the agreement
 - (ii) that the consideration of one hundred thousand dollars was not an undervalue;
 - (iii) the agreement was binding.
- (b) the Vendor in executing the said agreement, acted freely and fully of his own volition and in the exercise of his free independent will with full knowledge and due consideration of what he was doing;
- (i) that the deposit of ten thousand dollars (\$10,000) was held in escrow by Mr. Gopaul, Attorney-at-Law pending the verification of the title and that the Vendor died before such verification. The deposit “became payable to the Legal Personal Representative upon the obtaining of the requisite grant;”
 - (ii) upon the death of the Vendor, the First Defendant was informed of the said agreement and offered the deposit upon the First Defendant obtaining the requisite grant;
 - (iii) the First Defendant initially accepted the agreement, but subsequently purported to deny it and refused the payment of the purchase price and deposit, and
 - (iv) the Second Defendant accepted the agreement and upon being advised that he was not entitled to the proceeds of the sale, purported to deny the validity of the agreement and refused payment of the purchase price.

THE ISSUES

5. The following issues arise from the pleadings:
- (1) Whether the agreement made was a valid agreement having regard to:
 - (a) the capacity of the Vendor;
 - (b) the absence of separate and/or independent legal advice;

- (c) the purchase price and whether this was a gross under value of the property;
 - (d) the payment by the purchaser to the purchaser's Attorney at Law, of the deposit.
- (2) Whether the equitable remedy of specific performance ought to be granted.

THE EVIDENCE

6. The Plaintiff and Mr. Wesley Gopaul, Attorney at Law (who settled the statement of claim), testified on his behalf. Both the Defendants testified in opposition. The bundle of documents entitled "Plaintiff's unagreed Bundle of Documents" were subsequently agreed and by consent admitted into evidence as an agreed bundle.

THE PLAINTIFF'S EVIDENCE

Wesley Gopaul

7. Mr. Wesley Gopaul is an Attorney at Law having a conveyance practice since 1985. He knew the Vendor having done a conveyance between the Vendor and the Plaintiff on the 17th March, 1997 with respect to a parcel of land at Phillipine. Sometime in November, 1997, the Plaintiff came to him and told him that the Vendor agreed to sell him the property for the sum of one hundred thousand dollars (\$100,000.00). The Plaintiff gave him the Vendor's title deed and instructions to prepare a sale agreement, which he did.

8. On Mr. Gopaul's instructions a member of staff from his office contacted the Plaintiff, requesting that the Vendor attend his office to sign the agreement. Instead and at the Vendor's request, arrangements were made for both the Plaintiff and Mr. Gopaul to attend his home to have the agreement signed.

9. On 21st November, 1997 during his lunch break, Mr. Gopaul, together with the Plaintiff, went to the home of the Vendor where they were met by the Second Defendant. They were taken to a room where Mr. Gopaul saw the Vendor lying on a bed. The Vendor sat up and had a conversation with Mr. Gopaul recalling the details of the sale of the land

in Phillipine. The Vendor appeared ill but conversed in a normal, coherent fashion appearing fully to understand everything.

10. Mr. Gopaul told the Vendor that the Plaintiff informed him that he had an agreement with the Plaintiff to sell him the property. The Vendor confirmed this and the selling price of one hundred thousand dollars with a ten percent deposit. Mr. Gopaul said:

“Mr. Maharaj had indicated to me that the deposit was to be held in escrow and I explained to him what this meant. He confirmed that he had such an arrangement with Mr. Maharaj. When I explained to him that the completion was to be within three months, he told me that Mr. Maharaj told him that he would pay the full sum as soon as the searches were completed. I then asked Mr. Maharaj if this was so and he confirmed this.” [Paragraph 5 of the witness statement.]

11. Mr. Gopaul then had both the Vendor and Plaintiff sign the agreement which he witnessed. He stated that the Second Defendant was present throughout the transaction.

12. Sometime after, the Plaintiff informed him that the Vendor had died. He informed the Plaintiff that nothing further could be done until a Legal Personal Representative was appointed. Sometime in early 1998, the Second Defendant informed Mr. Gopaul of the Vendor's death and enquired when the transaction would be completed. When told by Mr. Gopaul, that he must await the appointment of a Legal Personal Representative, the Second Defendant then informed Mr. Gopaul that the First Defendant was the executrix of his father's estate and that he was the beneficiary of the property under the Vendor's Will. He was of the view that since the land was left to him, he was entitled to the proceeds. When informed that he was not so entitled he appeared disappointed and left abruptly.

13. On the 16th February, 1998, Mr. Gopaul wrote the First Defendant requesting that he be informed when she obtains the Grant of Probate so that steps could be taken to complete the sale. He received no response from the First Defendant and on the 4th May, 1998 received a letter in response from a firm of Attorneys at Law acting for the Second Defendant.

14. On the 12th May, 1998, Reynold Beharrylal, an Attorney at Law acting for the Second Defendant, wrote to Mr. Gopaul requesting a copy of the agreement. Mr. Gopaul responded six (6) days later enclosing *inter alia* a copy of the agreement.

15. There ensued an exchange of correspondence between himself and Harrikissoon and Company during the course of which he was informed that the Grant of Probate was obtained in October 1998, that the First Defendant lived abroad and upon her return the firm “would have her instructions”. Mr. Gopaul telephoned the firm where it was agreed that he would prepare the conveyance for the review and execution by the First Defendant. It was further agreed that the First Defendant would be paid the entire purchase price upon her return to the jurisdiction.

16. On the 25th February, 1999 Mr. Gopaul wrote to Harrikissoon and Company enclosing the Deed of Conveyance and confirming their agreement that the sum of one hundred thousand dollars (\$100,000.00) would be paid upon execution of the conveyance. Reminders were written in April, May and July of 1999 and in September 1999 Harrikissoon and Company informed Mr. Gopaul that they no longer acted for the First Defendant and that she had retained another Attorney.

17. In or about the month of September, 2000 on the instructions of the Plaintiff, Mr. Gopaul updated the title search on the property and discovered that a Deed of Assent was done in which the First Defendant as Legal Personal Representative conveyed the property to the Second Defendant. Mr. Gopaul informed the Plaintiff and gave him certain advice. Based on the Plaintiff’s instructions, Mr. Gopaul held his hands as he was of the opinion that efforts were being made to settle the matter so as to avoid litigation.

18. In November, 2001, Mr. Gopaul acting on behalf of the Plaintiff wrote the Second Defendant and having referred to the agreement, called upon him to indicate whether upon payment of the sums of one hundred thousand dollars (\$100,000.00), he was willing to transfer the said property to his client. Attorney acting for the Second Defendant replied

denying that the agreement for sale was valid, and accordingly was unable to comply with the request.

19. Mr. Gopaul was cross examined at some length. There was no suggestion that he was a dishonest or unreliable witness. Under cross examination, Mr. Gopaul stated that:

- (i) the Plaintiff had been his client for over twenty (20) years. He was aware that the Plaintiff was a Real Estate Agent, was involved in buying and selling land, that he provides valuations of land and that he was a Supermarket Proprietor;
- (ii) when he went to the home of the Vendor on the 21st November, 1997, he had in his possession a file with a sale of agreement that the Plaintiff had asked him to prepare, a copy of the Deed and a cheque for the deposit made pursuant to that agreement;
- (iii) he spoke to the Vendor in a bedroom. He knew the Vendor before and that the Vendor was a bit frail. He was on a bed and appeared to be ill. He spoke to the Vendor and the Vendor understood what he told him. The Vendor knew what he was doing. He did not know his age but he was elderly;
- (iv) he went through the terms of the agreement. He explained what were the terms of the agreement and the Vendor asked him questions. The Vendor was able to understand. He gave intelligible answers. The only matter that required his explanation was the term escrow.
- (v) he acted for both parties. He dealt with the Vendor before, without the Vendor obtaining independent legal advice. Having dealt with him before, he did not think it necessary. He did not obtain any written instructions from the Vendor. He did not obtain his consent to act on his behalf. He did not obtain written consent. When asked who protects the interest of the Vendor when the purchaser's Attorney holds the deposit, Wesley Gopaul replied **“If there is a problem, the Attorney can pay deposit to the Court and that as an Attorney, you have duties.”**

20. The general thrust of the cross examination of this witness was twofold; firstly to demonstrate that the Vendor was unwell and did not understand what he was doing and secondly, that the Vendor did not have the benefit of independent legal advice.

21. As to the first, Mr. Gopaul's attention was drawn to paragraph seven of his witness statement in which he stated:

“Robert Neemah did appear ill but he conversed with me in a normal, coherent fashion. He remembered me and discussed the previous conveyance and the terms of the agreement. He appeared to fully understand everything.”

He was then probed on whether he was aware that the Vendor executed a Will on the 17th November, 1997 in which he devised the very property that formed the subject matter of the sale agreement. Mr. Gopaul stated “I am aware of the Will now” and stated that in the Will he observed he devised the property that he had sold. He further stated that he had seen many cases in which people disposed of properties that had been the subject of gifts under a Will.

22. In answer to the Court regarding the prudence of having the Vendor medically assessed, Mr. Gopaul gave the following evidence:

Court: **As a conveyancer, is there any practice... you went to the home of the vendor.**

Wesly Gopaul: **Yes.**

Court: **This is not the usual practice.**

Wesly Gopaul: **No it is not.**

Court: **Reason why you attended the home of the vendor was because he was unwell.**

Wesly Gopaul: **As he was unwell and I knew him, did a sale agreement, I would have gone to his home, I felt I could go to his home.**

Court: **Is there any conveyancing practice where elderly, or unwell or frail person, where you would have a medical person make an assessment.**

Wesly Gopaul: **If I am of the view that they [are] under a disability or some form of a disability and some doubt as to whether he understood what was being done, then in that case it would be prudent to have a medical doctor present or refer him to another attorney. But in this case I was satisfied that Mr. Neemah was fully cognizant of everything that was taking place and answered all my questions in an intelligible way. And the only thing that I had to explain to him, which he did not seem to understand at first was what was meant by holding the money, the deposit in escrow. Since he understood everything that was taking place in my estimation and although he was ill, he was not under a disability, again in my estimation.**

I did not think it was necessary to require a medical doctor. And of course, I did not have the faintest clue that he would pass the next day.

I did not think he would have passed the next day. If I thought he would have, I would have taken those precautions.

[my emphasis]

Taran Maharaj

23. The Plaintiff testified that this transaction was not his first with the Vendor. In November, 1996 the Plaintiff responded to a newspaper advertisement in which the Vendor offered for sale a parcel of land in Phillipine. He met with the Vendor at his home and they together with the Second Defendant went to the advertised parcel of land. Price negotiations ensued and a meeting took place at the Chambers of Wesley Gopaul where arrangements were made for the preparation of an agreement for sale. A further visit to the parcel of land followed. During their discussions, the Vendor informed the Plaintiff that he had another parcel of land for sale (which now forms the subject of these proceedings) and that as soon as he was ready he would contact him.

24. Sometime in November, 1997 the Second Defendant telephoned the Plaintiff and informed him that the Vendor was ready to sell the property. The Second Defendant requested the sum of one hundred and fifty thousand (\$150,000.00) dollars. The Plaintiff found this price high and asked if the price was negotiable. When told that he needed to confer with the Vendor, the Plaintiff said that he would speak with the Vendor in person.

25. Two days later, the Plaintiff met with the Vendor at his home. The Plaintiff informed the Vendor that his price was too high and that he was willing to pay \$80,000.00. He noted that the Vendor appeared more feeble than he was at the time of their first transaction. Further attempts at negotiations resulted in the Vendor lowering his price to one hundred and twenty five thousand (\$125,000.00) dollars and within a week and after two further telephone calls, a reduction of ten thousand (\$10,000.00) dollars to a price of one hundred and fifteen thousand (\$115,000.00) dollars. The Plaintiff's position was that he would meet him in the middle and go up to one hundred thousand (\$100,000.00) dollars. He told the Vendor that he had the money and that he would pay him as soon as the search was completed. He stated that the Vendor agreed and arrangements were made for the Deed to be collected at the Vendor's home the following day.

26. On the following day, the Plaintiff went to the Vendor's home and collected the Deed for the property. The Plaintiff informed the Vendor that he could get Mr. Gopaul to prepare the agreement and handle the conveyance. The Vendor confirmed that he had a good title and that he will get all his monies when the search was completed. The Plaintiff stated that the Vendor "told me that he wanted all his money in one, that I could go ahead and do the search and then pay him all his money." The Plaintiff testified that he wanted a proper agreement so he told the Vendor that they could let Mr. Gopaul hold the deposit until the search was completed. The Vendor agreed.

27. The Plaintiff's testimony regarding the circumstances leading up to and including the actual execution of the agreement for sale between himself and the Vendor was consistent with that given by his witness Mr. Gopaul's. Noteworthy is his evidence that after he got the Deed from the Vendor, "he contacted Mr. Gopaul, took the deed to him and gave him instructions to prepare the agreement." [my emphasis]

28. The Plaintiff later learnt of the death of the Vendor. He consulted with his Attorney at Law, Mr. Gopaul and thereafter awaited the appointment of a Legal Personal Representative. Upon his instructions, Mr. Gopaul was in communication with Harrikissoon and Company, Attorneys for the First Defendant. The Plaintiff was of the view that the sale would be completed when the First Defendant returned to Trinidad and Tobago.

29. Having heard nothing from the Defendants Attorneys in 2000, the Plaintiff instructed Mr. Gopaul to update his search and learnt of the Deed of Assent. Having unsuccessfully attempted to settle the matter, he gave instructions for this matter to be commenced.

30. Under cross-examination, the Plaintiff stated:

- (i) that sometime after, he became aware that the Vendor had made a Will in which he had devised the same property and that the Will had been executed just before the agreement was signed;
- (ii) that there was nothing abnormal about the Vendor, that the Vendor was on his bed but claimed that he was not bedridden. He admitted that the Vendor did not leave his bed to meet them;
- (iii) that Mr. Gopaul did not advise the vendor that he should seek independent legal advice. Mr. Gopaul did not talk about Attorneys. He could not recall Mr. Gopaul saying that he acted for both parties. He did not know that this may have resulted in a conflict of interest.

THE AGREEMENT FOR SALE

31. The agreement for sale which forms part of the evidence, inter alia provides as follows.

- “2. The purchase price shall be the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) of which the sum of TEN THOUSAND DOLLARS (\$10,000.00) by way of deposit is now paid (the receipt whereof the vendor hereby acknowledges).

3 The said deposit of TEN THOUSAND DOLLARS (\$10,000.00) is to be held in escrow by Mr. Wesley S. Gopaul Attorney at Law for the purchaser pending verification of the title of the said lands and shall be refunded to the purchaser in the event the title proves to be defective.”

32. The Grant of Probate and Deed of Assent conveying the property to the Second Defendant were documents included in the agreed bundle and were by consent, admitted into evidence. The value of the Estate (including the property) was one hundred and thirty six thousand dollars (\$136,000.00).

THE DEFENDANTS EVIDENCE

Shirley Neemah

33. Shirley Neemah the First Defendant is a nurse and lives in the United States of America. She is the daughter of the Vendor and the Second Defendant is her brother.

34. Around the 6th of November, 1997 she returned to Trinidad to visit the vendor who was very ill and rapidly deteriorating in health. The Vendor was bedridden, physically weak and could not walk. She assisted the Second Defendant in bathing, cleaning, feeding and taking care of the Vendor. She stated that the Vendor spoke very slowly and could not read. He could understand when she spoke to him and was able to sign his name.

35. On the morning of the 17th November, 1997, the Vendor informed both her and the Second Defendant that he will not make it and that he wanted to be taken to his lawyer at Harrikissoon and Company. An appointment was set up for that morning.

36. The Second Defendant driving his pickup van, took both the Vendor and herself to Harrikissoon and Company. On their arrival Ms. Harrikissoon came downstairs and spoke to the Vendor in the van. This was so as the Vendor could not walk. Ms. Harrikissoon spoke to the Vendor for about ten (10) minutes and wrote certain information. She left and returned about fifteen (15) minutes later accompanied by her Clerk. She read and

explained to the Vendor the Will that she prepared. The vendor executed the Will and they immediately returned home.

37. On the 19th November, 1997 the First Defendant returned to the United States but again traveled to Trinidad on the 23rd November consequent upon the death of the Vendor on the 22nd November, 1997.

38. Sometime in November, 2001 the Second Defendant telephoned and informed her that the Plaintiff visited him with a lawyer letter informing him that the Vendor agreed to sell the property to him.

39. Subsequently the First Defendant applied for Probate of the Vendor's Will made on the 17th November, 1997 and Probate was granted to her on the 2nd October, 1998. By Deed of Assent dated 4th May, 2000 and in her capacity as Executrix of the Vendor's estate, she conveyed the property to the Second Defendant.

40. The First Defendant was cross-examined, the thrust of which was firstly to demonstrate that when the Vendor executed his Will on the 17th November, 1997 that he had the requisite mental capacity and that the evidence suggesting otherwise was a fabrication.

41. Secondly, it was suggested that the First Defendant's assertion that she had no knowledge of the agreement until November, 2001 was untrue. She was probed on correspondence exchanged between Harrikissoon and Company (acting on the First Defendant's behalf) and Mr. Gopaul for the Plaintiffs. While she accepted that her Attorney wrote three (3) letters concerning the agreement on 4th May, 1998, 26th November, 1998 and 26th January, 1999, this she asserted was done without her instructions.

Gerald Neemah

42. The Second Defendant lived with the Vendor since birth, is unemployed as well as the recipient of disability benefits. Around 6th November, 1997 the First Defendant came

to Trinidad to assist in the care of the Vendor who was very ill and rapidly deteriorating in health. The Vendor was bedridden, physically weak and unable to walk. He stated that the Vendor would understand when he was spoken to and was also able to sign his name.

43. In so far as the circumstances under which the Vendor came to make his Will on the 17th November, 1997 was concerned, the Second Defendant's evidence was consistent with that of the First Defendant, his sister. The Vendor asked that he be taken "to his Lawyer, Harrikissoon to fix up his papers." The Vendor was taken to Harrikissoon and Company where he executed the Will that was prepared on his instructions to Ms. Harrikissoon who read and explained the terms of the Will to him. Subsequent to the 17th November, 1997 the Vendor's speech deteriorated.

44. On 20th November, 1997 the Plaintiff visited the home of the Vendor and asked the Second Defendant to speak to him. The Second Defendant knew the Plaintiff from an earlier transaction that had been conducted a few months earlier in which the Vendor sold the Plaintiff a parcel of land at Phillipine. As a result of the Vendor's insistence, the Second Defendant took the Plaintiff to the Vendor's bedroom where he spoke to him for a few minutes then shook his hand before he left.

45. Sometime around midday on the following day, the Plaintiff and his lawyer Mr. Wesley Gopaul visited the home of the Vendor. The Second Defendant knew Wesley Gopaul as the Plaintiff's lawyer who had prepared the Deed for the earlier transaction at Phillipine. In spite of the Vendor's deteriorating health and the Plaintiff's request, both he and Mr. Gopaul were taken to the Vendor's room where the Plaintiff spoke with the Vendor. The Vendor mumbled a few words and began crying. Subsequently, they left the room. They did not tell or show the Second Defendant any documents.

46. The Vendor's condition deteriorated rapidly and the following day he died.

47. On the 15th November, 2001 the Plaintiff came to the home of the Second Defendant, gave him a lawyers' letter and informed him that the Vendor agreed to sell the property. He informed the Plaintiff that this was the first that he had heard of this,

whereupon he was informed of the written agreement and that he needed to speak with Mr. Gopaul. The office of Wesley Gopaul contacted the Second Defendant the following day and he was told to make contact with the Plaintiff. On the 20th November, 2001 he received correspondence from Mr. Gopaul claiming that the Vendor sold the property to the Plaintiff. Knowing this to be untrue, the Second Defendant did not contact either the Plaintiff or Mr. Gopaul as requested.

48. The Second Defendant was cross-examined at length. He stated that he lacked education, but even making allowance for this handicap, his evidence was unreliable and this Court formed the view that it was tailored to meet his case. His oral evidence contained material contradictions and as between his written statement and what he said in oral evidence, there were large and irreconcilable differences.

49. I give a few examples. At paragraph 8 (b) of the Defence, the Second Defendant admitted to being present when the agreement was executed but denies either negotiating himself or being aware of the negotiations. Initially when cross-examined, he denied being present when his father signed the agreement and denied even giving instructions to his attorney that he was present. When confronted with material contained in paragraph 15 of his witness statement he admitted knowledge of the agreement as he was present when it was signed. He also admitted to telling lies in his witness statement regarding his knowledge of the agreement.

50. Under cross-examination, the Second Defendant when probed, was forced to admit that material parts of his witness statement contained lies. He agreed that his witness statement was untrue when it asserted that the Plaintiff and Wesley Gopaul did not present any document to the vendor to sign and that they did not read or explain the document to him. Likewise he admitted to telling lies in his witness statement when in paragraph 10 he portrayed the meeting with the Vendor as lasting a few minutes and his father mumbling some words that he could not recognize and again that those passages in his witness statement that depicted his father as mumbling and crying were lies. His cross-examination concluded with his admission that he would not have lied had the proceeds of the sale come to him.

51. There is no dispute that the Vendor executed his last Will at his Attorney at Law Harrikissoon and Company on 17th November, 1997 just three days before he signed the agreement for sale. There is no medical evidence to establish that while the Vendor possessed the requisite capacity on the 17th November, 1997 he no longer had it on the 21st November, 1997.

FINDINGS OF FACT

52. I have for the reasons already stated, not found the Second Defendant (on whose evidence the Defendant's case in the main is made out) to be a reliable or credible witness. In my judgment, this witness was motivated to lie or embellish the facts with the hope of obtaining the proceeds of the sale of the property at 50 Circular Road. He admitted this. This undoubtedly coloured and distorted his recollection of events. The Plaintiff on the otherhand, a supermarket proprietor and real estate agent, gave his evidence confidently, clearly and cogently. The Court formed the impression that he was an astute businessman. His witness Wesley Gopaul (the Plaintiff's Attorney at Law for over twenty (20) years) came over as a clear and honest witness. His memory of the transaction was quite good as one would expect, given his role. For this reason, I have accepted the account given to me by the Plaintiff and his witness in preference to the account, or in some respects, the varied accounts given by the Defendants.

53. In viewing this transaction, I found that the Vendor was at a special disadvantage in dealing with the purchaser due to his age, frailty and his illness and this affected his ability to conserve his interest.

54. There is little dispute that the Vendor executed the sale agreement on his bed, and at that time appeared ill, and was frail and elderly. He died on the following day. Direct evidence of the Vendor's condition was provided by the Plaintiff, Wesley Gopaul and the Defendants (whose evidence though grossly exaggerated contained a kernel of truth). There is no evidence that the Plaintiff suffered any such disability.

55. Additionally, the Plaintiff negotiated the purchase of what must have been the Vendor's major asset. That he was able to buy this property with cash and without

recourse to any bank only serves to highlight his advantaged position. The value of the Vendor's estate set out in the Grant of Probate dated 2nd October, 1998 is one hundred and thirty six thousand dollars (\$136,000). The Vendor's Will identifies his three assets as:-

- (i) his dwelling house standing on a parcel of land at No. 31 Solomon Street, San Fernando, owned by the First Defendant
- (ii) the property and
- (iii) a parcel of land at Dumfries Road (which on the evidence was described as the land in Phillipine and was sold one year earlier)

Inferentially, the property was the major asset owned by the Vendor, an asset that he attempted to sell for \$150,000.00 and the Plaintiff offered to buy at \$80,000.

56. As to whether Mr. Gopaul acted for the Vendor, the Court was not persuaded that he did. The unchallenged evidence of both Defendants was that Messrs, Harrikissoon and Company was the Vendor's lawyers (see paragraph 4 of the witness statements of Shirley Neemah and Gerald Neemah). On the other hand, Wesley Gopaul did not obtain any written instructions from the Vendor retaining him to act on the Vendor's behalf nor did he obtain his consent to so act. Neither could the Court find any evidence from which it could be implied that such a relationship existed. The Court reminded itself of the observations of Lord Scott in **Royal Bank of Scotland v Etridge (AP) [2001] UKHL 44** at paragraph 179 where he said

“The formation of the solicitor/client relationship may come about by express retainer or the retainer may be implied by conduct. But whichever it is, it is not a relationship which can be brought into existence by the solicitor unilaterally.”

I find as a fact that Wesley Gopaul did not act for the Vendor. The Court also observed that Wesley Gopaul settled the pleadings in this matter and testified on behalf of the Plaintiff.

57. In my judgment, in the absence of independent legal advice, the Vendor was at a serious disadvantage to the Plaintiff. The Vendor was 83, frail, ill and at the time of execution of the agreement bedridden. The Plaintiff was a real estate agent, a supermarket proprietor and in the Court's assessment, an astute businessman. At least two aspects of the transactions pointed to the need to for independent legal advice to protect the Vendor's interest and restore the balance. Firstly, the transaction involved the sale of the Vendor's major asset which he purported to do while at the same time he was making arrangements through his Will to devise the very asset to the Second Defendant. As to the second, the agreement contained a provision in which the Vendor acknowledged receipt of the purchaser's deposit although this was retained by the purchaser's Attorney, and no money was actually received. While in the estimation of Wesley Gopaul, the Vendor appeared to understand everything that was taking place, in my judgment, this perception was not one of disinterest.

THE LAW

58. It is settled that if a valid contract is entered into for the sale of land and the Vendor dies before completion, his representatives must convey the property and, although not paid over in his lifetime, the proceeds of sale form part of the Vendor's estate: **Lysaght v Edwards (1876) 2 Ch. D 499.**

59. In this case, the Defendants in opposing the grant of specific performance challenges the validity of the contract on the basis that:

- i) the Vendor lacked capacity,
- ii) the purchase price was a gross undervalue,
- iii) the absence of independent legal advice, and
- iv) the absence of consideration.

60. The issue of the Vendor's capacity was challenged by the Defendants who submitted that the term capacity must be given a much broader scope to include whether there was any disability affecting the Vendor's capacity or whether the Vendor was entitled to independent legal advice such as to equip him with the appropriate legal capacity.

61. There is a well developed jurisdiction in equity, independent of the principles as to undue influence, to set aside unconscionable bargains. The jurisdiction is a branch of the general equitable jurisdiction in fraud and is raised whenever one party to a transaction suffers from certain kinds of disability or disadvantage. This doctrine appears to be particularly vigorous in Australian jurisprudence: **Meagher, Gummow and Lehane's, Equity Doctrines and Remedies, 4th Edition (2002) pp 525-530** referred to in **Lawrence v Poorah (Trinidad and Tobago.) [2008] UKPC 21.**

62. In this jurisdiction, the Court of Appeal has recognized the principle that “while a transaction will not be set aside merely because it is improvident, it will be set aside if the Vendor acts without independent legal advice.” **Poorah v Lawrence (2008) C.V. Appeal No. 131 of 2001** allowing an appeal, the Court of Appeal set aside a conveyance by which Edna Poorah conveyed her family home to one of her daughters. Edna Poorah was at the time 77 years old, had recently lost her husband, illiterate and did not have the benefit of independent legal advice. Although the conveyance contained a standard-form receipt clause, no money was in fact paid over. This authority was advanced by the Defendants in their written submissions in support of their case.

63. Although an appeal against the decision of the Court of Appeal in **Poorah v Lawrence** was allowed, this was on the basis that the Court of Appeal was not entitled to set aside the orders made by the judge at first instance on grounds which had not been pleaded, which had not been relied on by the judge and for which permission to raise new points had not been sought from, or granted by the Court of Appeal. It was both unnecessary and inappropriate to consider the doctrines of undue influence and unconscionable bargain to determine the Appeal. The jurisdiction to set aside improvident transactions therefore remains undisturbed.

64. In my assessment of the facts, I have considered the circumstances of this case and in particular the Vendor's age at the time of the execution of the agreement, that he was bedridden, frail and that he did not have the benefit of independent legal advice. Wesley Gopaul himself accepted that if a party to a transaction was under a disability and there was some doubt as to whether he would understand what was being done, it would have

been prudent to have a medical doctor present or refer the party to another attorney, and had he known that the Vendor in the instant case would die on the following day, he would have taken such precautions. In the event, he did not.

65. The following passage in Meagher Gummow and Lehane's Equity Doctrines and Remedies, 4th Edition page 530 is apposite:

“The presence of independent advice will be an important factor in any attempt by the stronger party to show the bargain to have been fair, just and reasonable, after the weaker party has set up his case against the bargain. However, because the focus is not upon the quality of the weaker party’s assent but upon the conduct of the stronger party, the absence of independent legal advice operates differently in the case of unconscionable dealings than cases of undue influence. Although such a finding will go far to satisfying the onus imposed where there is a presumption of undue influence (see [15-135] above), the denial of an opportunity to have the assistance of a disinterested legal adviser is itself an element of the unconscientious conduct of the stronger party; irrespective of any speculation as to what the weaker party would have done if that opportunity had been given: *Bridgewater v Leahy* (1998) 194 CLR 457 at 485; 158 ALR 66 at 88; BC9805443; [1998] HCA 66.”

In my judgment, the failure of the Plaintiff in this case to take the precaution of referring the Vendor to another attorney to provide him with the assistance of independent legal advice constituted unconscientious conduct.

66. The Plaintiff relied on several authorities in support of his submission that there is no hard and fast rule determining whether in any particular case, independent legal advice is indispensable where an attorney acts for both vendor and purchaser, but I have not found them helpful in determining whether this Court should exercise its equitable jurisdiction and intervene with an order for specific performance.

67. **Mc Master v Byrne [1952] 1 All E.R. 1362, Vialva and others v Yearwood and others (2004) (unreported) H.C.A. No. 6487 of 1986, Straker v Ramnath Hansraj Maraj (1984) 39 WIR 22 and Clark Boyce v Mouat [1994] 1AC 428** are decisions where the issue of conflict of interest arose but in the context of a breach of duty involving either Solicitors or Attorneys at Law. These decisions are distinguishable as the courts were not there concerned with the exercise of their equitable jurisdiction.

68. Having regard to the agreed issue for determination in this matter, it is unnecessary for me to consider the other matters raised on the pleadings. On whether the purchase price of the property was a gross undervalue, no valuation either at the time of the negotiations or after, featured in this trial. That challenge was abandoned. On the issue of consideration, I accept the Plaintiff's submission that such existed on the face of the contract. As noted before, although acknowledging receipt of his deposit the Vendor never in fact received it.

DISPOSITION

69. In my judgment I am not satisfied on the balance of probabilities that this matter is an appropriate case where equity will intervene to grant specific performance. I therefore dismiss the Plaintiff's action for specific performance and order the Plaintiff to pay the Defendant's cost certified fit for Counsel to be taxed in default of an agreement.

Dated this 10th day of December, 2009.

Geoffrey Henderson
Judge