

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2006-00045**

**BETWEEN**

**JAITON MOHAMMED**

**Claimant**

**AND**

**KAZIM MOHAMMED**

**Defendant**

*Before the Honourable Justice P. Moosai*

**APPEARANCES:**

*Mr. Gerard Raphael for Claimant*

*Mrs. Mohanie Maharaj-Mohan for Defendant*

**JUDGMENT**

**1. Introduction**

**(a) Relief sought**

1. The Claimant seeks to have the deed of conveyance dated June 2, 2004 and registered on February 17, 2005, by which she purported to transfer her fee simple interest in her property known as No. 1 Babwah Street, Orange Valley, Couva (“the said property”) to herself for life and after her death to the Defendant, her son, at and for the sum of \$250,000, set aside.

**(b) Background**

**(i) The early years**

2. There is no dispute that initially the said property belonged to the Defendant's grandfather, Maloub Mohammed. At the date of his death Maloub Mohammed had four children namely Nazir Mohammed (the Claimant's husband and the Defendant's father), Zain Mohammed, Shairoon Mohammed and Vio Ramsingh. After his death, Maloub Mohammed's four children became equally entitled to the said property on which the family home stood. However the parties entitled were all aware that Maloub Mohammed wanted the said property to be given to Nazir Mohammed as he was the eldest son, in consequence whereof the said property was transferred in the sole name of Nazir Mohammed. Similarly, even though she was the daughter-in-law of Maloub Mohammed, the Claimant became entitled to a parcel of land (the said parcel of land) owned by Maloub Mohammed. It would appear that in keeping with the wishes of Maloub Mohammed, the Claimant transferred the said parcel of land to the other son, Zain Mohammed.

3. It is clear that Shairoon Mohammed, Vio Ramsingh and the Claimant acted in conformity with family tradition and honour. As Shairoon Mohammed stated, even though she was very poor, "I wanted to follow my father's wish because that was my father's wish, and I did it."

**(ii) The present position.**

4. The Claimant is 69 years old and the mother of the Defendant. The Claimant was married to the said Nazir Mohammed ("Nazir Mohammed"), who died on April 4, 2004. There were four children of the marriage, two boys and two girls namely, the Defendant (who was the eldest), Mozim Mohammed ("Mozim"), Movina Beharry ("Movina") and Raffina Jangalee ("Raffina"). The Defendant is almost 53 years old. Movina is 52 years old.

5. By deed of conveyance dated May 9, 1985 and registered as No. 10982 of 1985, Nazir Mohammed and the Claimant became seised in fee simple as joint tenants of the said

property. By deed of conveyance dated June 2, 2004, and registered on February 17, 2005, the Claimant as beneficial owner in consideration of the sum of \$250,000 purported to convey the said property to herself for life and after her death to the Defendant in fee simple. Neither party has provided a valuation for, nor valued the life interest of the Claimant in, the said property. However the Defendant testified that the said property is valued about \$700,000, a figure which I am prepared to accept.

6. By will dated October 28, 2004 prepared by Attorney-at-law Lennox Sankersingh, the Claimant gave, devised and bequeathed the said property to all four children, gave the motor vehicle to the Defendant and gave her jewellery to Raffina to be distributed according to instructions given to her by the Claimant.

**(c) Issues**

7. The Claimant submits that the following issues arise for determination:
1. Whether the Defendant falsely represented to the Claimant that he was taking her to an insurance company dealing with the insurance of houses.
  2. Whether the Claimant executed the deed in the presence of Attorney-at-Law Mr. Richard Sirjoo (“Sirjoo”).
  3. Whether Sirjoo read over and explained the contents of the deed to the Claimant.
  4. Whether the Claimant executed the deed believing it to be insurance documents.
  5. Whether any money was paid by the Defendant to the Claimant and/or the Claimant’s husband.
  6. Whether the Claimant received independent advice.
  7. Was it the intention of the Claimant and her husband to leave the said property to the Defendant or for all the children.
  8. Whether having regard to all the circumstances the transaction was fair and reasonable.

As is clear from the Claimant's written submissions, the Claimant is essentially relying on the plea of non est factum, fraudulent misrepresentation and unconscionable bargain. However it should be noted on the parties being recalled for further submissions, the Claimant raised the issue of undue influence.

## **2. Analysis of the evidence**

### **(a) The Claimant**

8. In analysing the evidence, I have made allowances for the Claimant's age and her powers of recall. It is clear that the Claimant wished to give the impression that she was semi-literate, having received very little formal education, contending that she signed the deed because she was too distraught over her brother's recent death (about three weeks before), and because of the fraud perpetrated on her.

9. However I am of the view that the Claimant is literate to some extent, has a reasonable grasp of the English Language, and can read and understand what she is signing. Some support for this conclusion can be gathered from the fact that the Claimant attended the Canadian Missionary Primary School up to Standard Four. The Claimant herself in cross-examination admitted that she taught her husband to read and write. Further, at the very beginning of cross-examination, she was able to read paragraphs 1 and 2 of her witness statement reasonably well and went on to admit that she clearly understood everything in her witness statement. The Claimant even admitted that she would always read a document before signing it, but was unable to provide an explanation as to why she did not read that document on that day before signing same even though she had her glasses with her. Similarly the Claimant was unable to explain how her passport number came to be on the said deed insisting that on that date she did not walk with her passport.

10. Moreover even though the Claimant initially attempted to mislead the court by pretending that she had never executed a deed before, when confronted in cross-examination

with the 1985 deed, she began by denying that she had signed same, but eventually conceded that she remembers signing same. She was even able to read the first two lines of the deed reasonably well. And she was able to identify document 1 by pointing to the embossed part. She also went on to admit that she had in fact executed another deed on another occasion.

11. It is therefore appropriate to judge the Claimant not from the perspective of a lawyer or someone highly educated with a working knowledge of deeds, but as someone who was literate to some extent and had executed a couple of deeds before. The Claimant further sought to suggest that on that date she was as similarly circumstanced as when she was testifying in that she needed a walking stick to move about. I reject her testimony in that regard.

12. It is clear to me that shortly after the execution of the said conveyance on June 2, 2004 (but only registered on February 17, 2005) whereby the Claimant purported to transfer the said property to herself for life and after her death to the Defendant, the Claimant had a change of heart. This change of heart was more likely than not because of the pressure exerted by the other children, but principally by the daughter with whom she now resides, Raffina, after she found out that the Claimant had conveyed some interest in the said property to the Defendant. It also appears to me that the Claimant's brother Hakim Gardner, who incidentally was named as the sole executor of the Claimant's will dated October 28, 2004, also had a part to play in advising the Claimant to take the stance which she did.

13. The response by the Claimant in cross-examination provides some support for the conclusion that she was aware that she was about to transfer some interest to the Defendant. The Claimant testified that on that date (June 2, 2004, the date of the execution of the said conveyance), she had told Raffina that she was going with the Defendant. This is her testimony:

“Q: On June 2, 2004, you told any of your other children you were going with Kazim?

A: I told Raffina and Raffina told me how come he going with you, and I say he taking an interest, let him take it, and he went with me.

Q: So you willingly went with him?

A: Yes. I went with him, and I say he taking an interest, let him take it.”

14. In my view this was a Freudian slip, reflecting what truly transpired which is that the Claimant was aware, consequent upon the Defendant’s discussion with her, that the purpose of going with the Defendant on that day was to convey **an interest** in the said property to the Defendant. And the evidence is clear that this Claimant had executed two deeds before. Moreover the Claimant admitted in cross-examination that she knew what a life interest was, making it very likely, as I have found, that the concept of a life interest was explained to her by the Defendant (in layman’s terms) prior to going to Sirjoo’s office, and subsequently by Sirjoo. In that regard I also accept her testimony in cross-examination that the Defendant told her what a life interest is. As the Claimant seemed to be saying that she decided to let the Defendant have an interest in the property, the Court wanted to ensure that she understood what she was saying and immediately asked.

[TO COURT

Q: Let him take it, take what?

A: Let him take the interest nah, but I didn’t know he was carrying me by a lawyer.”]

It seems to me that this was a skilful but unsuccessful attempt to repair the damage by adding that she didn’t know she was being taken to a lawyer’s office.

15. Further the irresistible inference to be drawn is that after her conversation on the morning of the conveyance (June 2, 2004), the Claimant, because of the pressure exerted by the other children, on September 28, 2004 executed a will prepared by Attorney-at-Law, Lennox Sankersingh (“Sankersingh”) whereby she appointed her brother, Hakim Gardner, the Sole Executor and gave, devised and bequeathed the said property to her four children, the vehicle to the Defendant, and her jewellery to Raffina. This accords with what Nazir Mohammed predicted, which is that after the other children found out that the said property had been conveyed to the Defendant, they would grumble for a little while.

16. Moreover it is clear that it was around the time that Sankersingh was conducting a search on the title to the said property (around the middle of 2005) that the Claimant voluntarily

moved out of the said property and began residing with Raffina. The Claimant's testimony is that Raffina takes care of her while she is in Trinidad, and whenever she goes to Canada she stays by her big daughter, Movina, who takes care of her. The Defendant testified that he used to visit the Claimant by Raffina's house, but that he has now been prevented from so doing.

17. In considering the Claimant's demeanour, her lugubriousness in the witness-box seemed designed to serve two purposes: (i) to attract sympathy from the court; and (ii) to pacify both daughters who were present in court. Her former purpose failed miserably. Her display serves as a reminder to courts to be ever vigilant, particularly in family matters, where death of the patriarch or matriarch can so often lead to all kinds of baseless allegations for a share of the family fortune, based on a subjective assessment by parties that they ought to be entitled to a greater share than was allocated to them.

18. In my view the pressure exerted on the Claimant is what prompted the Claimant to level the kinds of allegations we have seen in this case against Sirjoo and the Defendant and would explain why she testified as she did.

19. My overall view of the Claimant therefore places me at a great disadvantage in trying to assess her residual credibility since the fact that she set out to deceive the Court means that I have to be very careful when I come to assess her evidence. While therefore the Claimant did not strike me generally as being a reliable witness, there are certain parts of her testimony which I accepted. Naturally therefore where there are conflicts in the evidence between the Claimant and the Defendant or his witnesses, I propose to rely on the latter.

**(b) The Defendant**

20. It is manifest that Nazir Mohammed and the Claimant regarded the Defendant as the one to have the benefit of the said property. After all he was the eldest child and the one who remained in the household, and the one who carried on a fishing business similar to his father's.

The Defendant left me with the general impression that he was a reliable witness. One area of concern was the fact that it was only in cross-examination that the Defendant stated he had gone to an insurance company on that date. In my view, and in keeping with the philosophy of the Civil Proceedings Rules, 1998. ("CPR"), that should have been pleaded with particularity. In any event I accept the Defendant's testimony that on that very same day after the deed had been executed he went back home and checked his mail and discovered that the insurance policy on the house had been cancelled. It was in those circumstances that he visited the insurance company's office that very evening and paid the insurance.

**(c) Richard Sirjoo**

21. Sirjoo also impressed me as a credible witness. Bearing in mind that Sirjoo was not as thorough as he should have been, it would have been quite easy for Sirjoo to have come and embellished his account of what he had done. To his credit he did not seek to do that.

**(d) For Kazim or not**

22. A material issue arising for determination is whether the said property was intended for the Defendant. That would give the court some insight as to the conduct of the parties with respect to the impugned transaction.

23. The Claimant in her testimony contended that it was always the intention of Nazir Mohammed and herself that the said property should be left to their four children (para 14 of witness statement). However the Defendant contended to the contrary, alleging that the said property, prior to it being held jointly by the Claimant and Nazir Mohammed, belonged to his grandfather, Maloub Mohammed, who made it absolutely clear that the said property was meant

firstly for the Defendant's father, Nazir Mohammed, and thereafter was to be given to the Defendant, the eldest son of Nazir Mohammed and the Claimant. Further, the Defendant went on to assert that even though the said property was subsequently held jointly by the Defendant's parents, it was the Defendant's father who had the ultimate say as to the final disposition of same and, in keeping with Indian family tradition, it was meant to go to the Defendant as the eldest son. Moreover the Claimant was at all material times aware of and agreed to such a course.

24. In determining the instant issue, the Claimant in cross-examination indicated that she and her husband never had any discussions about the eventual distribution of his property until he was in the hospital in Canada (this would be shortly before his death) when he told her he wanted the said property to be shared among his four children. I reject the Claimant's testimony on this issue. Having regard to the testimony emerging in this trial, it is highly improbable that during their years of marriage they would never have discussed or determined what was to be done with their entire property, inclusive of the said property, until Nazir Mohammed was sick and, as is now obvious, was dying in a hospital in Canada.

25. In that regard Nazir Mohammed's sisters, Vio Ramsingh and Shairoon Mohammed, provided significant support for the Defendant's contention. Having seen both, I view them as independent and credible witnesses with nothing to gain from the outcome. Indeed both testified that they continue to share a good relationship with the Claimant. Both also gave me the impression that they had, and still have, a great deal of respect not only for Nazir Mohammed, but also for the Claimant. Vio Ramsingh even stated that she grew up with Nazir Mohammed and the Claimant from the time she was 13 years old, and the Claimant was the one who married her. Even though both conceded that Nazir Mohammed never discussed the intimate details of his business affairs with them, it is not difficult to imagine siblings discussing generally the manner of the distribution of their estate. Both also expressed surprised that this matter was being litigated. On this issue, both Shairoon Mohammed and Vio Ramsingh confirmed that Nazir Mohammed had expressed the desire that the said property should go to the Defendant.

26. According to Shairoon Mohammed, Nazir Mohammed always said that his father said to give the said property to the Defendant and he would act in accordance with his father's wishes. Shairoon Mohammed referred to some of the occasions when Nazir Mohammed spoke of this. On one of those occasions her children and Vio Ramsingh's children were present. She went on to state that the Claimant was well aware of her husband's intention as the Claimant was present on some of the occasions when Nazir Mohammed said this, and did not disagree. Indeed the Claimant would respond by saying to her husband, "Yes, bait." ("Yes, dear").

27. According to Vio Ramsingh in chief, Nazir Mohammed on many occasions had said to her that he wanted the said property to go to the Defendant. Moreover her father as well wanted the said property to go to the Defendant.

28. Very importantly and on this very same issue, the Defendant in chief stated that towards the end of July 2003, at his father's request, he assisted his father in selling a boat owned by his father. The said boat was sold for \$690,000. His father then told him that as he was getting older and suffering from health complications, including arthritis, he wanted to dispose of his personal belongings to his children before he became ill and died. In this regard I also accept the Defendant's testimony that he also suggested to his father that it would be better to give the other three children their money so that they could help themselves. Once again this type of interaction between the Defendant and his father is indicative of the great amount of trust, respect and affection which Nazir Mohammed, and the Claimant, had for the Defendant. It is clear therefore that Nazir Mohammed, rather than consulting the Claimant with respect to his business affairs, would consult the Defendant. Further it is common ground that Nazir Mohammed was the one who would direct the Claimant as to what was to be done.

29. The Defendant went on to state that his father subsequently used the proceeds from the sale of the boat and gave to the other three children, namely Mozim, Movina and Raffina the sum of \$100,000 each. In cross-examination on this issue the Claimant once again came up woefully short. When asked whether she knew if her husband gave the children money, she immediately said, "Behind my back he could have given them money. I don't know." The Claimant then affirmed that the other three children, Mozim, Movina and Raffina never told her

that they received any money from their father. However when confronted with the three cheques dated July 11, 2003, each in the sum of \$100,000 made out to Mozim, Movina and Raffina, the Claimant quickly back-pedalled and hastily admitted that she knew her husband had given those three children \$100,000 each when he sold the boat. While I have made allowances for the Claimant's age and powers of recall, it is clear to me that the Claimant, on material issues, would feign ignorance or would not admit to matters detrimental to her interest unless there was positive proof from the other side which would contradict her testimony.

30. Surprisingly it was suggested to the Defendant that his father had also offered him \$100,000 but that he had refused it. Not only was there no evidence to support this, but it flies in the face of the position originally adopted by the Claimant which was that she was unaware whether her husband had given any of the children money.

31. In further cross-examination, the Claimant also sought to suggest that apart from the \$100,000 to each of the three children, Nazir Mohammed left \$150,000 for her and \$150,000 for the Defendant. She immediately modified that by stating that her husband didn't give the Defendant that, but put the Defendant as beneficiary of \$150,000 and herself as beneficiary of \$150,000. It is clear that these sums were in a joint account standing in the names of Nazir Mohammed, the Claimant and the Defendant. The Defendant whose testimony I accept on this issue explained how his name came to be on that joint account. The Defendant stated that prior to leaving for Canada, Nazim Mohammed, the Claimant and he went to Unit Trust where his father placed the Defendant's name on the joint account. After his father died, the Defendant went to Unit Trust and discovered that the Claimant and his sister had withdrawn \$150,000 from the said joint account. He also found out that he was entitled to the other \$150,000, a fact not known to him before. The Defendant went on to state that he never considered that money as being given to him as his father merely told him he was in charge. Rather he considered that once his father returned from Canada, that money would belong to him. Indeed the Defendant stated that after his father died, he told his mother that she could take that money and give it to the other three children, but the Claimant said no, she wasn't ready to give it to them yet. The Defendant continues to assert that the money is still there and can be utilised by the Claimant for her own use.

32. Shairoon Mohammed and Vio Ramsingh also support the Defendant on this issue. In August 2003, a prayer service was organised for Nazir Mohammed before he left to go to Canada for medical treatment. Both Shairoon Mohammed and Vio Ramsingh were invited, but the former was unable to attend because of illness.

33. Vio Ramsingh stated that it was the last occasion on which she spoke to Nazir Mohammed as he died in Canada a few months later. On that occasion he told her that she need not pay back the \$2,000 which he had lent her to pay her medical bills. He also told her the reason he was having the prayer service was because he was sharing whatever he had with his four children. He told her that he had already given three of his children money, and he gave the Defendant the said property. He did not tell her how much money he had given to the three children. He also told her that as he was a Muslim and didn't want to wear gold, he was giving his jewellery to his children.

34. While it is clear that Nazir Mohammed had not yet given the said property to the Defendant, the evidence of Shairoon Mohammed suggests that even while he was sick in Canada, he was concerned that he had not yet done so.

35. It is manifest that Nazir Mohammed, as a loving, caring and responsible father, was trying his best to put his house in order in the event that something should happen to him. Indicative of that intention was his distribution of the cash (\$300,000) and his jewellery. It is highly improbable that Nazir Mohammed would have been taking all these steps without informing or discussing same with the Claimant. With regard to the jewellery, I accept the evidence of the Defendant that he did not receive any. Moreover as evidence of his continuing to love, care and provide for his other children, Shairoon Mohammed testified that on numerous occasions he would meet Nazir Mohammed and the Claimant in the grocery and they indicated they were buying groceries for Raffina.

36. Both Vio Ramsingh and Shairoon Mohammed also confirmed that the Defendant contributed to the construction of the downstairs portion of the said property. In that regard Vio Ramsingh in cross-examination stated that there was already a kitchen and toilet downstairs, and what the Defendant constructed was a living-room and bedroom. The Claimant herself confirmed that at the time the house was rebuilt, Nazir Mohammed built a kitchen downstairs. I therefore hold that the Defendant constructed the downstairs portion of the said property (save for the kitchen and toilet) and enclosed same by erecting a wall. For the sake of completeness on this issue of the construction by the Defendant, it is clear that the Claimant sought to give the impression that the Defendant never assisted his father in any manner, but readily admitted in cross-examination that the Defendant gave his father \$5,000 to assist in renovating downstairs.

37. The Defendant has not provided a valuation as to the cost of the said renovations, but I am prepared to hold that it was significant. Moreover I accept the Defendant's testimony that he would have spent a substantial amount of money whether by way of renovations or otherwise on the said property and by direct contribution to his father. For example the Defendant stated that before his father left for Canada he gave him \$10,000 US. There is no other evidence before me to suggest otherwise. Surely it would have been easy to produce records showing that the father withdrew his own monies. I therefore hold that the Defendant contributed the sum of approximately \$250,000 which would include the cost of the downstairs renovations and monies which he would have given directly to his father over the years.

38. Finally on this issue I accept the Defendant's testimony that around that time when that was happening his father said to the Claimant in his presence:

“Jai, I giving “Pepsi” the place, if anything happens to me give “Pepsi” the place. The kids would grumble for a little while, and then it would be over.”

Again on this issue I accept the Defendant's testimony when he was asked if he had told his other siblings that the Claimant was going to transfer the said property to him and he said no, and followed up by referring to an earlier conversation that both he and his father had with his brother:

“My father told my brother that he was going to give the property to me, and my brother said ‘why you doh dead and go.’ My father told me this. And my brother himself told me this.”

I therefore hold that the evidence reveals that the said property was intended for the Defendant.

#### **4. The law**

##### **(a) Equitable fraud**

39. The Claimant’s claim as originally framed relied on certain categories of equitable fraud, namely fraudulent misrepresentation and unconscionable bargains, and on the common law defence of non est factum. The Claimant expanded his claim during submissions to include another category of equitable fraud, undue influence.

40. It is impossible to provide a complete definition of equitable fraud. In equity the term “fraud” included not only actual fraud (in the modern sense of fraudulent misrepresentation), but also certain other conduct which fell below the standards demanded by equity (and conventionally known as “constructive fraud”). Courts of Equity did not stop at moral fraud in the ordinary sense but also took account of any breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience. The courts also refused to impose defined limits on fraud, adhering to the view that fraud is as infinite as human ingenuity.<sup>1</sup> Viscount Haldane LC in *Nocton v Lord Ashburton* considered the doctrine of fraud in equity<sup>2</sup>. His Lordship made it clear that that an intention to cheat need not always be proved. Rather the focus is not upon moral fraud in the ordinary sense of the word, but upon breach of the sort of the obligation which is enforced by a court [of equity] that from the beginning regarded itself as a court of conscience:

---

<sup>1</sup> Snell’s Equity 31<sup>st</sup> edn (2005) paras 8-01,8-05.

<sup>2</sup>[1914] AC 932 at 954 (HL).

... when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct in that sense has always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.

41. Constructive fraud has traditionally been treated under the four headings of undue influence, abuse of confidence, unconscionable bargains and fraud on a power. The touchstone of these various doctrines under the umbrella of "constructive fraud" is unconscionable conduct.

## **(b) Fraudulent Misrepresentation and Non est Factum**

### **(i) Fraudulent misrepresentation**

42. **Snell's Equity**<sup>3</sup> defined fraudulent misrepresentation, which courts of equity remedied concurrently with courts of common law, in the following manner:

“[Fraudulent misrepresentation] consists of a false statement of fact which is made by D to C knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false, with the intent that it should be acted upon and which is in fact acted upon by C. D will be liable in such a case even though the misrepresentation was made with no corrupt motive and with no expectation of profit, and even though the person defrauded had a full opportunity of discovering the fraud or had an agent who knew the truth. But where an agent innocently makes a statement which his

---

<sup>3</sup> Snell's Equity (n1) para 8-06.

principal knows to be false, neither agent nor principal is guilty of fraud unless the principal intended the agent to make the false statement.”

43. It is common ground that the Claimant would succeed on the ground of fraudulent misrepresentation if the Defendant led the Claimant to believe that she was signing insurance documents and she then signed same in front of a clerk in the office of attorney Richard Sirjoo, without same being explained or read over to her, or without her being given an opportunity to read same.

**(iii) Non Est Factum**

44. The locus classicus with respect to the plea of non est factum is the authority of *Gallie v Lee*<sup>4</sup>. Essentially it may be possible for a person in certain cases to deny that a written document is his: non est factum. However the scope of the plea of non est factum is very limited and 'must be kept within narrow limits'; Lord Reid at 1015G. It is only in exceptional circumstances that the signer of the document who is able to read and sufficiently understand same will be able to rely on the plea: Lord Pearson at 1035A. In particular a person who signs a document differing fundamentally from what he believed it to be would be disentitled from successfully relying on a plea of non est factum if his signing of the document was due to his own negligence or carelessness: *ibid* 1036H – 1037A. For a party to succeed there must therefore be a radical or fundamental difference between what he signed and what he thought he was signing. Lord Pearson at 1034C – E articulated the position with regard to persons not capable of both reading and sufficiently understanding the document to be signed:

In my view, the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By “sufficiently understanding” I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be. There must be a proper case for such relief. There would not be a proper case if (a) the signature of the document was brought about by negligence of the signer in failing to take precautions which he ought to

---

<sup>4</sup> [1871] AC 1004 (HL).

have taken, or (b) the actual document was not fundamentally different from the document as the signer believed it to be....

**(ii) Conclusion on Fraudulent Misrepresentation and Non est Factum**

45. Clearly the Claimant would not be able to succeed on the grounds of fraudulent misrepresentation or non est factum as I have found that: (i) the Claimant approved of the Defendant approaching a lawyer to prepare a deed conveying the said property to her for life and after her death to the Defendant in accordance with the wishes of her deceased husband and herself; (ii) the Claimant was aware at all material times of the nature and character of the document that she was executing, and that the same had been explained to her by the lawyer.

**(c) Unconscionable Bargains**

46. As indicated earlier, the doctrine of unconscionable bargains is a species of constructive fraud whose touchtone is unconscionable conduct. In unconscionable bargains 'there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness, There has always been an appearance of fraud from the nature of the bargain': *Earl of Chesterfield v Janssen*<sup>5</sup>. The doctrine of unconscionable bargains involves some unconscionable exploitation by the transferee of some relative weakness in the position of the transferor.<sup>6</sup> Moreover, as distinct from undue influence, there is no presumption against the transaction raised by any anterior relation or influence. Davey JA in *Morrison v Coast Finance Ltd.*<sup>7</sup> distinguished between the doctrines of undue influence and unconscionable bargains as follows:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question

---

<sup>5</sup> (1751) 2 Ves. San. 125, 157 (Lord Hardwicke).

<sup>6</sup>(See David Capper, 'Unconscionable Bargains and Unconscionable Gifts' *Conveyancing and Property Lawyer* (1996); *Muriel Lawrence v Edna Poorah* [2008] UKPC para 20).

<sup>7</sup>(1965) 55 DLR 2d 712 at 713

whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the position of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Aylesford (Earl) v Morris* (1873) 8 Ch App 484, 42 LJ Ch 546, per Lord Selborne at 491, or perhaps by showing that no advantage was taken...

47. In Australia, where the doctrine appears to be well-developed, **Meagher, Gummow and Lehane's Equity Doctrines and Remedy**<sup>8</sup>, explains the concept as follows:

The jurisdiction [to set aside catching and unconscientious bargains] is a branch of the general equitable jurisdiction in fraud. It is raised 'whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands': *Blomley v Ryan* (1956) 99 CLR 362 and 415 per Kitto J. In the same case and context, Fullagar J (at 405) added to Kitto J's list, age, sex and 'lack of assistance or explanation where assistance or explanation is necessary'.

One might also include unfamiliarity with or imperfect English....

It will be seen that the essence of these situations is (a) parties who meet on unequal terms, (b) the stronger party takes advantage of this, (c) to obtain a beneficial bargain. When this is shown by the weaker party, the onus will pass to the stronger party to show his conduct to have been fair, just and reasonable: *Fry v Lane* (1888) 40 Ch D 312 at 322. In that case the court spoke of "poverty and ignorance" as important factors; in *Cresswell v Porter* [1978] 1 WLR 255 .... Megarry J emphasised that these were relative terms, so that whilst the plaintiff no doubt had her wits about her to earn her living as a telephonist, she was ignorant when it came to property transactions...'

48. In *Commercial Bank Limited v Amadio*<sup>9</sup>, Deane J traced the history of the doctrine of unconscionable bargains and propounded a three-pronged test:

---

<sup>8</sup>4<sup>th</sup> edn. (2002) para. 16-010

<sup>9</sup> [2000] 151 CLR 447 (HCA) at 474

The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty (see *O'Rorke v. Bolingbroke*). The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: "the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract" (see per Lord Hatherley, *O'Rorke v. Bolingbroke*; *Fry v. Lane*; *Blomley v Ryan*. (citations omitted).

49. The doctrine has been applied in cases of sales of property, mortgages, leases and of compromises of litigation. *Snell's Equity*<sup>10</sup> suggests that '[a] fortiori, the jurisdiction must extend to the setting aside of gifts.' I respectfully agree. As the lynchpin of the doctrine is the unconscionable exploitation of the transferor's weakness to gain an undeserved benefit, it is difficult to discern any rationale for not extending the doctrine to gifts. The High Court of Australia in *Wilton v Farnworth*<sup>11</sup> adopted such an approach and set aside a transaction which was voluntary. The plaintiff was a Kalgoorlie miner who was deaf, ill-educated, dull-witted and whose deceased wife was 20 years his senior. He had given her all his savings and upon her dying estate, the plaintiff became entitled to some 1800 pounds from her estate. The stepson of the plaintiff induced him to execute instruments agreeing to the stepson applying for letters of administration and assigning to him the share in the estate. Rich J at page 655 stated:

It has always been considered unconscientious to retain the advantage of a voluntary disposition of a large amount of property improvidently made by an alleged donor who did not understand the nature of the transaction and lacked information of material facts such as the nature and extent of the property particularly if made in favour of a donee possessing greater information who nevertheless withheld the facts. In the present case the capacities of the plaintiff and defendants were quite unequal. The plaintiff was sufficiently

---

<sup>10</sup>29<sup>th</sup> edn (2001) p229

<sup>11</sup>(1948) 76 CLR 646

handicapped by his defect of hearing in gaining an understanding of the facts relating to his wife's property, his interest therein and the transaction into which he was invited to enter. But his intelligence placed him in an even more unequal position in dealing with the defendant in the transaction. To all this the defendant must have been fully alive. We have here an improvident transaction entirely voluntary springing from no sensible motive. The donor has no education, small intelligence and a history of curious conduct.

The Court concluded that :

..... very substantial reasons have been proved for the intervention of a court of equity. Voluntary alienation of his property to the defendant was neither fair nor righteous and in the view of a court of equity it must be regarded as unconscientious for the defendant to take the gift or retain it.

**(i) Independent legal advice**

50. One of the difficulties encountered in this area is whether the absence of independent legal advice is a substantive requirement of the doctrine of unconscionable bargains. **Meagher**<sup>12</sup> is of the view that:

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, 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 458 ...Independent advice is not necessary to uphold a transaction but cf *Re Levey; ex parte Official Assignee* (1894) 15 LR (NSW) B&P 30 at 36.

---

<sup>12</sup> *Meagher (n8) 16-035.*

**(ii) Analysis of the law and facts**

51. In considering the issue of unconscionable bargains it would, I think, be necessary to identify the substance of the transaction. Although the legal form of the transaction between the Claimant and the Defendant dated June 2, 2004 as prepared by Sirjoo was a conveyance for sale by which the Claimant purported to transfer the fee simple interest in the said property to herself for life and, after her death, to the Defendant in fee simple at a price of \$250,000, I am of the view that this was merely a conveyancing device employed by Sirjoo for administrative convenience and that no money passed.

52. In that regard Sirjoo stated (paras 2-5 of witness statement) that after the Defendant instructed him to prepare a deed transferring the said property in accordance with the wishes of his deceased father to the Defendant with a life interest to the Claimant, he explained to the Defendant that he would prepare a deed of gift. However he explained to the Defendant, and this seems to be in keeping with the conveyancing practice existing at that time, that a valuation of the property would have to be done to ascertain the market value of the property for stamp duty purposes.

53. While the effect of what Sirjoo stated at para. 4 of his witness statement was that the suggestion that \$250,000 be used as the consideration for the transfer of the said property emanated from the Defendant, I am of the view that he does not give us the full story. It is very likely that Sirjoo would have provided the Defendant, who after all was a layman, with two options, namely a deed of gift or a conveyance for sale. In Trinidad and Tobago it is clear that, while not a common practice, it is not unknown for conveyancers to effect a transfer by way of a conveyance for valuable consideration rather than as a deed of gift. The rationale seems to be that it is done not for the purpose of avoiding stamp duty or defeating any statutory provision or for any illegal purpose, but for overcoming the administrative and/or sometimes lengthy delays that may be caused when a deed of gift and valuation are submitted to the Board of Inland Revenue for stamp duty purposes.<sup>13</sup> In *Poorah v Lawrence* the Privy Council wondered why a deed of gift was disguised as a

---

<sup>13</sup>(See also *Poorah v Lawrence* HCA No. 173 of 1995; rev'd Civ. App. No. 131 of 2001; rev'd [2008] UK PC 21; *Gulab v Khaleq* [1963] 3 All E R 824 (PC).

sale.<sup>14</sup> It may be that a similar practice was adopted in that case. However it is a practice that needs to be discouraged if only to avoid the pitfalls which are so evident in the instant case.

54. Accordingly I hold that Sirjoo was the one who provided the Defendant with the two options aforesaid and the Defendant was the one who suggested that the \$250,000 be used as the consideration for the transfer of the said property. I also hold that the substance of the transaction was a gift of the said property to the Claimant for life and after her death to the Defendant in fee simple.

55. In considering the facts, it would be too simplistic to say that the initiative for the conveyance came from the Defendant. It is clear that the conveyance to the Defendant was the culmination of discussions that had taken place between the Claimant and Nazir Mohammed and the Defendant over a considerable period of time, and after Nazir Mohammed had ensured that he had made what he considered adequate provision for his other children. Against the backdrop of the family history it is clear therefore that the initiative for the impugned transaction originated with Nazir Mohammed and the Claimant. That would explain why, after the death of Nazir Mohammed, the Defendant approached the Claimant and reminded her of his father's wishes to have the said property conveyed to him subject, of course, and in keeping with the intention of his father, to the Claimant having the benefit of living in same for the rest of her natural life. Consequent upon this the Claimant instructed the Defendant to retain a lawyer and have the necessary deed done and she would execute same to give effect to his father's wishes. It was in those circumstances that the Defendant retained the services of Sirjoo, Attorney-at-Law.

56. In summary therefore we have a voluntary disposition of the Claimant's sole real property to herself for life and after her death to her son. Can a court of equity allow this transaction to stand, or is it an unconscionable bargain? Adverting to the two

---

<sup>14</sup> [2008]UKPC 21 para 19.

circumstances referred to in *Amadio*<sup>15</sup> (para. 47 above), it is pertinent to address the first question: Did the Claimant and the Defendant meet on equal terms?

57. In the instant case I have found that: (i) the Claimant is elderly and literate to some extent, has a reasonable grasp of English language, can read and understand what she is signing, and has executed a couple of deeds before; (ii) the Claimant was at all material times aware of the nature and character of the document that she was executing, and that the same had been explained to her by Sirjoo; (iii) on the day in question the Claimant appeared to Sirjoo to be “perfectly fit mentally.” However when I factor in Sirjoo’s lack of thoroughness in that he omitted to ask certain basic questions (see para 62 below), I am prepared to assume that the Claimant was under a special disability in dealing with the Defendant such as to cause me to hold that the Claimant and the Defendant did not meet on equal terms. As indicated earlier ( para 47 above), the lack of assistance or explanation where assistance or explanation is necessary can have the effect of placing one party at a serious disadvantage in dealing with the other party.

58. The second question to be considered is whether the special disability of the Claimant was sufficiently evident to the Defendant to make it prima facie unfair or unconscientious that he procure or accept the Claimant’s assent to the impugned transaction in the circumstances in which he procured or accepted it.

59. In that regard it is necessary for the Claimant ‘who seeks relief to establish unconscionable conduct namely that unconscientious advantage has been taken of his disabling condition or circumstances.’<sup>16</sup> It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable, foolish or improvident. It must be proved to be unconscionable in the sense that ‘one of the parties to it has imposed the

---

<sup>15</sup>*Commercial Bank Limited v Amadio* (n 9) 474.

<sup>16</sup>(*ibid*) at 463 (Mason J).

objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience'.<sup>17</sup>

60. In the instant case it is clear that the Claimant was motivated by parental affection, family and cultural tradition and honour to act in the manner that she did. Both the Claimant and her husband, Nazir Mohammed, during the latter's lifetime expressed the desire to give the said property to the Defendant. Nazir Mohammed's father, the former owner of the said property, had also expressed a similar desire. Nazir Mohammed was careful to extract a promise from the Defendant that the Claimant would be able to live in the property for the rest of her life. Nazir Mohammed also ensured during his lifetime that he made what he viewed as adequate provision for his other children by giving each the sum of \$100,000, and by distributing his jewellery among all or some of his other children. Prior to going to Canada, it is significant that he ensured that the Defendant's name (and not any of the other children's names) be placed on the joint accounts. He also gave the Defendant signed blank cheques to meet the household expenses. It is against that backdrop that the impugned transaction needs to be considered. On the death of Nazir Mohammed, the Defendant reminded the Claimant of his father's wishes. The Claimant instructed the Defendant to retain a lawyer to prepare the necessary documents. The Defendant spoke to the lawyer, Sirjoo, who initially advised that a deed of gift be prepared transferring the said property to the Defendant with a life interest to the Claimant. Sirjoo, as I have found, provided the Defendant with two options, with the deed being prepared as one for valuable consideration for the sum of \$250,000 which the Defendant stated was about the sum he had spent on the said property.

61. Sirjoo advised the Defendant to discuss same with the Claimant. I accept that the Defendant did discuss same with the Claimant making it clear to her, from a layman's perspective, that the transaction was to be done as a sale rather than a gift and that she would receive a life interest in the said property. It was in those circumstances

---

<sup>17</sup>*Multiservice Bookbinding v Marden* [1979]ChD84 at 110(Browne – Wilkinson J).

that the Claimant gave the go-ahead to proceed with the transaction. The Claimant's conversation with Raffina on the morning of the transaction prior to going to Sirjoo's office provides significant support for her knowledge of and assent to the transaction. On that said day Sirjoo explained to her why he had prepared the deed of conveyance as a sale. The Claimant consented to the deed being done in this form. Sirjoo then read and explained the contents of the said deed to the Claimant and the Defendant, and the Claimant informed Sirjoo that she understood the purport and contents of the deed and that the deed reflected her instructions. Additionally Sirjoo explained the effect of having a life interest in the said property and the Claimant understood what Sirjoo had explained to her.

62. It is however legitimate to criticise Sirjoo for not being as thorough as he should have been, omitting to ask some basic questions. The following illustrates the deficiencies:

1. He made no notes.
2. He did not interview the Claimant by herself.
3. He did not enquire as to the age of the Defendant.
4. He did not ascertain the value of the said property.
5. He did not ascertain whether the Claimant had other children.
6. He did not explain to the Claimant that the said property belonged to her exclusively
7. He did not explain to her that the said property was hers to give to anyone that she wanted.

63. It is clear that in certain circumstances the omissions referred to above may be sufficient to warrant setting aside a transaction. However everything must depend on the circumstances. In this regard it is pertinent to note that in cross-examination Sirjoo was of the view that he was not acting solely for and on behalf of the Defendant, but on behalf of both parties. Moreover in re-examination, Sirjoo stated that he did not think it was necessary to advise the Claimant to seek independent legal advice because of the instructions received, and

because of her acknowledgement and consent to the transaction. However Sirjoo's honesty is not conclusive, the transaction must be able to withstand the scrutiny of a court of equity. I am of the view that the said omissions by Sirjoo, when considered with the other circumstances, do not tilt the scales so as to make it prima face unfair or unconscientious for the Defendant to retain the benefit of the gift by the Claimant. The Claimant understood perfectly the nature and consequences of the transaction which would explain why the thought of money passing, or any payment being made to her for the said property, never crossed her mind.. Even if Sirjoo had provided the fullness of advice required, I am of the view, having regard to the circumstances of this case, that the Claimant would have had no hesitation in conveying the said property as she did.

64. In summary this was not so improvident a transaction (the Claimant retained a life interest) as to render it unconscientious for the Defendant to retain the advantage of the voluntary disposition to him of the fee simple interest in the said property subject, of course, to the life interest of the Claimant. Nor is this transaction one which no competent solicitor could have recommended. In any event even if the Claimant had crossed the above threshold, I am of the view that the Defendant would have established that the transaction was fair, just and reasonable in all the circumstances.

### **(c) Undue influence**

65. While belatedly invoked as a ground of complaint, there is no evidence before me as to the influence exerted by the Defendant on the Claimant nor that the influence was undue. However, even assuming that the Claimant can invoke the doctrine of undue influence, I am of the view, by parity of reasoning with respect to my analysis on the doctrine of unconscionable bargains, that the Defendant would be able to provide a satisfactory explanation for the transaction.<sup>18</sup>

---

<sup>18</sup>See Snell's Equity 31<sup>st</sup> edn (2005) para 8-09 for the elements of undue influence; *Attorney-General v R* [2003] UKPC 22 at para 29.

66. By reason of the foregoing, the Court is of the view that the Claimant cannot succeed in having the deed set aside on the grounds of non est factum, fraudulent misrepresentation, unconscionable bargain and undue influence. In the circumstances the Claimant's claim is dismissed. Costs of the action are to be paid by the Claimant to the Defendant assessed in the sum of \$14,500.

**DATED** this 26<sup>th</sup> day of February, 2009.

.....

**PRAKASH MOOSAI**  
**JUDGE**