

**THE REPUBLIC OF TRINIDAD AND TOBAGO:**

In the High Court of Justice

San Fernando

Claim CV 2007 - 03629

BETWEEN

Sumatee Enal

Claimant

AND

Shakuntala Singh

Kiran Singh

Roshini Singh

Andra Singh

Defendants

**Before the Honourable Mr. Justice Ricky Rahim**

**Appearances:**

Mr. E. Koylass S.C. instructed by Ms. D. Roopchan for the Claimant.

Mr. A. Fitzpatrick S.C. instructed by Mr. M. Seepersad for the Defendants.

## **Judgment**

1. This action concerns land situate at # 6-8 High Street, San Fernando (the disputed land).
2. The Claimant was the common law wife and the executrix of the estate of Ravidath Ramnarine Maharaj also called Ravi Maharaj (Ravi) who died on the 11<sup>th</sup> January 2006.
3. By Deed dated 1<sup>st</sup> July 1976 and registered as no. 12415 of 1976, Ravi and the First Defendant became seized of #4-8 High Street San Fernando. The Claimant claims that Ravi became the owner of the disputed land by virtue of Deed of Partition registered as No. 11053 of 1992.
4. Prior to this in 1964 Ravi appointed his father Ramnarine Maharaj (Maharaj) as his attorney by virtue of Power of Attorney registered as No. 6812 of 1964. By Deed dated 4<sup>th</sup> January 2006 registered as No. DE2006014750950001 purportedly through his Power of Attorney, Maharaj (who is also now deceased having died on the 11<sup>th</sup> July 2006) conveyed the disputed land to the Defendants allegedly for the sum of \$500,000.00. It is this conveyance that is the subject of the present dispute.
5. The First Defendant is the daughter of Maharaj and the sister of Ravi. The Second Defendant is the grandson of Maharaj and the First Defendant's son. The Third Defendant is the granddaughter of Maharaj and the daughter of the First Defendant. The Fourth Defendant is the First Defendant's Stepdaughter.
6. The Claimant avers that the conveyance, by its terms and manner of execution, is invalid. In this regard, the Claimant claims:

- i. That the conveyance was not executed by Maharaj and it is found to have been so executed, it was not executed on the 4<sup>th</sup> January 2006 but sometime after the death of Ravi.
  - ii. In the alternative, that the conveyance was made in breach of Maharaj's fiduciary duties to Ravi and in fraudulent exercise of the Power of Attorney.
  - iii. That the conveyance was made pursuant to a conspiracy among the Defendants with intent to injure Ravi and to deprive and cheat him of the disputed land.
  - iv. In the further alternative that Maharaj was at all material times senile and not in a sound or proper state of mind to understand the nature of the transaction and enter into the conveyance.
  - v. Further and alternatively that Maharaj executed the conveyance under the undue influence of the Defendants and not in a proper exercise of the Power of Attorney. In relation to this the Claimant claimed that Maharaj lived with the First and Second Defendants and was completely dependent on them.
  - vi. That the conveyance constitutes an unconscionable bargain.
7. Consequently, the Claimant claims, inter alia, a declaration that the conveyance is invalid and seeks an order setting aside same.
8. The Defendants deny the allegations of fraud, conspiracy, senility, undue influence and unconscionable bargain. The Defendants claim that Maharaj validly conveyed the disputed land to them under his Power of Attorney for the consideration of \$500,000.00. The Defendants counterclaim for inter alia, a declaration of the validity of the said conveyance.

## **Issues**

9. Notwithstanding the pleaded case, the Claimant accepted that it was not put to Dr. Seepersad (the Defendants' witness) that the Deed was not signed by Maharaj, nor was it put that it was signed at a later date since it became clear that such a claim could not be properly furthered. Additionally, the Claimant admitted that proof of Ravi's mental decline was equally impracticable and was no longer part of the Claimant's case. The Claimant also appears to have abandoned her case of fraud as the only issue identified in her submissions was the issue of undue influence. Additionally, the Claimant made no submissions on the issues of conspiracy to cheat and fiduciary duty. It thus appears to the court that these have also been abandoned by the Claimant.

10. The following issues thus fall for determination:

- i. In whom did the beneficial interest in the disputed land lie;
- ii. Whether the conveyance is invalid by reason of it being an improper exercise of the Power of Attorney;
- iii. Whether the conveyance is invalid by reason of undue influence;

## **The First Issue**

### **Submissions**

11. The primary submission of the Defendants on this issue was that the Claimant first had to establish that Ravi was the beneficial owner of the disputed land before any other issue could be considered.

12. The Defendants contends that where real property is transferred into the names of persons other than the purchaser, a resulting trust arises in favour of the purchaser if there is no evidence that he intended the transfer as a gift.
13. Thus, it was submitted that Maharaj did not at the time of the 1976 conveyance, (whereby Ravi and the First Defendant became seised of No. 4-8 High Street) intend to make a gift to his children. It followed therefore that if Maharaj did not intend to make a gift by the 1976 conveyance, Ravi could not acquire a beneficial interest in the disputed lands by the Deed of Partition in 1992.
14. The Defendants contend that the evidence that Maharaj's practice of putting property in his children's names while retaining a Power of Attorney to deal with the properties was proof of his intention to retain the beneficial interest in the land. Additionally, it is the Defendants' belief that the terms of the Power of Attorney itself lends compelling support to the absence of any intention by Maharaj to gift the property.
15. The Defendants also argue that while the power of attorney gives Maharaj the widest powers to deal with property in Ravi's name, it excludes from such power three properties independently owned by Ravi. According to the Defendants, this indicates that the intention was always to retain the beneficial interest as the Power of Attorney only allowed Maharaj to deal with properties purchased by him.
16. Further, the Defendants contend that the fact that no use was made of the disputed lands by Ravi is consistent with the family arrangement that properties purchased by Maharaj were his and he was to deal with them as he pleased.
17. The Claimant's claim in relation to Ravi's entitlement to the disputed land was that by Deed of Partition registered as No. 11053 of 1992 he became the sole beneficial owner of the disputed land.

18. The Claimant firstly rejects the Defendants' submissions that a resulting trust arose in the circumstances on the basis that no facts to support such were pleaded in their Defence.

19. Further, the Claimant submitted that the use of the principle of resulting trust to this case is misconceived. The Claimant thus argued that the principle of advancement would in this situation operate to displace or rebut the presumption of resulting trust. In this regard the Claimant contended that the special relationship of father and son would be treated as prima facie evidence that the person who paid the purchase money or transferred the property intended to make a gift to the person into whose name the property was conveyed or transferred.

20. The Claimant contends therefore that the following is capable of rebutting the presumption of resulting trust:

- (i) *The Power of Attorney was given in 1964 while the lands the subject of the original purchase was purchased some 12 years later in 1976 so as to be unrelated to it and shedding no light on the specific purchase.*
- (ii) *The attempt to advance that the exclusion of three properties from the Power of Attorney was supportive of the view that all other properties were not intended as gifts fails to take into account that the subject property was not then existent and only came into existence 12 years later.*
- (iii) *The Power of Attorney was always revocable at Ravi's will.*
- (iv) *Under the Deed of the original purchase Maharaj expressly acknowledged that he was acting as an undisclosed agent of Ravi and Shakuntala effectively negating any claim that he had any beneficial interest in the property or any intention to hold such interest.*

- (v) *The existence of the Power of Attorney was a neutral event in that it was fully consistent with a purchase by Maharaj of property in Ravi's name intended by Maharaj as a gift to Ravi and over which Ravi as beneficial owner of the property gave Maharaj a power to sell his Ravi's property.*
- (vi) *That Maharaj, by Kiran's evidence in his Witness Statement had made a **declaration against interest** which was supportive of the conclusion that the purchase was as a gift viz "he said that he had bought it in Ravidath's name **but since then** Ravidath had become rich and that he thought we should purchase that property" (emphasis added). By this statement Maharaj effectively was saying that the property was purchased for Ravi so as to provide for him but since he no longer needed provision it was being taken away.*
- (vii) *Just as the presumption of a resulting trust naturally weakens with the passage of time if there had been some acquiescence where the person in whose name the property had been purchased is allowed to remain in possession, so too Ravi's possession and control of the property over 30 years including renting, collecting its rental, defending litigation concerning the property while Maharaj took no part to exert any beneficial claim to the property decidedly strengthens and supports the presumption of an intended gift to Ravi on its earlier purchase.*

## Law

21. A resulting trust may arise solely by operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a resulting trust in favour of the person providing the money, unless from the relation between the two, or from other circumstances, it appears that a gift was intended: **Halsbury's Laws of England**

**VOLUME 16(2) (REISSUE) para 853; Dyer v Dyer (1788) 2 Cox Eq Cas 92 at 93 per Eyre CB.**

22. Where the person in whose name a purchase or transfer is taken is the spouse or civil partner, child or adopted child of the person paying the purchase money or making the transfer, there is a presumption that a gift was intended: **Halsbury's Laws of England VOLUME 52 (2009) 5TH EDITION para 244.**
23. Thus, according to the principle of resulting trust, where a person buys property, but takes the purchase in the name of another, **who is neither his child**, adopted child nor spouse or civil partner, **prima facie there is no gift**, but a resulting trust for the person paying the money. Where the relationship of father and child exists, the presumption of advancement operates to itself rebut the presumption of a resulting trust. But the presumption of advancement is itself a rebuttable presumption. SEE **Cavalier v Cavalier** (1971) 19 F.L.R. 199 (S.C.N.S.W) 205; **Anson v Anson** (1953) 1 QB 636; **Re Salisbury-Jones** (1938) 3 All E.R. 459.
24. So that despite the existence of the father child relationship, the court can nonetheless conclude based on the evidence that the purchase was not intended to be a gift thereby permitting the operation of the original resulting trust. SEE **Re Roberts** (1946) Ch. 1; **Re Gooch** (1890) 62 L.T. 384.

### Findings

25. In the present case, by Deed dated 1<sup>st</sup> July 1976 and registered as no. 12415 of 1976 Maharaj purchased the property in the name of **his children** Ravi and the First Defendant. Thus no presumed resulting trust arises. Instead, the fact that it was in the name of his children meant that there is a presumption that a gift was intended.

26. Independent of the presumption of advancement, the Claimant testified in cross examination that the help Ravi received from Maharaj in the purchase of properties by Maharaj in Ravi's name was in the usual course of assistance that a parent would give to a child. The court agrees that a man of means such as Maharaj would seek to provide his children with assistance to build a life for themselves. It is a common feature of the parent child relationship, particularly in respect of parents who can readily afford it. Standing on their own, this fact together with the non involvement of Maharaj in the dealing with the property for over thirty years may well lead one to the conclusion that Maharaj intended the property to be a gift to his son at a time when he was just beginning his independent journey along adulthood.
27. However the court is not satisfied that the presumption of advancement ought not to be set aside. The power of attorney has weighed heavily in the court's consideration. The obvious and overwhelming question remains that of the intention of a man whose business it is to purchase real estate developing a practice whereby he uses his funds to purchase property but permits the conveyance of those properties unto his children. Not only does he so do but additionally, he ensures that those children execute and register powers of attorney in his favour in respect of those properties. This in the court's view is demonstrative of a clear and unambiguous intention by that man to maintain a level of control over those properties that is not merely illusory as the powers of attorney contain the power to sell. In so doing the man is exerting the absolute and ultimate rights of ownership over the property, that of the ability to dispose of same. The fact that the power of attorney is revocable does not weigh heavily against this finding in these circumstances. The fact of revocability may have been of more weight should this have been a case of a man transferring a single property which he purchased into the name of his child but the evidence shows that Maharaj was an astute land owner with several high end properties and had cultivated a practice of so doing while maintaining ultimate control.

28. Furthermore, it is clear from the cross examination of the Claimant that Maharaj had provided at least one other property at 37-39 High Street San Fernando (at which site Ravi and the Claimant constructed a mall) as an absolute gift to Ravi. In addition Maharaj also funded Ravi's medical studies which he pursued in Canada. These appear to have clearly been gifts from a father to a son. That appears to the court however not to have been the case with respect to the disputed property.

29. Further, in relation to the other arguments set out by the Claimant at paragraph 20 hereof the court finds as follows;

- a. The court does not agree with the Claimant that the fact that the Power of Attorney was given in 1964 while the lands the subject of the original purchase was purchased some 12 years later in 1976 sheds no light on this specific purchase and issue and therefore does not assist the court in making a determination thereon. The fact remains that this power of attorney continued to exist up until and continuing after the purchase. This fact while not solely determinative of the issue is itself to be considered in the round with all the other surrounding circumstances. There is no evidence that either Ravi or Maharaj had forgotten or were unaware of the existence of the subsisting power of attorney at the time of the purchase. Its existence is therefore a relevant factor to be considered when determining the issue of rebuttal of the presumption of advancement as a whole.
- b. That while ordinarily the fact that under the Deed of the original purchase the expressed acknowledgement of Maharaj that he was acting as an undisclosed agent of Ravi and Shakuntala may effectively negate any claim that he had any beneficial interest in the property or any intention to hold such interest that is not necessarily the case here as the court has had to factor into its consideration the existence of the power of attorney at the time of the purchase.

- c. That the statement allegedly made by Maharaj, as given in Kiran's evidence in his Witness Statement had he (Maharaj) said "*he said that he had bought it in Ravidath's name **but since then** Ravidath had become rich and that he thought we should purchase that property*" is not necessarily a declaration against interest and is capable of bearing two equally opposite interpretations. Contrary to that which is submitted by the Claimant, this statement may also reflect an indication that the transfer of the property was never meant to be an absolute gift to Ravi in the first place but was only meant to assist him by way of possession of an asset in his name until he was financially independent. As a consequence the court finds that this item of evidence is of no assistance on the issue to be determined and has therefore had no recourse to it.
- d. The court agrees with attorney for the Claimant that the passage of time without involvement by Maharaj in matters connected with the said property would be evidence that one would consider when determining whether the presumption of advancement is itself rebutted. However, a similar argument with respect to the effect of the passage of time may be made in favour of rebuttal. That Ravi never revoked the power of attorney or that Maharaj never sought its revocation is not in dispute. It can therefore be advanced that the non revocation over the period of some forty years is reflective of an acknowledgement and the desire on the part of both Donor and Donee of the power to keep Maharaj in control of that which he paid for. This is a defining feature of the evidence which mitigates against the fact of an absolute gift to Ravi.
30. In all the circumstances therefore the court finds that Ravi did not take the said property as a gift and did not acquire the beneficial interest in the property which remained vested in Maharaj. The presumption of advancement has therefore in the court's view been sufficiently rebutted on the evidence with the consequence being the creation of a resulting trust in favour of Maharaj.

## **The Second Issue**

31. Clause 4 of the Power of Attorney provides:

*"From time to time if and when my Attorney may think fit to sell, exchange, surrender, give up, demise, let, assign, lease, mortgage, charge or dispose of any house, buildings, lands, plantations, mines minerals (including properties held under the Real Property Ordinance) and/or any chattels effects and personal property including shares and debentures in any company whatsoever and also life assurance policies belonging to or held by me or in which I have or may hereafter have any estate or interest in the said Territory upon such terms, conditions and stipulations as my Attorney shall in his absolute discretion think fit*

32. The Claimant pleaded that the Power of Attorney was granted at a time when Ravi was a student living outside of Trinidad and it was not intended to be used 43 years after its grant and while Ravi was in Trinidad attending to his own affairs.

33. However, the appointment is expressed to stand until a deed is executed by Ravi revoking such appointment. Thus, whether it was the intention of Ravi or not to have the Power of Attorney used while he was in Trinidad is irrelevant bearing in mind that a power of attorney is construed strictly by the courts: see **Halsbury's Laws of England, VOLUME 1 (2008) 5TH EDITION para 31.**

34. Thus, at the time of the conveyance, the Power of Attorney having not been revoked by deed, Maharaj acted under a valid power. Further, Clause 4 above allowed for, inter alia, selling or disposing of buildings, lands, belonging to or held by the donor or in which he may thereafter have any estate or interest.

## **The Third Issue**

### **The Law**

35. A contract will not be upheld where one party (A) may be said to have exercised undue influence over another party (B) in order to induce B to enter into the contract: **Halsbury's Laws of England. VOLUME 22 (2012) 5TH EDITION, para 294.**

Undue influence may be actual or presumed.

36. It was submitted on behalf of the Claimant that the Claimant's case was one of presumed undue influence. This was accepted by the Defendant as the basis upon which the claim appears to have been brought.

37. In cases of presumed undue influence, B must establish (1) the existence of a relationship between A and B under which B placed trust and confidence in A and (2) that the transaction entered into is one which 'calls for explanation' or 'is not readily explicable by the relationship between the parties': **Halsbury's Laws of England. VOLUME 22 (2012) 5TH EDITION, para 296.** If B proves the existence of the necessary relationship of trust and confidence in A and the nature of the transaction is so suspicious as to call for an explanation this satisfies B's burden of proving undue influence. The burden then moves to A to rebut the presumption and give a satisfactory explanation for the transaction.

38. The necessary relationship of trust and confidence may be established in one of the two ways described below:

- (1) Certain relationships as a matter of law raise an irrebuttable presumption of trust and confidence; these have been held to include the following: parent and child, guardian and ward, religious adviser and disciple, doctor and patient, solicitor and client, trustee and cestui que trust and

fiancé and fiancée. The presumption may apply even after the relationship has ceased if the influence continues.

(2) Even if there is no relationship of the type falling within head (1) above, B may *in fact* prove the existence of a relationship under which he generally reposed trust and confidence in A. The most obvious instance will be proof of a relationship in which B has reposed trust and confidence in A in relation to the management of B's financial affairs, but it is enough for B to establish that A has acquired influence over B in relation to some general aspect of (B's) affairs. This category has deliberately been left undefined by the courts; but the necessary relationship of trust and confidence has been proved in the following: between spouses and other cases where there is an emotional relationship between co-habitees, whether heterosexual or homosexual; between a son and his elderly parents; between a bank and its elderly customer; between a manager and a young musician; and between an employer and his employee: **Halsbury's Laws of England. VOLUME 22 (2012) 5TH EDITION** *supra*

39. There is no dispute as to the law on undue influence. However, the parties disagree as to the application of the law to the present case.

### **Relationship of Trust and Confidence**

#### **Submissions**

40. The Defendants submitted that while the First Defendant was Maharaj's daughter, such a relationship did not give rise to a relationship whereby undue influence is presumed. In this regard, the Defendants relied on learning in **Snell's Equity paragraph 8-21 pg 214** for the proposition that the presumption does not operate qua child and parent but qua parent and child as there is nothing presumed from a child accepting anything from a parent. The relevant part of paragraph 8-21 reads:

*“There is no presumption of a relationship of influence by a child over a parent and such a relationship must be established on the facts”*

41. Further, the Defendants submitted that the evidence proffered by the Claimant was insufficient to support the establishment of the requisite relation. The Defendants contended that all that was alleged was that Maharaj was under the care and control of the First and Second Defendants from 1998 but gave no particulars of this alleged care and control. The Defendants submitted therefore that Maharaj undoubtedly trusted the First and Second Defendants to care for him and that no less was expected from them as such care was needed because of his deteriorating health, hearing and sight. According to the Defendants the Claimant’s evidence merely showed that the First and Second Defendants were caring for Maharaj in the usual way that a child cares for an aged parent.
42. The Claimant on the other hand submitted that the Defendants’ application of the law was wrong. It was contended instead that the First Defendant falls within the operation of presumed undue influence once it is shown that she shared a relationship with Maharaj in which he reposed trust and confidence in her and a transaction arises which calls for an explanation.
43. The Claimant seems to be arguing the second method of establishing the relationship of trust and confidence (para 34 (ii) above), that is that the evidence shows that the First Defendant shared a relationship with Maharaj in which he reposed trust and confidence in her. The Defendants’ submission however was that the Claimant could not establish presumed undue influence by either method. That is to say, that the relationship of child/parent could not give rise to a relationship whereby undue influence is presumed **automatically** (para 34 (i)) nor did the evidence prove the existence of a relationship of trust and confidence (para 34 (ii) above).

44. The law presumes a relationship of trust and confidence in certain situations. Outside of these categories, where such a relationship is alleged it must be proven on the evidence that it exists. Thus, the Defendants' application of the law is correct. The Defendants are saying there is no automatic presumption of trust and confidence based on the child/parent relationship and further, the evidence raised is insufficient to prove the existence of such a relationship of trust and confidence.

#### Evidence

45. Giving evidence for the Claimant's case was the Claimant herself, Roy Gumansingh and Mala Rajkumar. Roy Gumansingh is a chartered valuation surveyor and gave evidence of the value of the land at present and in 2006. Mala Rajkumar gave evidence in relation to her occupation of #6 Lower High Street, San Fernando as a car park from 2005 to present. Thus the only relevant evidence on the issue of undue influence stems from the Claimant herself.

46. The Claimant testified that she began a personal relationship with Ravi in 1985, and moved into the family house with him in 1988. At that time, both his parents occupied the house. A conflict arose between Maharaj and his wife which eventually resulted in him leaving the family home to live with the First Defendant in 1998 and he remained there under the care of the First and Second Defendants until 2005.

47. She gave evidence of a strained relationship between Ravi and his father which became worse when the conflict arose between his mother and father.

48. The relationship between Ravi and the First Defendant was also strained and was made even more distant when Maharaj went to live with the First Defendant. Prior to Maharaj living with the First Defendant, there had been a land conflict between Ravi and the First Defendant which further impaired their already tense relationship.

49. The Claimant alleged that Maharaj's *"head was not good in the sense that he could not communicate clearly, he was easily confused, was forgetful and of weak mind and suggestible and he was completely reliant on the First and Second Defendants for his care and that he followed the directions and instructions without question of his caregivers"*. In this regard the Claimant recalled that in 2005 at Maharaj's wife's funeral, Maharaj appeared incapacitated and required help to come out the vehicle and walk. Further, the Claimant observed that Maharaj seemed disoriented and did not recognise or remember who Ravi was.
50. It was the Claimant's evidence that Maharaj was in the habit of buying property in his children's names while retaining a power of attorney over them in order to have control over the property.
51. Giving evidence for the Defendants' case was the First Defendant, the Second Defendant, Charles Seepersad and Dr. Stephen Ramroop.
52. The First Defendant testified that Maharaj was neither senile nor easily influenced by her or the Second Defendant. According to the First Maharaj was in the business of buying and selling property all his life and no influence was exerted over him to convey the disputed land.
53. The First Defendant denied the Claimant's evidence that her relationship with Ravi was strained. In this regard, the First Defendant testified that she has had a close relationship with him and although there was a lull in the relationship when the land dispute arose but it was later rekindled.
54. The Second Defendant testified that he never exerted pressure on Maharaj. He gave evidence that Maharaj initially handled all his transactions, but as he got older he placed greater responsibility in him (the Second Defendant) to deal with tenants, businessmen, lawyers and doctors. Further, the Second Defendant denies that Ravi and the First Defendant were not on speaking terms.

55. Dr. Charles Seepersad was Maharaj's attorney and it was he who prepared the deed conveying the disputed land to the Defendants. He testified that at no time during the entire transaction did he see or hear any influence or pressure exerted on Maharaj. In fact, Dr. Seepersad gave evidence that he spoke to Maharaj prior to the execution of the deed and told him to speak with Ravi.
56. During cross examination, Dr. Seepersad admitted that he did not check the money brought by the First and Second Defendant for payment of the purchase price. However, Dr. Seepersad testified that the money was brought in a bag and after he conferred with Maharaj he instructed the First and Second Defendants to give Maharaj the bag containing the purchase price.
57. According to Dr. Seepersad, although Maharaj was advanced in age, he was meticulous in his dealings with him, was clear about what he required and understood what was being said to him. Dr. Seepersad gave evidence that before the deed was executed Maharaj read the document and was satisfied it reflected what he had requested.
58. Dr. Ramroop's evidence was confined to Maharaj's health between the period June 2003 and May 2006. He concluded that prior to May 2006 (when Maharaj was last seen by him) Maharaj was capable of making decisions regarding his management of his illness and performing daily activities.
59. However, Dr. Ramroop admitted in cross examination that his contact with Maharaj was limited to only physical impairments and did not entail any psychological evaluations. Dr. Ramroop particularised that he had problems walking due to a combination of medical issues and age. Further, Dr. Ramroop gave evidence that Maharaj would have had to be dependant or reliant some person or persons with a view towards accomplishing his normal activities.

## Findings

60. The court agrees with the Defendant's submissions that there is no automatic presumption of trust and confidence based on the child/parent relationship. The very nature of a parent/child relationship is one where naturally a parent has some degree of influence. It was said in **Bullock v Lloyds Bank Ltd and Another** [1954] 3 All ER 726 at p 729 per Vaisey J that:

*“The expression “undue influence” is, to my mind, one of ambiguous purport. It is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing not only greater experience but also such force as that which is inherent in such a relation as that between a father and his own child”*

61. The same does not obtain in the reverse. There is no presumption of a relationship of influence by a child over a parent, such must be proven. Thus, the Claimant was tasked with proving that there existed a relationship which gave rise to trust and confidence.

62. The court is of the opinion that the Claimant has failed to prove that there existed a relationship at the time of the conveyance, under which Maharaj generally reposed trust and confidence in the Defendants. It appears to the court that there is no reliable evidence from the Claimant that at the time of the conveyance Maharaj was bound or beholden to his daughter for his general care and support. In fact, Dr. Ramroop in his cross examination testified that Maharaj would only have needed assistance in **some** of his day to day activities. This of course may have changed subsequent to the conveyance as he became infirm and somewhat immobile. In those circumstances it is clear that as time went by Maharaj would have become less and less able to look after his own needs and would have depended more and more on his daughter thereby

reposing a considerable amount of trust and confidence in her in a general sense. However the Claimant has failed to prove to the court that it is more likely than not that this was the case at the time of the conveyance which is the instructive time for the purpose of this claim.

63. This in the court's view applied equally to Maharaj's ability to look after his own financial affairs at the relevant time. The evidence on the part of the Claimant has failed to prove that Maharaj had reposed trust and confidence in any of the Defendants in relation to the management of his financial affairs. While the court accepts that it will very often be difficult for a Claimant to pass muster when it comes to this type of proof owing to circumstances, it is nevertheless the duty of the Claimant to prove same and the Claimant's evidence in this case is devoid of such proof.

64. With regard to the evidence given by the Claimant about what she observed at the funeral in 2005, that is Maharaj's inability to exit the vehicle without assistance and his apparent non recognition of Ravi, the court finds as follows:

- a. That being assisted in the circumstances of the death and funeral of one's spouse may not be out of the ordinary particularly for those who are moving on in age.
- b. That the court is cognizant of the fact that at the time of the funeral Maharaj and Ravi had not been on speaking terms, they having fallen out sometime before. In those circumstances the court must be careful not to assign a disproportionate level of reliability to the evidence of the Claimant when she gives her opinion (which remains only that and which lies against the grain of the evidence of Dr. Ramroop) that Maharaj did not recognise Ravi. It may well be that he refused to recognise Ravi in the circumstances.
- c. Further, the Claimants assertion that Maharaj's "*head was not good in the sense that he could not communicate clearly, he was easily confused, was forgetful and of weak mind and suggestible..*" carries no reliability as not only is the Claimant not qualified to make such an assertion about the mental capability of Maharaj but she also gives no reasonable basis for the latter part of the statement.

### **Suspicious transaction calling for explanation**

#### **Submissions**

65. The Defendant submitted that the transaction was not one to incite suspicion. In this regard, the Defendants contended that evidence was led on both sides that Maharaj had been a wealthy businessman with the practice of purchasing properties held in the names of his children while holding a valid power of attorney from those children. Further, it was contended that the practice of Maharaj had been to transfer other properties in the same manner.
66. Additionally, the Defendants argued that the Claimant's reliance on an alleged undervalue of the property did not raise suspicion. It was submitted that this was not a sale on the open market, but to his children who had been taking care of him. Further, it was common ground that his relationship with Ravi had been strained and that they were in fact estranged.
67. Finally, the Defendant submitted that the idea to sell the land to them was Maharaj's and that he had received independent legal advice from Dr. Seepersad. The Defendants contended that Dr. Seepersad had a private conversation with Maharaj before preparing the deed and had been satisfied that no influence had been exerted on him to convey the disputed land.

#### **Findings**

68. There is nothing in the circumstances surrounding the transaction that would give rise to any suspicion calling for an explanation.

69. The Second Defendant testified that before execution of the Deed, he had handed Maharaj the purchase price. When Dr. Seepersad asked Maharaj if he had counted it, Maharaj is alleged to have told him that he had done so in the car. In cross examination, the Second Defendant explained that Maharaj had counted his share of the purchase price (\$40,000.00) at home and the First Defendant's share (\$10,000.00) in the car on the way to Dr. Seepersad's office.
70. Notwithstanding the fact that this is not a usual practice to deal with money in the manner Maharaj is alleged to have dealt with it, it is not entirely unreasonable that a man as experienced as him in land and other business transactions would be able to do so. Particularly a man of his age who would have been involved in the business during an age when dealings in cash transactions was the accepted *modus operandi*.
71. Further, the Claimant herself has admitted to a strained relationship between Ravi and Maharaj and in fact this was the main feature in her evidence. The court in passing notes that in those circumstances, a conveyance of land previously in the name of Ravi to the Defendants would not have been suspicious as the strained relationship in itself could have been the impetus for the conveyance without there being any influence on the part of the Defendants, but the court makes no finding in that respect. In addition to this, both sides admit to Maharaj's practice of purchasing properties in his children's names while dealing with the property pursuant to Powers of Attorney. In fact, in cross examination, the First Defendant testified that from the time they were young Maharaj had Powers of Attorney for all three of his children and he constantly bought and sold properties. The court accepts this evidence and in these circumstances, a conveyance pursuant to said unrevoked Power of Attorney cannot within reason and does not incite suspicion.
72. Further, the court accepts the argument that the sale at an under-value is also consistent with the sale being made to family and not on the open market. There is nothing suspicious in a grandfather selling his land at an under-value to his grandchildren one of whom is also a businessman and carries his (Maharaj's) very

surname. In this respect the court is satisfied with and believes the evidence of Dr. Seepersad who it appears from the very evidence was the attorney who had previously acted for Maharaj on two occasions although the evidence is that he would not consider them to be transactions but merely a case of giving advice. On these occasions from as late as when Maharaj was in his eighties he found him to be a meticulous man. The court has no reason to doubt Dr. Seepersad when he testified about the apparent knowledge and understanding of the transaction on that day for the stated amount. According to Dr. Seepersad Maharaj also had plans for the money he was to collect which was for the purpose of charitable donations. This, Dr. Seepersad learnt during his private conversation with Maharaj at which time he Dr. Seepersad was satisfied that Maharaj was not being influenced.

73. Further, there was much cross examination in relation to whether Dr. Seepersad had in fact taken written instructions from Maharaj and the reason for not including same in his witness statement. To this the witness replied that the instructions were unsigned and in his opinion it was not necessary to annex them to his statement. In this respect the court notes that written instructions (if admissible) may or may not have assisted particularly when they are unsigned. While the absence of such evidence may cause the court to pause for consideration, the court ought only to act upon the evidence as presented and not descend into the realm of speculation. In that regard, the evidence of Dr. Seepersad is that he did take instructions which are contained in the file. The claimant has brought no evidence to refute this (which is to be expected having regard to the nature of the transaction to which she would not have been privy). Be that as it may, the only evidence in this regard which remains is that of Dr. Seepersad. The fact that Dr. Seepersad has not annexed the instructions to his witness statement is not sufficient in the court's view for the court to make a finding that Dr. Seepersad is being untruthful or is mistaken. The court therefore accepts that written instructions were recorded from Maharaj.

74. The court finds therefore that there was no undue influence and in the circumstances the conveyance was a valid one.

### **Unconscionable Bargain**

75. Relief may be granted to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other: **Halsbury's Laws of England (VOLUME 22 (2012) 5TH EDITION para 298.**

76. In this regard the Claimant submitted that Maharaj (1) lived under the care and control of the First and Second Defendant (2) sold the property at a gross undervaluation and (3) seemed unable to communicate and to make sense of his surroundings.

77. While the evidence of Roy Gumansingh was that the disputed land had been valued at \$5,5000,00.00 in January 2006 and was sold at undervalue for \$500,000.00, there is no direct evidence from the Claimant of Maharaj's mental condition.

78. There is evidence from the Claimant that she observed Maharaj to be frail and forgetful. As noted in paragraph 49 above, this was allegedly observed at Ravi's mother's funeral. However, the Claimant has brought no medical evidence confirming Maharaj's mental decline. While there is evidence from the Defendants of Maharaj's health issues from Dr. Ramroop, this evidence was insufficient to link Maharaj's physical decline to the possibility that his bargaining power was impaired by reason of his infirmity.

79. Further, the court has found that there had been no undue influences or pressures targeted to encourage the conveyance.

80. Additionally, the court feels compelled to examine the issue of independent legal advice. It can be argued that it was incumbent given the circumstances of this case, the primary consideration being the age of Maharaj, and the fact that he was being cared for by the Defendants (despite the fact that he appeared to Dr. Seepersad to be "compus mentis" for the purpose of the transaction) that Mr. Maharaj be advised to seek independent legal advice. This does not appear to have featured in the evidence of Dr. Seepersad. It is of particular relevance in the circumstance where it is unclear as to which party the attorney acts for in the transaction. In this case although Dr. Seepersad testified that he saw Maharaj twice in relation to advice to be given, it is also the evidence that Dr. Seepersad at one time acted for the First and Second Defendants, although from the evidence the dates upon which he so acted are unclear. So then who was Dr. Seepersad acting for in the transaction? The court is of the view that Dr. Seepersad was in fact acting for and on behalf of Maharaj in the transaction. Despite his testimony in cross examination that he had also acted for the Defendants, he is quite clear that it was Maharaj who was his client at the time and that it was Maharaj who initially came to him in December of 2005 to request that he prepare the deed and to give instructions.

81. In this regard, these courts have reiterated in the past and it is well worth repeating that the advice to parties to seek independent legal advice is imperative so as to secure the interest of the affected party. Where such advice is refused it would be prudent that a signed acknowledgement that such advice was given and refused be obtained so as to provide proof of the refusal. But in this case, it is clear to the court that the requirement to advise a party to seek independent advice does not apply to Maharaj as he was in fact the client of Dr. Seepersad who acted on his behalf in the conduct of the transaction.

82. The Claimant's argument of unconscionable bargain is therefore unsubstantiated and fails.

### **Preliminary Issue**

83. An issue raised by the Defendants in their submissions was whether the relief sought could be granted, Maharaj's estate having not been joined in these proceedings.

84. The Defendants contend that it was incumbent on the Claimant to join Maharaj's estate as a party to the proceedings. The Defendants argue that Ravi's interests are represented by the Claimant as she is his executor. However the action has not been brought as a representative action on behalf of Ravi's estate, so it appears that Ravi is also not before the court.

85. Nonetheless, it was submitted by the Defendants that it is not merely a procedural error or misstep to not have brought Maharaj's estate as it goes to the root of the issue as to whether any such relief should be granted.

86. The Claimant submitted that the estate was not joined in these proceedings because the operative species under which the Claimant claimed was undue influence. Further, since it required no wrongdoing on the part of the influenced party, there was no need to join Maharaj's estate.

87. This court however finds it unnecessary to decide this issue having regard to the findings of the court in relation to the other issues presented in this case and having regard to the court's disposition of the claim hereinafter set out.

## **Disposition**

88. By Notice of Application dated the 9<sup>th</sup> July 2008, the Claimant applied for a value to be placed on the claim pursuant to Rule 67.6(1)(a). On the 10<sup>th</sup> March 2011 the parties agreed that the value of the claim was to be assessed at \$3,000,000.00. There was no agreement in relation to the value of the counterclaim so that Rule 67.5(2)(b)(iii) applies in that the counterclaim shall be treated as a claim for \$50,000.00. The orders as to costs that follow are based on this assessment.

89. The order of the court is therefore as follows:

- i. The Claim is dismissed.
- ii. Judgment for the Defendants on the counterclaim as follows:
  - a. It is declared that the Deed registered as No. DE200601475095 made in favour of the Defendants is a valid and subsisting Deed of Conveyance.
  - b. The Claimant shall pay to the Defendants the prescribed costs of the counterclaim in the sum of \$14,000.00
- iii. The Claimant shall pay to the Defendants the prescribed costs of the claim in the sum of \$184,000.00

Dated this 3<sup>rd</sup> day of July 2013

Ricky Rahim

Judge