

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

CV2016-01599

Between

**ZAINOOL HABIB**

Claimant

AND

**AZIM SALIM**

Defendant

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

**Appearances:**

Mr. G. Raphael instructed by Ms. L. Chunilal for the Claimant

Mr. D. Heeralal for the Defendant

## Judgment

1. This claim is one for possession of a parcel of land situate in the Ward of Chaguanas, comprising four hundred and seventy-five point zero square meters (475.0m<sup>2</sup>) (“the subject land”). The claimant was formerly employed with Caroni (1975) Limited (“Caroni Ltd.”) as a labourer. As part of the Voluntary Separation of Employment Program (“VSEP”), the claimant was offered a leasehold interest for one hundred and ninety-nine years upon payment of twenty-five thousand dollars for the land and sixteen hundred dollars for the preparation and registration of the lease.
2. The claimant has never received any formal education. He alleges that he is a poor illiterate man who is unversed in business. According to him, on the 2<sup>nd</sup> December, 2014 the defendant paid to Caroni Ltd. the sum of twenty-six thousand, six hundred dollars for the subject land without the knowledge of the claimant. Thereafter, he alleges that the defendant took him to the office of Mr. Richard H. Sirjoo, attorney-at-law where he was made to affix his thumb print on a document which turned out to be an agreement to sell the leasehold interest in the subject land to the defendant. The agreement for sale is dated the 2<sup>nd</sup> December 2014 and set out a purchase price of eighty-five thousand dollars (\$85,000.00).
3. By Deed dated the 25<sup>th</sup> February, 2015 and registered as DE201500968021D001, the claimant became possessed of the subject land for the unexpired residue of the term of one hundred and ninety-two years.
4. On the 29<sup>th</sup> August, 2015 the claimant alleges that he was again taken by the defendant to Mr. Sirjoo’s office where he attached his thumb print to a Deed of even date which was registered as DE201600056636D001. By this deed the claimant’s leasehold interest in the subject land was assigned to the defendant. The claimant avers that this deed was neither read nor explained to him. He further avers that he never saw or spoke with Mr. Sirjoo.
5. Moreover, the claimant claims that the defendant has not paid him any sums towards the purchase price of the subject land save and except for the twenty-six thousand, six hundred

dollars which was paid to Caroni Ltd. As such, by Claim Form filed on the 13<sup>th</sup> May, 2016 the claimant seeks to have the deed dated the 29<sup>th</sup> August, 2015 and registered DE201600056636D001 set aside.

6. By Defence filed on the 29<sup>th</sup> June, 2016, the defendant claims that his brother, Inshan Salim informed him that the claimant wanted to sell the subject land. When the defendant met with the claimant to discuss the sale of the subject land, the claimant informed the defendant that he did not have the sum of twenty-six thousand, six hundred dollars to secure the subject property and so he wanted to sell the land before he lost it. As such, it is the case of the defendant that the claimant knowingly, willingly and voluntarily sold his leasehold interest in the subject land to him (the defendant).

### **Issue**

7. Although the claimant did not specifically plead unconscionable bargain, the issue in this case became such by way of the submissions of both parties. It therefore means that at this stage, whether the claimant in fact executed both the agreement for sale and the deed are not issues for determination by this court. The main issue which falls to be determined is whether Deed dated the 29<sup>th</sup> August, 2015 and registered DE201600056636D001 should be set aside on the ground of unconscionable bargain. There are some factual sub-issues that arise therefrom which will be considered later on.

### **The case for the claimant**

8. The claimant, a seventy-five year old pensioner was the only person who gave evidence on his case. The claimant at first testified that he has no assets however during cross-examination he testified that he owns a house and a bank account. He also testified that he no longer resides at 139 Main Road, Petersfield. He currently resides at Sampson Street, Enterprise Village and has been living there for more than a year. He further testified during cross-examination that he never did any handyman work for anyone. That he worked for Caroni Ltd. until he resigned.

9. Sometime in the month of November, 2014, the claimant was in the process of building a small dwelling house for himself on a parcel of land owned by his deceased father. The land is situate at 139 Union Village, Felicity. He stated in his witness statement that the defendant's brother, Inshan Salim ("Inshan"), who lived five houses away from him at the time, assisted him in building his house. During cross-examination, however, he denied that Inshan assisted him in the construction of his house and stated that he assisted him in the repair of his house.
10. Inshan and the claimant discussed the claimant's entitlement to a lease from Caroni Ltd, therefore Inshan knew that the claimant was a former employee of Caroni Ltd and that as a former employee, he was entitled to a lease of a residential lot of land. During those discussions, Inshan informed the claimant that he saw the claimant's name in the newspaper as someone entitled to the subject land. It is to be noted that during cross-examination, the claimant testified that Inshan was literate. Inshan when giving evidence on his case testified that he could not read.
11. Inshan asked the claimant what he was going to do with the land and if he was going to sell it. The claimant told Inshan that he had not yet decided but that if he decided to sell the sale would be dependent on the value. During cross-examination, the claimant denied having offered to sell the land to Inshan for the price of one hundred thousand dollars or any amount whatsoever. Also during cross-examination, the claimant was asked whether he knew the process by which he could ascertain the value of his land and he testified that he did in fact know.
12. Sometime in or about the 2<sup>nd</sup> December, 2014 Inshan took the claimant to Caroni Ltd. for the claimant to make arrangements to obtain the lease for the subject land. When they arrived at Caroni Ltd., the defendant was there already. The claimant did not invite the defendant. The claimant assumed that Inshan informed the defendant of "an arrangement" to visit Caroni Ltd. During cross-examination, the claimant testified that he did not know beforehand that he was going to Caroni Ltd, that Inshan came and picked him on the morning of the 2<sup>nd</sup> and told him that he had to go to Caroni Ltd. to collect a paper. The

claimant further testified during cross-examination that he knew that the defendant was Inshan's brother since they both grew up in Felicity.

13. During cross-examination, the claimant testified that the night before he went to Caroni Ltd. on the 2<sup>nd</sup> December, 2014, Inshan invited him to his home. The claimant did see the defendant at Inshan's home but the claimant testified that he never discussed the land with the defendant.
14. In his witness statement, the claimant testified that in the presence of the defendant and Inshan, the claimant approached the officers of Caroni Ltd. During cross-examination however, the claimant testified the defendant did not accompany him into the office at Caroni Ltd. Also during cross-examination, the claimant testified that he did not have a badge and therefore did not give the officers a badge to identify himself. One of the officers informed the claimant that he had to pay the sum of twenty-six thousand, six hundred dollars to obtain the lease for the subject land. During cross-examination, the claimant testified that the officer who dealt with him knew his name. He further testified that the officer did not tell him the time within which he had to pay the twenty-six thousand, six hundred dollars. The claimant told the officer that he did not have that kind of money and he left with Inshan.
15. After leaving Caroni Ltd., Inshan took the Claimant to Mr. Sirjoo's office. While on the way to Mr. Sirjoo's office, the defendant informed the claimant that one of his relatives worked there. When they arrived at the office, the claimant sat in the waiting room. Whilst sitting in the waiting room, he saw the defendant speaking to an employee at a computer desk and overheard one of the employees telling the defendant that eighty-five thousand dollars was not enough for the land. During cross-examination, the claimant testified that the defendant did not inform him that he was taking him to Mr. Sirjoo's office when they left Caroni Ltd.
16. Subsequently, the defendant brought a document to the claimant and asked the claimant to place his thumbprint on the document. During cross-examination, the claimant testified that he waited for approximately two hours in the waiting room before the defendant

brought the document for him to sign. The document was not read over to the claimant. He further testified during cross-examination, that Mr. Sirjoo never spoke to him.

17. The claimant testified that even though he did not know what he was signing, he placed his thumbprint on the document. During cross-examination, the claimant testified that he placed his thumbprint on the document because the defendant asked him to see how his *"thumbprint looking"*. Further during cross-examination, the claimant testified that the defendant asked him for his identification card not Mr. Sirjoo. The claimant later found out that he had signed the agreement for sale dated the 2<sup>nd</sup> December, 2014. Clause 2 of the agreement for sale provides as follows;

*"The purchase price shall be the sum of EIGHTY FIVE THOUSAND DOLLARS (\$85,000.00) of which the Purchaser has paid to the Vendor the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00) on account by way of deposit on or before the execution of these presents (the receipt whereof the Vendor hereby acknowledges)."*

18. The claimant testified that he never discussed with the defendant and/or Inshan about selling the subject land to the defendant. The claimant further testified that he never agreed to sell the land to the defendant at the price of eighty-five thousand dollars and that he did not receive any deposit from the defendant for the land.

19. During cross-examination, the claimant testified that he only signed the sale agreement once. The claimant was then shown the sale agreement which had his thumbprint at three places. The claimant was asked if the prints on the sale agreement were his and he testified that *"it looking like my thumbprint"*.

20. Further during cross-examination, the claimant testified that after he left Caroni Ltd. with Inshan, they did not go directly to the office of Mr. Sirjoo. They first went to Republic Bank Limited, Pt. Lisas and from the bank, they went back to Caroni Ltd. When they arrived at Caroni Ltd. the claimant did not go back into the office, he sat in the car. He denied that the defendant gave him a cheque for twenty-six thousand, six hundred dollars

and that he paid the cheque to an officer of Caroni Ltd. The claimant testified that Inshan told him that the defendant went back to Caroni Ltd. to pay money for “*some land*”.

21. During cross-examination, the claimant testified that before going to the officers of Mr. Sirjoo, the defendant, Inshan and he stopped off at another place. The claimant was not sure if the place was Centropolis Mall. He went out with the defendant to an office in this place and saw the defendant speaking to a lady. According to the claimant, after the lady told the defendant that she could not do any agreement, the defendant and he left from the office. The claimant never spoke to the lady.
22. The claimant found out in December, 2015 that on the 2<sup>nd</sup> December, 2014 the defendant had paid the sum of twenty-six thousand, six hundred dollars for the subject land to Caroni Ltd. During cross-examination, the claimant testified that he never signed any document stating that he accepted the offer to lease the subject land. However, the defendant has produced a letter on the letterhead of Caroni Ltd dated the 1<sup>st</sup> April, 2014 in which the claimant appeared to have accepted the offer to lease the subject land having affixed his thumbprint thereto (*See the defendant's list of documents filed on the 28<sup>th</sup> November, 2016*).
23. Sometime in March, 2015 Inshan took the claimant to Caroni Ltd. to collect the deed for the subject land. This is deed dated the 25<sup>th</sup> February, 2015 and registered as DE201500968021D001. On this day, Caroni Ltd. refunded the claimant by cheque the twenty-six thousand, six hundred dollars the defendant paid for the land. Inshan kept the deed and deposited the cheque into the claimant's First Citizens Bank account. During cross-examination, the claimant testified that he did ask someone from Caroni Ltd. what the cheque was for and was told that the cheque was for the land. He further testified that he did not tell anyone at Caroni Ltd. that he did not pay the money which was refunded to him.
24. In his witness statement, the claimant testified that on the 29<sup>th</sup> August, 2015, the defendant again took him to the officer of Mr. Sirjoo and he (the claimant) placed his thumb print on another document which he later found out was deed dated the 29<sup>th</sup> August, 2015 and

registered DE201600056636D001. For stamp duty purposes, Inland Revenue assessed the land at three hundred thousand dollars. The claimant testified that this deed was neither read nor explained to him. He further testified that he never saw Mr. Sirjoo. During cross-examination however the claimant testified that he only went to Mr. Sirjoo's office once and that was after he went to Caroni Ltd. on the 2<sup>nd</sup> December, 2014. He denied going to the office of Mr. Sirjoo on the 29<sup>th</sup> August, 2015.

25. During cross-examination, the claimant agreed that when he placed his thumbprint on a document it was usually an important document.
26. On the 23<sup>rd</sup> October, 2015 Inshan gave the claimant a cheque for the sum of twenty thousand dollars and informed the claimant that the cheque was for the subject land. The claimant told Inshan that he did not want any cheque because he never sold the land to the defendant. It turned out that the claimant had promised or so he said, to sell the land to Sherry and Jagat Ganesh, immediately upon his return from Caroni Ltd on the 2<sup>nd</sup> December 2014.
27. On the instructions of Sherry and Jagat Ganesh, the land was valued by Ronald Heeralal, a registered valuator. By report dated the 21<sup>st</sup> December, 2015 the land was valued at three and seventy thousand dollars (\$370,000.00). Further, Ronald Heeralal prepared an addendum to his valuation report which provided that as at December, 2014 the subject land was in the same physical condition and therefore the sum of three hundred thousand dollars would have been a fair market value for the land at that time. The addendum was dated the 14<sup>th</sup> April, 2016 and marked attention Sherry and Jagat Ganesh.
28. According to the claimant, he never received any cash payments from the defendant for the land. When the claimant, the defendant and Inshan were liming and drinking at the home of Inshan, Inshan would get the claimant to put his thumbprint on pieces of paper. During cross-examination, the claimant testified that the pieces of paper where he placed his thumbprint on was a receipt book. He further testified that he only placed his thumbprint two times on the pieces of paper. During cross-examination, the claimant was shown the



nine receipts exhibited in the defendant's list of documents and was asked if the thumbprints thereon were his. The claimant testified that the thumbprints were his.

29. According to the claimant, Radha Sherry-Ann Ganesh ("Radha") approached him to purchase the land. After she approached the claimant to purchase the land, she made enquiries into the land and found out about the sale agreement between the claimant and the defendant. She informed the claimant about the sale agreement. Thereafter, Radha and the claimant went to the defendant and he gave them a copy of the sale agreement. During cross-examination, the claimant testified that the evening after he went to Caroni Ltd. on the 2<sup>nd</sup> December, 2014 he had discussed selling the land to Radha. The claimant told Radha that he was willing to sell her the land for one hundred thousand dollars. The claimant further testified that he did not execute a written agreement to sell the land to Radha.

30. By letter dated the 3<sup>rd</sup> March, 2016 the claimant's attorney at law, Mr. Gerard Raphael wrote to the defendant demanding that the defendant re-convey the subject land to the claimant. The letter stated as follows;

*"We represent Zaimool Habib a poor and ignorant man who informs us that by Deed registered as no DE201600056636D001 you caused him to transfer his property to you at and for the price or sum of Eighty-Five Thousand Dollars (\$85,000.00)*

*We are instructed that you failed and/or refused to pay him any money for the said parcel of land apart from the deposit of Twenty-Five Thousand Dollars (\$25,000.00) which was initially paid to Caroni Ltd that he was not allowed to have independent advice and that the sale was at an undervalue.*

*We are therefore to enquire whether you would be prepared to re-convey the said parcel of land to our client.*

*Should we not have a favourable response from you within fourteen days of the date hereof we have instructions from our client to make application to the High Court to have the said deed set aside and you may be held responsible for the entire cost of the action."*

31. Sometime in the middle of March, 2016, the defendant visited the offices of Mr. Raphael. At the time of the defendant's visit to Mr. Raphael's office, the claimant and Radha were present. The defendant tried to convince Mr. Raphael that he had paid the claimant for the land by showing Mr. Raphael the receipts for the money allegedly paid to the claimant which had the claimant's thumbprint thereon. After the defendant left the office, it is the testimony of the claimant that he explained to Mr. Raphael that Inshan would get him to put his thumbprint on pieces of paper while they were liming. Mr. Raphael immediately telephoned the defendant and demanded that he re-convey the land to the claimant. However, the defendant refused and so Mr. Raphael informed the defendant that he intended to take him to court. The defendant told Mr. Raphael to do whatever he wanted.

### **The case for the defendant**

32. The defendant gave evidence for himself and called two other witnesses, Inshan Salim and Mr. Richard Sirjoo.

33. The defendant is fifty-two year truck driver. Sometime in either late November or early December, 2014, Inshan called the defendant and asked him if he was interested in purchasing a piece of Caroni Ltd. land. Inshan informed the defendant that the land was owned by the claimant. Inshan further informed the defendant that he did not know the price of the land and that the defendant would have to ask the claimant the price. Inshan made arrangements for the claimant to meet the defendant at his (Inshan's) home. The claimant's home was not the best place to meet as his home was a small board house with no electricity. The defendant personally knew where the claimant was living as they were from the same village.

34. The defendant met with the claimant the evening after he received the call from Inshan. The claimant, the defendant and Inshan sat around a table to discuss the sale of the land. The claimant did not object to Inshan being at the table. The defendant asked the claimant if he had a deed for the land and why he wanted to sell the subject land. The claimant informed the defendant that he did not have the money to pay to Caroni Ltd. for the land. The claimant further informed the defendant that if he (the claimant) did not pay for the

land, Caroni Ltd. would rescind its offer of the land to him and so before he lost the opportunity he wanted to sell the land so he could get something out of it.

35. The defendant testified that the claimant offered the subject land to him at the price of eighty-five thousand dollars. The claimant told the defendant to pay the money to Caroni Ltd. and to pay him the remaining balance of the eighty-five thousand dollars. According to the defendant, he never bargained with the claimant or made any deal with him. The defendant testified that he never offered the claimant a price or made a counter offer to the claimant's offer. The claimant made his price and the defendant accepted.
36. The defendant asked the claimant how much money had to be paid to Caroni Ltd. for the land and the claimant responded that he did not know and that he would have to go to Caroni's Brechin Castle office to find out. The claimant and the defendant then made plans to go to Brechin Castle the next day. The defendant worked close to Brechin Castle and so it was easy for him to meet the claimant there. The claimant did not have a vehicle, so the defendant and the claimant agreed that Inshan would take the claimant to Brechin Castle.
37. The next morning, the defendant met with Inshan and the claimant at Brechin Castle after Inshan called and informed the defendant that they were there. The claimant and the defendant went up to the counter at the office and the claimant in the defendant's presence enquired from the person behind the counter how much had to be paid for the land. In the defendant's presence, the person behind the desk asked the claimant for his badge number and the claimant took out what appeared to be his badge and handed it to the person. The person then left the counter and after a while returned and informed the claimant that the sum of twenty-six thousand, six hundred dollars had to be paid for the land. The person further informed the claimant that he had two weeks to pay the money or he will lose the land. The defendant asked the person whether the money had to be in cash or cheque and the person informed him that if it was a cheque, it had to be a manager's cheque.
38. The claimant, the defendant and Inshan then left the office and went to Republic Bank Limited in Pt. Lisas. The defendant drove his car and Inshan and the claimant followed him in Inshan's car. When the defendant got the cheque, they all returned to the office and the

claimant and the defendant went up to the counter together where the defendant handed the claimant the cheque to pay. A receipt was made out for the claimant and he placed his thumbprint on same. The claimant handed the defendant the receipt and told him to keep it until they settled everything with the land. During cross-examination, the defendant testified that the manager's cheque was drawn on the claimant's name to pay Caroni Ltd. However, the court noted that on the cheque the defendant's name appear and not that of the claimant.

39. After the claimant and the defendant left Caroni Ltd., the defendant told the claimant that he wanted to go to a lawyer to make out a paper stating that he had paid him the money for the land. The defendant testified that since he never bought land before, he did not know any lawyers at the time. The defendant told the claimant that they would look for a lawyer in Chaguanas and the claimant stated that he had no problem with that. The defendant left in his car in search of a lawyer with the claimant and Inshan following in Inshan's car.

40. The defendant stopped at Centropolis Mall on Ramsaran Street, Chaguanas as he saw a lawyer's sign there. The claimant and the defendant met with a lady lawyer who told them that she could not prepare the agreement and that they would have to go to the firm's San Fernando office. The defendant told the claimant that he was not going to San Fernando. Whilst continuing their search for a lawyer's office on Ramsaran Street, the defendant stopped at the offices of Mr. Sirjoo, after seeing his sign. The defendant testified that he never told the claimant that he had relatives working at Mr. Sirjoo's office. The defendant further testified that he did not know Mr. Sirjoo before and Mr. Sirjoo was just a random lawyer he picked because he saw his sign while driving.

41. The claimant and the defendant went into Mr. Sirjoo's office. The defendant informed Mr. Sirjoo that he made a down payment to the claimant for the land and that he wanted to make an agreement. In the defendant's presence, Mr. Sirjoo asked the claimant how much he was selling the land for and the claimant told him eighty-five thousand dollars. Mr. Sirjoo then asked the claimant if he wanted to speak to another lawyer and the claimant replied that he did not want to. During cross-examination, the defendant admitted that he did not state in his defence that Mr. Sirjoo asked the claimant if he wanted to speak to

another lawyer. Thereafter, Mr. Sirjoo took the receipt from Caroni Ltd., the claimant and the defendant's identification cards and told them that it would take about two hours to do the agreement for sale. Before the claimant and the defendant left Mr. Sirjoo's office, Mr. Sirjoo asked the claimant again how much he was selling the land for and the claimant reiterated eighty-five thousand dollars.

42. After waiting in the waiting room for about an hour, a lady told the defendant and the claimant that Mr. Sirjoo was ready for them. The claimant and the defendant then went into the office and Mr. Sirjoo slowly and loudly read out the contents of the agreement. Mr. Sirjoo then asked both the defendant and the claimant if they understood and agreed with the contents of the agreement. They both responded yes. Mr. Sirjoo also asked them if they had any questions and they both responded that they did not.

43. The defendant and the claimant then signed the agreement. Mr. Sirjoo and his secretary also signed the agreement in the presence of the defendant. After signing the agreement, the claimant and the defendant left the offices of Mr. Sirjoo. On their way out, the claimant asked the defendant if he was going to re-sell the land and the defendant told him no. The defendant informed the claimant that he bought the land to build his house on it. The claimant then told the defendant that *"I does want a little money to use during the month"* and *"you could pay me off after you get the deed"*. During cross-examination, the defendant testified that when the contents of the agreement for sale was being read out by Mr. Sirjoo, the claimant did not tell Mr. Sirjoo that he was not paid any money for the land.

44. On the 29<sup>th</sup> August, 2015 the claimant and the defendant went to Caroni's Brechin Castle office to collect the claimant's deed for the land. On this same day, the claimant and the defendant went back to Mr. Sirjoo's office to have deed registered as DE201600056636D001 executed. Mr. Sirjoo took the agreement for sale, the claimant's deed and told the claimant and the defendant to hold on outside. Sometime later Mr. Sirjoo called the claimant and the defendant back into his office where he slowly and loudly read over the contents of deed to them. Mr. Sirjoo then asked the claimant and the defendant if they understood and agreed with the contents of the deed and they replied that they did. Mr. Sirjoo then asked if they had any questions to which they responded that they did not.

The defendant and the claimant then signed the deed. Thereafter, Mr. Sirjoo and his secretary signed the deed in the presence of the defendant and claimant.

45. During cross-examination, the defendant testified that when the contents of the deed were being read out by Mr. Sirjoo, he did not inform Mr. Sirjoo that the eighty-five thousand dollars had not yet been paid to the claimant because he and the claimant had agreed that when he (the defendant) received his deed he would pay to the claimant the balance of the outstanding money for the land. The defendant further testified that Mr. Sirjoo did not explain that the deed acted as a receipt for the payment of the eighty-five thousand dollars.
46. After the claimant and the defendant left Mr. Sirjoo's office the claimant never told the defendant that he had a problem with the agreement or the deed. The claimant also did not inform the defendant that he was unhappy with the price he had offered to sell the land for. After making the deed the claimant continued to collect money from the defendant for two months.
47. Between the 2<sup>nd</sup> December, 2014 and the 23<sup>rd</sup> October, 2015 the defendant paid to the claimant over sixteen thousand, eight hundred dollars in cash. The defendant personally prepared receipts for the claimant and the claimant placed his thumbprint on those receipts to acknowledge receiving the sums. During cross-examination, the defendant testified that no one witnessed when he paid the claimant the money for the land. That even though most of the payments were made to the claimant at Inshan's house, Inshan did not witness the payments.
48. The defendant also gave to the claimant a cheque dated the 23<sup>rd</sup> October, 2015 in the sum of twenty thousand dollars. The claimant placed his thumbprint on a receipt for receiving the cheque but after a week he returned the cheque to the defendant and informed the defendant that he had lost his identification card. The claimant asked the defendant to keep the cheque until he got back his identification card. A week after the claimant returned the cheque, the defendant tried locating the claimant to pay him off but the defendant could not find him. The claimant's neighbours informed the defendant that the claimant had moved out from his home located at 139 Main Road, Petersfield.

49. During cross-examination, the defendant testified that Inshan gave the claimant the cheque and that the cheque was returned to Inshan who returned it to the defendant. The defendant was then referred to letter dated the 12<sup>th</sup> April, 2016. This letter was written by the defendant's attorney-at-law in response to the claimant's letter dated the 3<sup>rd</sup> March, 2016. The fourth paragraph of this letter provides as follows;

*“...on the 23<sup>rd</sup> October, 2015 my client gave Mr. Habib a Republic Bank Limited manager's cheque drawn on Mr. Habib's name in the sum of \$20,000. Mr. Habib refused to cash the cheque and returned it to my client...”*

50. During cross-examination, the defendant testified that he did inform his attorney that the claimant refused to cash the cheque. He further testified that when he went to find out why the claimant refused to cash the cheque, the claimant was not living in Petersfield anymore. The defendant was then asked if he thought there was a problem when the claimant returned the cheque and he responded by saying yes and that was why he went to look for the claimant.

51. About six months after making the agreement for sale, the defendant started building his house on the land. The defendant spent over three hundred thousand dollars in constructing his home. Although the house has not been completed, the defendant is presently living in it. The defendant disclosed numerous receipts to prove the money he spent on constructing his home. During cross-examination, the defendant testified that he began constructing his home on the land in early 2015. The defendant was then shown that the earliest date on the receipts he disclosed was March, 2016. The defendant testified that those receipts were for the construction of the house itself and not for the foundation of the house. The defendant was then directed to receipt dated the 16<sup>th</sup> March, 2016 which stated that twelve thousand dollars was made to Parasram Mahabir for the preparation of the foundation. The defendant then admitted that when he was constructing his house, he was aware that the claimant was unhappy with the transaction he had made to sell him the land as he (the defendant) had received letter dated the 3<sup>rd</sup> March, 2016.

52. The defendant testified that the claimant knew that he was building his home on the land. The defendant further testified that in reliance on the claimant's promise to sell him the land, he started building on the land. According to the defendant, if he loses the land, he will lose hundreds of thousands of dollars.
53. Sometime in November, 2015 Inshan called the defendant and asked him if he had placed a sign on the land. The defendant told Inshan that he had not placed any sign on the land. Inshan then informed the defendant that there was a sign on the land with a number on it. Inshan called the number and a man answered the phone.
54. The defendant then went to the land. Inshan was standing in the driveway of the land. Subsequent to the defendant's arrival at the land, a man and a woman arrived at the land. The defendant did not know who the man and woman were. From the claimant's evidence, it is reasonable to infer that the man and the woman were Radha and her husband Jagat Ganesh ("Jagat"). The defendant informed Jagat that the land was his. Jagat then said that the claimant sold him the land. Thereafter, the claimant existed from the back seat of Jagat's car. The defendant told the claimant "*you want to make a jail ah wah for selling other people the land you sell me*". The claimant did not respond and just went back into the car. The defendant told Jagat to take down his sign and leave. The defendant never saw the claimant after that day until he met him at Mr. Raphael's office in March, 2016.
55. Sometime in early January, 2016 the defendant received a letter dated the 5<sup>th</sup> January, 2016 from Attorney-at-law Mr. Garvin Narine-Ramsepaul. This letter stated as follows;
- ".... I act on behalf of Radha Sherry-Ann Ganesh and Jagat Ganesh.  
My clients instructs me that they entered into an agreement with one Zainool Habib for the conveyance of the subject property to my clients.  
Further my clients later received information that the said Zainool Habib entered into an agreement for sale with you good self. A copy of the agreement for sale was provided to my clients by you. My clients are unable to ascertain any clear information from Mr. Habib as to whether he executed a deed of assignment in your favour or the exact stage of your transaction in the matter.*



*In the circumstances my clients humbly request any official documentation relating to the execution of a deed of assignment in your favour by Mr. Habib to determine any legal recourse they may have in the matter. I humbly look forward to your response within the next 14 days hereof failing which, my clients would take steps to register a deed relating to the conveyance of the subject property from Mr. Habib to themselves... ”*

56. The defendant contacted Mr. Sirjoo who informed him to take a copy of the sale agreement to Mr. Ramsepaul. Mr. Ramsepaul never contacted the defendant again after the defendant gave him a copy of the sale agreement.
57. On the 9<sup>th</sup> March, 2016 the defendant received a call from Mr. Sirjoo's office for him to collect his deed. The defendant collected his deed and on the same day he went to Republic Bank and took out a manager's cheque in the sum of twenty-two thousand dollars to pay the claimant the balance owing on the land.
58. Soon after the defendant received his deed, he received letter dated the 3<sup>rd</sup> March, 2016 from Mr. Raphael. The defendant called Mr. Raphael's office and made an appointment. When the defendant went to Mr. Raphael's office he met the claimant and Radha. The defendant asked Mr. Raphael who Radha was and Mr. Raphael informed the defendant that she concerned the claimant. Mr. Raphael then informed the defendant that he was not paying the claimant his money for the land. The defendant informed Mr. Raphael that he was paying the claimant his money and showed Mr. Raphael the receipts with the claimant's thumbprint.
59. Mr. Raphael took the receipts and told the claimant in the defendant's presence "*how come you say the man not paying you but look it have receipts with your fingerprints on it*". The defendant then heard Radha say "*oh god!*" The defendant then told Mr. Raphael that he had two manager's cheques for the claimant in the sum of forty-two thousand dollars. The claimant refused to take the cheques and Mr. Raphael informed the defendant that the transaction could not be completed in his office. Mr. Raphael then told the defendant he was free to leave. Before leaving the defendant asked the claimant for his new address in

order to meet him to pay him off for the land. The claimant refused to give the defendant his address.

60. About half an hour after leaving Mr. Raphael's office, Mr. Raphael called the defendant on his phone and informed him that the claimant wanted to bring him up in court for underpaying for the land. This was the first time the defendant heard that he had underpaid the claimant for the land.
61. **Inshan** is an illiterate forty-three year old labourer. He worked as a private contractor some years ago doing maintenance and sometimes hired the claimant to work with him. Inshan knows the claimant from seeing him around Petersfield Village and the claimant has visited Inshan's home on several occasions.
62. Inshan helped the claimant to repair his house in early 2015. This was about two months after the claimant entered into the agreement for sale with the defendant. Much of Inshan's evidence was the same as the defendant's evidence and as such there was no need to repeat it.
63. According to Inshan, the claimant on several occasions told him that he had to get a piece of land from Caroni Ltd. but that he had no money to pay for it. Each time the claimant informed Inshan about the land, the claimant offered to sell the land to Inshan. The claimant initially stated that he wanted one hundred thousand dollars for the land. Inshan testified that each time the claimant offered to sell him the land, he informed the claimant that he did not have money to purchase the land and was therefore not interested.
64. During cross-examination, Inshan testified that a friend of his whilst reading the papers saw the claimant's name on same and told him "*look your worker name is on the papers*". Inshan further testified that he did not inform the claimant that his name was on the papers.
65. Eventually the claimant informed Inshan that he would sell the land for eighty-five thousand dollars. Inshan again informed the claimant that he was not interested in purchasing the land as he had no money to do so.

66. One evening, sometime in late November, 2014, the claimant went to Inshan's home and informed him that he (the claimant) had gotten a paper from Caroni Ltd. which stated that he had to pay for the land or else he would lose it. The claimant again asked Inshan if he wanted to purchase the land. Inshan reiterated that he had no money but he told the claimant that he would ask the defendant if he wanted to purchase the land.
67. During cross-examination, Inshan testified that he was present when the claimant was paid money for the land. That claimant would visit his home and ask for the money and he (Inshan) would contact the defendant to inform him the claimant wanted money. The defendant would then drop the money for Inshan's wife who would give the money to the claimant. Inshan further testified during cross-examination that after his wife gave the claimant the money, she would make out receipts for the money and get the claimant to put his thumbprint on the receipts. This evidence was contrary to the evidence given by the defendant.
68. Sometime in November, 2015, a friend of Inshan's who has a piece of land next to the subject land asked Inshan if the subject land was for sale as there was a sign on the land. Inshan drove over to the land and saw the sign which had a phone number on it. Although he cannot read, he can recognize numbers and so he called the number and told the person who answered that he was interested in the land. This was after he called the defendant and told him about the sign.
69. During cross-examination, Inshan testified that when the claimant was refunded the twenty-six thousand, six hundred dollars from Caroni Ltd. he took the claimant to deposit the cheque in First Citizens Bank but the claimant deposited the cheque for himself.
70. **Mr. Richard Sirjoo** is an attorney-at-law with twenty-one years of standing. Mr. Sirjoo's main office is located at No. 7A Ramsaran Street, Chaguanas.
71. On the 2<sup>nd</sup> December, 2011 the claimant and the defendant went to Mr. Sirjoo's office. Mr. Sirjoo testified that he did not know the claimant and the defendant before the aforementioned date. The defendant informed Mr. Sirjoo that the claimant had agreed to

sell him the subject land and that he (the defendant) had earlier made a down payment towards the land and wanted to “*make a paper for the land*”. Mr. Sirjoo informed both the claimant and the defendant that he could not act for both of them in the same transaction unless they both agreed. Mr. Sirjoo further informed the claimant of his right to seek independent legal advice in the matter, explained the importance of the transaction and the possible consequences of not seeking independent legal advice. Mr. Sirjoo testified that the claimant appeared to fully understand what was being told to him and the claimant then waived his right to independent legal advice.

72. During cross-examination, Mr. Sirjoo testified that he did not think that he should put in writing that he had informed the claimant of his right to seek independent legal advice. He further testified that he concluded that creating such a document would have had little value since the claimant could not read or write.

73. Mr. Sirjoo then asked the claimant the price at which he was selling the land and the claimant stated eighty-five thousand dollars. During cross-examination, Mr. Sirjoo testified that he did not ask the claimant how he arrived at the price of eighty-five thousand dollars or whether that price was the true value of the land. Mr. Sirjoo further testified during cross-examination that he did not advise the claimant to do a valuation of the land.

74. Mr. Sirjoo proceeded to take instructions from both the claimant and the defendant, took copies of their identification cards and prepared the agreement for sale. During cross-examination, Mr. Sirjoo testified that the defendant gave him instructions for the preparation of the sale agreement. He further testified that he was initially acting for the defendant.

75. After the agreement for sale was prepared, Mr. Sirjoo slowly and loudly read out its contents to both the claimant and the defendant in the presence of his secretary, Mrs. Nankumarie Samaroo (“Samaroo”). Mr. Sirjoo then asked both men if they understood the contents and they both said yes. He also asked both men individually if they had any questions or if they needed anything in particular to be explained. Both men stated no.

Thereafter, the claimant and the defendant executed the sale agreement in the presence of Mr. Sirjoo and Samaroo.

76. On the 29<sup>th</sup> August, 2016 the claimant and the defendant returned to Mr. Sirjoo's office. The claimant presented Mr. Sirjoo with the deed of lease from Caroni Ltd. in his name and the defendant asked Mr. Sirjoo to prepare a deed of sale. Mr. Sirjoo again advised the claimant of his right to seek independent legal advice and the claimant responded by saying "*That's ok, you going good*". During cross-examination, Mr. Sirjoo testified that he prepared the deed based on instructions from both the claimant and the defendant since at this time he was acting for both men.

77. Mr. Sirjoo duly prepared the deed of sale and slowly and loudly read over its contents to both the claimant and the defendant. Again in the presence of Samaroo, Mr. Sirjoo asked both men individually if they understood what was read to them and they both replied that they did. Mr. Sirjoo also asked both men individually if they had any questions or needed anything in particular to be explained and they both responded by saying no. Further, Mr. Sirjoo asked them both if they had sorted out the balance of the money and they stated yes. During cross-examination, Mr. Sirjoo testified that he could not recall specifically asking the claimant whether he was paid. However, Mr. Sirjoo testified that he did go through the deed and explained same in detail to the claimant which would have included an explanation as to the meaning of the receipt clause.

78. Both the claimant and the defendant then executed the deed in the presence of Mr. Sirjoo and Samaroo. Subsequently, Mr. Sirjoo sent the deed to be evaluated for stamp duty and to be registered. When the deed was returned, Mr. Sirjoo instructed Samaroo to contact the defendant and inform him that the deed was ready for his collection.

### **Unconscionable bargain**

#### **Law**

79. **Halsbury's Laws of England, Volume 22 (2012), paragraph 298** provides as follows;

*“Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. In respect of this last category, the jurisdiction extended beyond expectant heirs per se to all persons under pressure and without adequate protection, the usual requirements being that the sale was: (1) by a poor or ignorant person; (2) at a considerable undervalue; and (3) without independent legal advice. The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident.*

*It has been suggested that these various instances of protecting against weakness or vulnerability might be gathered together under a general doctrine of inequality of bargaining power: by virtue of it, English law gives relief 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 ....*

*It is said that the remedies available in respect of unconscionable bargains are subject to the same rules as those made under undue influence.”*

80. Snell’s Equity, 31<sup>st</sup> edition, page 228, paragraphs 8-46 & 8-47 provides as follows;

*“...There is a well-established equitable jurisdiction to set aside a purchase from “a poor and ignorant man” at a considerable undervalue unless the purchaser satisfies the court that the transaction was fair, just and reasonable. The doctrine is distinct from undue influence because it does not require a pre-existing relationship between the parties and may arise between parties who are completely unknown to each other. However, “a bargain cannot be unconscionable unless one of the parties has imposed the objectionable terms in a morally reprehensible manner; that is to say, in a manner which affects his conscience.” All of the leading authorities stress the importance of a finding not only that*

*there is an imbalance in the relationship between the parties and the terms agreed but also that the party who imposed them was guilty of morally culpable or reprehensible terms. The doctrine applies where (1) C was suffering from certain kinds of disability or disadvantage; (2) the bargain was oppressive to the complainant (C); and (3) the counterparty (D) acted unconscionably in that he or she knowingly took advantage of C. It is not clear whether the absence of independent legal advice is a substantive requirement of this doctrine.”*

81. In **Fry v Lane (1888) 40 Ch. D 312 at page 322** (a case relied upon by the claimant) Kay J stated as follows;

*“The result of the decisions is that there a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and à fortiori if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just, and reasonable.”*

82. In the Privy Council case of **Boustany v Pigott (1993) 42 WIR 175 at 180** (a case relied up by the defendant) Lord Templeman in delivering the advice of the Board stated as follows;

*“In a careful and thoughtful submission, Mr Robertson, who appeared before the Board on behalf of Mrs Boustany, made the following submissions with which their lordships are in general agreement. (1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience': Multiservice Bookbinding v Marden [1979] Ch 84 at page 110. (2) 'Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1983] 1 WLR 87 at page 94. (3) Unequal bargaining power or*

*objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, 'it was not right that the strong should be allowed to push the weak to the wall': Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173 at page 183. (4) A contract cannot be set aside in equity as 'an unconscionable bargain' against a party innocent of actual or constructive fraud; even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: Hart v O'Connor [1985] AC 1000, applied in Nichols v Jessup [1986] NZLR 226. (5) 'In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances': per Mason J in Commercial Bank of Australia Ltd v Amadio (1983) 46 ALR 402 at page 413."*

83. As such, the court has to consider first, whether the claimant is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the claimant had independent advice.

### **Poor and ignorant**

#### **Submissions of the claimant**

84. The claimant submitted that there can be no dispute that he on the facts of this case satisfies the test of poor and ignorant. The claimant relied on the case of **Creswell v Potter [1978] 1W.L.R. p 255 at 257** wherein Megarry J in considering the three requirements in Fry v Lane supra stated as follows;

*"I think that the Plaintiff may fairly be described as falling within whatever is the modern equivalent of "poor and ignorant". Eighty years ago when Fry v Lane was decided, social conditions were very different from those which exist today. I do not, however, think that the principle has changed, even though the euphemisms of the 20th century may require*



*the word “poor” to be replaced by “a member of the lower income group” or the like and the word “ignorant” by “less highly educated.”*

85. Further at page 258 Megarry J stated as follows;

*“...I think that a telephonist can properly be described as “ignorant” in the context of property transactions in general and the execution of conveyancing documents in particular...”*

#### The submissions of the defendant

86. According to the defendant, during cross-examination the claimant insisted that he would sell the land at market value and that he knew how to go about finding out the value of his land despite being illiterate. The defendant submitted that it was irrelevant whether the claimant availed himself of the opportunity to have his land valued before he sold it to the defendant. That what was relevant was that the claimant knew how to ascertain the proper value of his land, chose not to and freely contracted with the defendant to sell his land for eighty-five thousand dollars.

87. As such, the defendant submitted that even though the claimant maybe poor and ignorant in the literal sense, he was neither suffering from a serious disability which significantly affected his judgment to act in his best interest nor did he lack the understanding to know what he was doing. The defendant submitted that by his own evidence the claimant failed to satisfy the test of ‘poor and ignorant’.

88. The defendant further submitted that as the defendant never bought land before, it was reasonable to hold that both parties were of equal bargaining power and involved in a transaction at arm’s length. That this was emphasized by the evidence of the defendant and supported by the claimant that the parties went in search of attorney before Mr. Sirjoo was retained.

## **Findings**

89. The court agrees with the submissions of the defendant that the claimant has failed to satisfy the test of poor and ignorant. In his witness statement, the claimant testified that he informed Inshan that if he was going to sell the subject land, the sale would be dependent on its value. During cross-examination, the claimant was asked if he knew how to ascertain the value of the land and he testified that he did. He was further asked if he knew how to make a good deal and he stated that “*well I not dotish*”.
90. As such, the court finds that that even though the claimant may be poor in the literal sense, he was not ignorant and/or suffering from any disability which affected his judgment to act in his best interest during the transactions with the defendant. The evidence of the claimant clearly depicts that although he is illiterate, he knew that his land held value and also knew how to ascertain that value. The court therefore agrees with the submissions of the defendant that it was irrelevant whether the claimant availed himself of the opportunity to have his land valued before he sold it.

## **Considerable undervalue**

### **The submissions of the claimant**

91. The claimant submitted that the sale of the subject land to the defendant was at a considerable undervalue of the land. According to the claimant, at the time of the agreement for sale the value of the land was three hundred thousand dollars (*see Addendum from Ronald Heeralal dated the 14<sup>th</sup> April, 2016*) and at the time of registration of the defendant’s deed dated the 25<sup>th</sup> February, 2015 and registered as DE201500968021D001 the value of the land was three hundred and seventy thousand dollars (*see Valuation report dated the 21<sup>st</sup> December, 2015*). As such, it was the submission of the claimant that he has satisfied the requirement of the sale being at a considerable undervalue.

92. The claimant relied on the case of Cresswell v Potter supra. In Cresswell, after the dissolution of the parties' marriage, the wife (the plaintiff) executed a deed of release and conveyed to her husband her joint interest in the matrimonial home. The husband subsequently sold the home. The plaintiff claimed a half share in the proceeds of sale, contending that the deed of release was of no effect against them. For the plaintiff to succeed she had to show that she was poor and ignorant, that the disposal was at an undervalue and that she did not have independent advice. It was held that the plaintiff satisfied the three requirements and as such the transaction was set aside. In determining whether the sale was at a considerable undervalue, Megarry J stated the following at page 258;

*“The second question is whether the sale was at a “considerable undervalue.” Slate Hall cost £1,500, £1,200 of the price being provided by the mortgage. The release recited that £1,196 13s.5d. remained outstanding on the mortgage, so that very little had been paid off the capital sum due. Nevertheless, all that the plaintiff was getting for giving up her half interest in Slate Hall was the release from her liability under the mortgage. If Slate Hall was worth no more than it cost, she was giving up her half share in an equity worth £300; and, after all, the mortgage was a recent mortgage to a well-known building society. If she had sought advice it is unlikely in the extreme that she would have been told that there was any real probability that the value of the property would be less than the sum due under the mortgage. There can be little doubt that she was getting virtually nothing for £150.*

*In fact, as is now known, within a little over two years the property fetched £3,350, so that at the time in question the plaintiff's share of the equity may have been worth appreciably more than £150. It is true, as Mr. Balcombe pointed out on behalf of the defendant, that there was no valuation evidence before me, and that any valuation of the property must rest upon inferences from the prices for which the property was sold. I do not think it right to assume, without evidence, that there was a dip in the value of the property between its purchase in November 1958, and the sales in December 1960, and September 1961; and without such a dip it seems to me that the probabilities point to the property having a value in August 1959, which at all events substantially exceeded the sum due under the mortgage*

*for £1,200. The more valuable the equity, of course, the less valuable would be the indemnity against the mortgage. It seems to me that by the release the plaintiff parted with her interest in Slate Hall at an undervalue which cannot be dismissed as being trifling or inconsiderable. In my judgment the undervalue was “considerable.”*

#### The submissions of the defendant

93. The defendant submitted that there is no dispute that the claimant sold his land for below market value. However, the defendant argued that the fact that the claimant did sell his land at an undervalue in no way affects the validity of the agreement for sale.

94. The defendant submitted that it is trite law that in contract for the sale of land, as in any other contract, parties are free to negotiate on whatever terms are suited to them. That it is also trite law that consideration may be anything that the parties consider of value to them. In so submitting, the defendant relied on the authority of *Mountford v Scott [1975] Ch. 258* wherein the vendor agreed to sell the interest in his land for £1. Lord Justice Russell at page 264 stated as follows;

*“...If the owner of a house contracts with his eyes open, as the judge held that the Defendant did, it cannot in my view, be right to deny specific performance to the purchaser because the vendor then finds it difficult to find a house to buy that suits him and his family on the basis of the amount of money of the proceeds of sale.”*

95. According to the defendant’s evidence, the claimant approached him and offered to sell the land at the price of eighty five thousand dollars. The defendant testified that he never bargained with the claimant, made any deal with him or made a counter offer. He simply accepted the claimant’s offer.

96. The defendant submitted that his evidence was supported by Inshan who testified the claimant approached him on several occasions and offered to sell him the land for one hundred thousand dollars. The claimant’s offer then went down to eighty-five thousand

dollars. Inshan further testified that he told the claimant that he would ask the defendant if he was interested in purchasing the land and arranged with the claimant to meet the defendant at his home.

97. According to the defendant, during cross-examination the claimant admitted to meeting the defendant at Inshan's home. The defendant submitted that this admission supported his evidence that the claimant offered to sell him the land for eighty-five thousand dollars.

98. As such, the defendant submitted that the evidence clearly indicated that it was the claimant who made his price of his own accord and offered the defendant who simply accepted. The defendant further submitted that by simply accepting the offer, he in no way acted with moral culpability or impropriety. Consequently, the defendant submitted that the claimant failed to satisfy the test of "*considerable undervalue*" and *Mountford v Scott* (supra) should be applied.

### **Findings**

99. The court finds that the land was sold at a considerable undervalue. This much is clear. However, the court agrees with the submissions of the defendant that the fact that the claimant did sell his land at a considerable undervalue in no way affected the validity of the agreement for sale and the deed as the court accepted the defendant's evidence that it was the claimant who offered the land to him at the price of eighty-five thousand dollars and that he simply accepted the claimant's offer. This is so because in the court's view the evidence of the claimant was inherently unreliable for several reasons set out hereunder.

100. The closer the examination of the claimant's evidence, the more it reeks of untruth. The claimant's evidence was filled with inconsistencies. Some of the material inconsistencies are as follows. In his witness statement, the claimant made no mention of the fact that he visited the house of Inshan on the 1<sup>st</sup> December 2014, the day before he went to Caroni Ltd. This evidence is fundamentally material but the claimant hides this from the court in his witness statement. It could not be that he forgot that he in fact went

there the night before as during cross-examination (months after he filed a witness statement), he admitted that he went to Inshan's house and saw the defendant there. He however denied speaking to the defendant about the land. Two things strike the court in this respect. Firstly, a court would have to ask itself, why would the claimant hide that information and what was he hiding. It could not be that he was hiding a chance encounter with the defendant the night before as there is no benefit to him in hiding such a mundane event. It must therefore be that he sought to hide the meeting because he knew that he had made an arrangement with the defendant at that meeting to go to Caroni the next day to enquire about the land and that he agreed to accept the price of eighty five thousand dollars. It was quite frankly astounding that the claimant would have left this material evidence out of his witness statement and the court finds that it was in fact designed to deceive. The court therefore finds that the claimant did knowingly agreed to a price for the sale of the land without ascertaining its value although he knew that he could have done so. But the claimant's lack of reliability and credibility did not end there.

101. In his witness statement the claimant testified that after he left Caroni Ltd. on the 2<sup>nd</sup> December, 2014 he was taken to Mr. Sirjoo's office. However, during cross-examination the claimant admitted that after he left Caroni Ltd. he did not go directly to Mr. Sirjoo's office but went to Republic Bank, returned to Caroni Ltd., and then after leaving Caroni Ltd. stopped off by another office before arriving at Mr. Sirjoo's office. Those admissions corroborated the defendant's version of events but are patently absent from the evidence in chief of the claimant. Once again, the court found that the claimant omitted this evidence from his witness statement in an attempt to distance himself from the entire transaction with the full knowledge that he was part of the bank transaction having agreed with the defendant that the defendant would pay the sum of twenty six thousand dollars to Caroni and the balance to him. It is therefore abundantly clear that the claimant was once more attempting to deceive the court. One only has to repeat the claimant's version of events to appreciate its incredibility.

102. Further, in his witness statement the claimant testified that Radha approached him to purchase the land. However, during cross-examination the claimant testified that he

approached Radha and offered to sell her the land for one hundred thousand dollars. This offer occurred on the same day he went to Caroni Ltd. on the 2<sup>nd</sup> December, 2014. The claimant further testified during cross-examination that even though the land is valued at three hundred and seventy thousand dollars, he is willing to sell Radha the land for one hundred thousand dollars. This evidence clearly demonstrated several matters to this court. Firstly, that despite the fact that the claimant knew the value of the land, he was quite willing to sell to Radha at a considerable undervalue, which is literally the same position he placed himself in with the defendant. So that the claimant was always willing to sell the land at a considerable undervalue.

103. Secondly, the evidence of what transpired in Mr. Raphael's office is telling in at least one material respect. Radha's reaction upon hearing of the existence of receipts is nothing short of priceless and demonstrated to this court that she appeared to be genuinely shocked by that revelation. It follows as a matter of common sense and the court so finds, that as is common with human behaviour, the claimant would have sold the land to the defendant and having realized thereafter that he could have gotten a higher price from Radha and her husband he (either with advice of others or not) decided to attempt to set aside the transaction with the defendant. To that end he would have been literally feeding one side of the story to Radha and her husband so that when she discovered that he in fact signed receipts her shock was palpable. The court therefore finds that the evidence of the claimant was concocted with the aim of setting aside the transaction with the defendant because the claimant has more to financially gain from selling the land to Radha and her husband.

104. In so saying the court also accepted that the receipts were genuine receipts signed by the claimant with the full knowledge of that which he was signing. His story of the persons having him sign a receipt on the several occasions that he visited Inshan's home simply does not accord with what is plausible and common sense. The court accepts the evidence of the defendant in that regard.

105. Consequently, the court finds that even though the transaction may have been improvident, it was not oppressive to the claimant since he knew that the land was a

valuable asset and willingly offered to sell it to the defendant at a considerable undervalue. The court further finds that the defendant did not act unconscionably by accepting the claimant's offer.

### **Independent advice**

#### **The submissions of the claimant**

106. According to the claimant, the general rule is that the pleadings determine the issues the court is required to decide. The claimant submitted that the defendant did not allege in his Defence that the claimant was advised of his right to independent advice and that he had refused it. As such, the claimant submitted that the issue of independent advice is not an issue for determination by this court.
107. The claimant submitted that even if the issue is one for determination, the court ought to reject any submission that the claimant was advised of his right to independent advice since the evidence given by the defendant and Mr. Sirjoo was given as an afterthought to meet the claimant's case against the defendant. The claimant further submitted that the defendant's evidence on this issue lacks credibility as the evidence of the defendant and Mr. Sirjoo were inconsistent with each other.
108. The claimant submitted that the evidence of the defendant and Mr. Sirjoo were inconsistent because with respect to the execution of the Deed, the defendant gave no evidence that Mr. Sirjoo advised the claimant of his right to independent advice whereas Mr. Sirjoo testified that he advised the claimant of his right to seek independent legal advice and that the claimant declined.
109. According to the claimant, it was incumbent upon Mr. Sirjoo to put in writing that he had invited the claimant to seek independent legal advice, that he had declined the invitation and have him attach his thumb print to the document. The claimant submitted that if this was done the court may have been readily satisfied that he was offered independent advice but declined it.



110. Moreover, the claimant submitted that Mr. Sirjoo failed in his duty towards him since he failed to ascertain whether the balance of the purchase price was paid and whether the purchase price reflected the true market value of the land before causing the execution of the Deed. The claimant submitted that notwithstanding the fact that Mr. Sirjoo testified that he was acting on his behalf, he was not in fact so acting since he admitted in cross-examination to not having knowledge of all relevant facts such as the value of the land and the fact that it was land given to the claimant for all his years of work with Caroni Ltd. According to the claimant, it can hardly be said that Mr. Sirjoo acted as a competent and honest adviser would have in giving his advice, if he was solely acting in the interests of the claimant.

111. The claimant relied on the Privy Council case of **Inche Noriah binte Mohamed Tahir v Shaik Allie bin Omar bin Abdullah Bahashuan [1928] ALL ER Rep 189 at 193** wherein Lord Hailsham LC provided as follows;

*“...It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of COTTON, LJ, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.”*

112. In **Inche Noriah** supra, the appellant, a Malay woman, who was of great age and wholly illiterate, executed a deed of gift of property in Singapore in favour of her nephew,

the respondent who had the management of all her affairs. Before executing the deed the appellant had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the appellant's property, and did not bring home to her mind that she could more prudently, and equally effectively, benefit the respondent by bestowing the property upon him by will. The gift was set aside, as the presumption of undue influence which arose was not rebutted.

113. The claimant also relied on the case of *Cresswell v Potter* supra wherein Megarry J at page 258 stated as follows;

*“As for independent advice, from first to last there is no suggestion that the plaintiff had any. The defendant, his solicitor and the inquiry agent stood on one side: on the other the plaintiff stood alone. This was, of course, a conveyancing transaction, and English land law is notoriously complex. I am certainly not saying that other transactions, such as hire-purchase agreements, are free from all difficulty. But the authorities put before me on setting aside dealings at an undervalue all seem to relate to conveyancing transactions, and one may wonder whether the principle is confined to such transactions, and, if so, why. I doubt whether the principle is restricted in this way; and it may be that the explanation is that it is in conveyancing matters that, by long usage, it is regarded as usual, and, indeed, virtually essential, for the parties to have the services of a solicitor. The absence of the aid of a solicitor is thus, as it seems to me, of especial significance if a conveyancing matter is involved. The more usual it is to have a solicitor, the more striking will be his absence, and the more closely will the courts scrutinise what was done.”*

114. According to the claimant, the defendant's evidence must be compared to his evidence. The claimant maintained throughout his evidence that he has never seen Mr. Sirjoo and that he has never spoken to him about the transaction. The claimant submitted that the evidence of the defendant in cross-examination when he testified that Mr. Sirjoo did not tell him that the Deed was a receipt in some way corroborated his evidence that he did not see or speak to Mr. Sirjoo. Further, the claimant submitted that the discrepancy in

the evidence of the defendant and Mr. Sirjoo concerning what Mr. Sirjoo said to the claimant about independent advice also suggested that the evidence was concocted.

115. The claimant submitted that the court ought to reject the evidence of the defendant pertaining to the agreement he and the claimant arrived at after signing the agreement which was that the defendant would pay off the claimant when he got his deed since that evidence clearly contradicted the written agreement which the parties had just executed and which Mr. Sirjoo testified that he had thoroughly read out and explained to the defendant and the claimant.

116. The claimant further submitted that the credibility of the defendant's evidence in relation to the cash payments to the claimant was completely undermined by Inshan's evidence. In cross-examination the defendant testified that he paid the claimant the money and that on every occasion he paid him, he gave him the receipts. The defendant further testified in cross-examination that no one witnessed the payments he made to the claimant. That Inshan was never there when he paid the claimant. However, Inshan testified in cross-examination that the defendant brought the money for his wife and his wife would give the money to the claimant. Inshan further testified that the defendant was not present when the money was given to the claimant, his wife made the receipts and she would get the claimant to sign them.

117. As such, the claimant submitted that the above inconsistency within the defendant's evidence tends to corroborate his evidence that he never received any cash payments from the defendant.

#### The submissions of the defendant

118. The defendant denies that the issue of independent advice was not pleaded in his Defence. The defendant relied on **Part 10.5(1) and (2) of the CPR** which provides as follows;

*“(1) The defendant must include in his defence a statement of all the facts on which he relies to dispute the claim against him.*

*(2) Such statement must be as short as practicable.”*

119. The defendant submitted that paragraph 10, line one of his Defence which provides that *“Both the Defendant and Claimant went into Mr. Sirjoo’s office and all three spoke”* satisfies the criteria as set out in Part 10.5(1) & (2).

120. Alternatively, the defendant submitted that the claimant was at fault for not setting out his case concisely and properly. According to the defendant, there was no positive averment from the claimant in his Statement of Case that he did not receive an opportunity to seek independent legal advice. The defendant submitted that the Statement of Case was vague on the issue and such an important and material detail needed to be positively and properly averred and not be left to averment by inference.

121. The defendant relied on the authority of **Real Time Systems Limited v Renraw Investments Limited and others Civil Appeal No. 238 of 2011**, wherein Justice of Appeal Jamadar at paragraphs 8 and 9 stated as follows;

*“8. Part 8, Rule 8.6 requires a claimant to set out “a short statement of all facts on which he relies” to establish his claim. This rule establishes an objective standard. It is not what a claimant wants (subjectively) to set out that is required; but rather it is what a claimant is required (objectively) to set out in order to establish his claim. However, even this formulation of a claimant’s responsibility may be somewhat understated. Clearly fairness and justice require, that if a defendant is to be able to discharge the duty on him to also set out all of the facts on which he relies to dispute a claim made against him, then a claimant must set out fully (without being prolix) the facts which underpin his case so as to have the legitimate and relevant issues the he reasonably knows will arise on his claim and responded to. Such an approach is consistent with the purpose and mandate for the use of pre-action protocols under the CPR, 1998.”*

*9. The thrust of the CPR, 1998 is towards litigation with full disclosure at the earliest opportunity and against tactical non-disclosure for the purpose of gaining strategic advantages in the conduct of litigation.”*

122. The defendant submitted that the claimant has failed to objectively set out his case and the assertions on this issue is nothing but a tactic to gain a strategic advantage and therefore the claimant’s submissions on this point ought to be rejected.

123. The defendant submitted that the claimant’s evidence that he was unaware that he signed the agreement for sale and the deed and that he never saw or spoke with Mr. Sirjoo should not be believed as it is both unrealistic and illogical.

124. According to the defendant, the claimant in his submissions made much ado about the defendant’s evidence at paragraph 15 of his witness statement where he did not mention that at the time of executing the deed, the opportunity for independent legal advice was given to the claimant, a fact which was addressed by Mr. Sirjoo in his witness statement. The defendant submitted that the claimant’s conclusions that this proved a concoction is misplaced. The defendant further submitted that Mr. Sirjoo was the best person to give the evidence that he gave the advice. The defendant did aver to the fact of independent legal advice at the executing of the agreement for sale. According to the defendant, it ought to be remembered that evidence is not a test of memory and in any event, as stated before, it was Mr. Sirjoo’s evidence to give as he was the person advising.

125. The defendant submitted that Mr. Sirjoo’s explanation as to why written instructions were not taken from the claimant was both logical and reasonable. According to the defendant, it is both rational and sensible to suggest that the claimant would have contested placing his signature on the written instructions if same were taken since he contested to voluntarily placing his signature at least fourteen times on twelve different documents; the agreement for sale, the deed of transfer and the payment receipts.

126. The defendant submitted that further support for the proposition that the claimant’s evidence was both unrealistic and illogical can be found in the claimant’s own testimony

where he denies aspects of his evidence contained in his witness statement during cross-examination although there was a certificate at the end of his witness statement stating that it was “*clearly, distinctly and audibly read over*” to him and that “*he seemed to thoroughly understand same*”. The defendant further submitted that the claimant during cross-examination went further than a mere denial and accused his own attorney of putting lies in his witness statement.

127. The defendant submitted that Mr. Sirjoo did not fail to advise the claimant on the purchase price of the land as Mr. Sirjoo asked the claimant on two occasions if he was sure about the selling price of the land. According to the defendant, the case of *Inche Noriah* supra is distinguishable from the facts of this case as in this case the claimant has failed to prove that he was acting under the defendant’s influence during the transaction.

128. Moreover, the defendant submitted that the agreement made between the claimant and the defendant after the sale agreement was executed in the office of Mr. Sirjoo cannot be used to prove that Mr. Sirjoo failed to properly explain the contents of the agreement as Mr. Sirjoo had no control over what the claimant and the defendant did after they left his office. The defendant further submitted that since the claimant and the defendant were never involved in a transaction of this nature before, it was reasonable to suggest that by their arrangement outside of the agreement they were acting in their best interests, despite fully knowing and understanding the terms of the agreement.

129. As such, the defendant submitted that the claimant has failed to prove that he was not given an opportunity to seek independent legal advice and that he was in any way disadvantaged by the representation of Mr. Sirjoo.

## **Findings**

130. The court accepts Mr. Sirjoo’s evidence that he did inform the claimant of his right to seek independent legal advice, explained the importance of the transaction and the possible consequences of not seeking independent legal advice. The court further accepts Mr. Sirjoo’s evidence that the claimant appeared to fully understand what was being told

to him and then waived his right to independent legal advice. Mr. Sirjoo is an attorney at law with twenty-one years standing. Common sense would dictate that having regard to the findings on the evidence of the claimant, his inherent unreliability and lack of credibility, Mr. Sirjoo's evidence is to be preferred on this issue. The court does not believe that Mr. Sirjoo would have fabricated evidence as the claimant in essence submits.

131. The court finds that there were no material inconsistencies between Mr. Sirjoo's evidence and the evidence given by the defendant on this issue. The defendant's evidence on this issue would have given based on his perception and recollection of the events as a non-legal mind so that his version would more than likely not contain the precision of words which Mr. Sirjoo's evidence would contain. His evidence would in essence amount to a lay person's interpretation of what Mr. Sirjoo was doing and saying on that day. The evidence however remains consistent in general form. In that context therefore, the absence of writing by Mr. Sirjoo is in the court's view not fatal to this issue.

132. In any event, the court finds that the claimant did not plead in his statement of case that he was denied the opportunity to seek independent legal advice. Therefore, the claimant could not have expected the defendant to respond to same in his defence. In his statement of case, the claimant simply pleaded that the agreement for sale and the deed was never read to him and that he never saw or spoke to Mr. Sirjoo. The defendant in his defence responded to those allegations made by the claimant.

133. The court further accepts the defendant's submissions that Mr. Sirjoo had no control over the arrangement made between the defendant and the claimant in relation to the payment of eighty five thousand dollars. The court finds that it was probable that the claimant failed to mention that he was not paid the eighty five thousand dollars in full at the time Mr. Sirjoo read and explained the deed because he was fully aware that the defendant was paying him his money pursuant to the agreement he made with the defendant. The court further finds that the variance between the evidence of the defendant and Inshan relating to the cash payments made to the claimant in no way affected the credibility of the evidence given by the defendant and Inshan whose evidence were preferred over that of the claimant. The court therefore finds that the claimant was paid the

sixteen thousand, eight hundred dollars in cash by the defendant and that the claimant did knowingly attach his fingerprints to the respective receipts for the cash payments.

134. Consequently, the court finds that the claimant was advised of his right to seek independent legal advice and that he was no way disadvantaged by the representation of Mr. Sirjoo. As such, the court finds that in the circumstances of this case the defendant has proven that the transaction was fair, just and reasonable. The claimant's claim is therefore dismissed and he shall pay to the defendant the prescribed costs of the claim in the sum of \$14,000.00.

Dated the 6<sup>th</sup> December, 2017

Ricky Rahim

Judge