

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2010-01705

BETWEEN

**RAFFEOUN ALI**

*Claimant*

AND

**RENNIE MOHAMMED**

*First Defendant*

**NATALIE ALI-MOHAMMED**

*Second Defendant*

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Ms. Angela Z. Mohammed for the Claimant

Mr. Ronald Dowlath for Defendant

## ORAL DECISION

### FINDINGS

1. I find that the memorandum of transfer was the product of a misrepresentation by the claimant's daughter that the transfer was necessary in order to enable a mortgage loan to be secured by the defendants on the property, and that the said property would be restored to the claimant.
2. I find that the defendants effected a series of suspicious transactions, the last one being the remortgaging of the said property to secure a sum unknown, of which \$490,000 remains outstanding, while this matter was before the court, or shortly to come before the court, knowing that one of the reliefs that was going to be sought by the claimant was an order preventing the property from being the subject of charges and borrowing.
3. The said property is now encumbered by a mortgage loan with approximately \$490,000 still outstanding. The claimant has not received the proceeds from that loan. The securing of that mortgage was with cynical disregard to any rights the claimant may have established at trial.
4. Any equitable interest the defendants may establish by virtue of the initial mortgage on the said property, some part of which was used to finance repairs to the said property, would be precisely that - **an equitable interest**.
5. The conduct of the defendants constitutes a clear **bar to any such equity**. Any order this court makes as to the setting aside of the memorandum of transfer will still be subject to the rights of any third party mortgagee, and the said property is now encumbered with significant debt.
6. The claimant's property is security for the debt. The claimant is a retired pensioner, who still works as a seamstress to support herself.
7. On the evidence she has no means to pay that mortgage, if or when the defendant stops paying the mortgage. The only deterrent to the defendants' default on that mortgage would be the possibility that the sale on the exercise of any power of sale, will result in a shortfall, and the

difference will be pursued by a mortgagee against the defendants personally, under the personal covenant usual in all commercial mortgages.

8. The challenge to the defendants' title was based on allegations of questionable conduct on the part of the defendants. Notwithstanding that, the defendants persisted in dealing with the property so as to secure maximum monetary benefit from it, regardless of the fact that the claimant was claiming that she had not intended to part permanently with possession to the two defendants.

9. Any court must consider such conduct to be reprehensible, bordering on the fraudulent, and refuse the aid of equity to any claim by the defendants to an equitable interest on the basis of any alleged contributions by them.

10. The affidavits of the defendants set out expenditure which was stated by their counsel, Mr. Dowlath, to be in the vicinity \$350,000.00, that is based upon a loan of \$35,000.00 to start with, a further mortgage loan of \$250,000, (the bona fides of which I will deal with in an extended judgment), and then further sums, after the contractor to whom that money was allegedly paid, left the site without completing the job. Those further sums are set out in their witness statement.

11. The approximate value of the sums the defendants **claim** to have expended on this property is \$350,000. That is approximate, because, of the sum of \$250,000 given to the contractor not all of it was actually spent on the property. The contractor left the property, with the job unfinished. When one totals the figures on the defendants' own evidence, one gets approximately \$324,000 and I will take that into account.

12. Based upon the evidence **of the defendants** on the amounts that they have spent I make the following orders, bearing in mind that I do not consider that their conduct allows equity to assist them in support of any equitable claim. The orders are as follows:

## ORDERS

13.

1. A declaration is granted that the deed of gift dated on the 17<sup>th</sup> day of April 1999, and made between Raffeeoun Ali and Rennie Mohammed and Natalie Ali-Mohammed, (the said deed), is void as between the parties thereto having been executed as a result of **undue influence** exerted by the Defendants.
2. It is ordered that the said deed be set aside.
3. A declaration is granted that the Claimant is the owner of All That piece of land situate in the ward of Tacarigua, in the Island of Trinidad comprising FIVE THOUSAND ONE HUNDRED AND TWENTY SQUARE FEET be the same more or less delineated and coloured pink in the plan registered in Volume 2467 Folio 505 being portion of the lands described in the Crown Grant in Volume 10 Folio 411 and also described in the Certificate of Title Volume 2207 Folio 55 and shown as Lot 311A in the General Plan filed in Volume 2160 Folio 205 and now described in the Certificate of Title in Volume 2467 Folio 507 and bounded on the North by a road reserved 25 feet wide, on the South by an open space, on the East by a drain reserve 3 feet wide and on the West by Lot 331 (the said property).
4. An injunction is granted restraining the Defendants, their servants and/or agents, from selling, transferring or placing any further charges on the said property and/or howsoever otherwise disposing of it.
5. A declaration is granted that the Defendants are not entitled to evict the Claimant and/or her servants and/or agents and/or licensees from the said property.
6. A declaration is granted that the claimant is entitled to delivery up of the said property.
7. It is ordered that the Defendants do convey the said property to the Claimant within fourteen (14) days from the date of the Court's order and in default that the Assistant Registrar be empowered to and do execute same.

8. The defendants are to pay the claimant the sum of \$140,000.00.
  9. The defendants are to pay the claimant's costs in the sum of \$14,000.00.
  10. Liberty to apply.
14. So the effect of the orders is as follows:
1. The deed of Gift dated 1999 is to be set aside within 14 days.
  2. The defendants have taken out value from the property by way of mortgage, securing on the property, value in the amount of \$490,000.00. On their own evidence they have spent no more than \$350,000. (On their witness statements they have spent no more than \$324,000.00).
  3. There is (therefore at least) \$140,000 (\$490,000.00 minus a maximum of \$350,000.00), which represents benefit they have received from that property, (giving them the benefit of the doubt on their own evidence), that the claimant has no hope of ever receiving, (and for which her property is now encumbered). The defendants are liable under the mortgage. They are to re pay the mortgage. The difference between the amount for which they have mortgaged the property and the amount of any benefit that they could conceivably claim to have **expended** on the property is \$140,000.00, and the claimant is to be paid that sum, but that payment is to be suspended once the defendants continue to pay the mortgage.
  4. If they don't pay the mortgage instalments and the property is then put at risk from actions by a mortgagee then, immediately, the claimant is entitled to a \$140,000 judgment which she can enter without any further order from this court.

5. (Upon being informed that there has been default under the mortgage and the property has been advertised for sale – it is ordered that)
6. The defendants are to pay the claimant the sum of \$160,000.00 (not \$140,000.00).

Dated this 16<sup>th</sup> day of May, 2012.

.....

**Judge**

**Peter A. Rajkumar**

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2010-01705

BETWEEN

**RAFFEOUN ALI**

*Claimant*

AND

**RENNIE MOHAMMED**

*First Defendant*

**NATALIE ALI-MOHAMMED**

*Second Defendant*

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Ms. Angela Z. Mohammed for the Claimant.

Mr. Ronald Dowlath for Defendant.

**REASONS FOR DECISION**

**BACKGROUND**

1. The claimant is the mother of the second named defendant and the mother in law of the first named defendant.

2. The claimant claims, inter alia, to set aside a deed of gift (memorandum of transfer) dated 17<sup>th</sup> April 1999, made by the claimant in favour of the defendants, on the ground that the said memorandum of transfer was executed by undue influence exerted by the defendants for personal gain.
3. The subject matter of the memorandum of transfer is property which is situated at # 311 Mc Connie Street, Dinsley Village, Tacarigua (the said property).
4. The basis of the claim as appears from the Statement of Case is that:
  - (a) The claimant trusted the second defendant ... and as a result she entrusted the defendants with ... the said property; (Paragraph 5)
  - (b) The second named defendant, in or around 1999, expressed to the claimant that the house on the said property was in disrepair and that she wanted to secure a **loan** from a commercial bank in order to facilitate the renovations of the said property; (para 6)
  - (c) It was represented to the claimant by the second defendant that the claimant needed to sign a document giving the second defendant a “sign on the property” to take out a loan and the second defendant would then ‘take off her name” as soon as the loan was approved;
  - (d) The claimant was abroad in New York at the time and relied **solely** on the **advice given to her and represented to her by the second defendant** over the telephone and she trusted the defendants;
  - (e) The claimant was instructed by the second defendant that on receiving the documents the claimant should take them to a Notary Public and have them signed, the claimant did not seek independent legal advice;
  - (f) The claimant did not understand the document she signed or its implications and she believed that she retained some interest in the said property and further **that she would regain her interest** once the loan had been secured and repaid.



5. The claimant alleged that the execution of the memorandum of transfer dated 17<sup>th</sup> April 1999 was obtained by the undue influence of the defendant, and that she only discovered the nature of the transaction that she had entered into in September or October 2008.

6. The defendants deny this and aver that the execution of the said deed was the product of the free and independent exercise of judgment by the claimant. The defendants allege that they spent \$324,000.00 on the said property - \$35,000.00 from a first loan, and \$250,000.00 from the proceeds of the mortgage loan they took out using the property as security, \$10,000.00 from a loan from a credit union, and another alleged \$40,000.00. However when the latter alleged expenditure was particularized it totalled \$29,000.00. Further there is nothing to show that this alleged further expenditure was not already encompassed in the other previous sums.

7. The defendants attempted to evict the claimant from the said property but the proceedings in the magistrate's court in fact resulted in a protection order being entered against the first defendant instead.

## **ISSUE**

8. At issue therefore is whether the memorandum of transfer was the product of undue influence and therefore liable to be set aside.

## **FINDINGS AND CONCLUSION**

9. a. I find that the memorandum of transfer was the product of a misrepresentation by the claimant's daughter that -

(i) The transfer was necessary in order to enable a mortgage loan to be secured by the defendants on the property, and

(ii) That the said property would be restored to the claimant.

b. I find that a series of suspicious transactions were effected by the defendants, the last one being the remortgaging of the said property to secure a sum unknown, of which \$490, 000.00 still remains outstanding, **while this matter was before the court**, knowing that one of the

reliefs being sought by the claimant was an order preventing the property from being the subject of further charges and borrowing.

c. The said property is now encumbered by a mortgage loan with approximately \$490 000.00- still outstanding. The securing of that mortgage was in cynical disregard of any rights that the claimant may have established at trial.

d. Any equitable interest that the defendants may have established by virtue of the initial mortgage on the said property, some part of which was used to finance repairs to the said property, would be precisely that - an equitable interest.

e. The conduct of the defendants constitutes a clear bar to any such equity. Any order this court makes as to the setting aside of the memorandum of transfer would still be subject to the prior legal rights of any third party mortgagee, and the said property is now encumbered with significant debt. The said property is security for the debt. The claimant is retired and a pensioner, who still works as a seamstress to support herself.

On the evidence she has no means to repay that mortgage debt if or when the defendants stop paying the mortgage, and there remains the significant risk that she will lose the property in that event.

10. The only deterrent to a default on that mortgage would be the possibility that a sale under any power of sale would result in a shortfall, and the difference would be pursued by a mortgagee, against the defendants personally, under the usual personal covenant standard in all commercial mortgages. However the defendants claim that the value of the property is now well in excess of the sum outstanding on the mortgage, and if correct, it is the claimant alone who will bear the loss of any default as the property is liable to be sold.

11. The challenge to the defendant's title was based on allegations of questionable conduct on the part of the defendants. Notwithstanding that, the defendants persisted in dealing

with the property so as to secure and extract maximum monetary benefit from it, regardless of the fact that the claimant was claiming that she had not intended to part permanently with possession of it to the defendants.

12. Any court must consider such conduct to be reprehensible, bordering on the fraudulent, and refuse the aid of equity to any claim by the defendants to an equitable interest on the basis of any alleged contributions by them. Further the Defendants have lived there from in or around August 1995 to in or around March 2010, and have had the significant benefit of rent free occupation of the said property for well over a decade.

### **DISPOSITION AND ORDERS**

13.

- (a) A declaration is granted that the deed of gift dated on the 17<sup>th</sup> day of April 1999, and made between Raffaeoun Ali, and Rennie Mohammed and Natalie Ali-Mohammed, (the said deed), is void as between the parties thereto having been executed as a result of undue influence exerted by the Defendants.
- (b) It is ordered that the said deed be set aside.
- (c) A declaration is granted that the Claimant is the owner of All That piece of land situate in the ward of Tacarigua, in the Island of Trinidad comprising FIVE THOUSAND ONE HUNDRED AND TWENTY SQUARE FEET be the same more or less delineated and coloured pink in the plan registered in Volume 2467 Folio 505 being portion of the lands described in the Crown Grant in Volume 10 Folio 411 and also described in the Certificate of Title Volume 2207 Folio 55 and shown as Lot 311A in the General Plan filed in Volume 2160 Folio 205 and now described in the Certificate of Title in Volume 2467 Folio 507 and bounded on the North by a road reserved 25 feet wide, on the South by an open space, on the East by a drain reserve 3 feet wide and on the West by Lot 331 (the said property).
- (d) An injunction is granted restraining the Defendants, their servants and/or agents, from selling, transferring or placing any further charges on the said property and/or howsoever otherwise disposing of it.

- (e) A declaration is granted that the Defendants are not entitled to evict the Claimant and/or her servants and/or agents and/or licencees from the said property.
- (f) A declaration is granted that the claimant is entitled to delivery up of the said property.
- (g) It is ordered that the Defendants do convey the said property to the Claimant within twenty-eight days from the date of the Court's order and in default that the Assistant Registrar be empowered to and do execute same.
- (h) The defendants are to pay the claimant's costs to be determined by this court in default of agreement.
- (i) Liberty to apply.

## **ANALYSIS AND REASONING**

### **THE EVIDENCE**

#### **The Claimant**

14. The Claimant's evidence was to the effect that:
- a. She intended to give "a sign" on the property, just to get a loan and when she got the loan the second defendant's name would come off.
  - b. A sign on the property meant ownership.
  - c. She did not intend to give the first defendant any ownership of the property.
  - d. She had a good relationship with all her children.
  - e. She consulted with her two children Neesha and Reeza (Junior) before she signed the Memorandum of Transfer.
  - f. In paragraph 7 of her statement of case she said that she relied solely on the advice of the second defendant, under cross examination she said that she consulted with both Neesha and Junior before she went to the Notary Public to sign the document.
  - g. The claimant was asked to read the document aloud. She said that she never intended to give Rennie a sign on the property. With respect to the agreement for sale she never sold the property nor did she ever receive any money for it.
  - h. She did not know of subsequent transaction when the defendants purportedly transferred property to Junior and he obtained a mortgage. In cross examination she

agreed that if that was so then Junior was part of the trickery with the defendants, but she believed he knew nothing about it as he had told her so.

- i. In 2007 she discovered that the defendants had mortgaged the property and she did nothing about it until 2008. The defendants took her to court after serving her with an eviction notice.
- j. She agreed that there were extensive renovations on the house, but did not think that \$285,000.00 was a reasonable sum to have spent on those renovations.

## **The First Defendant**

### **15. Witness statement**

#### **Paragraph 8**

*In or about early 1997, my wife became pregnant with Nicolette our first child. I was still employed with the Public Service. The house had continued to deteriorate badly and **we were ashamed of having friends visit and we were also concerned about the health of our expected baby. We decided that we would take a loan and effect whatever repair that we could.** I asked one of my uncles to give me a written estimate to do the repairs, which he did, in the sum of thirty five thousand dollars (35000.00). My wife and me then approached the Bank of Commerce, Tunapuna branch (now Republic bank, Tunapuna East). The loans officer told us that due to the fact that I was still temporary and my wife was self employed that we could not qualify for the loan.*

#### **Paragraph 11**

*We then asked one of the 2<sup>nd</sup> defendant's aunts to stay with her at her home for a short while, until the repairs were completed, and she agreed. During this time, **my wife and I decided** to make further enquiries from the banks about raising money to effect the repairs to the house. We approached FINCOR and **were told** by the loans officer that we **would have to get a sale agreement** made with the claimant agreeing to sell the property to us in order **to qualify for the loan.** The 2<sup>nd</sup> defendant then telephoned the claimant and informed her of the **requirements of the bank.** After several lengthy conversations, between the claimant and the 2<sup>nd</sup> defendant, at least about twice a week for about three to four weeks, the 2<sup>nd</sup> defendant told me that the claimant had agreed to execute the*

***agreement for sale** if we stood all the expenses of getting a lawyer to prepare it and have the agreement sent to her for execution. We then went to Mr. L.K. Doodnath, attorney at law in Arima, who advised that there was an existing mortgage on the property in favour of Asaf Hosein (who is the 2<sup>nd</sup> defendant's uncle) and that the only way we could have gotten a valid sale agreement was that the existing mortgage had to be discharged. We then obtained the claimant's consent to instruct Mr. Doodnath to obtain the necessary discharge and by memorandum of Discharge No.40 dated the 17<sup>th</sup> November, 1998 the mortgage in favour of Asaf Hosein was discharged at our expense.*

**Paragraph 12 – (“in order for us to obtain the loan”)**

*Thereafter the claimant, my wife and I **executed an agreement for sale** for the property. All this time the claimant was residing in America. We then went back to FINCOR with the sale agreement. **We were again turned down** and the loans officer gave the reason that I could not prove sufficient income and my wife could not prove any income although she was self employed as a seamstress. **The loan officer then advised us to have the property transferred to our names by a deed of gift** and that once we were owners it would be easier for us to get the financing for repairs as opposed to obtaining financing to purchase a property. The 2<sup>nd</sup> defendant again telephoned the claimant and informed her of the bank's position and **she agreed to transfer the property by gift to us in order for us to obtain the loan.***

**Paragraph 13**

*The 2<sup>nd</sup> defendant again telephoned the claimant and informed her of the bank's position causing us to be unsuccessful in obtaining the loan. The claimant suggested that we should get Junior to assist in trying to secure the loan. Eventually Junior got the assistance from someone his cousin knew in Trinidad and Tobago Mortgage Finance Limited and as a result **he was able to qualify for a loan to purchase a property.** On the instructions of the claimant **the 2<sup>nd</sup> defendant and I entered into an agreement with Junior to sell the property to him** for the sum of Three Hundred Thousand (\$300000.00). This sale of the property was done by memorandum of Transfer No. 80 dated 16<sup>th</sup> July, 1999 registered in Volume 4131 Folio 395 and **Junior made a mortgage** in favour of the*

*Trinidad and Tobago Mortgage Finance Company Limited on the sum of Two Hundred and Sixty Five thousand Dollars (\$265000.00) by Memorandum of Mortgage No.81 dated the 16<sup>th</sup> July, 1999 registered in Volume 4131 Folio 399.*

#### **Paragraph 14**

*We only **received** the sum of **Two hundred and Fifty Thousand Dollars** (\$250000.00) **from the sale** as the balance of the money was used for the closing charges for both the transfer and mortgage. We then hired a contractor whom **we paid the entire sum of Two Hundred and Fifty Thousand Dollars** (\$250000.00) to rebuild the house. The roof, walls, floor ceiling, doors and windows were changed. By this time I had paid off the first loan of Thirty Five Thousand Dollars (\$35000.00) and my wife and me began to pay the monthly installments of Two thousand Three Hundred Dollars (\$2300.00) to the Trinidad and Tobago Mortgage Finance Company Limited. **Junior never contributed to any of the mortgage payments.** In our about December, 1999 the claimant returned to Trinidad for Junior's wedding. The house was not yet completed to Trinidad for junior's wedding. The house was not yet completed because of delays caused solely by the contractor. During the period of the repairs my wife and me and our child were staying at one of my uncles home at Beccles Street, Tacarigua, and the claimant moved in there with us.*

#### **Paragraph 15**

*Junior got married in December, 1999 to Michelle, and they both lived with Michelle's parents in Dinsley. In 2000, my wife and I had our second child, a son Nicholas. From the inception of the mortgage **my wife and I solely paid the monthly mortgage installments.** The claimant again left Trinidad in or about **April, 2000** and **told us** that once she was consistently employed that she **would assist us with the mortgage installments, which she did until sometime in the year 2002.***

#### **Paragraph 18**

*After Junior left the property he kept nagging my wife and I to get his name off the property since he did not want his wife to know that **he was liable for a mortgage on the***

*property* and because he also wanted to access a loan for himself so that he could purchase his own property. The claimant then asked my wife and I to purchase the property from Junior **because she wanted to have the property** and because she did not trust Junior's wife Michelle....

#### **Paragraph 19**

We then approached the First Citizens Bank Tunapuna and applied for a mortgage. Junior agreed that since **he never paid any part of the mortgage** that he was not interested in receiving any monies for transferring the property to us, he just wanted his name off the property. The 2<sup>nd</sup> defendant and I were successful in obtaining a mortgage in the sum of \$300000.00 and we paid off Junior's mortgage with T.T.M.F. and all legal fees and disbursements for the release of Junior's mortgage with T.T.M.F. by memorandum of discharge No.11 dated the 26<sup>th</sup> January, 2005, the transfer from Junior to my wife and me by memorandum of transfer No. 43 dated 20<sup>th</sup> May, 2005 registered in Volume 4669 Folio 209, and the mortgage in favour of First Citizens bank by memorandum of mortgage No.44 dated 20<sup>th</sup> May, 2005 registered in Volume 4669 Folio 213. I was also able to obtain **a loan** from the Hindu Credit Union in the sum of ten Thousand Dollars (\$10,000) which we took to **further upgrade the property**.

#### **Paragraph 20 – First Sentence**

We continued solely paying the monthly mortgage installments together.....

#### **Paragraph 21**

Sometime after 2006 the claimant returned to Trinidad. The claimant started to sew for people to obtain an income although she was receiving Old Age Pension from the Government of Trinidad and Tobago, via the social Welfare Department. My wife and me told the claimant that because of the crime wave in Trinidad that she should be careful about having strange people in the house and that since **she was using an electric sewing machine that she must contribute to the electricity bill** since we were continuing to also purchase all the groceries in the house and paying all the utility bills. **We told the claimant that was unfair for us to be doing this** and that **she was not contributing to the**



*expenses especially as she was using an electric sewing machine to earn an income.*  
*The claimant refused and thereafter the claimant's behavior changed towards my wife and me .....*

**Paragraph 29 – improvements cost \$40,000**

*The additional improvements which we had to make over the years have costed the 2<sup>nd</sup> defendant and me over forty Thousand Dollars (40000.00).*

However when the individual items of alleged expenditure are totaled they come to just \$29,000.00.

**Second defendant**

**Paragraph 15**

*On or about early 1997, I became pregnant with Nicolette our first child. The 1<sup>st</sup> defendant was still employed with the Public Service. The house had continued to deteriorate badly and **we were ashamed of having friends visit and concerned about the health of our baby** so we decided that we would take a loan and effect whatever repair that we could. I called the claimant in the United States and told her that **the 1<sup>st</sup> defendant was now ready to take the loan to effect the repairs to the house** and she expressed her delight at this change of heart. The 1<sup>st</sup> defendant asked one of his uncles to give us a written estimate to do the repairs which he did in the sum of thirty five thousand dollars (\$35000.00). We approached the then Bank of Commerce, Tunapuna branch (now Republic bank, Tunapuna East). The loans officer told us that due to the fact that the 1<sup>st</sup> defendant was still temporarily employed and I was self employed that **we could not qualify for the loan.***

**Paragraph 22 – in order for us to obtain the loan**

*We were again turned down and the loans officer gave the reason that the 1st defendant could not prove sufficient income and I could not prove any income although I was self employed as a seamstress. The loans officer then advised us to have the property transferred to our names by a deed of gift and that once we were owners it would be easier for us to get the financing for repairs as opposed to obtaining financing to*

*purchase a property. I again telephoned the claimant and informed her of the bank's position and she agreed to transfer the property by gift to us in order for us to obtain the loan.*

16. The first defendant's and second defendant's evidence was to the effect that:
- a. The claimant knew that she was giving the ownership of the property to both the defendants.
  - b. The claimant did so as a result of a free exercise of her independent will as a result of full, free, and informed thought.
  - c. That the defendants borrowed money and spent it on renovating and rebuilding the house. Some of the money loaned was used to construct fish ponds for his own business.
  - d. That the said property has been further mortgaged, beyond the amount they claim to have expended, (in total \$324,000.00), and the amount now outstanding on the mortgage is \$490,000.00. The first defendant admitted that the claimant assisted in paying the mortgage.
  - e. They had paid no money for the property.
  - f. They had no intention of returning the property to the claimant.

**Michael Griffith**

17. The evidence of Michael Griffith was to the effect that:
- a. He worked for Mr. Sanjay Maharajh and was in charge of the construction of the house.
  - b. He carried out the project for the first defendant.
  - c. The work took a year. They did not work 5 days a week or every week. They left the job incomplete. The finishing work on the inside of the building was not complete.

His evidence did not advance the matter as to the value of the work performed or the amount actually expended by them on this particular contract.

**Damien Best**

18. The evidence of Damien Best was to the effect that:

- a. He was the next door neighbour.
- b. He gave a description of the house before renovations began.
- c. He gave a description of its dilapidated state.
- d. He gave a description of changes which took place with respect to the construction of the house.

His evidence was coloured by the sense of grievance that he appeared to harbour toward the claimant's son, and I do not accept his evidence as that of a truly independent witness. His evidence did not advance the matter as to the value of the work performed or the amount actually expended by them on this particular contract.

### **The transactions**

19. The defendants set out in their defence and witness statements a series of transactions and attempted transactions.

- a. A loan from a cousin – to raise money -\$35,000.00 -to repair the house
- b. An agreement for sale between the claimant and the defendants – to be taken to the bank to secure a loan to raise money to repair the house. However the defendants did not qualify for that loan.
- c. The deed of gift dated April 17<sup>th</sup> 1999 - to be taken to the bank to secure a mortgage to raise money to repair the house. Again the defendants did not qualify for a loan or a mortgage.

20. Despite this, the property was not re-conveyed to the claimant. Instead the defendants purported to sell the property to Junior, who curiously, was able to secure a loan from TTMF, to purchase the said property. The agreement was for the sale price of \$300,000.00. The loan was for \$265,000.00. Junior was then able to pay out, of those loan proceeds, the sum of \$250,000.00 to the Defendants.

21. The Defendants say that they paid the mortgage installments and that Junior paid nothing. It is clear that this Mortgage was a sham. If this transaction were genuine there would be no reason for the Vendors - that is the defendants - to pay mortgage installments on a mortgage obtained by a genuine purchaser. It would be the purchaser - Junior, who obtained the loan, who

would be responsible for its repayment. This is confirmed by the fact that Junior subsequently re-conveyed the property to the Defendants. The Defendants say that he did so willingly and eagerly as he had not made any payment toward the mortgage and wanted to divest himself of that liability in order to qualify for a mortgage for acquisition of his own property.

22. Each transaction above was therefore clearly designed primarily to enable the defendants to secure a loan. The transactions they entered into, and attempted to enter into, were simply transactions that they thought would enable them to secure that loan. In fact the agreement for sale, and the deed of gift itself, did not achieve this purpose as the Defendants did not qualify for a loan.

23. The Mortgage loan from TTMF was eventually replaced by a mortgage loan that the defendants were eventually able to secure in their own right when they both secured regular jobs with sufficient earning capacity.

24. It is clear however that it was never contemplated the defendants would not retain an interest in the property, notwithstanding its purported sale to Junior. Similarly, it was never contemplated that the claimant would divest herself, for all time, of all her interest in her major asset, even after she executed the purported deed of gift. Both transactions were for the purpose of securing a loan with the said property as security. Both transactions were initiated by the defendants.

25. Her daughter Natalie told her that the deed of gift, like the earlier agreement for sale, was intended to allow the Defendants to obtain a loan, and that the property would revert to the claimant after that occurred.

26. It is regrettable, and in fact reprehensible, that the defendants now seek to conveniently forget that this transaction was not intended to vest her major asset, the said property, in them exclusively, and deprive the claimant, for all time, of her rights to that property, which she had owned since in or around 1984.

27. I find the transaction was as explained and characterized by the claimant. I accept the claimant's version of events, including that she contributed toward the mortgage repayments.

28. I find that, even on the defendants' version of events, the explanation as to how the sole legal interest in the subject property became vested in them corroborates to a large extent the claimant's version of events.

29. Under normal circumstances, on the evidence of some level of expenditure by the defendants on the said property encouraged by the claimant, or at least acquiesced in by her, an assessment of an equitable interest in favour of the defendants would arise. I find, however, that in these circumstances the issue of a bar to such equity arises.

### **Conduct**

30. I find that the defendants effected a series of suspicious transactions, the last one being the remortgaging of the said property in 2010 to secure a sum unknown, of which \$490,000.00 remains outstanding, while this matter was before the court.

31. On 11<sup>th</sup> March 2010 the claimant was granted a protection order against the first defendant and the defendants left the said property. This was after the defendants had attempted to evict the claimant in 2009, and had already received a pre action protocol letter dated November 6<sup>th</sup> 2009 indicating that the claimant was asserting her ownership of the said property, and requesting that the existing mortgage be repaid and a half share retransferred to her. In addition, the claim form was filed on May 5, 2010. By that time the defendants would have known that one of the reliefs being sought by the claimant was an order preventing the property from being the subject of further charges and borrowing.

32. Instead the defendants proceeded to further encumber and charge the said property, which is now encumbered by a mortgage loan of which approximately \$490, 000.00 remained outstanding at the time of trial.

33. On their own evidence therefore, the defendants have executed an additional mortgage on the said property while aware that their title was being questioned by the claimant. The claimant has not received the proceeds from that loan. The amount outstanding is far in excess of what the defendants themselves say they allegedly spent on improvements to the said property. On their own evidence they allegedly spent \$35,000, plus \$250,000.00, plus \$ 10,000.00 (HCU loan) plus \$29,000 approximately (alleged additional improvements) (para 29 witness statement first defendant). (This is even without factoring the claimant's contribution of \$72,000.00 and the fact that some of those improvements related to the construction of fish ponds entirely for the business and benefit of the first named defendant).

34. Any benefit to her from those loans is outweighed by the fact that she has no means of repaying the mortgage. The claimant stands to lose the said property if she cannot repay the almost half a million dollar debt with which the said property is now encumbered.

35. The securing of that mortgage was in cynical disregard of any rights that the claimant may have established at trial. It was clearly designed to extract maximum value from the said property in cash, leaving the claimant's property to be sold if the defendants did not honour their commitment to pay loan installments. In fact, at the time judgment was delivered, the said property was being advertised for sale by the mortgagee.

36. Any equitable interest that the defendants may have established by virtue of the initial mortgage on the said property, some part of which was used to finance repairs to the said property, would be precisely that- an equitable interest.

37. The conduct of the defendants constitutes a clear bar to any such equity. See **Snell's Equity 30<sup>th</sup> Ed para. 39-17**. Any order this court makes as to the setting aside of the memorandum of transfer would still be subject to the prior legal rights of any third party mortgagee, and the said property is now encumbered with significant debt. The claimant's property is security for the debt. The claimant is a retired 72 year old pensioner, who still works as a seamstress to support herself.

38. On the evidence she has no means to pay that mortgage, if or when the defendants stop paying the mortgage and there remains the significant risk that she will lose the property in that event. The only deterrent to a default on that mortgage would have been the possibility that a sale under any power of sale would result in a shortfall, and the difference would be pursued by a mortgagee, against the defendants personally, under the usual personal covenant standard in all commercial mortgages. In the case as here where the value of the property is alleged to be in excess of the amount outstanding on the mortgage that deterrent would be inapplicable.

39. The challenge to the defendant's title was based on allegations of questionable conduct on the part of the defendants. Notwithstanding that, the defendants persisted in dealing with the property so as to secure maximum monetary benefit from it, regardless of the fact that the claimant was claiming that she had not intended to part permanently with possession of it to the defendants. Any court must consider such conduct to be reprehensible, bordering on the fraudulent, and refuse the aid of equity to any claim by the defendants to an equitable interest on the basis of any alleged contributions by them.

40. In addition, the defendants had been living in the said property rent free since August 1995. On 11<sup>th</sup> March 2010 the claimant was granted a protection order against the first defendant and the defendants left the said property. The defendants' evidence throughout was an attempt to besmirch the character and conduct of the claimant. However her actions, and theirs, spoke louder than words. The claimant was the one assisting the defendants from the time of their marriage by providing them with a place to live. The defendants on their own evidence appeared to believe that the claimant had an obligation to assist them.

41. They claim that they were bearing all the expenses, and complained that they also bore expenses without contribution, or sufficient contribution, from Junior. Junior's failure to contribute, even if established, is not relevant to the issues in this matter. The expenses that they appear to complain about do not appear to be any different from the expenses that anyone who occupies property would have to bear. Certainly the defendants have not particularized what these expenses were supposed to be, and it is inferred they would have been normal

maintenance, for example painting, water and electricity bills, and possibly land and building taxes. The latter are usually insignificant, and the former are normal incidents of occupation, even in rental accommodation.

42. The second defendant even attests in his witness statement – paragraph 33- that they considered it unfair that the claimant was using extra electricity for her sewing machine. It was this sewing machine that the claimant was using to secure an income to support herself, after trying to earn a living and support herself, and the defendants, by working abroad as a babysitter. The first defendant also repeats this baffling complaint against her own mother in her witness statement. - Paragraph 21

43. The claimant in any event claimed to have sent money to the defendants to assist in defraying expenses and to repay the loan taken to repair the property. She claims to have sent US \$400 per month and in all sent \$72,000 to the defendants. I have no hesitation in accepting her evidence, and prefer it wherever it conflicts with that of the defendants.

44. I find that the defendants' conduct was calculated to secure money from the said property, via loans, in any way possible, and further that some of the transactions they attempted were dishonest, in that they relied on representations to financial institutions that they owned the said property. In fact one of those transactions involved a purported sale of the said property to Junior. That dishonesty culminated in their own belief that the property, which they had represented to the claimant would be re-vested in her after a loan was obtained to repair and renovate it, now belonged to them in fact.

45. Their refusal to reconvey the said property to the claimant, and their attempt to evict her from the said property, was not only disgraceful, but dishonest. Even on their own case they had received the said property from her as a gift, and, even on their own case, it would have been the ultimate in ingratitude to attempt to evict her thereafter.



## LAW

46. The law on undue influence has been clarified in recent decisions and is set out and summarized in **Snell's Equity 31st edition** as follows. The principles are set out at some length hereunder – (all emphasis added)

### [Extracts from Snell's Equity 31st Edition]

*“But in Royal Bank of Scotland plc v Etridge (No. 2) the Court of Appeal and the House of Lords have now confirmed that the basis of the doctrine is not absence of consent but **proof of wrongdoing**. Despite this clarification of the principles, however, the scope of undue influence still remains uncertain. The Court of Appeal has recently confirmed that the **presumption of undue influence can still arise even where the “wrongdoer” is able to satisfy the court affirmatively that his conduct was unimpeachable and that there was nothing sinister in it.**”*

*At page 712*

*“it is brought into play whenever **one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them; and Etridge [6]-[7]: “The law will investigate the manner in which the intention to enter into the transaction was secured...If the intention was secured by unacceptable means, the law will not permit the transaction to stand”***

*Paragraph 8-09 page 204-205*

*“The doctrine of undue influence enables C to obtain relief **where he or she has been induced by the influence of D to enter into or participate in a transaction in circumstances where the court considers that the influence was exerted improperly or unfairly....** The kind of conduct which will attract the Court's intervention may involve threats or other overt acts of coercion. But **the Court may also intervene where D has exercised no overt pressure on C because he or she has such a power of influence that this is unnecessary....** cases where the doctrine operates are conventionally divided into two classes. The first class consists of cases of **actual undue influence**. The second class consists of cases of **presumed undue influence**. The legal burden of proving*

undue influence remains on C throughout but if C establishes the existence of a relationship of influence and the nature of the transaction is so suspicious that it calls for an explanation, this satisfies the evidential burden of proving undue influence and the burden moves to D to provide a satisfactory explanation for the transaction. *In the absence of a satisfactory explanation the inference of undue influence can be drawn and the legal burden of proof will be satisfied even if there is no direct evidence of undue influence...* Further, where the relationship between the parties falls into one of a number of recognised categories of **parent and child**, guardian and ward, trustee and beneficiary, solicitor and client or medical or spiritual adviser and patient or follower a relationship of influence is **presumed**. This is an irrebuttable legal presumption (as opposed to an evidential one) **although in order to establish undue influence it remains necessary in all cases for C to establish that the transaction called for an explanation on the basis that it was “immoderate or irrational” or cannot “be reasonably accounted for on the grounds of friendship, relationship, charity, or other motives on which ordinary men act”.**

Paragraph 8-12

*“Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage... In cases of this latter nature the influence one person has over another provides scope for misuses without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests.”*

Paragraph 8-13 page 208

*Actual undue influence*

*“In cases where no overt pressure is exerted actual undue influence may be proved by adducing evidence of the relationship of ascendancy and by the court drawing the inference that C was acting under D’s direction without any independent thought... If actual undue influence is proved the transaction will be set aside even if the transaction was not clearly or obviously disadvantageous to the victim”.*

Paragraph 8-14

*Presumed undue influence*

*“But in many cases across the spectrum C cannot point to any overt acts or statements from which the court can make direct findings of undue influence and the relationship between the parties is not one of domination or complete ascendancy. Even if C is, therefore, unable to prove undue influence directly, undue influence may be presumed upon proof of (1) a relationship of influence and (2) a transaction which excites suspicion or calls for explanation. “Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.” The onus then shifts to D to provide a satisfactory explanation and to satisfy the court that C was free from D’s influence altogether or that any reliance placed by C upon D was not abused. If D is unable to provide a satisfactory explanation then the court may draw the inference that C was induced to enter into the transaction and the legal burden of proof is discharged”.*

Paragraph 8-15

*“It is also important to emphasize that the fact in issue which is the subject of the presumption is not the existence of a relationship of influence but that this relationship has been wrongfully abused. In *Barclays Bank Plc v O’Brien* it appeared to be suggested that proof of a relationship of influence was sufficient to give rise to the*

presumption of undue influence and that any exercise of influence by one party over another (and, in *particular, husband over wife*) *would be wrongful. This suggestion has now been rejected.* Further, there is bound to be a substantial overlap between actual and presumed undue influence *particularly in cases of actual undue influence which involve no overt pressure. Where the court finds on the evidence, therefore, that there has been no express or actual undue influence it is not open to the court to infer undue influence from the nature of the relationship between the parties. The claim must be dismissed.*”

Paragraph 8-21

“All transactions whereby benefits are conferred on parents by their children are objects of the court’s jealousy especially where the parent has been guardian of the child’s property. For example, where a daughter made over property to her father without consideration shortly after attaining her majority, the father was required to show that the daughter was a free agent. The presumption operates even after the marriage of the child, but normally lasts only a short time after he or she attains full age. ***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.*** *Avon Finance Co. Ltd v Bridger (1979)[1985] 2 All E.R. 281 (son and elderly parents).*”

Paragraph 8-28

Nature of transaction

“In *National Westminster Bank plc v Morgan* it was held that the ***presumption of undue influence will not arise unless the transaction is manifestly to the disadvantage of the person influenced.*** In *Royal Bank of Scotland plc v Etridge (No. 2)* the House of Lords declined to depart from their earlier decision although they considered that because of its ambiguity the expression “manifest disadvantage” should be discarded.” Accordingly, ***the presumption does not arise unless the nature of the transaction is sufficiently unusual or suspicious to require D to provide an explanation: “so something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the***

***disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.***

Paragraph 8-30

***Rebutting the presumption***

*“In the case of gifts, the presumption **may be rebutted by affirmative proof** that “the gift was the **spontaneous** act of the donor acting under circumstances which enabled him to exercise **an independent will** and which justify the court in holding that the gift was the result of a free exercise of the donor’s will” Put more shortly, D must establish that the gift was made as a result of “full free and informed thought about it”*

Paragraph 8-31

*“The most obvious way for D to rebut the presumption is to prove that C received Independent legal advice. The normal standard of the advice required to rebut the presumption is that S, C’s adviser, explained the nature and consequences of the transaction to C with full knowledge of the relevant circumstances.”*

**Summary of principles**

47. Applying these principles to the facts I therefore turn to consider the following:

1. Is there evidence of actual undue influence?
2. Was there a relationship of influence?
3. Can an inference be properly drawn on the evidence that the claimant acted under the direction and influence of the defendant without any independent thought?
4. Is there any basis for a finding of presumed undue influence?

That is – a. Is there evidence of a relationship of influence, given that the relationship between the defendant and the deceased is not in the category where there is an irrebutable legal presumption of such a

relationship and that such a relationship must be established on the facts?

b. If so, is there evidence that such relationship has been abused?

c. Is the transaction one which calls for explanation or excites suspicion?

5. Was there anything suspicious or unusual about a mother transferring outright to her daughter and son-in-law by way of gift her main asset – her house, without retaining any interest whatsoever for herself ?

6. If a, b, and c above are satisfied then the burden shifts to the defendant for an explanation of the transaction, in the absence of which the transaction may be set aside. In that case the greater the disadvantage to the vulnerable person, (the elderly claimant / mother in this case), the more cogent must be the explanation before the presumption will be regarded as rebutted. This can be satisfied by establishing, for example, that the transaction was the product of independent legal advice.

## **FINDINGS**

48.

- a. I find that the transaction was not a rational one, and to the obvious detriment of the claimant. It provided no protection whatsoever for the occupation and ownership of the claimant, divesting her of all ownership or occupancy rights to her home, her main asset.
- b. I find there is an evidential basis for a finding that the defendant was in a relationship of influence over the claimant in that the claimant clearly trusted her daughter, wanted to provide for her welfare and that of her family, and accepted her characterization of the transaction as one which would ultimately see the re-vesting in the claimant of her property.

- c. I find that that the claimant's intention to divest herself of her sole ownership of the subject property was not the product of her own independent thought and judgement, but was based on the characterization, by the second defendant, of that transaction as vesting only temporary ownership in the defendants. That characterization was based upon the representation of the second defendant to the claimant, and was, on the evidence of the claimant which I accept, readily accepted, as the claimant trusted the second defendant, her youngest daughter, who at the time even promised her mother that she would not rob her of her property.
- d. I find that the evidence does support a finding that the second defendant was in a relationship of influence over the claimant, and further, that the subject deed was the product of such influence. I find further that that relationship was clearly abused by the behaviour of her daughter, which amounted to trickery.
- e. I find that the transaction by outright deed of gift of the subject property was one that readily and instantly excites suspicion. I find that the transaction was one which called for explanation. It was one which was not rational and explicable in that it did not preserve the deceased's interest in the subject property during her lifetime.
- f. I find that the burden shifted to the defendants to explain to the court's satisfaction that the claimant was free from the influence of the defendants altogether, or that any reliance placed by the claimant on the defendants was not abused. I find that they have failed to do so.
- g. I find that the defendants' conduct has disentitled them to further consideration as to the extent of any interest in the said property that they might have acquired in equity. See **Snell's Equity 30th Ed para. 39-17.**

## **DISPOSITION AND ORDERS**

1. A declaration is granted that the deed of gift dated on the 17<sup>th</sup> day of April 1999, and made between Raffeoun Ali, and Rennie Mohammed and Natalie Ali-Mohammed, (the

said deed), is void as between the parties thereto having been executed as a result of undue influence exerted by the Defendants.

2. It is ordered that the said deed be set aside.
3. A declaration is granted that the Claimant is the owner of All That piece of land situate in the ward of Tacarigua, in the Island of Trinidad comprising FIVE THOUSAND ONE HUNDRED AND TWENTY SQUARE FEET be the same more or less delineated and coloured pink in the plan registered in Volume 2467 Folio 505 being portion of the lands described in the Crown Grant in Volume 10 Folio 411 and also described in the Certificate of Title Volume 2207 Folio 55 and shown as Lot 311A in the General Plan filed in Volume 2160 Folio 205 and now described in the Certificate of Title in Volume 2467 Folio 507 and bounded on the North by a road reserved 25 feet wide, on the South by an open space, on the East by a drain reserve 3 feet wide and on the West by Lot 331 (the said property).
4. An injunction is granted restraining the Defendants, their servants and/or agents, from selling, transferring or placing any further charges on the said property and/or howsoever otherwise disposing of it.
5. A declaration is granted that the Defendants are not entitled to evict the Claimant and/or her servants and/or agents and/or licencees from the said property.
6. A declaration is granted that the claimant is entitled to delivery up of the said property.
7. It is ordered that the Defendants do convey the said property to the Claimant within twenty-eight days from the date of the Court's order and in default that the Assistant Registrar be empowered to and do execute same.



8. The defendants are to pay the claimant's costs to be determined by this court in default of agreement.

9. Liberty to apply.

Dated this 19<sup>th</sup> day of December, 2012

.....  
**Peter A. Rajkumar**  
**Judge**