

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV 2015 - 00194

BETWEEN

JOSEPHINE THOMAS

CLAIMANT

AND

PHILLIP THOMAS

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr Saeed Trotter for the Claimant

Mr Thomas Cunningham for the defendant

Oral Judgement

Background

1. The claimant is the sister of the defendant. She seeks possession from him of a parcel of land, a portion of a larger parcel of land that she occupies. She claims to own that land by virtue of a Deed (the DEED) from her father (the deceased). The Deed reflects purported payment of \$100,000.00 and it purports to convey in addition to the subject portion of land, another parcel of land which the deceased had previously conveyed to another daughter of his.

2. The claimant claims to have given a licence to the defendant to occupy but, based on deterioration in their relationship, she claims to have terminated that licence, and seeks in this action to recover possession from him.

3. The defendant claims that he entered the premises after the death of his father, created a “house spot”, and built a dwelling out of galvanise in which he still lives with his family. He

denies that he entered into occupation with permission, and in fact claims that his occupation is adverse to that of the claimant. Further he claims that her deed is voidable as it was procured by undue influence, and in any event was the result of unconscionable bargain.

Issues

4.

- i. Is the defendant's occupation adverse to the rights of the claimant.
- ii. Was the deed of the claimant procured by undue influence, either actual or presumed.
- iii. Was the defendant's occupation based on a licence.
- iv. If so, has it now been terminated entitling the claimant to possession.

Findings and conclusion

Adverse possession

5. It is highly unlikely that the defendant entered into occupation without permission of the claimant. If he had, she, having a Deed, would have been unlikely to simply stand by and allow the defendant to remain in occupation without taking some step. In fact the evidence is that the relationship between the claimant and defendant was initially quite good. On a balance of probabilities I find that his initial entry into occupation of the premises, to which his sister had a Deed, must have been with her permission, and therefore not adverse. In any event there is evidence that his entry onto the premises was not for a period of 16 years, and that he had been renting premises elsewhere well within that period.

6. The defendant is not in any event pursuing his claim based on adverse possession, preferring to rely upon his claim to have the Deed of the claimant set aside. He would then be a beneficiary of his father's estate under an intestacy, and the claimant would have lost her locus to evict him.

Whether the deed of the claimant was procured by undue influence, either actual or presumed

7. In a compelling argument counsel for the defendant claims that the deed was procured by undue influence.

Relationship of ascendancy

8. He avers that the claimant herself has by her witness statement described a situation of immobility, vulnerability, and dependence on the claimant and her family. She described a situation of isolation from his other children, where only one other daughter visited occasionally. He contends that as an issue of fact the Court should find a relationship of ascendancy on the part of the claimant over the deceased.

I so find.

Suspicious transaction

9. The defendant contends that the Deed itself evidences highly suspicious matters:-

- a. The Deed purports to convey land which includes land that the deceased had previously conveyed to another daughter and which he no longer owned;
- b. The deceased was immobile;
- c. The deceased purported to convey his only remaining major asset;
- d. The deceased never received the \$100,000.00 that was expressed as the consideration for its alleged purchase by the claimant. In fact the claimant herself admits that she never paid any such sum, and was under the impression that the deceased intended to gift the land to her;
- e. The deceased purported to benefit the claimant to the exclusion of his several other children; With respect to the last no undue emphasis should be placed on this. The claimant looked after him. His other children were apparently not that close. It would not be surprising if he wished to benefit the claimant to their exclusion.

10. It is however cause for pause that an outright conveyance would be made or allowed to be made by the attorney preparing the Deed, as best practice is that such persons should be advised of the option of a will, or at least of the option of preserving to themselves a joint interest or a life interest. The execution of a deed of gift, to the exclusion of those options, is actually

suspicious as it left the deceased, having divested himself of his major asset, and his home, highly vulnerable, even more so than he already was.

11. The claimant contends that in the circumstances of:-

- i. the undisputed vulnerability of the deceased,
- ii. the relationship of ascendancy by the claimant,
- iii. the suspicion that the deceased may not have known what he was doing in
 - a. purporting to convey his major asset, including with that conveyance land that he had ceased to own, and
 - b. for consideration that he never received, the presumption of undue influence arises.

I find that it clearly does.

12. He contends that in those circumstances the burden of proof shifts to the claimant to establish that the transaction was not procured as the result of undue influence.

I find that it does.

13. The evidence however is that although the claimant selected the attorney at law for her father, who prepared the Deed for his execution, she herself was not present with her father when he gave instructions. She claims that she did not know of the Deed (although she knew of his intention to give her the land), until after the death of the deceased, when she first saw the Deed.

14. Her evidence, which has not been rebutted, is to the effect that she did not procure the Deed herself, was not aware of the contents of the Deed until after the death of the deceased, and is not responsible for the errors it contains in the description of the parcel of land conveyed. Neither is she responsible for the unexplained reference to consideration of \$100,000.00 in what was supposed to have been a Deed of gift.

15. In *Savitri Jagdip Singh and others v Doodnath Jagdip Singh and Ors* HCA 362/2014 delivered 7th June 2014 and in *Sadiqua Boos v Saadia Lee Ying* HCA 1056/2015 delivered 20th May 2016 this court set aside Deeds on the basis of undue influence.

In Jagdipsingh the facts appear from the following extract:-

“It is the first defendant’s conduct which is challenged, not that of any person from whom he claims. He is not one step removed from the allegation of fraud. It is conduct which has been brought home directly to him.

*55. As the eldest son who was **literate**, upon whom his mother **relied**, the first defendant can hardly claim not to have been in a position of influence and ascendancy. She was taken to a lawyer’s office to sign a Memorandum of Transfer. He would be expected at the very least to ensure that the document was read over to her. He can hardly claim that the transaction was not a suspicious transaction, carrying as it does the following clear hallmarks of suspicion for which he was directly involved, implicated, and responsible:-*

i. Being in a relationship of trust, confidence and ascendancy as demonstrated by his being a beneficiary of an extensive Power of Attorney from his mother.

ii. Abusing that relationship by carrying his illiterate mother to a lawyer to execute a Memorandum of Transfer, after himself executing the preceding agreement for sale as her attorney, pursuant to a Power of Attorney.

iii. Having his illiterate mother execute a document which was not read over to her,

iv. Not advising his illiterate mother of the opportunity to obtain independent legal advice, where his interests in seeking the property for himself conflicted with the duty of his mother to ensure that the estate of the deceased, including that property, was preserved for the benefit of all the children of the deceased.

v. Not ensuring that his illiterate mother obtain such advice where the effect of executing that document involved his illiterate mother a. doing something manifestly to the benefit of the person carrying her to the attorney and benefitting from the execution of that document, and b. where, as here, the document on the face of it, involved his illiterate mother acting in breach of fiduciary duty to an estate which she was entrusted to represent.

*56. In this case the first defendant cannot honestly state that he believed the transfer to himself and his mother in their **personal** capacities, of land:-*

a. on which stood a building which belonged to his father,

b. for whom his siblings were also beneficiaries under his will,

c. in respect of which his mother was the executrix, and d. entitled only to a life interest,

could be a genuine document.

*57. Even apart from the obfuscations and justifications raised by him with respect to the land, he must have known at least that he **could not** be entitled to the **building** in his own right, and that if his mother died that his siblings would get nothing, despite the will of his father. The alleged verbal waivers of his siblings of their interests in the property are completely unsubstantiated.*

58. His mother was illiterate. There is no evidence the Memorandum of Transfer was even read over to her.

59. *There is absolutely no reason to believe that his mother knew that this property had been transferred to her and the first named Defendant solely in their personal capacities, and that the effect of that was that she had in fact enabled the transfer after her death to the first defendant.*

60. *The first named Defendant laid the foundation for that transfer to them both in their personal capacities when he utilised the Power of Attorney that she gave him to execute the agreement for sale to them both in their personal capacities.*

61. *I find that procuring her thumb print on that Memorandum of Transfer must have been the result of the exercise of undue influence, both actual and presumed.*

62. *The means by which this dishonest result was achieved falls within the classic descriptions of undue influence, both actual and presumed. I find that such undue influence in this case constituted an act of dishonesty tantamount to fraud. This dishonesty is attributable entirely to the first defendant.*

In Boos

1. *“The First Named Defendant carried her elderly mother to a lawyer. There her elderly mother engaged in a transaction at the end of which she had effectively given her property to the Second Named Defendant, as she received not one penny of the four million dollars that she, curiously, acknowledged receiving. If she had received competent independent legal advice, she would necessarily have been strongly advised to consider whether there were actually any advantages of such an arrangement to anyone except the first named defendant and her family.*

2. *In fact it raises questions as to whether the deceased even appreciated the effect of what she was doing – conveying her main asset for a promise of future monthly installments, most of which were comprised of rent which she would have received in any event if she had retained ownership.*

3. *Further the monthly installments were less than the monthly rental income she had been receiving before the loss of one tenant, and less than she would have received once the premises were completely rented once again, as they were by November 1st 2012.*

4. *The fact that:-*

i. *the documents relating to this transaction do not support the explanation of the first defendant as to any agreements that she could utilise rents that continued to be received by the deceased as part payment of the alleged monthly installment, combined with*

ii. *the absence of any formal record that she had received a reprieve from the deceased from making full payment of the alleged monthly installment,*

lead to the conclusion that this transaction bears too many hallmarks of suspicion, with the explanations therefor continuing to raise more questions than answers.

16. The evidence in both these cases established that the defendants therein had done more to procure the deeds which were eventually set aside by the court than the claimant in the instant case. This case leaves a distinct suspicion that the transaction, which was completely for the benefit of the claimant, may have involved her to a greater extent than she claimed. It leaves a distinct suspicion that the transaction – the gift disguised as a sale by Deed, may have been less the product of free and informed choice by the deceased than the product of undue influence applied to an elderly, immobile and highly vulnerable old man, dependent on her for food, care and cleaning.

17. However suspicion is not proof. Even with the burden of proof being upon the claimant to justify the transaction and establish that it was not the product of undue influence, her unrebutted testimony that she only even saw the Deed after the death of the deceased and had no actual involvement in its contents, must suffice.

18. The evidence falls just short of establishing that the Deed of the claimant was procured by undue influence.

Was the defendant's occupation based on a licence

19. It is clear that the defendant entered into occupation based on permission of the claimant. It is also clear however that, rather than simply a bare licence, she permitted him to construct a dwelling, and occupy an area of the land. He did so and has lived there for over a decade. In those circumstances he acted to his detriment. The claimant in effect granted him a licence coupled with an interest. In quantifying the interest the court must take into account the entire factual context. The defendant felt sufficiently comfortable with the permission granted to him, (as I have expressly found that he entered with permission), to carve out a house spot. However, he did nothing further with that area, and instead erected a galvanized structure in which he still lives with his family. This was a family arrangement and I find that no time limit was placed on his occupation.

20. In the circumstances his interest associated with the licence that was granted to him can most equitably be assessed as a life interest to occupy the structure that he now occupies, and a curtilage surrounding it, together with a right of access to that structure. No one has surveyed the land. In so far as a claim was made in respect of a 'house spot' dug out or created on the subject property, nothing further has ever been done with respect to it, and no interest arises in aspect of that area.

Orders

21.

- i. It is ordered that a **survey** be conducted to be paid for by the defendant to delineate the area that his structure occupies, a curtilage of 15 feet surrounding it, and a right of access to it from the entrance to the subject property described in the claim form.
- ii. **Injunctions** are granted as follows:-
 - a. Restraining the defendant his servants or agents from harassing, threatening, molesting, or in any way interfering with the claimant or her family, or from erecting any additional structure on the subject property.
 - b. Restraining the claimant her servants or agents from harassing threatening molesting or in any way interfering with the defendant or his family.
- iii. Th claimant's claim against the defendant for possession is dismissed.
- iv. The claimant is to pay to the defendant costs of the claim in the sum of \$14,000.00.
- v. The defendant's counterclaim is dismissed, save for a declaration that the defendant is entitled to a **life interest** in the area of land that is now occupied by the structure that he lives in, together with a curtilage, where the layout of the land allows it, of 15 feet, together with a right of access to the said structure from the entrance to the subject property, as delineated in the survey conducted as ordered above.

- vi. The claimant is to pay the defendant's costs on the counterclaim in the sum of \$14,000.00.
- vii. Liberty to apply.

Dated the 14th day of July 2016

Peter A. Rajkumar
Judge