

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2013-04946

BETWEEN

MUKESH RAMPERSAD

1st Claimant

SHAMILA PERSAD RAMPERSAD

2nd Claimant

AND

RAMKARRAN RAMPARAS

1st Defendant

VIDIA RAMPARAS

2nd Defendant

Appearances:

- Claimant: Elton Prescott S.C. leading Russell Huggins and instructed by Crystal Dottin
- Defendant: Ramesh Lawrence Maharaj S.C. leading Alvin Ramroop

BEFORE THE HONOURABLE MR JUSTICE DEVINDRA RAMPERSAD

Dated the 11th of June 2015

JUDGMENT

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THE CLAIM

1. The claimants in this matter are husband and wife. The first named claimant is the second defendant's brother, and the latter party is married to first named defendant. At the heart of this action is a Deed of Conveyance ("the 2013 Deed") and a Power of Attorney ("the Power of Attorney"), both described later on, which the claimants are seeking to set aside for the reasons given below.
2. It is important at this stage to quote directly from the amended statement of case (complete with the amendments shown) in order that the gravamen of the claim is accurately represented:

"7. In or about July 2013 the Claimant's encountered difficulties with the enforcement agencies in the United States of America and were prevented from leaving the United States of America. Unaware of how things would have turned out and in an attempt to safeguard their interest in Trinidad the Claimants contacted the Defendants with whom the Claimants had a very long-standing friendship and business relationship in which the Defendants managed the business operations of the Claimants in Trinidad.

8. After several discussions between the Claimants and the Defendants it was verbally agreed that the Claimants would give a Power of Attorney ~~which is dated 4th February 2013 and was signed by the Claimants on the 28th July 2013 at their No. 16533 SW 32nd Street, Miramar, Florida home,~~ to the Defendants for the sole purpose of handling ~~their~~ the business affairs of the Claimants in Trinidad. The Claimants always reposed great confidence and trust in the Defendants. The said Power of Attorney is dated the 4th day of February 2013 and was signed by the Claimants on the 28th day of July 2013 at their No. 16533 SW 32nd Street, Miramar, Florida home.

9. As a result of extenuating circumstances in which the Claimants found themselves and fearing the loss of their property in Trinidad it was verbally agreed between the Claimants and the Defendants by phone that a document, a Deed of Conveyance (hereinafter referred to as "the said Deed"), would be prepared and executed but was to be registered only in event that the Claimants were prohibited by the authorities in the United States of America ~~authorities~~ from returning to Trinidad.¹

10. Pursuant to the said verbal agreement the Defendants on or about the 15th day of February 2013 caused the 2013 Deed to be prepared for execution by the Claimants.²

11. The Claimants executed the said 2013 Deed on the 28th day of July 2013, the said 2013 Deed and the said Power of Attorney bore the following dates; 15th day of February 2013 and 4th February 2013. The said 2013 Deed and the said Power of Attorney were executed at the Claimants' home, aforesaid, in the presence of the First named claimant's younger brother Kendell Shastri Persad (hereinafter referred to as

¹ The words that are highlighted in bold, italics and underlined were excluded from the amended statement of case which was filed but were included in the original statement of case. Without those words, this paragraph in the amended statement of case makes no sense in relation to the alleged agreement and that agreement is crucial to the claimants' case. Consequently, the court will treat with the exclusion of those words in the amended statement of case as a typographical error and will include them in its consideration of the pleadings.

² The reference to the "said Deed" in paragraph 9 of the amended statement of case and then the "2013 Deed" and "the said 2013 Deed" in the other paragraphs are with reference to the same Deed which would be referred to as "the 2013 Deed" in this judgment. This underlined portion of the pleading, however, is contradictory to the claimants' case since, according to them, the 2013 Deed could only have arisen after their issues in July 2013 and was not in contemplation before.

“Kendell”) and his wife Elizabeth Badri-Rampersad (hereinafter referred to as “Elizabeth”).....

12. Notwithstanding the verbal agreement between the Claimants and the Defendants that the registration of the 2013 Deed would be effected only upon the occurrence of the event aforementioned in paragraph 9 above, the Defendants caused the 2013 Deed to be registered on the 6th day of August 2013.....”

3. The claimants say that the defendants took advantage of the relationship they shared with the claimants to their detriment. They pleaded particulars of undue influence, particulars of breach of the **Registration of Deeds Act** Chapter 19:06 of the laws of Trinidad and Tobago and particulars of special damage. They further claimed that the first named defendant made threats to dispose of all of the claimants’ properties. In that regard, particulars of special damages were given in relation to:
 - 3.1. The sum of \$125,000 being the proceeds of the sale of a Kia pickup truck registration number TCW 9138;
 - 3.2. The sum of \$93,600 being the proceeds of the sale of 360 2x4x20 steel beams;
 - 3.3. The sum of \$375,000 being the proceeds of the sale of 2 lots of land situate at Siewdass Road, Freeport; and
 - 3.4. Such other sum to be determined on the basis of the accounts which are to be provided pursuant to paragraph 3 of the Claim Form.
4. In mid-September 2013, it came to the claimants’ attention that the 1st named defendant was attempting to dispose of other properties belonging to the claimants. This was confirmed through a number of telephone calls between the 1st named claimant and the 1st named defendant. As a result, these proceedings were filed in which the claimants claimed for:
 - 4.1. A declaration that the execution of the Deed of Conveyance No. DE201302011707D001 dated 15th February 2012 made between Mukesh Rampersad and Shamila Persad Rampersad of the One Part and Ramkarran Ramparas and Vidia Ramparas of the Other Part is in breach of the provisions of the Registration of Deeds Act.
 - 4.2. A declaration that the registration of the Deed of Conveyance No. DE201302011707D001 dated 15th February 2012 made between Mukesh Rampersad and Shamila Persad Rampersad of the One Part and Ramkarran Ramparas and Vidia Ramparas of the Other Part is void.
 - 4.3. An order setting aside the Deed of Conveyance registered as DE201302011707D001 and dated 15th February 2012 made between Mukesh Rampersad and Shamila Persad Rampersad of the One Part and Ramkarran Ramparas and Vidia Ramparas of the Other Part;
 - 4.4. An order directing the Registrar General to expunge the said Deed of Conveyance from the Register

- 4.5. An account of the proceeds of the sale of the Kia pick-up truck registration number TCW 9138, 2 lots of land situate at Siewdass Road, Freeport and 360 2x4x20 steel beams
- 4.6. An injunction restraining the defendants and each of them whether by themselves and/or their employees and/or servants and/or agents or otherwise howsoever from all or any of the following act: entering, selling and/or renting, and/or otherwise disposing of, and/or in any way encumbering the properties situate at No. 1 Southern Main Road, Chaguanas; No. 85 Siewdass Road, Freeport; LP #5 Cemetery Road, Freeport and Walter Trace Las Lomas.
- 4.7. All further accounts, directions and inquiries as may be necessary
- 4.8. Such further and other reliefs
- 4.9. Costs

THE DEFENCE AND COUNTERCLAIM

5. The defendants accepted that they were appointed the claimants' attorneys by virtue of a Power of Attorney executed by the claimant on 4 February 2013 and revoked by deed made on 3 October 2013. The defendants however stated that in 2011, the claimants, who reside in Florida, were in financial difficulty and asked the first named defendant for help in meeting the instalments on their mortgage of the Southern Main Road property ("the SMR property"), which is the subject of the 2013 Deed. As such the first named defendant agreed and made certain payments to the claimant in the amount of \$130,000 on 3 October 2011 and \$268,000.00 on 11 November 2011.
6. The defendants said that in January 2012, the first named claimant proposed to the first named defendant that the first named claimant construct a three storey building on the SMR property to be financed by the first named defendant and the first named defendant informed the first named claimant that if he were to expend substantial monies on the SMR property, it would have to be sold to him. In that regard, the defendants pleaded payments allegedly made to the first named claimant in the sum of \$1,760,000 from 19 December 2012 to 22 July 2013 towards the construction of the said building. It is the defendants' case that the first named claimant agreed in early February 2012 to sell the SMR property to the first named defendant for the sum of \$800,000 subject to the existing mortgage and that he would be coming to Trinidad that Carnival so that a deed of conveyance could be prepared.
7. On this basis, the defendants said that on 15 February 2012, the claimant and the defendants all attended the office of Mr. Mervyn Mitchell in Chaguanas where they executed the 2013 Deed in the presence of Mr. Mitchell and his law clerk Laverne Jackson. Regarding payment, the defendants say that it was orally agreed that the first named defendant would be credited with an initial payment of \$398,000.00, comprised of the 2 payments made in October 2011 for \$130,000 and in November 2011 for

\$268,000, with the remaining \$402,000.00 to be paid within one year and that the 2013 Deed would not be registered until the full sum was paid. The defendants detailed the payment by instalments of the \$402,000 to the claimants in their defence with the last payment being made on 7 December 2012.

8. The defendants said further that in January 2013, the first named claimant asked the first named defendant to help him buy a property at Siewdass Road and as such a deed of conveyance in favour of the first named claimant for this property was executed on 4 February 2013. The first named defendant paid four cheques of \$250,000.00 in consideration for the conveyance. On this same date, the defendants claim that the claimants executed a power of attorney appointing the defendants as their lawful attorneys. This, power of attorney, the Power of Attorney, they said, was executed at the office of Mr. Mitchell.
9. The defendants said that they ultimately registered both the 2013 Deed and the Power of Attorney because in July 2013, the first named defendant wished to raise some money by way of a loan and, in order to obtain the loan, he needed to register the 2013 Deed. Furthermore, he wished to be in a position to redeem the existing mortgage on the SMR property. Accordingly, he registered the Power of Attorney on 31 July 2013 and the 2013 Deed on 6 August 2013. The defendants denied that there was any undue influence, fraud or otherwise and claim that they were always ready to account to the claimants.
10. The defendants say that they received a total of \$328,000 under the Power of Attorney on behalf of the claimants and a total of \$405,800.00 was expended by the first named defendant in exercise of the Power of Attorney, leaving a difference of \$77,800 owing to him. That difference, the defendants said, ought to be recovered by them as a debt. Furthermore the defendants contended that to date they had expended the sum of \$6,131,760.00 towards the construction of the building on the SMR property and have paid off the mortgage on that property in the sum of \$2,180,858.06.
11. By way of counterclaim, the defendants seek repayment of debts namely \$1,005,100.00, being the sums advanced by the first named defendant on the completion of the purchase of the Siewdass Road property, and the difference of \$77,800.00 mentioned above in relation to the first named defendant.

REPLY AND DEFENCE TO COUNTERCLAIM

12. The claimants denied that at any point they faced financial difficulties and stated that at no point did the first named claimant approach the first named defendant for help in meeting mortgage payments. The claimants say that it had been a practice of the first named claimant and first named defendant for a period of almost 20 years to exchange credit or pay each other for services mutually rendered on each other's behalf and all of the payments referred to in the Defence and Counterclaim were pursuant to that arrangement.

13. As to the construction of the building on the SMR property, the claimants say that the first named claimant managed the construction of this building from February 2012 until July 2013 without assistance from the first named defendant and further denied that he agreed to sell the SMR property to the first named defendant. They further denied much of the defendants' defence and reiterated what was said in the statement of case. In particular, the alleged payment of \$1 million with respect to the property at Siewdass Road was repaid in US dollars in the USA by way of a payment towards the purchase of a house in the US for the claimant as part of the long-standing arrangement for the sale of US dollars to the first named defendant.
14. In defence to the counterclaim the claimants denied that they were indebted to the defendants and reiterated that any sums paid by the first named defendant was pursuant to the mutual business arrangement that existed between the parties. The claimants say that the counterclaim disclosed no reasonable cause of action against them.

THE DEFENDANTS' REPLY

15. In reply to the defence to the counterclaim, the defendants repeated what was stated in the defence and denied much of the claimants' reply including the mutual business relationship whereby the parties expended monies on behalf of each other. In particular, the defendants put the claimants to proof of this alleged mutual business relationship. The defendants also denied that the first named claimant managed the construction of the building on the disputed property.

THE CLAIMANT'S EVIDENCE

MUKESH RAMPERSAD

16. Mukesh Rampersad presented an exhaustive 53 page witness statement to the court. In it, he detailed the relationship that he had with the first named defendant and his sister, the second defendant, and what made him migrate to the United States. He gave further details of the monies he made in the United States and the investments he made in Trinidad and Tobago, including those he made through the first named defendant. He noted that in 2006 he purchased property in Miami, Florida, in 2007 he purchased a property in Trinidad at Cemetery Road, in 2009 he completed renovations on the Siewdass Road property in which his parents lived and in 2011 he purchased the SMR property which consisted of two lots of land, subject to an existing mortgage, for \$5,604,000.00. In order to purchase the SMR property he approached First Citizens Bank to obtain a loan in the sum of \$2,500,000.00 which had a monthly installment of \$30,000.000.

COMMENT

- 16.1. It is important to note that even though his uncontested evidence is that the SMR property was the subject of an agreement to purchase for the price of \$6,100,000 initially and then a subsequent new agreement to purchase at the price of \$5,604,000, subject to an existing mortgage, the deed of conveyance for the purchase of the SMR property by the claimants³ exhibited a purchase price of \$500,000 on which no stamp duty was paid.
- 16.2. This is a very serious state of affairs as, by the first named claimant's own evidence in his witness statement, the purchase price on the deed of conveyance to the claimants was grossly understated and this would necessarily have implications in relation to stamp duty due to the Board of Inland Revenue.
17. He also went on to purchase a property at 125 Southern Main Road, Chaguanas ("the 125 property") and began construction on the same to house a door factory which he bought from his cousin. The construction on that property for that door factory was completed in December 2012.
18. He stated that the first named defendant purchased certain property in Florida in 2012 for the sum of UD\$393,900. At the time the first named defendant put down \$236,000.00 leaving a balance of \$157,000.00. To this end, he said that he loaned to the first named defendant the US in cash and was reimbursed the equivalent through a wire transfer or gave him TT dollars because of the construction on the 125 property.
19. According to this claimant, after giving details of the process by which the 2 parcels of land described in the deed for the SMR property were consolidated and the process he engaged in having plans specifically drawn for the particular business which he had hoped to open in Trinidad, he commenced construction on the SMR property on 2 January 2013 without any input from the defendants. He also described how he purchased the Siewdass Road Property property which lands were previously rented by his parents.
20. As to the SMR property, the first named claimant's evidence is that he began construction on this property in January 2013 and regularly travelled to Trinidad at this time. In the same year he asked the first named defendant to make out four cheques in the sum of TT\$250,000.00 to the vendors in order to complete the transaction of the sale in his parents land. He gave to the first named defendant the equivalent of US\$167,000.00 in cash as reimbursement when he came to Trinidad in March 2013.

COMMENT – THE ALLEGED PAYMENT OF US \$167,000 IN CASH

- 20.1. Once again, there is evidence being adduced by this witness in relation to a questionable transaction. He alleged that \$167,000 US in cash was paid by him to the first named defendant but failed to pinpoint the source for this large sum of cash. Did he bring it into the country? If so, where is the customs' declaration? Was it in Trinidad in a bank? If so, where is the corroborating

³ See exhibit "MR 12" to the witness statement of the 1st named claimant.

documentation? Was it in cash in his mother's safe - an allegation was made that he had accumulated US \$800,000.00 in a safe at his mother's home in 2003 but no account was given as to the amount there in 2013. If so, what was the source of these funds? As such, the allegation stands rather baseless.

21. He detailed further transactions made in respect of the SMR property and stated that the first named defendant was not involved with the property. In fact, at the end of June 2013, he says that construction was 85-90% complete.
22. In July 2013, he encountered difficulties in the USA and his wife and his passports were seized and were not released even up to the date of the trial. He stated that his immediate concern was for the SMR property and he informed the first named defendant that it would take approximately TT\$1,500,00.00 to complete the same. The first named defendant told him that he would "handle it" and an agreement was made for the Power of Attorney for the defendants to be able to complete these works. He stated that the first named defendant at this time also brought up the idea of the execution of a deed for the SMR property and that he, the first named claimant, would never willingly sign over this property.

COMMENT - THE REASON FOR THE 2013 DEED

- 22.1. The pleaded case for the claimant as to the reason for the 2013 Deed was set out verbatim above. That reason was that the same would be registered in the event that the claimants were prohibited by the US authorities from returning to Trinidad. Obviously, as this court has stated previously, that condition was met since, up until the time of the trial, the claimants were prohibited from leaving the USA due to this seizure of their passports by the US authorities.
- 22.2. To my mind, and contrary to his pleaded case, the first named claimant stated in his witness statement ⁴ another reason which the first named defendant advised for the preparation of the 2013 Deed, which was:

"..... He suggested that he could have a Deed prepared conveying to him and Vidia the Southern Main Road Property; it could be signed by me and my wife and it would only be registered in the event of any extenuating circumstances. He advised that the main reason for doing this Deed was that should the US authorities attempt to seize any properties belonging to my wife and myself, this Deed would protect his interest from the monies he was investing. He further advised that the Deed would also safeguard Shamila and my interest.

76. When Ramparas first brought up this idea about the Deed, initially I had concerns as I did not think it was necessary. This Southern Main Road Property, the visions I had for it and the effort and time that I put into it, it was like my baby; my dream property. I would never willingly sign over one of my properties to anyone no matter what the situation. However, after further discussions with Shamila and since I trusted my sister Vidia, and Ramparas was like my brother, I was confident that Ramparas would only have suggested this because he was looking after my best interest."

⁴ At paragraph 75

- 22.3. Therefore, not having provided any other explanation, it seems that the real reason for the preparation and the signature of the 2013 Deed was to prevent the US authorities from seizing the property as a result of the charges brought against the claimant in the US.
- 22.4. Of course, this amounts, in my respectful opinion, to an admission that the transaction was intended to put the property out of the hands of the claimants to protect it from possible seizure under US law.
23. He said that both the 2013 Deed and the Power of Attorney were sent by the first named defendant to Florida through a third-party from whom the same were collected and which were executed on 28 July 2013 just after a religious prayer session was held at his home in Florida. He stated that both he and the second named claimant signed the 2013 Deed and Power of Attorney while his sister alone signed the 2013 Deed since the first named defendant was not there present.
24. The witness detailed the transactions between himself and the first named defendant with relation to the SMR property. In particular, he detailed an email transaction dated 11 September 2013 in which the first named defendant listed several transactions for which he sought repayment.

COMMENT – THE 11 SEPTEMBER 2013 EMAIL

- 24.1. Why would this account have been done? Why would the first named defendant seek to provide an account of monies spent in relation to the construction of the SMR property and the legal costs of the preparation of the 2013 Deed?
- 24.2. To my mind, it raises deep reaching questions. Why would the first named defendant provide an account to the first named claimant with respect to monies to be repaid for work done on the SMR property, along with the legal costs for the 2013 Deed if, in fact, that property had in fact belonged to the defendants since December 2012 when the balance alleged to be owing on the 2013 Deed was paid off?
- 24.3. It is well known that a purchaser is the one responsible for paying for the preparation of a deed of conveyance so that a claim in that email account for \$65,000 (or rather \$865,000 as set out in the said email) for the preparation of the 2013 Deed in respect of which the first named defendant was seeking repayment seems to suggest that the first named defendant was acknowledging, by providing the account, that he was really holding the property in trust for the claimants.
25. According to the first named claimant, many of the transactions set out in the email were not authorized by him and he had no knowledge of some of the work.
26. Having regard to the behaviour of the defendants he revoked the Power of Attorney by deed registered on 3 October 2013 and advised his attorney to place a lis pendens on all of his properties after which he found out that that the 2013 deed was registered on 6 August 2013. He also found out that the Power of Attorney was dated 4 February 2013,

and he stated that neither he nor the second claimant ever gave the defendants a Power of Attorney in February 2013. He stated that the first named defendant disposed of some properties belonging to him through the use of this Power of Attorney and further that in January 2014, he found out that the amount owing on the SMR property was paid off by the defendants and the property released in their names. It is on the basis of the matters set out in his witness statement that he filed the claim seeking certain reliefs.

27. The witness also provided a supplemental witness statement, having read the witness statement of the first named defendant. In response to the first named defendant's claim that he borrowed monies for the Siewdass property, he detailed certain transactions with First Citizens Bank. He further detailed the relationship that he had with the defendant whereby they would deposit monies into each other's account in order to conduct business transactions. He denied much of what was said in the first named defendant's witness statement and in particular stated that he never met Mr. Mervyn Mitchell and never visited his office and maintained that the deed and power of attorney were both executed in Florida. He gave further details of his involvement in the construction of the building on the SMR property and denied the transactions as stated by the first named defendant. He also noted that the first named defendant failed to account for certain sums of money.

SHAMILA PERSAD-RAMPERSAD

28. The second claimant also provided a detailed witness statement in this matter. She too detailed the relationship between the first named claimant, her husband and the first named defendant and her own relationship with the first named defendant including the fact that she asked the first named defendant to wire transfer monies to her US account for the purchase of a Range Rover.
29. In relation to the SMR property, this claimant says that between January and June 2013, her husband travelled at least once a month between Miami and Trinidad to oversee the construction on the SMR property and that at no time during this period was the first named defendant involved in the disputed property. Of course, this is not information that she illustrated any firsthand knowledge of.
30. She noted that in July 2013 she and her husband encountered legal difficulties in the United States and as a result their passports were seized. In that same month she noted that the first named defendant contacted the first named claimant, volunteered to help with the SMR property and suggested that a Power of Attorney be done so that he could oversee the final stages of construction on the disputed property. He further suggested that a deed of conveyance be done for the property to protect his interest. She stated that the documents were sent with a mutual acquaintance to Florida and they were signed on 28 July 2013.
31. She, like her husband stated that the behaviour of the defendants drastically changed after the signing of these documents and based on their behaviour, the claimants caused

the Power of Attorney to be revoked by deed. It was only when the Power of Attorney was revoked that she learned that the 2013 Deed for the SMR property was registered on 6 August 2013 and that the Power of Attorney was dated 4 February 2013. It is on this basis that she and her husband seek relief.

32. She also provided a supplemental witness statement in this matter. In it, she denied much of what was said in the first named defendant's witness statement and, like her husband, maintained that the 2013 Deed and Power of Attorney were both executed in Florida. She too stated that she had never met Mr. Mervyn Mitchell, the attorney-at-law who had prepared and registered the 2013 Deed and the Power of Attorney. She denied certain monetary transactions as stated by the first named defendant and provided bank records as proof of the same.
33. It is important to note certain things about this witness' evidence:
 - 33.1. It was disconcertingly similar to that of her husband's. While one would expect the evidence of both claimants to be similar, many of the paragraphs prove to be identical, except with pronouns changed. For example, paragraphs 25 and 26 of her witness statement were identical to paragraphs 83 and 84 of the first named claimants while Paragraph 30 of her witness statement was identical to paragraph 87 of the first named claimant's. The defendants' attorney at law did a paragraph-by-paragraph analysis showing the stark similarities which, to my mind amounts to more than just coincidence. More would be said about this later on.

KENDELL RAMPERSAD

34. Kendell Rampersad, the brother of the first named claimant and second named defendant, also gave a witness statement in this matter. However, he was not called as a witness so that his witness statement was not put into evidence.

ELIZABETH BADRI-RAMPERSAD

35. This witness is the wife of Kendell Rampersad, the first named claimant's and second named defendant's brother, and is therefore the sister-in-law of the first named claimant and second defendant. She noted that the first named claimant and first named defendant had a close relationship and detailed the same. She said that in 2011, the first named claimant informed her that he bought the SMR property and that after the claimants fell into legal difficulty the first named defendant proposed to the first named claimant that a Power of Attorney and the 2013 Deed should be executed in order for the first named defendant to exercise control. In her statement she stated that she visited Trinidad with her husband in 2014.
36. The court wishes to note certain things about this witness' witness statement:

- 36.1. Almost the entirety of her witness statement was a direct copy of her husband's witness statement as well as from that of the claimants. Several paragraphs prove to be word for word duplications, even in respect of mistakes made at the very same places.
- 36.2. A considerable amount of time was spent in her cross examination on the issue of the copying of the witness statement. In fact, at first, this witness tried very hard to defend the indefensible. She tried to wriggle around the issue of the similarity by saying that, even though she prepared her own witness statement herself and without the assistance of anyone else, the words used or similar because all of the parties had sat down and discussed it and therefore their recollection of the facts were the exact same hence the exact replication. Eventually, she relented and accepted that the words were cut-and-paste from the other witness statements although she was unable to identify from which one.
- 36.3. This court will discuss this issue further later on.

SUZIE RAJ

37. Suzie Raj was at one point a worker for a company owned by the claimants. She gave a witness statement but was not called upon to give evidence so that her witness statement was not put into evidence.

THE DEFENDANT'S EVIDENCE

RAMKARRAN RAMPARAS

38. The first named defendant stated in his witness statement that in September 2011, the first named claimant telephoned him and asked him about borrowing monies as he could not pay his mortgage on the SMR property. He stated that he agreed to assist the first named claimant and transferred monies to the claimant on 3 October 2011 and 11 November 2011 via internal transfers from First Citizens Bank. He stated that in 2012 the first named claimant proposed constructing a building on the SMR property and requested that he finance the construction. To that end, the first named defendant said he told the first named claimant that if he were to expend the monies, the first named claimant would have to sell him the SMR property, which he agreed to do in February 2012 for \$800,000.00 subject to an existing mortgage.
39. The first named defendant said that on the basis that he would be purchasing the property, he instructed Mr. Mervyn Mitchell to prepare a deed of conveyance, a copy of which he sent to the first named claimant through one Errol Rampersad, the first named claimant's brother. This defendant said that Mr. Mitchell requested that the parties

attend his office on 15 February 2012 to execute the conveyance and the first named claimant agreed to that date. He stated further that when the first named claimant arrived in Trinidad on 13 February 2012, it was agreed that the \$398,000.00, which the first named defendant loaned to the first named claimant to help him pay installments in 2011, was to be treated as the first instalment of the \$800,000.00 purchase price for the SMR property, with the remaining \$402,000.00 to be paid within one year. It was further agreed at that time that the deed would not be registered until the full consideration was paid.

40. It was this defendant's evidence that on 15 February 2012 the defendants along with the claimants attended the office of Mr. Mitchell and he detailed the process of the execution of the deed of conveyance. The first named defendant gave evidence that the balance of the purchase price for the SMR property was paid within one year, with a payment of \$180,000.00 being made on 28 May 2012, a payment of \$100,000.00 being made on 5 July 2012, and a payment of US\$25,000.00 being made on 7 December 2012.
41. According to the first named defendant, during the period January 2012 to December 2012, he and the first named claimant made arrangements for the commencement of the construction of a three storey structure, the design of the same and the necessary approvals. He stated that they agreed at that time that he would transfer money to the first named claimant for the purchase of materials and paying contractors. A sum of \$1,000,000.00 was then transferred from the first named defendant to the first named claimant on 19 December 2012 and construction began in January 2013.

COMMENT

- 41.1. According to the first named defendant, his last payment towards the full purchase price of \$800,000 was made on 7 December 2012. Yet, according to his evidence in his witness statement⁵, he transferred \$1 million into the first named claimant's bank account on 19 December 2012 – almost 2 weeks later – so that the first named claimant could purchase materials and pay contractors.
- 41.2. There was no evidence of any arrangement for the first named claimant to be engaged as the project manager for the construction of the building on what, according to the first named defendant, was the first named defendant's property.
42. He also spoke about the first named claimant's other properties and arrangements made for the same, including the fact that he loaned the first named claimant monies to purchase the Siewdass Road property. He stated that the first named claimant asked for further financial assistance with a property at 195 Edinburgh Village Chaguanas and when he indicated that he did not have the sums to pay, the first named claimant suggested that a Power of Attorney be executed on their next visit so that the first named defendant could sell certain items belonging to the claimants - namely a van, some steel, two lots of land at Siewdass Road and motorbikes - to repay him. As such the first named defendant once again contacted Mr. Mervyn Mitchell to prepare the

⁵ See paragraph 39 of his witness statement

same. According to the first named defendant, this document was executed on 4 February 2013.

43. This defendant said that he did not register the Power of Attorney until the claimants were arrested in the United States. According to him, a few days after the arrest of the claimants, the first named claimant telephoned him and informed him of what had happened and said that they were unable to travel to Trinidad and Tobago until the outcome of the charges. He then went ahead to say that since the Power Of Attorney was already signed, he, the first named defendant, could go ahead and register it and take all steps to complete all the buildings. The same was registered on 31 July 2014. After the Power of Attorney was registered, the defendant sold certain items of the claimants, which he detailed at paragraph 58 of his witness statement.
44. The first named defendant stated that around the end of July 2013, his funds were getting low and the building on the SMR property was not yet completed so he decided to apply for a loan from Development Finance Limited (DFL). In order to do so he informed the first named claimant that he was proceeding to register the 2013 Deed, which he did on 6 August 2013.

COMMENT

- 44.1. It is not clear from his evidence why the first named defendant found it necessary to inform the first named claimant of his intention to register the 2013 Deed especially since, according to him, had already paid off the agreed price of \$800,000 to the claimant since December 2012.
45. After some sour dealings with the first named claimant, this defendant stated that he received a pre-action protocol letter on 29 October 2013 and he detailed the correspondence back and forth between the attorneys for the parties. The first named defendant noted that around this same time he completed the payment for the SMR property and a deed of release dated 14 January 2014 was granted and registered on 13 March 2014.

MERVYN MITCHELL

46. Mervyn Mitchell, attorney at law gave evidence in this matter. He stated that in January 2012, he was asked by the first named defendant to prepare a deed of conveyance between the claimants and the defendants for the purchase of property by the defendants in the sum of \$800,000.00. He stated that he received all of his instructions from the first named defendant. It was his evidence that his secretary/clerk Ms. Laverne Jackson typed the deed of conveyance on his instructions and he sent the same in draft form for vetting by the claimants and the defendants. He stated that On 15 February 2012, the defendants and the claimants attended his office where the deed was executed. He detailed the circumstances and procedure of the execution and the witnessing of the same.

47. He stated that on 4 February 2013 he received instructions from the first named defendant that the claimants required him to prepare a Power of Attorney in favour of the defendants and on that same date the claimants and the defendants attended his office and executed the same. He detailed once again the procedure of the execution of the document. He stated that he received instructions from the first named defendant at the end of July and he caused the Power Of Attorney to be registered. He also received instructions at the end of July from the first named defendant with respect to the registration of the deed of conveyance and he registered the same on 6 August 2013.

COMMENT

- 47.1. Mr. Mitchell's cross examination left his evidence in a state of shambles. His file containing the defendants' documents seemed contrived for the occasion and his evidence in respect of the 2013 Deed being held in escrow illustrated an alarming lack of professionalism and the revelation of fundamental breaches in standard practice in that regard. There were several other points which caused this court grave concern.

LAVERNE JACKSON

48. This witness, law clerk/legal secretary to Mr. Mitchell, gave evidence that on 15 February 2012 the defendants attended the office of Mr. Mitchell accompanied by the claimants. She said that a few minutes after, Mr. Karran Nancoo attended the office. Mr. Nancoo spoke to the claimants and the defendants and then came to her desk where they conversed, she gave him documents and he left.
49. After Mr. Nancoo left, the witness said that she called the claimants and the defendants into Mr. Mitchell's office and she witnessed the execution of the deed of conveyance between the claimants and the defendants, which she detailed. After the execution of the deed, she stated that she took steps to prepare the affidavit of witnessing the execution of the same and swore to the affidavit before Mr. Karran Nancoo on the same day.
50. She gave further evidence that on 4 February 2013 the defendants and the claimants once again attended the office of Mr. Mitchell and she witnessed the execution of a Power of Attorney, which she detailed. Once again she stated that she swore to an affidavit of execution before Mr. Karran Nancoo on that same day.

KARRAN NANCOO

51. Karran Nancoo, a Justice of the Peace, community mediator and pundit stated that he worked with Mr. Mervyn Mitchell for several years, witnessing the swearing of affidavits. He also noted that he knew the first named defendant for several years. It was his evidence that on 15 February 2012 he visited the office of Mr. Mitchell and saw

the first named defendant who introduced him to his wife and the claimants. He conducted his business and left. He stated that later that day Ms. Laverne Jackson came to his office where she swore to an affidavit of execution of a deed of conveyance. On 4 February 2013, Ms. Jackson once again attended his office where she swore to an affidavit of execution of a Power of Attorney.

OTHER WITNESSES

52. The following persons also provided witness statements on the defendants' behalfs but were not called as witnesses so that their witness statements were not put into evidence:
- 52.1. **Steven Peters**, operator of Steven Peters Transport and Construction Services and who did the construction work on the SMR property,
 - 52.2. **Sharmila Ogeer**, from whom the first named defendant allegedly purchased various hardware and building materials in July 2013,
 - 52.3. **Roger Ramcharan**, a licensed electrician who worked on the SMR property,
 - 52.4. **Desai Ali**, Manager of Desai Hardware and Plumbing Supplies from whom the first named defendant allegedly bought certain materials in June 2013,
 - 52.5. **Ria Lalla**, from Classic Tiles Limited, from whom the first named defendant allegedly bought materials in August 2013,
 - 52.6. **Roger Traboulay** and **Winston Richards**, who both did work on the SMR property and
 - 52.7. **Pundit Bramhanand Rambachan**, who is the Hindu priest who was allegedly called upon to bless the SMR property as a new purchase by the defendants in February 2012.

SUBMISSIONS

DEFENDANT'S SUBMISSIONS FILED 22 DECEMBER 2014

53. The defendant's attorney submitted that the claimants' claim should be dismissed as they failed to discharge the onus of proof imposed by law upon them to satisfy the Court of the grounds pleaded in their Statement of Case for the impugned Deed of Conveyance to be set aside. It was further submitted that the cross examination of the claimants and their witness shows that the evidence in support of their claim that the Deed of Conveyance and Power of Attorney were executed by the claimants on the 28th July, 2013 in Miami, Florida is unreliable and inconsistent.
54. The defendants' attorney took issue with the pleaded case and evidence of the claimants stating that the claimant's pleaded case stated that the claimants were planning to hide

from the US authorities that they owned properties in Trinidad and the court is entitled to consider the possible motives and attitude of the claimants to deceive the USA authorities in assessing their truthfulness and credibility. Furthermore, the defendant stated that in the witness statements for the claimants and their witnesses, additional grounds to set aside the Deed that were not pleaded were introduced. It was submitted that evidence given by a party of matters which are not pleaded by the party can be used by a Court as a “compelling factor” in a fact finding exercise by the Court to find against that party. Reference was made to *Alice Mohammed v Jeffrey Bacchus* Court of Appeal No. 106 of 2001; *Charmaine Bernard v Ramesh Seebalack* [2010] UKPC 15; *Beverley Ann Metivier v The Attorney General of Trinidad and Tobago, ETeck & Wendy Hoyte* CV 2007- 00387

55. Furthermore it was submitted that the evidence given in cross examination proved that the claimants’ witnesses who gave evidence were guilty of cutting and pasting their witness statements from another or other witness statements prepared on behalf of the Claimants. Reference was made to **Part 29.5 (1) (d) of the Civil Proceedings Rules 1998** and *Jamal Sambury v The Attorney General of Trinidad and Tobago* CV 2011-02720.
56. It was submitted also that the undue influence pleading at paragraph 13 of the amended Statement of Case does not plead a sustainable case and ought to be struck out. The defendants say that the registration of the 2013 Deed cannot amount to a transaction tainted by undue influence and in any event the transactions referred to were carried out by the first named defendant in the exercise of the Power of Attorney and cannot amount to transactions tainted by undue influence.
57. Furthermore, the defendants submitted that the court should draw adverse inferences from the claimants’ failure to call evidence. Reference was made to *Ian Seunarine v Doc’s Engineering Works (1992) Limited* H.C.A No. 2387 of 2000 and *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R 7. It was submitted also that the claimants’ case as pleaded was inconsistent with the evidence put before the court.
58. Finally, it was submitted that the claimants had not established their case while the defendants, however, had adduced cogent and compelling evidence to show that the claimants’ were present at the law offices of Mr. Mervyn Mitchell in Trinidad on the 15th February 2012 when the Deed of Conveyance was executed by the claimants and the defendants in the presence of Mr. Mervyn Mitchell Attorney at Law and Ms Lavern Jackson Law Clerk.

CLAIMANTS’ SUBMISSIONS FILED 12 JANUARY 2015

59. The claimants first submitted on the evidence. It was submitted on the issue of the unreliability of the evidence of Elizabeth Badri-Rampersad, which the claimants accepted was unreliable, and of the Second Claimant that the fact that the 2013 Deed and Power of Attorney was executed in the presence of these witnesses, and, in the presence of the second named defendant, and Kendell, at the claimants’ residence was not directly challenged nor shown to be unreliable or untrue. The claimants say that the

core of the evidence of Elizabeth Badri-Rampersad is corroborative of the evidence of the claimants on the principal question, the events of 28th July, 2013 as was the evidence of the second claimant. It was submitted that although an adverse inference may be drawn from the oral evidence of Elizabeth Badri-Rampersad that she prepared the witness statement, such is not a reflection on the substance and thrust of the case for the claimant and no weight should therefore be placed on those statements of that witness which were shown to be copied.

60. It was further submitted that there was no denial of allegations in the defendants' reply to the claimants' pre-action protocol letter. Furthermore it was submitted that the court should draw adverse inferences from the refusal or failure of the second defendant to defend the proceedings or to give evidence and the Court should hold that the second defendant was present on 28th July, 2013 in Florida when the Deed of Conveyance was executed by the claimants. The claimants submitted that in any event the case for the defendants was fabricated and that the evidence on behalf of the defendants was unreliable. They detailed the same.
61. As to the power of attorney it was submitted that the court should conclude that the balance of probabilities favoured the first named claimant's evidence as to the events of 4th February, 2013 and should reject the evidence of the first named defendant in that regard. Furthermore it was submitted that both the Power of Attorney and the 2013 Deed were executed in Florida and although the facts surrounding the execution are seemingly different from what has been pleaded, they are inherently truthful. The claimants maintained that their evidence is not wholly inconsistent with the pleaded case. Reference was made to *Mc Philemy v Times Newspapers Ltd* (1999) 3 AER 775 and it was submitted that the Court should not look at the pleadings alone in order to decide what were the issues between the parties.
62. On the issue of undue influence, it was submitted that "*The premature and clandestine registration of the Deed of Conveyance and the exercise of powers under the Power of Attorney were exploitative excursions on the part of the Defendants*" and say that the first named defendant acted cynically to gain an unfair advantage and the contract should be rendered voidable. Reference was made to *Re Craig (dec'd) Meneces v Middleton* (1970) 2 AER 390, *Goldsworthy v Brickell* (1987) 1 AER 853 and *Barclays Bank PLC v Coleman* (2000) 1 AER 385.
63. As to the counterclaim, it was submitted that the first named defendant has made no attempt to prove the claim and the claim should be denied.

DEFENDANTS' SUBMISSIONS IN REPLY FILED 27 JANUARY 2015

64. It was submitted in reply that the submissions of the claimants that pleadings alone do not define the issues of dispute in the case and that the Court must also look at the witness statements to know the issues raised is erroneous in law. The defendants maintained that the claimant could not rely on unpleaded matters and erred in law when

they relied upon *Mc Philemy v Times Newspapers Limited* (1999) 3 AER 775. Reference was made to *Charmaine Bernard v Ramesh Seebalack* 2010 UKPC 15.

65. On the issue of the refusal or failure of the second defendant to give evidence, the defendants submitted that in the pleadings of the claimant they stated that the 2013 Deed and the said Power of Attorney were executed at the claimants' home in the presence of the Kendell Shastri Persad and his wife Elizabeth Badri-Rampersad and they did not allege that the second named defendant was present and therefore she did not need to give evidence on the issue. The defendants maintained that the issue of the customs and immigration documents represented a new and unpleaded issue and since the first named defendant was not cross examined on it, it should not be in issue. As to the without prejudice letter from Mr. Koylass, it was submitted that the letter stated to be "without prejudice negotiation document" and was a clear proposal to resolve the matter.
66. The defendants maintained in these submissions that the claimant could not rely on undue influence as part of their claim. Reference was made to *Allcard v Skinner* [1990] 1 QB 923, *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773 and *Bristol and West Building Society v Mathew* [1998] Ch. 1.
67. It was submitted that the Claimants had not advanced any plausible defence to the Defendants' Counterclaim.

CLAIMANTS' SUBMISSIONS IN REPLY FILED 5 FEBRUARY 2015

68. The claimants say in reply to the defendants' submissions that it is not true to say that the claimants did not give evidence that the second defendant was not present at the time of the execution of the deed and power of attorney. It was submitted that the "unpleaded" facts that were brought out in evidence were material to a fair determination of the principal issue, that is the place(s) and date(s) at which the Power of Attorney and the 2013 Deed were executed by the claimants.
69. On the issue of the travel documents, the claimants submitted that the defendants had constructed their case around information contained in travel documents and the defendants' reliance on them were probative of the knowledge of the defendants. Furthermore, it was submitted that this was not a matter to be pleaded as it is supportive of the principal issue in the case.
70. On the issue of the letter in response to the pre action protocol letter it was submitted that no claim of privilege or protection or of inadmissibility in evidence could be supported in relation to the contents of the defendants' letter dated 11th December, 2013 and that the "without prejudice rule" was a rule governing the admissibility of evidence. Reference was made to *Rush & Tompkins Ltd. v Greater London Council & Anor.* (1988) 3AER 737, *Schering Corp v Cipla Ltd* (2004) EWHC 2587.
71. On the issue of the undue influence the claimants maintained that there was undue influence and relied on their previous submissions.

DEFENDANTS' SUBMISSIONS IN REPLY FILED 23 FEBRUARY 2015

72. The defendants maintained that the claimants in their witness statements gave evidence of material facts which were not pleaded and that these unpleaded facts ought not to be taken into consideration.
73. On the issue of the pre action protocols, it was submitted that the Court has to consider the contents of the letter in the context of the intended negotiations and without prejudice discussions. Further, as to the contention by the claimants that the date and venue of execution of the Deeds was constructed by the defendants around information obtained in travel documents of the Claimants which were obtained from the Immigration Department, it was submitted that these matters were not pleaded.
74. Finally it was submitted that the claimants had failed to appreciate that their plea of undue influence was not maintainable in law. It was submitted that before the claimants could rely on a case which dealt with a fiduciary relationship, they must show that their plea of undue influence as pleaded in the statement of case was maintainable in law and there was no evidence of undue influence to set aside the 2013 Deed in this case.

THE ISSUES

75. An agreed statement of issues was filed by the parties along with respective statements as to unagreed issues.
76. The issues can, to my mind, be properly summarized as follows:
 - 76.1. The issues on the pleaded claim:
 - 76.1.1. Was there an agreement, as pleaded, that the 2013 Deed would only be registered in the event that the claimants were prohibited by the United States authorities from returning to Trinidad?
 - 76.1.2. Was the 2013 Deed signed on 15 February 2013, as pleaded by the claimants, or 15 February 2012, as pleaded by the defendants, in the office of Mr. Mitchell, or was it signed in the USA on 28 July 2013 at the claimants' home?
 - 76.1.3. Similarly, where was the Power of Attorney signed – in Mr. Mitchell's office on the 4th February 2013 or at the claimants' home on the 28th of July 2013, at the same time as the 2013 Deed?
 - 76.2. The issues in the counterclaim are:
 - 76.2.1. Whether the sum of \$1,005,100, which the claimants acknowledged was paid in relation to the property at Siewdass Trace, was repaid in kind by the claimant in the United States towards a property?
 - 76.2.2. Whether or not the defendants had the claimants' approval to make all of the payments referred to at paragraph 26 of the defence and

counterclaim in respect of which the difference of \$77,800 is claimed and whether those sums were actually paid?

THE RESOLUTION OF THE ISSUES

77. The essence of this claim is the issue as to whether the 2013 Deed and the Power of Attorney were signed on the 28th July 2013 in Florida as contended by the claimants or in Trinidad on the dates alleged by the defendants before Mr Mervyn Mitchell, attorney at law, and his clerk, Ms. Jackson. That is the central argument raised by the claimant.

UNDUE INFLUENCE

78. In light of the issues referred to above, it is difficult to see how the plea of undue influence assists the claimants. There is no allegation that they did not know what they were signing or that they were in any way pressured to sign those documents. In fact, their evidence was to the contrary. There is no suggestion or independent medical evidence of vulnerability on the part of the claimants or any plea of having been influenced in any way whatsoever by the defendants into making the decision to execute the Power of Attorney or the 2013 Deed. The plea in the statement of case set out above quite clearly shows that there was a mutual decision to take certain steps to protect the claimants' property in Trinidad in light of their arrest by the US authorities with a certain condition being imposed with respect to the registration of the 2013 Deed. That condition, as pleaded, was that the 2013 Deed was to be registered only in the event that the Claimants were prohibited by the authorities in the United States of America from returning to Trinidad. Ostensibly, the claimants' complaint is that the defendants failed to abide by that condition⁶. Therefore the principles espoused in respect of undue influence, as set out in in this court's decision in HCA No. 3335 of 2003: *Norma Ward v Phyllis Bhagwandeem & Scotiabank Trinidad and Tobago Limited* at paragraphs 21 – 27, in which this court discussed and quoted from the decision in *Royal Bank of Scotland v Etridge (No 2) and other appeals; Barclays Bank plc v Coleman; Bank of Scotland v Bennett; Kenyon-Brown v Desmond Banks & Co (a firm)*⁷, do not have any applicability.
79. Consequently, the court dismisses the claim in relation to the alleged undue influence.

⁶ It is difficult to see how that condition was not satisfied since even at the time of the trial of this matter in 2014, it was common ground that the claimant were unable to come to Trinidad because they were prohibited by the authorities in the United States of America from traveling out of the country as a result of which the trial was conducted by videoconference with the claimants in the US.

⁷ [2001] UKHL 44, [2001] 4 All ER 449, [2001] 3 WLR 1021, [2002] 1 Lloyd's Rep 343, [2001] 3 FCR 481, [2001] 2 FLR 1364, [2001] Fam Law 880, [2001] 43 EG 184

THE COMPETING CLAIMS AS TO THE SIGNING OF THE DOCUMENTS

80. There are so many unanswered questions in this transaction which causes great concern to this court.
- 80.1. Why would the first named defendant forward \$1,760,000 to the first named claimant from December 2012 to July 2013 to build a three-storey building on the SMR property after he had already paid off for the purchase of the property as agreed in December 2012?
- 80.2. Why would the first named defendant allow the first named claimant, who lives abroad, to build a three-story building on lands which, according to him, was the subject of the 2013 Deed and was therefore beneficially owned by the second named defendant and him by the time the building actually began in January 2013?
- 80.3. What motivated the first named claimant to join with the first named defendant in the conceptualization and carrying out of the construction of the building on the SMR property if the SMR property had already been sold to the defendants – there was no suggestion that he was hired as a project manager or under any contract whatsoever to assist in the building on lands which, quite clearly, the first named claimant had purchased for his own in 2011?
- 80.4. Why was the deed, which was allegedly signed in February 2012, not registered shortly after the last payment was made towards the purchase price, which was allegedly made on 7 December 2012?
- 80.5. Why did the defendants wait until August 2013 to register the deed – conveniently, after the claimants’ run-ins with the US authorities in July 2013 and after the date when the claimants allege that the deed was signed i.e. 28th of July 2013?
- 80.6. Why was the first named defendant accounting to the first named claimant for monies spent on the property by email dated the 11 September 2013 in respect of which the former was seeking repayment if the property was now to be treated as his? Was this an acknowledgement of the ultimate interest of the claimants in the SMR property?
- 80.7. Why would the claimant have chosen Mr. Mervyn Mitchell to prepare the power of attorney in February 2013 when, in that same month, just five days later according to the dates on the respective documents, the claimant had retained their normal lawyer – Mr. Ramischand - to prepare a deed from the second named claimant’s mother to the claimants? The other deeds presented as having been prepared on behalf of the claimants were all done by Mr. Ramischand, including a power of attorney to Mr. Steven Peters on 13 March 2013 – that very same year. Bearing in mind the nature of a power of attorney, one would have expected an attorney-at-law who was familiar with the particular client’s properties and affairs would be best placed to prepare such a document.

81. According to the defence and counterclaim filed in these proceedings, the defendants say that they registered both the 2013 Deed and the Power of Attorney because:
 - 81.1. In July 2013, the first defendant wished to raise some money by way of a loan and in order to obtain the loan he needed to register the 2013 Deed for the SMR property; and furthermore,
 - 81.2. He wished to be in a position to redeem the existing mortgage on the SMR property.
82. In this regard, the explanation given with respect to what this alleged loan was supposed to have been used for and why it came up conveniently in the month of July 2013 and why he wished to redeem the existing mortgage on the SMR property, despite the fact that the first named claimant had gotten \$1.76 million from him toward erecting a structure on it and at a time when the claimants were both restricted in their travel capacity and were obviously in a very difficult legal, if not emotional, situation, seemed quite opportunistic.
83. Respectfully, this position put forward by the defendants did not make sense. To my mind, these explanations proffered by the defendants seem incredibly convenient. What does make sense is that in July 2013, a new ingredient was poured into the relationship mix i.e. the detention of the claimants in the USA in relation to drug-related charges which, conceivably, *could* have had an effect on their property in Trinidad. Broadly speaking, that ingredient seems to have been the catalyst for the change in position with respect to the 2013 Deed and the Power of Attorney. However, as appealing as that position may seem intuitively, the court must pay due regard to the evidence before it.
84. Ultimately, this case has to be decided upon legal principles. It is trite law that the foundation of those legal principles rest upon the legal burden of proof. In this case, the claimants carry the legal burden to establish their claim with the prima facie evidential burden to ground their allegations.

THE CLAIMANTS' EVIDENCE IN RELATION TO THE PLEADED CASE

85. The defendants contended in submissions that the claimants introduced new evidence in their witness statements and at trial. These matters, according to the defendants, ought to have been pleaded and a failure to do so meant that the court should not take them into consideration. Those new matters were that:
 - 85.1. The 2013 Deed and the Power of Attorney were undated at the time the Claimants executed them;
 - 85.2. The 2013 Deed at the time of execution by them did not have the consideration of \$800,000.00 inserted in the Deed;
 - 85.3. The Second Defendant was present in Miami on the 28th July, 2013 when the Claimants executed the Deed of Conveyance and the Power of Attorney and the Second Claimant signed the Deed of Conveyance in Miami on that date.
86. The law is clear on the issue of pleadings. The CPR Part 8.6 (1) sets out the claimants duty to set out his case and states:

8.6 (1) *The claimant must include on the claim form or in his statement of case a short statement of **all the facts** on which he relies.*

(2) *The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case.*

(Emphasis mine)

87. The defendants quite understandably relied on the decision of the Judicial Committee of the Privy Council in the case of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**⁸ in which Sir John Dyson SCJ, at paragraph 15 to 17:

“... made it clear that under the CPR the Claimant has a duty to set out his case in his pleadings which is required to mark out the parameters of the case which are being advanced by each party. He stated that pleadings are critical to identify issues and the extent of the dispute between the parties. He further stated that it was important both under the old rules and under the new rules for the pleadings to make clear the general nature of the case of the pleader. He made it clear that a witness statement or list of documents could not be a substitute for the requirement of the pleadings to set out the case of the pleader”⁹.

88. Kokaram J in **Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and ors** CV 2007- 00387 stated:

“The Statement of Case is a fundamental pillar to the Claimant accessing justice under the CPR. It must be carefully drafted so as to properly articulate the facts in the support of the cause(s) of action or the basis on which the claim is being made against the Defendant...the duty to state material facts necessitate a careful attention to details of the case that are material to establishing a claim.”

89. Further, in **Alice Mohammed v Jeffrey Bacchus** Court of Appeal No. 106 of 2001 Sharma JA, in determining a case under the RSC where there was a contrast between the evidence in the witness’s evidence and the pleadings, stated:

“The trial judge in my view was entitled in these circumstances not to rely on the appellant as a witness of truth. He was also entitled to conclude, if the evidence was truthful, why did it not find their way in the pleadings. In my view this was a perfectly valid approach by the trial judge to assist him together with other matters to determine the matter on a balance of probabilities.”

90. It is clear that the law requires parties to plead the entirety of their case and a failure to do so means that adverse inferences may be drawn against the parties should new factual evidence be brought into consideration after the fact.

91. It is therefore necessary for the court to consider these “new” matters and the effect they have had on the claim.

⁸ [2010] UKPC 15 PC Appeal No. 0003 of 2009

⁹ Paragraph 22 (b) of the defendants’ submissions filed on the 22 December 2014

THE DOCUMENTS WERE UNDATED AND THE DEED DID NOT HAVE THE CONSIDERATION STATED

92. At paragraphs 88 and 31 of the first and second claimants' witness statements respectively, they gave evidence that the 2013 Deed did not have the consideration stated nor was it dated. A similar allegation was made with respect to the Power of Attorney being undated. The defendants have suggested that this was a material fact that ought to have been included in the pleaded case of the claimants since this document essentially forms the crux of the case.
93. The court agrees with the defendants.
94. *All* of the circumstances surrounding the 2013 Deed ought to have been properly pleaded and particularized. In that regard, the claimant pleaded at:
- 94.1. Paragraph 10 of the amended statement of case – “ *Pursuant to the said verbal agreement the Defendants on or about the 15th day of February 2013 caused the 2013 Deed to be prepared for execution by the Claimants.*” This pleading clearly establishes and acknowledges preparation **prior** to the July dates contended by the claimants.
- 94.2. Paragraph 11 of the amended statement of case that the 2013 Deed and the Power of Attorney “*bore the following dates; 15th day of February 2013 and 4th February 2013.*” Therefore, any suggestion in their witness statements that the 2 documents were undated at the time that they signed it definitely contradicts the pleaded case and, necessarily, affects their credibility negatively. It must be noted that the 2013 Deed actually bears the date 15th February 2012 and not 2013 as pleaded.
95. With respect to the failure to state a consideration in the 2013 Deed, that, to my mind, is a material fact going to the heart of the issue. The case for the defendants is that there was an agreed price of \$800,000. The suggestion made in the witness statements by the claimants was that no such price was ever agreed. That would have been consistent with paragraph 6 of the reply filed by the claimant in which they denied any agreement to sell the SMR property to the defendants for \$800,000 or for any sum. Having regard to the comments made by the Court of Appeal in the recent case of *First Citizens Bank Limited v Shepboys Ltd & or*¹⁰, it seems that the more appropriate place to raise this contention in relation to the failure to agree on any price would have been the statement of case. That being said, the issue was addressed by the defendants in their Reply to the Defence to the Counterclaim.
96. Therefore, it would be unfair to state that the defendants were not aware of this contention in respect of there not being an agreed price since they may have been inferred from the claimants' contention that there was no agreement to sell.
97. However, the salient issue is whether or not the 2013 Deed had any consideration in it at all and, to my mind, that is not addressed anywhere in the pleadings on behalf of the

¹⁰ Civil Appeal No. P231 of 2011

claimants. Importantly, when the court saw the original of the 2013 Deed as a result of the summoning of the same from the office of the Registrar General, there was no obvious interlineations or adjustments in respect of the dates or the consideration and the document looked to be a complete document prepared at the same time of signing. It was suggested by attorney at law for the claimants that the first page could have been reprepared or reprinted later on the same type of paper for a seamless fit but this was an allegation which was only made after the evidence was presented at the trial. Such a strong suggestion amounts to fraudulent conduct which ought to have been properly pleaded and particularized.

98. As a result, this court is of the respectful view that the failure to do so has, once again, negatively impacted upon the claimants' credibility as, by failing to plead the absence of a consideration on the document, the claimants have introduced a new ingredient which put the defendant at a disadvantage especially in light of the fact that the only issue raised in the pleading in relation to the 2013 Deed was that it was not signed on the date and at the place and in the presence of the parties alleged by the defendants.
99. Consequently, this court agrees with the defendants in respect of the effect of the failure to plead that the 2013 Deed did not have a consideration on it.

THE SECOND DEFENDANT AS A WITNESS TO THE EXECUTION OF THE 2013 DEED AND POWER OF ATTORNEY

100. At paragraph 11 of the statement of case the claimants stated:

“The claimants executed the said 2013 Deed on the 28th day of July 2013, the said 2013 Deed and the said Power of Attorney bore the following dates; 15th day of February 2013 and 4th February 2013. The said 2013 Deed and the said power of attorney were executed at the claimants' home, aforesaid in the presence of the first named claimant's younger brother Kendell Shastri Rampersad and his wife Elizabeth Badri-Rampersad.”
101. In the written evidence of the claimants however, they both stated that the second defendant was not only present but handed them both the documents and signed the deed of conveyance. Not only that, they went on to discuss a conversation between the first named claimant and his sister, the second named defendant, and sought to rely upon an assurance allegedly given by the second named defendant at this time.
102. In the amended statement of case, however, at exhibit “H”, the pre-action protocol letter issued on behalf of the claimants to the defendants and dated 29 October 2013 was exhibited and it is clearly set out at paragraph 4 thereof that the second named defendant was present at the time of the signing of the 2013 Deed on 28 July 2013 together with the other two persons mentioned in the pleading.
103. To my mind, this ought to have brought home to the defendants that the claimants were alleging that not only was the deed signed on 28 July 2013 but also that the second named defendant was present when it was signed. Consequently, this is not new evidence which the court can ignore but, rather, it is consistent with the documentary evidence before this court which includes the pre-action protocol letter. The defendants would clearly have addressed their mind to that allegation and would have considered

its effect since it was addressed in the reply from Mr. Koylass dated 11 December 2013 when he confirmed that “*the terms of the said Conveyance are accurate ...*”

104. Therefore, it must have been apparent to the defendants, notwithstanding the plea at paragraph 11 of the amended statement of case, that the contention with respect to the witnesses to the 2013 Deed included the second named defendant. To my mind, in this regard, the defendants acted to their own peril in failing to have the second named defendant give evidence. The plea at paragraph 11 and the allegation made in the pre-action protocol letter were not conflicting or contradictory. The plea was incomplete but, when read together with the pre-action protocol letter, gave the entire story in this regard. It was open to the defendants to have sought further and better particulars in light of this allegation or even further information but they did not.
105. The circumstances surrounding the preparation and execution of the 2013 Deed and the Power of Attorney was always a live issue before this court. The failure to include the second named defendant’s evidence in relation to that live issue seems to have hinged upon paragraph 11 of the amended statement of case without regard to the pre-action protocol letter. However, that does not seem to be the whole story.
106. The first named claimant is the second named defendant’s brother. She would have known if she was there on the 28th of July 2013. This court paid particular attention to the second named defendant’s demeanor in court during the course of the trial even though she did not give evidence in the box. For almost the entirety of the trial, the second named defendant gave a nervous and subdued visage, constantly looking down at her feet and fingers in an anxious and uncomfortable manner. This was especially so when her brother was giving evidence. During his evidence she seemed especially uncomfortable and refrained from looking directly at the video conference screen for the majority of the evidence. When it was suggested to Elizabeth Badri-Rampersad by attorney at law for the defendants that the second named defendant was not present on 28 July 2013 at the claimants’ home when the deed was signed as alleged by the claimant, Mrs. Badri-Rampersad looked straight at the second named defendant and shook her head and answered affirmatively and confidently that she *was* there. At that point, the second named defendant looked down in an almost defeated manner towards her feet.
107. Clearly, the second named defendant did not seem to want to give evidence in this matter. Whatever may have been the reason for that desire, paragraph 11 of the amended statement of case gave her an avenue out of the witness box.
108. Yet, the authorities often cited in this regard such as *Wisniewski –v- Central Manchester Health Authority* [1998] P.I.Q.R 324 allow this court to draw an adverse inference in respect of the defendants’ case. In *Wisniewski* Brooke LJ stated:

“In certain circumstances a Court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.”

If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference, in other words, there must be a case to answer on that issue.

If the reason for the witnesses' absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is such credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

109. The second named defendant was well-placed to counteract the allegations made by the claimants in relation to the signature being affixed in the office of Mr. Mitchell. Further, the second named defendant was better placed out of the two defendants to address the allegation made in the pre-action protocol letter that she was present on 28 July 2013 at the claimants' home in Florida and that she saw them sign the 2013 Deed. She must have been aware of the allegation that she was present at the home in Florida on that date. The fact that she chose not to directly address that allegation upon the explanation given on her behalf that she was not mentioned in paragraph 11 of the amended statement of case seemed not to be good enough in the circumstances.
110. On the date fixed for the delivery of this judgment, however, this court sought and received the consent of the parties to call the second named defendant as a witness of its own to answer the question as to whether she was present at the claimants' home in Florida on the 28th of July 2013 *and* whether she saw the 2013 Deed and Power of Attorney being signed. This was done without prior notice to the parties of this court's intention to do so. To both of these simple questions, she answered unflinchingly and confidently in the negative.
111. Consequently, this court does not accept the contention made by the attorney at law for the defendants that it should disregard this allegedly "new" evidence in relation to the second named defendant's presence in Florida on 28 July 2013. However, in light of the second named defendant's *viva voce* testimony, this court cannot ascribe any intention to suppress evidence or to avoid giving any evidence or any other negative inference on this issue and the court accepts the defendants' reasons for not calling the second named defendant as a witness before.

INCONSISTENCIES BETWEEN PLEADINGS AND EVIDENCE

112. In addition to the omissions in the pleaded case of the claimants, the court finds that there were several inconsistencies found between the pleadings and the evidence of the claimants, whose burden it was to prove their case.

THE REASON FOR THE EXECUTION OF THE DEED

113. At paragraph 9 and 10 of the statement of case (which bears the typographical errors mentioned before) the claimants stated:

“9. As a result of extenuating circumstances in which the claimants found themselves and fearing the loss of their property in Trinidad it was verbally agreed between the claimants were prohibited by the authorities in the United States of America from returning to Trinidad.

10. Pursuant to the said verbal agreement the defendants on or about the 15th day of February 2013 caused the 2013 Deed to be prepared for execution by the claimants”

114. As mentioned above, when the amended statement of case is read with the original statement of case, paragraph 9 makes more sense and may be read as follows:

*“9. As a result of extenuating circumstances in which the Claimants found themselves and fearing the loss of their property in Trinidad it was verbally agreed between the **Claimants and the Defendants by phone that a document, a Deed of Conveyance (hereinafter referred to as “the said Deed”), would be prepared and executed but was to be registered only in event that** the Claimants were prohibited by **the authorities in the United States of America** ~~authorities~~ from returning to Trinidad.¹¹”*

115. However, in his witness statement, at paragraph 75, a different reason was given i.e. *“... the main reason for doing this Deed was that should the US authorities attempt to seize any properties belonging to my wife and myself, this Deed would protect his interest from the monies he was investing. He further advised that the Deed would also safeguard Shamila and my interest.”* Even though this evidence is a repeat of what the first defendant apparently advised him, he does not refute this advice as the eventual reason for the decision.

116. Typographical error aside, it seemed clear that the true reason was as stated in his witness statement as opposed to what was set out in the statement of case. On a balance of probabilities, in light of the serious drug related charges against the claimant in USA, it is likely that the parties became concerned that some sort of forfeiture of property order could possibly have been made in the US affecting the claimants’ property in Trinidad and Tobago. Therefore, it seems rather obvious that the vague reason given in the statement of case was deliberately done to deflect the truth as to the true purpose.

117. The defendants’ attorney suggested in his submissions that:

“On the claimants’ case therefore they were planning to hide from the US authorities that they owned properties in Trinidad. The Court is entitled to consider the possible motives and attitude of the claimants to deceive the USA authorities in assessing their truthfulness and credibility.”

¹¹ The words that are highlighted in bold, italics and underlined were excluded from the amended statement of case which was filed but were included in the original statement of case. Without those words, this paragraph in the amended statement of case makes no sense in relation to the alleged agreement and that agreement is crucial to the claimants’ case. Consequently, the court will treat with the exclusion of those words in the amended statement of case as a typographical error and will include them in its consideration of the pleadings.

118. It is important to note that the defendants did not rely upon an illegality or public policy defence. In fact, other than the statement quoted above, no further mention was made with respect to the authorities which the court ought to rely upon in relation to this perceived attempt to deceive the US authorities. In any event, there was no evidence led in relation to this aspect so that this court does not have any evidence that there was a likelihood of any forfeiture. However, this divergence from the pleaded case in the witness statement suggests an attempt to mislead this court on the pleadings.
119. The effect of this ambivalence in the claimants' reasoning on the pleadings and in evidence suggests to the court that the claimants' case as pleaded cannot succeed. The condition referred to in the amended statement of case, if read in the manner suggested by this court, has clearly come to pass. There was no restriction on the condition to suggest that it would only come into effect upon the claimants being prohibited from returning to Trinidad and Tobago *permanently*. It is not in issue that the claimants were prohibited from returning to Trinidad and Tobago due to the seizure of their passports arising out of the ongoing charges in the US. On the facts presented and by the very fact that the trial was conducted via videoconference due to the claimants being unable to travel to Trinidad and Tobago meant that the pleaded condition had been satisfied. Therefore, this court has no doubt whatsoever that, based on the pleaded case, the defendants were entitled to register the 2013 Deed.
120. There was no alternative plea with respect to a declaration of trust in favour of the claimants so the court need not proceed further if the court accepts that the 2013 Deed was properly executed. That decision would obviously depend upon the credibility of the claimants and their witness, the defendants and their witnesses, in particular, on the evidence of the maker of the document – Mr. Mitchell – and his clerk.
121. It is noteworthy that a further reason, a third reason, was given for the 2013 Deed in cross examination and that would be detailed below in this court's discussion of the first named claimant's credibility.

WHERE WAS THE 2013 DEED AND THE POWER OF ATTORNEY EXECUTED?

122. The decision in respect of this is the crucial one and, having regard to the points raised and determined above, the court will now go on to rule on this issue.
123. It was suggested by the attorney at law for the defendants that the claimants have failed to discharge the onus of proof imposed by law upon them to satisfy the court of the grounds pleaded in their statement of case for the impugned 2013 Deed of to be set aside. The submission continued that the cross examination of the claimants and their witness showed that the evidence adduced by them in support of their claim that the 2013 Deed and Power of Attorney were executed by the claimants on the 28th July, 2013 in Miami, Florida was manifestly unreliable.
124. The defendants' attorney essentially based his submissions on the following:

- 124.1. The inconsistencies in the pleadings and the eventual evidence led on their behalves with respect to reason for executing the 2013 Deed – this was dealt with above;
- 124.2. The attempt to introduce new evidence beyond the pleaded case – this too was dealt with above;
- 124.3. The unreliability of the claimants and their witness which was manifested in the above and the obvious cut-and-paste of the witness statements.

CUT-AND –PASTE IN THE WITNESS STATEMENTS

125. Now would be an appropriate stage to discuss this very important issue about the witness statements. The witness statements of Mukesh Rampersad, Shamila Persad Rampersad, Kendell Rampersad and Elizabeth-Badri Rampersad bore striking similarities to each other. In many cases, the words appearing in these documents were identical. This point was raised in the cross examination of the witnesses and one particular witness stands out to the court. When Elizabeth Badri-Rampersad was cross examined she admitted that the witness statements were ‘cut-and-pasted’. Although this witness initially maintained that she personally typed the document in its entirety, she eventually had to agree that it was in fact identical to the others. In cross examination, the witness was referred to the common mistake made in all the statements of the incorrect designation of the claimants being the “purchasers” and the defendants being the “vendors”, when it was in fact the other way around, and she agreed that it appeared to be because the evidence from the witness statements were cut-and-paste:

Q: “So four of you made the same mistake in describing this event”

A: “According to the documents; Yes Sir”

Q: Does this appear to you as cutting and pasting

A: Yes, I believe it does

126. Cutting and pasting evidence cannot be, and is not, acceptable, especially in relation to the crucial heart of the case.
127. Part 29.5 (1) (d) of the CPR mandates that the words that appear in the witness statement must represent the words of the witnesses.

“29.5 (1) A witness statement must—

(d) so far as reasonably practicable, be in the intended witness’s own words”

128. In the case of ***Jamal Sambury v. The Attorney General of Trinidad and Tobago*** CV 2011-02720, Master Sobion stated at par 18 stated

*“Apart from the sheer volume of the material that is common to both witness statements, when one analyses it qualitatively, it was clear that this was not mere coincidence. There was a quite deliberate exercise of “cut and paste” undertaken to create the Claimant’s witness statement from the earlier statement. **To my mind, it was implausible that two persons could experience separate events involving different persons in such an identical manner.** Moreover when one looked at the shared grammatical errors,*

phrasing and sequence of events, the similarities were so startling that the only reasonable conclusion was that the Claimant copied and presented as his own sizable portions of the witness statement of Jamal Fortune.”

129. The *Sambury* case was appealed and the Court of Appeal, in the transcript of the hearing, also commented on the issue of identical witness statements. A reading of the transcript found Mendonca JA stating in relation to the identical witness statements:

“Yes. It is unlikely that the Master will accept much of his oral evidence. Let’s face it, in these courts throughout everyday people try to mislead the court, none of them as obvious as this. The fact is that they do try to mislead the court ... This case has been made relatively simple in that he has just plagiarized somebody else’s witness statement in large parts, which would make his evidence as to that totally unreliable.”

130. Smith JA stated:

“It was significant that the claimant offered no explanation for this obvious copying and use of another person’s witness statement. In the absence of that I conclude that the copying was done deliberately and in an effort to mislead the court ...”

131. In dismissing the appeal Mendonca JA made these statements:

“I think it should be obvious from the exchanges during the course of the argument that we are not in favour of allowing the appeal. We think that the Master carried out an appropriate balancing exercise. She had to weigh the fact of an admitted loss against what she found as an abuse in the context of copying parts of various witness statements... Essentially, we agree with the conclusion of the Master and cannot say she is plainly wrong.”

132. It is clear that the copying of witness statements is frowned upon. Notably, it is further frowned upon when no explanation is given for the same and in this case, not only was no explanation given but the second named claimant and the witness, Mrs. Badri-Rampersad attempted, unsuccessfully, to defend their statements even when confronted in cross examination with the fact that their statements bore identical words.

133. The court wishes to go further. This case is more than simply one of copy and pasting. The court wishes to acknowledge that attorneys ought to manage their cases properly and in accordance with the rules of court. Parties to actions are, more often than not, laypersons, or even professionals, who are not attorneys and do not know the rules and procedures of the court. These parties are then placed into this position by their attorneys, upon whom they would rely for guidance on the legal requirements. Too often, witness statements are in fact prepared by attorneys at law replete with legalese which the witness is unable to understand or even to justify because of their sheer inability to make sense of the words used on their behalf in their witness statements. Even in a situation such as this where the parties said that they prepared their witness statements independently, if even this were so, it ought to be the duty of the attorney-at-law acting on their behalf to recognize the plain and obvious plagiarism and to advise accordingly. Failure to do so would quite often result in witnesses of fact being disbelieved because they cannot even understand or defend their own witness statements since it was not in fact prepared or understood by them. It is important to note a witness statement, once signed by a witness and entered under oath at the trial,

becomes that witness's evidence so that attempts by the witness to distance himself/herself from the contents thereof in cross-examination becomes increasingly difficult. That, to my mind, is a situation often created by the attorneys who ought to be familiar with the rule quoted above and ought to ensure compliance to the best of his/her ability.

134. Faced with the position such as that outlined in the preceding paragraph where a witness statement is in fact prepared by an attorney at law and signed by a witness but which does not incorporate their own words, a witness in the witness box is then faced with a difficult dilemma. Having accepted the truth of its contents, the witness would then lose all credibility if he/she were to then disavow himself/herself from the contents thereof on the ground that he/she did not prepare it or, worse yet, merely appended his/her signature without fully understanding it. Either way, the witness comes off the worse for it.

135. In this case, when confronted with the several instances of cutting and pasting pointed out by attorney at law for the defendants, the second named claimant said:

Q- Are the contents of paragraph 31 (a) true and correct?

A - (Looking at it again) No because I forgot to correct something initially. I don't think I understand the terms properly I believe its mixed up

Q- You signed this statement without understanding the terms properly?

A- I understand what I was signing but when I saw this document, because the deeds of Trinidad and Tobago are different, I didn't understand

Q - So you signed the statement without understanding the terms properly

A - Correct

Q- Would you say that you have a good memory?

A - I would say so yes sir

Q - Would you not agree with me that looking at what it had in 31 (a) and (b) it could give the impression that you copied

A - It could

Q - But you did not copy?

A - No sir"

136. On the one hand, she admitted that she signed the statement without understanding the terms properly but went on to assert that she did not copy from her husband's witness statement. That latter assertion could easily have been tempered by admitting that she did not in fact prepare the statement but she chose not to go that far.

137. All of this has to be viewed against the backdrop of the hearsay statement filed by the instructing attorney-at-law for the claimants in support of the application to use the first named claimant's witness statements notwithstanding the fact that he was out of the country in which she said that *she* had prepared the witness statement as a result of an oral statement taken by her from the witness.

138. The witness for the claimant, Elizabeth Badri-Rampersad, went at great lengths at first to describe how she prepared her own witness statement when she was placed in the position of having to defend the allegation of cutting and pasting until she relented and admitted that there was cutting and pasting.
139. Unfortunately, as mentioned before, this court is of the respectful view that these witnesses were herded into this position. However, instead of “coming clean” and admitting the truth, the witnesses chose to try to defend the statements by insisting that they had prepared the statements independently. To my mind, this critically affected their credibility because they chose, under oath, to insist upon that which was clearly incorrect.
140. When one takes the oath to tell the truth, such an oath ought not to be taken lightly and by doing what they did in this regard, i.e. attempting to defend their preparation of their witness statements, they illustrated a wanton and deliberate disregard for the oath that they had taken resulting in their evidence being fundamentally unreliable.

THE FIRST NAMED CLAIMANT’S CREDIBILITY

141. At this point, it is necessary for the court to look at the evidence given by the first named claimant in cross-examination. Attorney at law for the defendants sought to elicit the reason for the 2013 Deed from the first named claimant:

“Q - Your case is that you entered into this arrangement because you feared the loss of your property?”

A - It was brought to my attention

Q - I am asking is it correct that you entered into this arrangement because you feared the loss of your property in Trinidad?”

A - I had no fear of that. He said he was going to invest into it when I was away ... there was a trust factor

Q - As a result of extenuating circumstances and fearing the loss of their property it was verbally agreed that a document or deed was prepared but was only to be registered if the claimants are prohibited from coming to Trinidad. Is that a true reflection of your case?”

A - Yes

Q - So when you say you feared what you meant?”

A - I was not afraid. It was more of Ramparas being protected

Q - You did not enter this agreement because you feared losing the property?”

A - No

Q - You had no fear that as a result of your problems in the US you would have lost your property?”

A - There were discussions between us

Q - *I am asking you did not fear you would have lost your property?*

A - *I did not fear ...*

Q - *Did you enter into this agreement to sign the deed of conveyance because you feared the loss of your property in Trinidad?*

A - *No*

Q - *And the reason you signed the deed is because Mr. Ramperas said that if he had to invest in your property he would like to have the property sold to him?*

A - *That is not correct*

Q - *So what was the reason to sign?*

A - *Mr. Ramperas and I had lengthy discussions. It was signed on 28 July 2013. He stepped up as a family member to assist and he said that he would take over the property and we discussed a payment.*

Q - *So you went forward to agree for a deed of conveyance to be prepared*

A - *Yes but not executed*

Q - *But for it to be in his name? A transfer from you and your wife to Ramperas and his wife?*

A - *Yes that is correct*

Q - *What was the event that caused the deed to be executed?*

A - *For him to protect his investment he wanted it to be executed but never registered.*

142. Quite obviously, this *viva voce* evidence in cross examination is in conflict with paragraph 9 of the pleaded case and paragraph 75 of this claimant's own witness statement (which also contradicted and was in conflict with the pleaded case). Apart from it being quite incongruous in itself and the fact that the first named defendant seem genuinely reluctant to answer the question forthrightly, this evidence in cross examination seemed to create a third alternative – that the 2013 Deed was intended to be used as security by the first named defendant to protect his investment of funds in the building after the claimants got into their difficulties in the US. According to this new version, in order to finish the building, the first named defendant “*stepped up*” to do so and, in order to protect his funds, the 2013 Deed was supposed to have been executed ***but never registered!***
143. Having regard to this bit of evidence, and the other matters referred to above in relation to the pleaded case and the failure to plead material facts such as the missing dates and the missing consideration, the first named claimant's evidence seems to be quite unreliable and this court has no hesitation in dismissing the first named claimant's evidence on the whole. Try as this court might to find some semblance of consistency and reliability, the first named claimant's evidence, when taken on its own and when taken in context of all of the other evidence in matters mentioned above, failed to stand up to scrutiny, even on a balance of probabilities.

CONCLUSION ON THE CLAIMANTS' CASE

144. The legal burden of proof lay squarely with the claimants to prove their case with a shifting evidential burden. On the basis of the matters mentioned above and the omissions and the inconsistencies in the evidence, the court finds that on the basis of the evidence before it, the claimants have failed to present a cogent and reliable version of events sufficient to shift the evidential burden of proof from themselves on to the defendants. On a balance of probabilities, the claimants have failed to establish prima facie that the defendants have a case to answer. Accordingly, the claimants' case must fail.

COMMENT ON THE EVIDENCE FOR THE DEFENDANTS

145. It is worthy of note that had the evidential burden shifted to the defendants, the defendants may have found themselves in difficulty since the evidence presented by Mr. Mitchell was not at all impressive. However, having failed to cross the necessary evidential bridge, the claimants have failed in their evidential and, ultimately, their legal burdens of proof.

CONCLUSION ON THE CLAIM

146. There is no doubt that the 2013 Deed and the Power of Attorney were signed by the claimants. The issues were what were the circumstances under which the same was signed and agreed to be registered – circumstances which the claimants have been wholly contradictory on – and whether these documents were signed on the dates written on them or on 28 July 2013. In respect of the latter, the claimants have been unable to cross the threshold of the evidential burden to establish a credible and cogent case for the defendants to answer and that seriously impacts in a negative way upon their reliability as witnesses of truth.
147. Consequently, the claim relating to the setting aside and expunging of the 2013 Deed is dismissed.
148. With respect to the sales of the items and property, the first named defendant has admitted receiving \$125,000 for the sale of the vehicle, \$40,000 for the sale of the motorcycle, \$88,000 for the sale of certain steel and \$75,000 for the deposit on the sale of lands. All of those sales were supported by receipts so that there is no doubt that the first named defendant received the sum of \$328,000 for and on behalf of the claimant. The claimants did not provide any suggestion that the figures were not as were stated. No other items were mentioned nor admitted so that this seems to be the totality of the accounting exercise which is necessary in this case. The question which follows is whether or not the defendants have established a set-off/counterclaim for monies paid

by them on behalf of the claimant. That would be dealt with in the next section of this judgment.

THE COUNTERCLAIM

149. The issue of the first named defendant having forwarded the sum claimed for the property at Siewdass Road was not contested. The only issue was whether or not he was reimbursed. By admitting that he received the benefit of the first named defendant's funds for the purchase of the property, and by stating that he repaid the sum, the court is satisfied that the claimants acknowledged a legal duty to repay the sum. In this regard, however, the claimants have failed to establish on a balance of probabilities that they did in fact reimburse him. The only allegation in that regard in his witness statement was when the first named claimant stated that he paid to the defendant the sum of \$165,000 US in March 2013. Of course, for the reasons given previously, the court is not impressed with that assertion and does not believe that any such payment was made, on a balance of probabilities, especially in light of the unreliability of the case for the claimants and of their evidence on the whole. Therefore, the court finds that the claimants are in fact liable to pay the first named defendant the sum claimed by him in this respect.
150. With respect to the sum of \$77,800 claimed to be owing to the defendants by the claimants as the excess due and owing as a result of having spent \$405,800 under the Power of Attorney and having received \$328,000 from the sale of certain items belonging to the claimant, the burden was on the defendants to prove. Out of the claim of \$405,800, receipts were annexed to the defence to substantiate these sums but were never introduced into evidence by way of agreed documents or as part of a witness statement to substantiate the same. Consequently, this cross claim cannot be entertained.

THE ORDER

151. In light of what this court has set out above, the claim as to the setting aside of the 2013 Deed, and the Power of Attorney, is dismissed.
152. However, in respect of the claim for monies owed, the court finds that the defendants, having admitted to receiving the sum of \$328,000 from the sale of certain items belonging to the claimant, are liable for the same to the claimants and there is nothing to offset this against by the defendants. Therefore, there will be judgment for the claimants against the defendants in the sum of \$328,000.00.

153. Having been partially successful on the claim, a substantial portion of which was the validity of the 2013 Deed which the claimants have failed to set aside, the court awards the claimants 50% of their prescribed costs quantified in the amount of \$27,150.00, being 50% of the full prescribed costs of \$54,300.00 on the claim.
154. In respect of the counterclaim, there will be judgment for the defendants in the sum of \$1,005,100.00 and the claimants shall pay the defendants' prescribed costs of the counterclaim quantified in the sum of \$109,255.00.

/s/ Devindra Rampersad
Devindra Rampersad
Judge