

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2007 – 00205

BETWEEN

RASHEED MOHAMMED

Claimant

AND

DHEERAJIE BENNY

Defendant

**[MOHANIE MAHARAJ, appointed Administratrix Ad Litem by Order of the Court
dated the 5th August, 2010, the Defendant having died on the 5th May, 2010]**

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Mr. Gaston Benjamin instructed by Mr. Justin Sobion for the Claimant.

Mrs. Lynette Maharaj S.C. leading Mrs. Gillian Seecharan Scott instructed by Mr. Kijana De Silva for the Defendant.

Dated the 17th September, 2010.

JUDGMENT

INTRODUCTION

Claim Form

1. By his Fixed Date Claim filed on the 23rd January, 2007, Rasheed Mohammed, the Claimant, (“the Claimant”) claims against Dheerajie Benny, the Defendant, (“the Defendant”) an order that the Defendant do show cause why the caveat dated the 21st September, 2006 lodged by the Defendant with the Registrar General concerning a piece or parcel of land situate in the Ward of Cunupia in Trinidad comprising four acres three roods and thirty eight perches (less approximately three roods and thirty eight perches acquired by the Government of Trinidad and Tobago) registered in the names of Preetam Benny and Rasheed Mohammed in Certificate of Title in Volume 4745 Folio 299 should not be removed. The Claimant also sought an order that the said caveat lodged by the Defendant with the Registrar General be removed. The said piece or parcel of land situate in the Ward of Cunupia and comprising four acres, three roods and thirty eight perches (less three roods and thirty eight perches acquired by the Government of Trinidad and Tobago) is referred to as “the said lands” in this judgment. On the 5th May, 2010, the Defendant departed this life and by order dated the 5th August, 2010, Mohanie Maharaj was substituted as Administratrix ad Litem to represent the estate of the Defendant. Nevertheless, the Court will continue to refer to Dheerajie Benny as the Defendant throughout this judgment.

Statement of Case

2. By his Statement of Case filed on the 23rd January, 2007, the Claimant alleged that in H.C.A. No 1174 of 2005, in the matter of the Estate of Benny Lutchman also called

Beni, deceased, between the Defendant, (Dheerajie Benny) and Preetam Benny, Ventour J. ordered on the 26th September, 2005 that the Registrar of the Supreme Court do execute a Memorandum of Assent assenting to the registration unto the Defendant and Preetam Benny as tenants in common of the said lands. It is undisputed that pursuant to the order of Ventour J. the Registrar of the Supreme Court executed the Memorandum of Assent.

3. By his Statement of Case, the Claimant further alleged that by Memorandum of Transfer dated the 22nd February, 2006 (“the Memorandum of Transfer”) the Defendant in consideration of the sum of \$800,000.00 transferred unto the Claimant her one half share and interest in the said lands. The Claimant alleged at paragraph 3 of the Statement of Case that the Defendant agreed to sell her half interest in the said lands to the Claimant at the price of \$800,000.00. It is further alleged at paragraph 3 that on the 25th January, 2006, the said lands were valued by Mr. Cecil Alcantara at \$500,000.00, but the Claimant agreed to pay the Defendant the sum of \$800,000.00 for her half share.

4. The Court will set out in full what was further alleged at paragraph 3 of the Statement of Case:

The Memorandum of Assent was prepared by Mr. Mervyn Campbell Attorney at Law who advised the Defendant to obtain independent legal advice. Mr. Eric Noel Etienne Jr. Attorney at Law, independently advised the Defendant and fully explained to her the nature of the transaction and Mr. Etienne also read over the Memorandum of Transfer to the Defendant. The Defendant having agreed to the transaction placed her thumb print on the Memorandum of Transfer as her act and deed in the presence of her said Attorney at Law Mr. Etienne and also in the presence of her grand daughter Ms Shamalar Selal. Both Mr Etienne and Ms Selal signed the Memorandum of Transfer as having witnessed the placing of her thumb print thereon by the Defendant.

The Memorandum of Transfer was duly registered, the Stamp Duty Section of the Board of Inland Revenue having accepted the figure of \$800,000.00 as being a bona fide purchase price for the half share and interest in the said parcel of land.

5. At paragraph 4 of the Statement of Case, the Claimant contended that the allegation that the transfer of the Defendant's interest in the said lands was obtained by deceit, undue influence and coercion on the part of the Claimant against the Defendant was untrue. The Claimant contended that the Defendant agreed to the transaction having had the benefit of independent legal advice from an attorney at law who read over the Memorandum of Transfer to her and explained to her the nature of the transaction.

Defence and Counterclaim

6. The Defendant filed a Defence and Counterclaim on the 2nd April, 2007. Although she admitted that she executed a document on the 22nd February, 2006 at the offices of Mr. Mervyn Campbell, Attorney-at-Law ("Mr. Campbell") by affixing her thumb print thereto in the presence of her grand-daughter, she denied that she agreed to sell her half interest in the said lands at the price of \$800,000.00 or that she received the sum of \$800,000.00 as alleged.

7. At paragraph 2.6 of the Defence and Counterclaim, the Defendant denied that Mr. Campbell advised her to obtain independent legal advice or that she received independent legal advice from Mr. Eric Noel Etienne Jr., Attorney-at-Law ("Mr. Etienne") or that he fully explained to her the nature of the document on which she put her thumb print. The Defendant also contended that the one and only time she saw Mr. Etienne was when Mr. Campbell asked her to execute a document on 22nd February 2006.

8. The Defendant alleged further that on the 22nd February, 2006 when the document was executed, she went to Mr. Campbell's office with her daughter Mohanie Maharaj and the Claimant. Her grand-daughter Vashti also called Shamalar Selal was also present. [paragraph 2.7] Further, the Defendant alleged that Mr. Campbell gave her a piece of

paper and told her to put her thumb print. Vashti signed the paper after the Defendant placed her thumb print. She alleged that there was a man sitting in Mr. Campbell's office whom she subsequently came to know as Mr. Etienne [paragraph 2.8].

9. The following important facts are alleged at paragraphs 4 and 5 of the Defence and Counterclaim:

4. In further answer to paragraphs 1 to 3 of the Statement of Case the Defendant says:

4:1 The Defendant was born on the 23rd day of December, 1920 and was 86 years old on 22nd February, 2007.

4:2 The Defendant is illiterate and can neither read nor write.

4:3 The Defendant and her deceased husband Benny Lutchman also called Beni had purchased the parcel of land described in Certificate of Title Volume 874 Folio 113 in or about the year 1936. The property was vested in the name of Benny Lutchman.

The Defendant will rely on the Certificate of Title in Volume 874 Folio 113.

4:4 The Defendant and the deceased occupied the said land upon which they constructed a house and together had 8 children namely:

- (1) Zita Benny
- (2) Mohanie Maharaj
- (3) Balkaran Benny
- (4) Hemraj Benny
- (5) Thakoordial Benny
- (6) Ramkumarie Mansingh

- (7) Pretam Benny
- (8) Sylvia Mungal

4:5 As the children became adults and started their own families the Defendant and the deceased allowed them and encouraged them to build their houses on the said land which were measured out in metes and bounds. It was the intention of the Defendant and the deceased that all their children should be given a piece of the lands on which they had built their homes.

4:6 At the time of the death of the deceased on 18th August, 1998 the Defendant and the deceased had promised to their children certain parcels of the said land as set out hereunder and as shown on the Sketch Plan hereto annexed as **“D.B.I”** and their children had in fact built on these lands.

To	1.	Balkaran Benny	- 1 lot
	2.	Hemraj Benny	- 1 lot
	3.	Thakoordial Benny	- 2 lots
	4.	Ramkumarie Mansingh	- 2 lots
	5.	Pretam Benny	- 2 lots

4:7 When the deceased died the Defendant resided on the subject parcel in the family house with her son Preetam.

4:8 The said family house was in a very bad state of disrepair and would leak from the roof whenever it rained. The Defendant would be beaten by her son Preetam whenever she complained about these conditions.

4:9 At the date of the deceased’s death to the Defendant’s knowledge the deceased had never made a Will. However, Preetam Benny produced a Will in 2000 and applied for a grant of probate of the deceased’s estate. The

Defendant will rely on the application for Grant of Probate hereto annexed as “**D.B.2**”.

- 4:10 The Defendant was treated so badly by Preetam that she had to leave the family house without her personal effects for fear of her personal safety.
- 4:11 The Defendant fled to the home of her daughter Mohanie Maharaj and began residing with her.
- 4:12 The Claimant would come by Maharaj’s home and it was during these visits that the Defendant related her problems to the Claimant whom the Defendant first met sometime in or about 2005.
- 4:13 The Defendant told the Claimant that her land had been taken by her son Preetam and the Claimant promised that he would get a lawyer to fight the case and get back her land.
- 4:14 The Claimant took the Defendant accompanied by two police officers to the family home to collect her clothing and personal effects.
- 4:15 The Claimant retained an Attorney-at-Law Mr. Mervyn Campbell who instituted High Court Proceedings No. CV2007-00205 and the order referred to at paragraph 2 of the Statement of Case was made.
- 4:16 The Defendant made several trips to the office of Mr. Campbell with the Claimant but never had a conversation with him. The Defendant would be accompanied by her daughter Mohanie Maharaj who is also illiterate.
- 5:1 The Claimant told the Defendant that when she got the land he would buy it from her at or for the price of **\$4 Million**.

- 5:2 The Claimant also told the Defendant that out of the purchase price of **\$4 Million** that he would have to pay Mr. Campbell **\$1 Million** in fees for getting the land back for her.
- 5:3 3 days after she was requested to sign the document at Mr. Campbell's office and did so, the Claimant's wife took the Defendant to a Bank in San Juan and gave the Defendant a cheque.
- 5:4 When the Defendant took the cheque to the bank she was told by the bank teller that the cheque was for **\$400,000.00**.
- 5:5 The Defendant received the cheque of **\$400,000.00** but did not understand that in so doing she would lose her family home to which she wants to return or that her children's licences and/or interest in the said lands would be affected accordingly.
- 5:6 The Defendant never agreed to sell her property to the Claimant or any one else at or for the sum of \$800,000.00 or at all.
- 5:7 The Defendant now understands that she could not sell her lands without taking into account the claims of her children some of whom have occupied the lands for over 25 years and who have built their houses thereon.
- 5:8 The Defendant's children have been calling upon her to vest in them the fee simple of the lands distributed to them by the Defendant and the deceased but the Defendant is unable to do so unless and until this matter is determined.

10. The Defendant therefore contended that the sale was at a gross undervalue. Further, she contended that she trusted the Claimant and had developed a confidential relationship with him by reason of their several conversations and her confiding in him about her family

dispute. Accordingly, the Defendant contended that the Claimant became and was at all material times under a duty of trust and confidence towards her in relation to any transaction relating to the said lands.

11. The Defendant therefore contended as follows:

- 8:2 The Defendant will contend that the Claimant had at all times assured her that he would help and assist her and protect her interests and that he was dealing with her fairly and honourably when in truth and in fact these representations were untrue and were made by the Claimant to the Defendant fraudulently and/or negligently with the intention that the Defendant would be induced thereby to convey to him the property at a price that was a gross undervalue and/or without giving effect to the overriding interests of her children who had been promised portions of the land and were actually living thereon.
- 8:3 The Claimant by his friendship with the Defendant at a time when she was out of her house and without the assistance of any one capable of guiding her acquired dominion over the Defendant and influenced her and coerced her to act as he advised.
- 8:4 The Defendant had no independent legal advice and executed the document which she now understands to be the Memorandum of Transfer subject to the undue influence of the Claimant and without being informed of all relevant circumstances and facts and matter to be taken into account before executing the document.
- 8:5 The Defendant states that she executed the Memorandum of Transfer without any understanding as to its nature and contents and in the bona fide belief that she was executing an instrument which would restore her to her

property and home. The Defendant would not have executed the document if she had known the truth and effect of its contents.

8:6 Further and/or alternatively the Defendant will contend that the Claimant duped her into executing the Memorandum of Transfer at a price which amounted to an unconscionable bargain and/or to taking advantage of her so as to obtain a benefit for himself to the disadvantage of herself and her children.

8:7 Further and/or alternatively the Memorandum of Transfer was executed by the Defendant under a unilateral mistake or common mistake induced by the Claimant.

12. The Defendant counterclaimed inter alia that the Memorandum of Transfer be set aside with all consequential directions; that the said lands be re-conveyed to her or to whom she may direct freed and discharged from all charges and encumbrances; that she be paid mesne profits and damages for fraudulent misrepresentation.

13. The Defendant also sought a declaration that the Memorandum of Transfer was executed and obtained by the Claimant from the Defendant by improper and illegal pressure and threats and without any consideration to the Defendant's age, infirmity, illiteracy and obligations to her children and herself and was illegal and void, or by fraud and/or undue influence and/or deceit and/or misrepresentation and/or coercion and/or mistake and/or at an undervalue.

Reply and Defence to Counterclaim

14. By his Reply and Defence to Counterclaim filed on the 17th September, 2007, the Claimant joined issue with the Claimant on her Defence. He admitted that he first met the Defendant in 2005 and that the Defendant went to the offices of Mr. Campbell on several occasions but denied that the Defendant never had conversations with Mr. Campbell. The

Claimant alleged that the Defendant had many conversations with Mr. Campbell in the Claimant's presence [paragraph 9].

15. At paragraph 10, the Claimant denied that he ever promised or offered to buy the Defendant's share in the said lands for \$4 million or that he would have to pay Mr. Campbell \$1 million in fees.

16. At paragraph 11, the Claimant admitted that he did agree with the Defendant at her request to engage and pay a lawyer to fight a case on her behalf for her to get her share of the said lands. The quantum of legal fees payable or to be paid was never mentioned or discussed between Claimant and Defendant.

17. At paragraphs 12, 13 and 14 of the Reply and Defence to Counterclaim the Claimant alleged as follows:

12. In answer to paragraph 5:3 of the defence and counterclaim, the Claimant admits that after leaving the office of Mr. Mervyn Campbell where the Defendant had executed the Memorandum of Transfer, he went with the Defendant to Scotia Bank, San Juan where he gave the Defendant a cheque for the sum of \$400,000.00 in the presence of the Bank Manager.

13. On the date and at the time and place i.e. at Mr. Campbell's office when the Defendant executed the Memorandum of Transfer the Defendant was accompanied by her daughter Mohanie Maharaj and her grand-daughter Vashti who signed as a witness. The said Vashti is literate and is a public servant employed at the Ministry of Agriculture.

14. The Claimant admits that he told the Defendant that he would be responsible for paying Mr. Campbell's legal fees and all the fees and expenses associated with the Court action against Preetam, but denies that Mr. Campbell's fees amounted to \$1 million or that he ever told the Defendant so.

18. By way of Defence to Counterclaim, the Claimant contended that the Defendant at all material times knew and fully understood the nature of the transaction in executing the Memorandum of Transfer after the same had been read over and explained to her, the same being in accordance with the agreement freely made between the Claimant and the Defendant.

Witnesses

19. The Claimant called four witnesses:

- The Claimant himself
- Mr. Campbell
- Mr. Etienne
- Mr. Mervyn Thompson, Valuer

20. The Defendant called six witnesses:

- The Defendant herself
- Mrs. Gillian Seecharan-Scott (Attorney-at-Law) (“Mrs. Scott”)
- Miss Shamalar Selal
- Mr. Thakurdial Benny
- Mr. Hemraj Benny
- Mr. Roy Gumansingh, Valuer

THE ISSUES

21. Although there are many issues of law and fact in dispute between these parties, there is one central issue which falls to be determined by the Court:

Whether in all the circumstances of the case and having regard to the evidence and the law, the Memorandum of Transfer should be set aside on any of the following grounds:

- (i) Constructive fraud
- (ii) Unconscionable bargain
- (iii) Undue influence
- (iv) Abuse of confidence
- (v) Unfairness
- (vi) Hardship
- (vii) Misrepresentation
- (viii) or on any other ground

22. If the Memorandum of Transfer is set aside by the Court, it follows that the Court will have to determine what consequential orders, if any, should be made.

THE EVIDENCE

The onus of beginning

23. At the Pre-Trial Review held by the Court, Attorneys for both parties agreed with the Court that the Court would fix an early trial date and that the Defendant's evidence would be taken first, having regard to the Defendant's advanced age. Accordingly, the trial began and the Defendant was cross-examined for two days. Thereafter, since there were procedural issues still to be worked out between the parties, the Court agreed that the matter would be adjourned for a status hearing. At the start of the trial, Attorneys had agreed that the issue of which party should have the onus of beginning would be dealt with at the status hearing.

24. At the status hearing, Attorney for the Claimant made it clear that he did not intend to pursue his earlier submission that the Defendant should have the onus of beginning "*in an effort to get on with the case*".

25. For the sake of convenience, however, the Court will consider first the evidence advanced on behalf of the Defendant.

The Defendant's witness statement

26. On the 20th March, 2008, the witness statement of the Defendant was filed. The witness statement comprised some eight pages and on last page the thumb print of the Defendant was placed. Mrs. Scott, Attorney for the Defendant, certified on the witness statement that she had read and explained the true meaning and effect of this witness statement to the Defendant, a person being illiterate, who marked the witness statement. Mrs. Scott certified further that she was satisfied that the Defendant understood the true meaning and effect of the witness statement.

27. According to the witness statement of the Defendant, when she was 14 years old she and Beni Lutchman ("Beni"), now deceased, went through a Hindu Marriage Ceremony "under bamboo". The marriage was never registered. They lived as husband and wife for 59 years until he died on the 8th August, 1998. According to the Defendant, she and Beni bought the said lands when she had her first child. They agreed that the said lands would be put in Beni's name alone since he was the one who saw about their business and money affairs while she saw about the house and the children. According to her, they both worked to pay for the said lands and she used to work in the garden and on the Caroni Estate. She and Beni went onto the said lands and built a house. They had 8 children together. They had encouraged the children as they grew up and started families to build houses on the said lands. She, Beni and the said children, as each one was ready to build, measured out the plots each would occupy.

28. According to the Defendant's witness statement, after Beni died, she continued to live in the house that they had built ("the family home"). The family home, however, was in a very bad state of disrepair and leaked from the roof whenever it rained. All her furniture and personal belongings used to get wet. When she complained about these conditions and asked her son Preetam for help to fix the roof, Preetam beat her and treated her very badly. Indeed she was forced to run from the family home without any of her personal belongings and went to live with her daughter, Mohanie Maharaj.

29. I will set out in full the evidence of the Defendant given at paragraphs 13 – 25 of her witness statement:

13. *That is how I met the Claimant, Rasheed Mohammed. I first met him in or about 2005. He used to come by my daughter's home and during these visits I started to tell him about all my problems with Preetam.*

14. *I told him that Preetam had taken my land and house and I was afraid that I could not go back there and had lost my home. I also told him that I had to leave all my clothes and valuable papers when I left my home and land. Rasheed promised that he would help me get back my land and home even if he had to get a lawyer and pay for it. I told him that I had very little money and nobody to help me.*

15. *Rasheed told me he would see about everything. I was grateful to him. He was like my big son. I depended on him to help me because most of my children cannot read and write.*

16. *Soon after this conversation Rasheed came and took me with my daughter Mohanie to the Chaguanas Police Station. Two policemen went with us to my home in Charlieville and helped me to get my things.*

17. *After that Rasheed took me to his lawyer Mr. Mervyn Campbell. He gave his lawyer instructions to help me. His lawyer filed High Court Proceedings No. 1174 of 2005 and the Judge made an Order (referred to at paragraph 2 of the Statement of Case) for the land to be given back to me.*

18. *It was while this case was going on that I heard that my son Preetam was saying that my husband made a Will and he had applied for the probate of the Will. As far as I know Beni did not make a Will. I believe that he would have told me if he had as we always talked about everything. The application for Grant of Probate is annexed to the List of documents filed in these proceedings as Document 7.*

19. *Rasheed took me several times to the office of Mr. Campbell but Mr. Campbell never spoke to me. My daughter Mohanie Maharaj used to go with me but she also cannot read or write. Rasheed did all the talking with Mr. Campbell.*

20. *Rasheed told me that when he got back the land for me he would buy it from me at or for the price of **\$4 Million**. I never answered him. I never told him I would sell him my land. I alone was not living on the land. All my children had built their homes there.*

21. *He also told me that out of that \$4 Million that he would have to pay Mr. Campbell \$1 Million in fees for getting the land back for me. I told him that was too much and when I got my land back I would deal with that.*

22. *One day Rasheed took me and my daughter Mohanie to Mr. Campbell's office. After I got there my grand-daughter, Vashti, came. After a while all of us went into Mr. Campbell's room. He had a lot of papers out on his desk. He spoke to me. I did not understand everything he said and then he put a paper in front of me. He told me to put my thumb print. He brought a pad with ink and I put my thumb in it and then I put my thumbprint on the paper. I saw another man sitting in Mr. Campbell's office who I now know to be Mr. Etienne. He did not say anything to me. He also signed that paper and then Vashti signed the paper.*

23. *On this day as far as I understood I had signed a deed to get back my land from Preetam.*

24. *Sometime after I put my thumbprint on the document at Mr. Campbell's office Rasheed's wife took me to a Bank in San Juan and gave me a cheque. I took the cheque to my bank. I was told by the bank teller that the cheque was for \$400,000.00. I put the cheque for \$400,000.00 into my account. I thought Rasheed was still helping me like my own son. I did not understand that this money was*

supposed to be for my family home in which I have always wanted to live and that my children would lose their share of the land.

25. *I never agreed to sell my property to Rasheed or any one else at or for the sum of \$800,000.00 or at all.*

30. Further, at paragraph 33 of her witness statement, the Defendant said that she believed that in taking her to Mr. Campbell and arranging for her to put her thumb print on a deed to sell her land to him, the Claimant took advantage of her and of the fact that she could not read and write and was not educated. According to the Defendant, she would never have put her mark on a deed to sell her land for \$400,000.00 or \$800,000.00 or even more.

31. The Defendant was put into the witness box on the first day of her evidence. She confirmed in chief that she had given Mrs. Scott a statement but she could not remember if she put her thumb print on a paper. She said, however, that when she gave Mrs. Scott the statement what she said in it was the truth. According to the Defendant, she remembered what she said but she could not hear well.

32. At that stage, by consent, Mrs. Scott was sworn to identify the Defendant's witness statement. Mrs. Scott identified the Defendant's witness statement as the witness statement which she took from the Defendant in relation to these proceedings. According to Mrs. Scott, the Defendant affixed her right thumb print to the base of the witness statement in Mrs. Scott's presence. The Defendant's witness statement was then tendered into evidence and marked "G.S.S. 1". Attorney for the Claimant with the leave of the Court reserved Mrs. Scott's cross-examination to a later stage.

The Defendant's cross-examination

33. According to the Defendant in cross-examination, she gave her lawyer a statement, and her lawyer was writing down what she was telling her, but when the lawyer was

finished writing, the Defendant did not know if she read it back. Further, the Defendant said that she did not know if Mrs. Scott had “*read back loud*” the statement to her and if she understood what Mrs. Scott had written down. According to the Defendant, although she put her thumb print on a piece of paper for Mrs. Scott, she did not know what was in the paper on which she put her thumb print. Although she did not know what was in the paper, she said that she still put her thumb print.

34. Thereafter, the Defendant’s evidence was riddled with inconsistencies. She contradicted her witness statement several times. She seemed not to follow the questions and questions had to be repeated frequently. Straightforward, simple questions could not be answered. For example, a straightforward question such as whether she took her son Preetam to Court produced this evidence:

Q: You took your son Preetam to Court.

A: I have a son by the name of Preetam. I did not take my son Preetam to Court. He took me to Court.

Note: Court asks Mrs. Scott to tell the witness loudly to listen carefully to Mr. Benjamin then answer his questions. Mrs. Scott complies.

Q: Are you saying that Preetam took you to Court.

A: No, I don’t know that.

Q: Did you take Preetam to Court.

A: Yes.

Q: What did you take Preetam to Court for.

No answer.

Question is asked again.

Q: What did you take Preetam to Court for.

A: I do not know what I took him to Court. I got a lawyer to see what I could do. How could you say the father make a will. He made a will for nobody.

Q: You say you went to see a lawyer about Preetam; what for.

A: He took my ID card, the bank book, he took everything. He put me out of the house. Preetam is a “dirty fella”.

Q: Did you take Preetam to Court to get half of the land.

A: No.

35. Even where matters were not in dispute and the evidence in her Defendant’s witness statement was being put to her, the Defendant denied it. For example, the first sentence of paragraph 14 of the witness statement was read to the Defendant. Thereafter, the cross-examination went as follows:

Q. Did you tell Mr. Rasheed that Preetam had taken your land and house and you were afraid that you could not go back there and had lost your home.

A: No.

Second sentence of paragraph 14 of the witness statement is read to the witness.

Q: Did you tell Mr. Rasheed that you had to leave all your clothes and valuable papers when you left your home and your land.

A: Yes.

Next sentence of paragraph 14 of the witness statement is read to the witness.

Q: Did Rasheed promise that he would help you to get back your land.

A: No.

Q: Did you tell Rasheed that you lost your land.

A: No; I did not lose any land.

Q: You said that you never tell Rasheed anything about getting back your land because you never lost your land.

A: I never tell him about land.

Q: When Rasheed said he was going to help you, what was he going to help you with.

A: The lawyer.

Q: What did you need a lawyer for.

A: I can't remember.

Q: When you talked to your lawyer, and give a statement did you remember.

A: *I can't remember.*

36. Although it may be lengthy, the Court will set out an important part of the cross-examination of the Defendant:

Put: *That you agreed with Mr. Rasheed that if he pay for a lawyer to see about you getting your share of the land you would sell to him if you get your share of the land.*

A: *I aint get no land. I never agreed to sell any land to Rasheed.*

Put: *Rasheed paid for legal fees and you got back half share of the land.*

A: *No.*

Put: *He carried out his side of the bargain by you getting your share of the land.*

A: *I have no share of the land. The land is mine.*

Q: *When you said in an affidavit you have half share in the land that is not true.*

A: *That is not so. My husband name alone on the deed and when he died the land is mine.*

Q: *Even though as common law wife you have the whole land.*

A: *He told me to give the children 2 lots. Some months before he died, he told me to give the children 2 lots each.*

Put: That Mr. Rasheed carried out his share of bargain and that you went to Mr. Campbell's office knowing that you were going to sign a deed to sell your share of the land.

A: No. I did not know that.

Put: That paper was read over to you by Mr. Campbell and by the other gentleman Mr. Etienne.

A: I don't know the gentleman. He was sitting in a corner.

Put: Mr. Etienne explained to you what was in the paper.

A: The Mister aint tell me nothing and Mr. Campbell aint tell me nothing.

Put: After you put you thumb print, Vashti signed.

A: When Vashti signed, then I put my thumb print.

Put: Then Mr. Etienne signed.

A: No. I aint see nobody sign. He was sitting in a corner on a chair.

Put: You were given a cheque in the bank not cash for \$400,000.

A: Yes.

Put: You were not given any cash.

A: No cash.

Q: Yesterday when you told us that you got money in cash and count it that was not true.

A: Yes.

Q: Was that the truth.

A: Yes, it was the truth.

Q: That is not the truth you were given a cheque not cash.

A: They gave me a cheque.

Q: When you tell us this morning that Vashti and the lady from the bank went upstairs to check the money that was not the truth.

A: No.

Q: Sometime in September 2006, you went and had lawyers stop Rasheed from dealing with the land.

A: I did not hear you good.

Q: Did you go to lawyers in San Fernando to stop Rasheed from dealing with the land.

A: No.

Q: Do you know why Rasheed has brought you to Court in this case.

A: No.

Q: Did anybody explain to you why Rasheed has brought you to Court.

A: No.

Q: You do not know why Court Rasheed brought you to Court.

A: Rasheed came and brought a summons. They gave the summons to my daughter. Sargeant came and Rasheed was hiding in the vehicle. They read the summons to me. My daughter kept the summons. They tell me I have to come to Court, I came twice and Rasheed did not come. My daughter has the summons.

Q: Did anybody tell you what you going to Court for.

A: Nobody ever say that.

Q: Between time you leave Mr. Campbell's office and date when Rasheed brought summons to come to Court, did you go to any other lawyer.

A: I know no other lawyer. I only know Campbell. I never talk to any other lawyer. I only know man sit in the corner.

37. At the end of two days of cross-examination, the Court was left with the impression that the Defendant did not hear well and did not remember certain things at times and then remembered them at other times. Her short term memory, as to matters which transpired from one moment to the next while she was in the witness box, was very bad. Her memory, as to simple, straight-forward, undisputed matters, was very bad. However, the mention of the names of Preetam (her son), Mr. Campbell, Mr. Etienne and the Claimant, triggered certain responses which appeared from her demeanour to be genuine, and which were consistent with her witness statement and her evidence generally. As to Mr. Etienne,

the Defendant had a certain memory of a particular situation – the memory of a man sitting in a chair in a corner. This she repeated throughout her evidence.

Mrs. Scott's cross-examination

38. Mrs. Scott was cross-examined at length as to how she took the Defendant's instructions and how she compiled the Defendant's witness statement. Mrs. Scott's evidence was that she had been practising as an Attorney-at-Law for 12½ years. Mrs. Scott explained fully how she took the Defendant's instructions and compiled the witness statement. Accordingly to Mrs. Scott, the Defendant "*did not speak the Queen's English*". Mrs. Scott took the Defendant's words and put them into Standard English. Mrs. Scott made it clear that the language in the witness statement was hers, but the contents were the Defendant's. Mrs. Scott was adamant that the witness statement contained the Defendant's instructions.

39. Mrs. Scott's evidence as to preparation of the witness statement was as follow:

A: *This statement was recorded after several hours of interview stretching over several days. Mrs. Benny is not literate. It is a pains-taking process to get information from her. When she came to me she brought a stack of papers; I went through them with her. She had her daughter with her. We went through the documents and identified the appropriate documents. She then told me her story.*

40. Mrs. Scott was cross-examined as to the Defendant's repeated disavowal of the evidence in her witness statement. Her response was:

A: *Mr. Benjamin, Mrs. Benny regards you as her enemy and she regards your client as her enemy. She is a simple soul and therefore anything you were telling her she would say no to you because she has no trust in you. If you*

had put to her that the sky was blue, I rather suspect she would have said no.

Q. Are you saying that she would deny the things in the statement because I was the one making the statement.

A. Yes and she is hard of hearing.

41. Attorney for the Claimant cross-examined Mrs. Scott as to the details contained in the Defendant's witness statement. Mrs. Scott's evidence was generally as stated above. She took what was said by the Defendant in her own words and put them into Standard English. As to paragraph 22 of the witness statement, Mrs. Scott testified that she was particularly careful. She said that paragraph 22 contained as near as possible the actual words the Defendant used. When cross-examined as to who told her (Mrs. Scott) the name "Etienne", Mrs. Scott replied:

A: I said to her that it had a man in the room called Mr. Etienne who said he witnessed the document. She said, "I think dat is de man who was dere". I said "Mr. Etienne talk to you?" "and she said "he never said nutting". When we put together that there was a man who signed the paper that the name on the paper was Mr. Etienne then the man had to be Mr. Etienne.

42. As to paragraphs 38 and 39 of the Defendant's witness statement, Mrs. Scott's evidence in cross-examination was (inter alia):

A: As to her evidence that she did not get independent legal advice, I said to her "Mrs. Benny you did not talk to no other lawyer before you signed that paper, eh? Any lawyer talk to you about that paper, tell you what it was, what it mean? You pay any lawyer?" Her answer would have been no to all 3 questions. Then I said to her "You did not have any independent legal advice".

A: *I told her “Mrs. Benny, do you know what this paper means. This paper means that you sell Rasheed your land for \$800,000.00. You wanted to do that?” She said “No, I thought I was getting back my house and land”. I said to her “That is not what it was Mrs. Benny.”*

43. As to how Mrs. Scott finalized the Defendant’s witness statement, her evidence was that after each paragraph and sometimes after each line, she stopped and checked that the Defendant understood. According to Mrs. Scott, *“it was a joke in the office because it was done in the conference room and everybody could hear”*.

The Evidence of Shamalar Selal

44. Shamalar Selal also called Vashti (“Vashti”) was the grand-daughter of the Defendant. It is undisputed that Vashti was present when the Defendant’s thumb print was placed on the Memorandum of Transfer. In fact, Vashti signed as a witness to the Memorandum of Transfer. The Claimant both in his Reply and Defence to Counterclaim and in his witness statement described Vashti as literate and as a public servant who worked at the Ministry of Agriculture.

45. Vashti’s witness statement described the relationship which developed between her grandmother, the Defendant, her parents and the Claimant since 2004. She described how in 2005, after her third child was born, she heard the Defendant tell the Claimant about how Preetam was treating her badly and ask the Claimant for help to fight for her land. According to Vashti’s witness statement, the Claimant promised to help the Defendant “to get back her land”.

46. Vashti’s evidence as to the events which took place when the Memorandum of Transfer was executed was as follows [paragraphs 12-16 of her witness statement]:

12. *On February 22, 2006 Mr. Mohammed told me that the lawyer’s name was Mervyn Campbell and he gave me his address.*

13. *When I arrived at Mr. Campbell's office I saw my mother, my grandmother and Mr. Mohammed sitting on the outside of Mr. Campbell's office where his secretary was.*
14. *The secretary sent us in when Mr. Campbell was ready to see us. All the papers were set out on the lawyer's desk. Mr. Campbell spoke to my grandmother in my presence and told her she had to sign. I did not understand all that he was saying but I understood some of it.*
15. *He told my grandmother in my presence that she was going to sign a deed for her land. I heard my grandmother say yes. Then the lawyer, Mr. Campbell brought this ink thing and put my grandmother's thumb into it and put her thumb onto the paper. Another lawyer was present there and he signed as a witness. I do not know the name of that lawyer. Then one of Mr. Campbell's secretaries was going to sign as another witness but Rasheed said no her grand daughter is here let her sign.*
16. *Mr. Rasheed's lawyer, Campbell told me that I was going to sign as a witness of the deed. I then signed the paper.*

47. The cross-examination of Vashti proved that she was indeed a simple witness. According to her, she passed Common Entrance and entered Sangre Grande Junior Secondary. Although she passed the examinations to enter the senior secondary school, she did not enter the school, but left school after Form 3 at age 14 to get married. In 2005, she was a housewife with three children. In 2006, she began working with the Forestry Division in Sangre Grande as a nursery worker. In the Court's view, although Vashti was able to read and write, she had what could only be described as the most basic education. In other words, she could not be described as well educated or as the educated adviser that the Claimant has contended.

48. Vashti was cross-examined as to the events which took place when the Memorandum of Transfer was executed. Her evidence was as follows:

A: *I went in Mr. Campbell's office, the private office inside. My grandmother was there. Mr. Campbell was there. Mr. Rasheed was there and it had a next man. I don't know his name. He was there. It had a woman. I don't know her name. She was there. My mother was not there, inside the office. She was outside. When I went in, it had a paper like a deed or something. The paper was on his desk. I did not see him with the paper. I saw one paper in front of him. Then he called my grandmother and said she had to put her thumb print. When she put her thumb print Mr. Campbell signed. The next fella signed.*

They had a girl there. She was going to sign. Then Mr. Rasheed said "No, the grand-daughter there, let she sign".

Mr. Campbell said nothing. I asked to read the paper I asked Mr. Rasheed and Mr. Campbell to allow me to read the paper. Mr. Rasheed said "No". I cannot recall if Mr. Campbell said anything.

I cannot recall what happened next. I did sign the paper as a witness.

Q: *You asked to read the paper and Rasheed said no. They did not allow you to read paper.*

A: *I signed as a witness to the deed, but I did not know anything in the deed. I did not read it myself. Nobody read it over to me.*

Q: *Did you ask your grandmother if she know what was in the Deed.*

A: *She said deed is for her. I asked her.*

Q: When did you ask her.

A: When we came out of Mr. Campbell's office.

Q: Are you in the habit of signing things without knowing what is in it.

A: No.

Q: Nobody force you to sign on that day.

A: Rasheed tell me that I have to sign. He told me that they will kidnap my son. He used to call me on my phone and threaten me. I report it to Matura and Sangre Grande Police.

Q: These telephone calls and threats were before signing of the deed.

A: Yes.

Q: Why did you not tell Mr. Campbell this the day you went there.

A: I could not.

49. Although there was further cross-examination on the threats to kidnap Vashti's son, Attorneys for the parties have left this issue well alone. Although there were brief references to coercion, pressure and threats in the Defendant's Defence and Counterclaim, the Defendant has never alleged that she placed her thumb print on the Memorandum of Transfer because of any specific threats by the Claimant to kidnap Vashti's son. She did however allege that the Claimant came with a member of the Muslimeen when he came to pay the balance. In all the circumstances of this case, the Court understands Vashti's evidence to reflect how the relationship broke down

between the Defendant (and her family) and the Claimant. The Court will not consider this issue further. The Court finds as a whole that Vashti was a credible and straightforward witness and accepts her evidence.

The Evidence of Thakurdial Benny

50. In his witness statement, Thakurdial Benny (“Thakurdial”) 51 years of age and the son of the Defendant, said that he was in occupation of 2 lots of the said lands for the past 29 years. According to him, he lived there with his wife and 5 children. He had approved plans for the portion that he occupied [Lot 3]. The approved plan of Ganesdath Ramcharitar, Land Surveyor, dated the 21st November, 1997 and the Application for Permission to develop land dated 18th October, 1996 were annexed to his witness statement. According to Thakurdial, the wife and children of his brother, Balkaran Benny, (who died some 2 to 3 years before his father, Beni), lived on Lot 1. Lot 4 was occupied by his sister Rajcumarie and her two sons. According to him, their parents always encouraged them to live on the said lands which were marked out and given to them. The Defendant and Beni helped the children build houses on the said lands and always promised that they would give them the plots they occupied by Deed.

51. Thakurdial was cross-examined. According to him, he did not know the Claimant and did not know of any arrangement between the Claimant and the Defendant. The Court notes that Thakurdial’s evidence lends support to the Defendant’s allegation that she had children who had built homes and were living on the said lands in reliance on the promise of the Defendant and Beni that the respective plots would be transferred to them. Thakurdial’s evidence was otherwise unhelpful as far as the central issue was concerned.

The Evidence of Hemraj Benny

52. In his witness statement, Hemraj Benny (“Hemraj”) aged 58 years of age and the son of the Defendant, said that when he was 15 years old, his parents gave him 2 lots of the

said lands to occupy and on which he could build his house. According to him, with his parents' encouragement, he built a concrete house.

53. Hemraj said that although the said lands were rice lands, he only remembered the said lands flooding once. Since then they had filled up the said lands and by 2003 they had completed filling up the said lands.

54. According to Hemraj's witness statement, he first met the Claimant several years ago and next met him about 14 years later in 2003 when Hemraj moved from Charlieville (where the said lands are located) and was staying with his brother in law and sister. According to him, he met the Claimant through a man named Mr. Bannister. Hemraj had asked Mr. Bannister to arrange for him to meet the Claimant. Hemraj took the Claimant to meet the Defendant. According to him, on another occasion, the Defendant talked to the Claimant about her problems with Preetam.

55. Hemraj was offered a job at a guest house owned by the Claimant and worked there for one year. According to him, he was never paid any money although the Claimant had offered to pay him \$150.00 per day. He said that during the time he worked for the Claimant, the Claimant developed a relationship with the Defendant, his sister Mohanie and his brother-in-law Dookie.

56. In cross-examination, Hemraj said that Mr. Campbell made him sign certain papers. According to him, Mr. Campbell made him sign some papers when he visited Mr. Campbell's office for the first time. According to him, Mr. Campbell told him that the papers concerned the piece of land that the Defendant owned on the Uriah Butler Highway. The Court notes that there was never any allegation advanced on behalf of the Defendant or made by Hemraj before he went into the witness box that Mr. Campbell forced him to sign any papers. There was also no allegation made on behalf of the Defendant that Hemraj was present when she signed any papers in Mr. Campbell's office. His evidence that the Defendant put her thumb print after he signed certain papers must be disbelieved. In fact, Hemraj's evidence in cross-examination contradicted his witness statement and he even

contradicted his evidence in cross-examination. The Court formed the impression that Hemraj's memory was poor and that he really did not know what he was saying. Little reliance can be placed on his evidence.

57. The Court will examine the evidence advanced on behalf of the Claimant next and will consider thereafter the evidence of the valuers.

The Evidence of the Claimant

58. According to the Claimant's witness statement, he was first introduced to the Defendant's family at his home in 2005 when they complained that her son Preetam was abusing her and that they had not been allowed to see her. According to him, he accompanied Vashti and her mother Mohanie Maharaj to the Chaguanas Police Station, and together with two (2) police officers, they went to Preetam's home where they assisted the Defendant to leave. They all returned to the Claimant's house where, according to him, the Defendant related to him her experiences at the hands of Preetam. She told him that the said lands belonged to Beni and that Preetam wanted to kill her. She told him that Preetam had said Beni had made a will leaving the said lands to her and Preetam but that Preetam wanted the said lands for himself.

59. At paragraphs 6 - 9 of the Claimant's witness statement he said:

6. *In the presence of Vashti, Mohanie Maharaj, Hemraj Benny and one Lincoln Charles the Defendant told me she had no money to take Preetam to court to fight for the property but if I put out the money to pay a lawyer and also pay for her food, doctor visits and transport that she would sell me her portion of the property if she won it back for the sum of \$800,000.00.*
7. *She also said that she wanted to help her son Hemraj Benny and that I should give him money every week but only up to \$80,000.00 as that would be his share of the money she was getting for the property.*

8. *The property is rice land. I know the area to be prone to flooding and that a lot of money would have to be spent to fill it. But I also thought that the Defendant had a very good chance of winning back the property in court and perhaps the investment would be a good one in the end.*
9. *I agreed to buy the property from the Defendant if she got through in Court for the price of \$800,000.00 on the understanding that I would pay Hemraj Benny a weekly sum, that I would pay all lawyer costs and cost of food, doctor visits and transport for the Defendant. I also understood that if the Defendant didn't get the property that I would lose all monies which I expended.*

60. According to the Claimant's witness statement, he therefore took the Defendant to his lawyer, Mr. Campbell. Vashti, Mohanie and Hemraj accompanied the Defendant on their first visit to Mr. Campbell's office in Port of Spain. Mr. Campbell filed H.C.A. 1174 of 2005 against Preetam. According to the Claimant, he was responsible for all Mr. Campbell's fees. He also paid for all doctors' visits for the Defendant and provided food and/or grocery items and transport to various places and paid Hemraj a weekly sum.

61. As to the High Court Action filed by Mr. Campbell, according to the Claimant, after many court appearances before several judges, on the 26th September, 2005, Mr. Campbell got an order in favour of the Defendant that the Registrar of the Supreme Court do execute a deed of assent whereby the said lands were registered in the name of the Defendant and Preetam in equal shares. The Registrar executed the deed of assent in January, 2006. According to the Claimant, the deed of assent did not say which portion of the said lands belonged to the Defendant and as such the portion, which the Defendant pointed out to him as being her portion, would have to be cut out from the said lands. The Claimant said that he understood then that there would have to be another court matter to partition the said lands.

62. The Claimant further said that for stamp duty purposes and for his own curiosity, he commissioned a valuation of the said lands by Cecil Alcantara, which was completed on the 25th January, 2006, fixing a value of \$500,000.00.

63. The Court will set out in full the Claimant's evidence as to the execution of the Memorandum of Transfer contained at paragraphs 19-25 of his witness statement:

19. *I explained to the Defendant that there would have to be more court matters to get her portion identified but that I was not prepared to put out any more money until she signed the Deed. I also told her that I would pay her half of the agreed price of \$800,000.00 when she signed the Deed and the other half I would pay when the other court matter got on the way. The defendant agreed to this arrangement.*

20. *On the 22nd day of February 2006 I attended Mr. Campbell's office together with the Defendant, her daughter Mohanie Maharaj and Vashti in order for the Defendant to sign the deed for the property to me.*

21. *We all went into Mr. Campbell's office, he told me that although he appeared for the Defendant in the Court matter he could not represent both of us in the deed transaction.*

22. *As such Mr. Campbell recommended that another lawyer in his chambers could act for the Defendant and the Defendant and her family appeared to understand and agree. It was then that Mr. Etienne, Attorney at Law was introduced to us and Mr. Etienne then spoke with the Defendant in the presence of all of us, he read the Deed out loud and asked the Defendant if she had any questions. The Defendant replied "No" and asked where she had to put her print. The Defendant then placed her thumb print on the Deed and her grand daughter, Vashti signed as a witness. Even if the Defendant and her daughter could not read or write I am certain that Vashti*

who works at the Ministry of Agriculture is literate and further the deed was read out loud for everyone to hear, and definitely there is nothing wrong with the Defendant's hearing.

23. *After attending Mr. Campbell's office I went with the Defendant to Scotiabank, San Juan where I gave the Defendant a cheque for \$400,000.00 in the presence of the Bank Manager.*

24. *The Defendant at all times knew that she agreed to sell me the property at the price of \$800,000.00, she also understood clearly that although she had won back the property, her portion was not identified and as such more court was necessary. The Defendant wanted very much to get the money for the property and agreed to accept half of the \$800,000.00 on signing the Deed and the next half when the next court matter to partition the property was in court.*

25. *At no time did I agree to buy the property from the Defendant for \$4 Million. In my opinion the property was not worth much more than I agreed to pay as it is rice land with small frontage area.*

64. The Court has examined closely the Claimant's evidence in cross-examination. The Court wishes to say at once that the Claimant was an untruthful, difficult and unhelpful witness. In cross-examination, he contradicted his witness statement. The impression left with the Court was that the Claimant *changed his story* whenever it suited his cause. Although the Court will examine in detail only certain portions of the Claimant's evidence, the Court finds that the Claimant's evidence as a whole is not believable.

The Claimant's plans to purchase the Defendant's share of the said lands

65. The Court wishes firstly to examine the steps which the Claimant took in planning the purchase of the Defendant's share of the said lands. In the Court's view, the evidence

suggests that long before the Claimant went to rescue the Defendant's from Preetam's ill-treatment, he had decided that the purchase of the said lands was a good investment. In fact, according to the Claimant's evidence in cross-examination, the very first time that the Claimant took the Defendant and her family to see Mr. Campbell, he told Mr. Campbell that he would pay all the bills for the lawyers, all transport, *to file the case from low court to high court and all appeals*, and all other expenses, and that the Defendant had agreed to sell him her share of the said lands for the price of \$800,000.00. The Court notes that Mr. Campbell has never denied this in his evidence.

66. Although the Claimant in his witness statement had stated that it was in or around July 2005 that he first met the Defendant's family and then the Defendant herself, the Court notes that the Nasser Abdool plan is dated the 7th December, 2004. According to the Claimant, he had retained Nasser Abdool, Land Surveyor, to survey the said lands to determine which portion belonged to the Defendant. Although the Claimant gave to the Court a long and convoluted story as to how he came to instruct Mr. Nasser Abdool to survey the said lands in November 2004, in the Court's view, the Claimant has not properly explained how he became involved in the survey of the said lands in November 2004. Even if the Claimant was mistaken, and it was not July 2005, but sometime earlier in 2005, that he had first met the Defendant and her family, which is more likely having regard to the fact that Mr. Campbell began the proceedings against Preetam on the 12th May, 2005, his evidence was that it was shortly after he met the Defendant that Mr. Campbell filed the case.

67. The Court wishes to say that although the Claimant's evidence was that the first time he saw the said lands was when he visited the said lands with the Defendant's family to assist the Defendant to leave, when confronted with the 2004 Nasser Abdool plan, the Defendant's evidence was as follows:

Q: What were you doing instructing Mr. Nasser Abdool in November 2004 to do a survey plan of this piece of property.

A: *When I went there before survey of the Benny family - to see if I could find the old lady - because they could not go; the old lady was upstairs living in a terrible position with the son. So I went there and I met the son, Preetam, the wicked son who wants to rob her everything. I did not tell him that I was sent by the Benny family. So then I went back next day not next day, a couple of days after that, when he went to work. I discussed it with my surveyors. I waited till he went to work and I tell the surveyors that I would like the surveyors - I told them Mr. Benny is not there. So I or nobody is allowed to visit the old lady upstairs. So I tell them to sneak on the land, of her piece of land and to survey it as quickly as possible so Preetam will not throw you out. It was two to three days that I did it. It was a quick job to make sure that we do not get throw out. I told them exactly when he left for work and exactly when he come back. I just gave them instructions and they did it. Nobody could have gone after that.*

68. In addition to the Nasser Abdool plan, there was shown to the Claimant in cross-examination the Application for permission to develop land made to the Town and Country Planning Division and dated the 8th December, 2004, in the name of the Claimant and in which he was described as a Tenant. Despite the fact that the application was signed by Nasser Abdool, the Claimant initially said he could not remember making the application. He then explained that businessmen like him would sometimes see a property and to make sure that it could be developed commercially or residentially, they would send an application to the Town and Country Planning Division to make sure that they would be given permission.

69. When shown the Notice of Grant of Permission to develop land dated that 8th March, 2005, giving him outline approval to develop five (5) parcels of land, the Claimant then said that he could remember.

70. In addition, on the first day of the Claimant's cross-examination, the Claimant testified that the Benny family asked Mr. Campbell to give him a Power of Attorney so that

he could go onto the said lands to make sure that no one built on the said lands. According to the Claimant, this was done because he would not have purchased the said lands if there were buildings thereon. According to the Claimant, there was a small building to be broken.

71. The Court notes that the Defendant executed a Power of Attorney dated the 11th May, 2005 and stamped and registered on the 12th May, 2005 (“R.M.A.1”) in favour of the Claimant. The Power of Attorney was prepared by Mr. Campbell and the thumb print of the Defendant was affixed thereto. The Power of Attorney was a general power of attorney which gave the Claimant general power to do just about anything on behalf of the Defendant. It is interesting to note that despite the Power of Attorney the Defendant affixed her thumb print to the documents required for the court proceedings against Preetam. The Court notes that the Power of Attorney had not been disclosed in the List of Documents filed by the Claimant in accordance with Form 8 of the Civil Proceedings Rules, 1998.

72. The Court will set out in full the Claimant’s explanation as to why the Power of Attorney was prepared in his favour:

The effect of the Power of Attorney, I ask him Mr. Campbell – I have to fight all cases. I also have to check the land to make sure nobody building anything because I already have a building to break. My duty is to inspect the land. I have to take them. I have to take workers along with me, take police; I have to take clothes. I had to take a bailiff for breaking of property. The lady was on pension and the son was destroying her slips when they came. She had no money and I had to bear all the expenses.

73. At paragraph 2 of the Claimant’s witness statement he stated that he first met the Defendant’s family at his home and was then told by them that she was being abused by

Preetam. In cross-examination, however, a different, convoluted story was told. I will set out that part of the cross-examination in full:

Q: What did you understand about the property from what the Dookie family told you.

A: Where the old lady was staying with her son half the property belongs to the son and half belong to the old lady. Any decision, anything about the property, old lady has to be there with them. The son Preetam wants to rob everybody.

Q: What decision to be made were you talking about.

A: I said that I had a discussion with them and the old lady.

Q: You said you had a discussion with them, any decision to be made the old lady had to be there. What decision.

A: They said, the old lady property, and she would like to sell she piece of the property for me. The decision was to sell the property if I would do the case because she had no money.

Q: What case.

A: The case concerning her son who wanted to rob. But I would have to pay all the bills from lower court to Supreme Court. But I would have to pay all the bills and I agreed.

Q: This was your discussion with the Dookie family.

A: No with the old lady and the Dookie family.

Q: This was before you actually met Mrs. Benny.

A: No; all I discussed with Dookie family is that the old lady had a piece of land in Charlieville and the brother wants to rob the old lady the whole property and they said that they discussed with the old lady that she would sell me the property. But I have to take the full responsibility of the lawyer – from lower court to Supreme Court and all appeals and she would sell it to me. No discussion of price was done then, because the old lady was not there.

74. In addition, in preparation for the purchase of the Defendant's one half share in the said lands, the home of Hemraj had to be broken down. According to the Claimant's witness statement, the Defendant together with Hemraj, a bailiff and the Claimant went to the said lands and demolished the shack which belonged to Hemraj. The Claimant further stated that the Defendant instructed that he should give Hemraj money every week but only up to \$80,000.00 as that would be Hemraj's share of the money the Defendant was getting for the said lands.

75. In cross-examination, a different version emerged. According to the Claimant, the Defendant had requested him to look for a small property valued at about \$200,000.00-\$250,000.00 for Hemraj. According to him, the Defendant would pay for this property when she collected the money from the sale of the said lands.

The Claimant's efforts to distance Mr. Campbell from any responsibility for the Memorandum of Transfer

76. Throughout his cross-examination, the Claimant sought to establish that the Defendant and her family had hired Mr. Etienne to prepare the Memorandum of Transfer and that the arrangements that were made for the finalizing of the Memorandum of Transfer were their responsibility together with Mr. Etienne.

77. In answer to the simple question whether Mr. Campbell made the deed for him, the Claimant said that Mr. Campbell did nothing for him. According to the Claimant, Mr. Etienne was working for them, namely, the Defendant and her family. Despite the Claimant's evidence in his witness statement and despite the fact that the Memorandum of Transfer on its face showed that it was prepared by Mr. Campbell, the Court notes that the Claimant was at pains to place the responsibility for the preparation of the Memorandum of Transfer on Mr. Etienne.

78. In fact, the Claimant testified, when asked about the arrangements made prior to the visit to Mr. Campbell's office for the execution of the Memorandum of Transfer, that Mr. Campbell had said to him that Mr. Etienne was handling that; that Mr. Etienne was working for them concerning the deed.

79. The Court wishes to note that the Claimant was a witness who changed his evidence several times. In answer to the question whether, when the deed was being made, Mr. Campbell was not acting for him at all in its preparation, the Defendant said:

*"He was acting for them. I mean Mr. Etienne was acting for them.
Mr. Campbell was not acting for me".*

The Claimant even went on to deny that he had given Mr. Campbell instructions to prepare any deed from the Defendant to himself.

The Claimant's efforts to make the Defendant and her family appear to be the decision-makers

80. Throughout his cross-examination, the Claimant took every opportunity to give the impression that the Defendant and her family were the ones making the decisions and giving the instructions. Although the Claimant conceded that the Defendant was sickly and could not read or write, his response was that she was *"very intelligent"*. *"She is smart;*

she knows everything. She is very intelligent. She understands everything. Anything you tell her she understands.”

81. In addition, as to the Power of Attorney mentioned earlier, the Claimant’s evidence was that the Benny family and the Defendant came to a decision that he had to have a legal document in his hand to go to make sure everything was alright.

82. Further, when asked by Senior Counsel for the Defendant to identify where he had signed the Power of Attorney as he had testified, the Claimant said:

“The lady signed. I did not sign. She was the boss. I did not sign. She gave the authority”.

83. Further, the Claimant’s evidence was that they had discussions with the Defendant and her family, and the Defendant and her family decided to *“proceed with the deed making to proceed with his business”*. At one point in his cross-examination, the Claimant went so far as to say that he took instructions from the Defendant.

84. In addition, the Claimant attempted to show that Vashti was an educated adviser to the Defendant. According to him, Mr. Etienne passed the deed to Vashti who could read and write and she read the deed over to everybody again. He even went on to say that not only was Vashti reading the Deed, but while reading, she was explaining the deed to her family. Of course, the Claimant could not remember what explanations were given by Vashti.

The Evidence of Messrs. Campbell and Etienne, Attorneys-at-Law

85. It was not in dispute that as at the year 2005, Mr. Campbell had been the Claimant’s Attorney for sometime and that Mr. Campbell had provided services for the Claimant many times. In fact, the Claimant’s evidence was that he had many, many Attorneys and used their services many times. Mr. Campbell’s evidence was that from 1991 to 1992 he came

to know the Claimant as a client. Further, it was not in dispute that Mr. Campbell and Mr. Etienne had law offices located in the same building in Port of Spain.

86. The Court has examined Mr. Campbell's evidence in cross-examination. In the Court's view, Mr. Campbell's only interest was in ensuring that one half share of the said lands was vested in the Defendant so that the Claimant could purchase it. During his cross-examination, he was asked:

Q. Did you advise Mrs. Benny that if she removed the caveat, she would not be pursuing the claim for the entirety of the property.

A. I would not have advised her because her instructions were that she was entitled to half share.

Q: You did not consider that you should have advised Mrs. Benny that she should reconsider position.

A: I had a position before me where the lady said she wanted her half and she was insistent.

87. Mr. Campbell's cross-examination revealed that as far as other matters were concerned, that is to say, the Town and Country Planning application which had been made for the said lands to be divided into five parcels [for the use of the Defendant's children], the several plans which had been drawn, the matters disclosed in the affidavit sworn by Preetam in the High Court proceedings, and the caveat which the Defendant had filed, Mr. Campbell's view was that he could simply follow the Defendant's instructions and had no duty to advise her on these matters.

88. The Court was left with a sense of unease as to Mr. Campbell's evidence. I will set out some of his evidence in cross-examination:

Q: When you had to prepare the Memorandum of Transfer what were your instructions.

A: Mrs. Benny wanted to transfer it to Mr. Mohammed. I would prepare it.

Q: In preparation, who did you consider you were acting for.

A: I was acting for the purchaser.

Q: Did you have a meeting with the purchaser and the vendor.

A: Yes.

Q: Was there any written agreement before the sale.

A: No.

Q: Did you at that time advise Mrs. Benny that she should have separate legal advice.

A: Yes.

Q: How long before the Memorandum of Transfer was executed of did you advise Mrs. Benny that she should have separate legal advice.

A: I do not recall.

Q: How long before the Deed was prepared, did you know that you had to prepare this deed.

A: It could not be long - days or weeks.

Q: You prepared a Memorandum of Transfer to transfer half share in the Deed of Assent from Mrs. Benny to Rasheed.

A: Yes.

Q: There was consideration.

A: Yes. \$800,000.00 was to be paid.

Q: Did you enquire how \$800,000.00 was to be paid.

A: No.

Q: You were not concerned.

A: No.

89. Later on in cross-examination, however, Mr. Campbell indicated that he would most likely have informed the Defendant that he could not act for her and that she needed independent legal advice for the first time when she attended his office for the purpose of executing the Memorandum of Transfer.

90. Although he was the preparer of the Memorandum of Transfer, for some unexplained reason, Mr. Campbell said that he had told his secretary that he did not want her “involved in this as a witness”. In addition, although, Mr. Campbell recognized that he was the Claimant’s Attorney, he did not consider it necessary as the legal representative of the Claimant, who was the purchaser, to be present throughout the transaction. According to Mr. Campbell, he felt his presence in the room would have compromised the situation and that is why he did not want his secretary to be involved.

91. In addition, the Court notes that Mr. Campbell has not been able to explain properly to the Court, in the light of the receipt clause in the Memorandum of Transfer, why he did

not think it absolutely necessary for the Claimant to hand over the sum of \$800,000.00 at the time the Memorandum of Transfer was executed.

92. According to Mr. Etienne's evidence in cross-examination, the first time that Mr. Campbell spoke to him about the transaction (concerning the Defendant's execution of the Memorandum of Transfer) was ten to fifteen minutes before the Claimant and the Defendant and her family arrived at Mr. Campbell's office. Although Mr. Etienne knew that High Court proceedings had been filed in which the Claimant was providing the funding on behalf of the Defendant, he did not know the nature of the High Court action; he did not know the details and he did not see any of the papers or documents relating to the High Court proceedings.

93. As to the transaction in which Mr. Etienne was to give the Defendant independent legal advice, according to Mr. Etienne, he was told by Mr. Campbell that the Defendant had been successful in the High Court action and thereafter had entered into an agreement to sell part of the said lands to the Claimant. According to Mr. Etienne, he gathered that it was an act of gratitude on the part of the Defendant. According to Mr. Etienne, Mr. Campbell simply asked him to take execution of the deed by the Defendant. Mr. Campbell had explained to him why he could not do so, since he had acted in that High Court action out of which this transaction arose and he [Mr. Campbell] felt that the Defendant in turn should get independent legal advice.

94. In the same vein as the Claimant, Mr. Etienne referred to Vashti as the Defendant's adviser. According to him, when he was explaining to the Defendant that he was now acting on her behalf, he was speaking to two people at the same time – to the Defendant and to another lady whom he assumed was "*her adviser*". Further, his evidence was that he handed the document over to this lady "*who appeared to be conversant*".

95. When asked by Mrs. Maharaj, Senior Counsel for the Defendant, to do with the deed exactly what he did on that day, and to read it exactly as he did then, Mr. Etienne read the Memorandum of Transfer verbatim; he did not stop to give any explanations. In fact,

Mr. Etienne made it clear that he only asked the Defendant two questions: (i) “*Do you understand what is going on?*” and (ii) “*Do you understand what I have read?*” Indeed, Mr. Etienne’s evidence was that he thought it was a simple transaction between Mr. Campbell’s regular client and “*a third or second party*”. He thought that it was simply the execution of a deed for Mr. Campbell.

96. Subsequent to that evidence, however, Mr. Etienne testified that while reading the Memorandum of Transfer, he paused after a few sentences and explained and asked the Defendant and her family whether they understood.

97. The Court notes that no documents or relevant material were passed on to Mr. Etienne. Mr. Etienne never enquired of the Defendant a number of things, including whether there was an agreement in writing for the sale of the said lands, how the purchase price was arrived at, what was the value of the land, whether there was a valuation that could be relied on. Although Mr. Etienne said that he asked the Defendant whether she had received the sum of \$800,000.00 representing the purchase price and according to him, her answer was “*obviously yes*”, the Court does not accept his evidence. In the Court’s view, this evidence is made up to explain an untenable position. The Court must also express its concern that no explanation has been given to the Court as to how the Memorandum of Transfer was registered on the 8th March, 2006, without the full consideration of \$800,000.00 having been paid to the Defendant. This is indeed a serious matter.

The Evidence of the Valuers

98. The Court has considered the valuation report of Mr. Mervyn C. Thompson dated the 14th April, 2007 and the valuation report of Royce Realty Limited signed by Mr. Roy Gumansingh and dated the 5th September, 2007. In Mr. Thompson’s opinion, the value of the unencumbered freehold interest in the said lands was \$1,800,000.00. On the other hand, in Mr. Gumansingh’s opinion, the current market value of the said lands (land only) as a vacant site was \$7,000,000.00.

99. The Court has considered the respective valuation reports and the cross-examination of the two (2) valuers. Having regard to the matters referred to below, the Court prefers the evidence of Mr. Gumansingh. As to the valuation of Mr. Cecil Alcantara (annexed as R.M.2 to the Claimant's Statement of Case) which placed a value of \$500,000.00 on the said lands, the Court notes that Mr. Alcantara has given no evidence at the trial of this matter. Accordingly, no reliance can be placed on his valuation.

100. Mr. Thompson has stated in his report that he was instructed to prepare a valuation report for the said lands and that his instructions came from Mr. Campbell and Mrs. Scott. According to his report, the subject property was inspected on the 8th March, 2007 for the purpose of preparing the report. In cross-examination, it was suggested to Mr. Thompson that the Court made an order for a valuation on the 23rd March, 2007 and that he actually received instructions from Mr. Campbell before the Court made that order. The Court has carefully checked the Court's records and notes that there was no court hearing on the 23rd March, 2007. There was a case management conference on the 23rd February, 2007 and the issue of a valuation was discussed. The Court requested that Attorneys consider whether they could agree to have the said lands valued, but no order as to any valuation was made by the Court on the 23rd February, 2007, the 23rd March, 2007, or at any other time.

101. It was further put to Mr. Thompson that it was not until the 3rd April, 2007, that Mrs. Scott wrote to Mr. Campbell requesting that Mr. Campbell sign a joint letter to him to do a valuation and that Mr. Campbell did not return the letter signed by him until the 4th May, 2007. Although Mr. Thompson has indicated that the date of the 8th March, 2007 for inspection of the property may have been a typist's error, the report itself is dated the 14th April, 2010 certainly before the joint instruction letter of Mr. Campbell and Mrs. Scott to Mr. Thompson.

102. Further, Mr. Thompson admitted to having spoken to Mr. Campbell with respect to the valuation in April, 2007, and to having received a letter from Mr. Campbell sometime in April, 2007. The Court wishes to say that these matters do not sit well with the Court especially in the light of the fact that there was no contradiction on the Claimant's part that

the joint letter of instructions was not signed off by Mr. Campbell until the 4th May, 2007. In the Court's view, in these circumstances, it could not be argued that the Defendant was bound to accept Mr. Thompson's valuation.

103. In addition, Mr. Thompson's approach cannot be accepted. He carried out the valuation without any documents. He never knew that there had been Town and Country Planning permission to develop the said lands into several housing plots between the years 1997 to 1998. He did not even have a proper identification of the said lands, just an address and directions.

104. As to question of comparables, Mr. Thompson's approach was that he used a six month period. According to him, he would probably have looked at sales at the top of Charlieville which took place a little earlier than the six month period. Further, he said, there was another sale about two plots north of that parcel and which took place probably before or within a year. According to him, he would have looked at industrial lands in Aranguez and El Socorro. The Court notes that these are not in the same locality.

105. The Court does not accept Mr. Thompson's approach to the question of comparables. According to him, courts have been known to disregard comparables unless the valuer had intimate knowledge of the transactions. He admitted that rather than risk bringing the comparables to have them thrown out, he did not walk with them but left them on his computer. This is clearly unacceptable since the Court is given no assistance as to what comparables were used by Mr. Thompson.

106. On the other hand, Mr. Gumansingh's approach was clear. He explained fully in his report inter alia the use of the said lands, the demands for same, the valuation basis, and valuation methods. According to the report, the said lands were located on the eastern side of the Uriah Butler Highway and on the eastern side of the Warrenville overhead pedestrian highway cross-over. The said lands were located between two business places, Rex Kar and RBJ Engineering Limited. It was within walking distance of the Warren Road Junction. The land-use along that section of the Uriah Butler Highway was mixed

commercial with few remaining residential users. In addition, his assumptions and limitations were clearly set out in his report.

107. In addition, Mr. Gumansingh's evidence on the comparables used was as follows:

"I looked in the vicinity of the Price Smart area and the Endeavour overpass at properties there. That is a developed area and they are being sold for \$350.00 per square foot.

I also looked at what lands are selling for in Orchard Gardens area in the Moolchan Seuchan Main Road – \$250.00 per square foot.

I also looked at residential land along Sumarie Trace obliquely opposite to this property and Hillview Gardens on Warren Road, lands – approximately \$75.00 per square foot.

I also looked at a ten acre parcel of swamp lands at Sumarie Trace Extension sold at \$25.00 per square foot.

I also looked at five acre plot of land near to the Freeport Exit which was being sold at \$50.00 per square foot. One of my clients had ten acres of swamp land at the Bird Sanctuary Exit and he was offered \$50.00 per square foot.

After looking at all these properties, I formed the opinion that the subject property was worth at least \$40.00 per square foot as it is in an undeveloped state, vacant land without planning permission as it is. On the assumption that there was planning permission for commercial, it would have been twice that value."

108. Having considered the evidence of the valuers, the Court accepts that the market value of the said lands as at the 5th September, 2007, was \$7,000,000.00.

The Court's treatment of the Defendant's Evidence

109. Part 29.5 (1) of the Civil Proceedings Rules, 1998 ("the C.P.R.") 1998 provides as follows:

- (1) *A witness statement must -*
 - (a) *give the name, address and occupation of the witness;*
 - (b) *be dated;*
 - (c) *be signed by the intended witness;*
 - (d) *so far as reasonably practicable, be in the intended witness's own words;*
 - (e) *sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the document;*
 - (f) *not include any matters of information or belief which are not admissible and, where admissible, must state the source of such information or belief of any matters of information or belief; and*
 - (g) *include a statement by the intended witness that he believes the statements of fact in it to be true.*

110. Part 29.9 (1) of the C.P.R. provides as follows:

- (1) *Except where rule 29.11 applies, if –*
 - (a) *a party has served a witness statement; and*
 - (b) *he wishes to rely on the evidence of the witness*

*who made the statement,
he must call the witness to give evidence unless the court orders
otherwise.*

111. In these proceedings, the Defendant had filed her witness statement and attended Court for cross-examination pursuant to the orders of the Court but could not identify her witness statement and in fact said that she did not know what was on “the paper” that Mrs. Scott prepared and on which she had placed her thumb print.

112. The circumstances of this case are truly exceptional. The unreported cases of **Clem Lewis vs Trinidad and Tobago Electricity Commission** HCA Cv. S587 of 1994 and **Ian Seunarine v Doc’s Engineering Works (1992) Limited** HCA No. 2387 of 2000 cited to the Court were matters tried under the Rules of the Supreme Court, 1975, and concerned litigants who had suffered injuries to the brain. Further, in both cases, there was expert medical evidence as to the effect of the injuries on the litigant’s ability to recall and to give evidence. Here, however, the Court is dealing with an aged and illiterate litigant with an extremely poor memory. There is an additional feature which the Court must consider closely, and that is the evidence of Mrs. Scott, the Defendant’s Attorney, who described at length the steps she took in recording the Defendant’s witness statement. Having examined Mrs. Scott’s evidence, the Court wishes to say that I accept Mrs. Scott’s evidence wholeheartedly and regard her as a truthful witness.

113. It has been contended on behalf of the Claimant that, having regard to the fact that the Defendant’s witness statement was not in the Defendant’s own words and since she denied all material aspects of her witness statement apart from her name, address and that she could not read or write, it was just as if the Defendant had not given evidence. The Court notes that Mrs. Scott has testified that because the Defendant did not speak the Queen’s English, she reduced the Defendant’s language into Standard English. In the Court’s view, in the circumstances of this case, Mrs. Scott’s approach was proper and the Defendant’s witness statement accorded with Part 29.5(1)(d) which provides that the

witness statement must be in the intended witness's own words "*so far as reasonably practicable*".

114. It was submitted by Mrs. Maharaj S. C. on behalf of the Defendant that the Defendant was cross-examined at length on her witness statement and that her evidence in cross-examination was consistent on all material aspects. The Court agrees with Mrs. Maharaj. The Court has already examined in detail the evidence of the Defendant. She has consistently denied that either Mr. Campbell or Mr. Etienne explained to her the nature of the transaction when she affixed her thumb print to the Memorandum of Transfer. She has also consistently denied that she knew she was executing a sale of her share of the said lands to the Claimant and that she had ever agreed to sell to the Claimant her share of the said lands.

115. The Court has already examined closely the evidence of Mr. Campbell and Mr. Etienne. Mr. Campbell has testified that he "*would have read*" the deed and mentioned in the presence of the grand daughter why he was not acting for them and then Mr. Etienne came and he left. Further, Mr. Campbell testified that he "*might not have read the deed verbatim*" but explained that this was a deed between the Claimant and the Defendant. Mr. Campbell also went on to say, he "*might have read the deed*" or he "*may have read the deed*". He then went to fetch Mr. Etienne.

116. In all the circumstances of the case, the Court accepts the Defendant as a witness of truth as to the material aspects of her case. There was nothing in her demeanour which suggested that this aged lady was being untruthful. In the exceptional circumstances of this case, the Court does not agree with Mr. Benjamin's submission that it was just as if the Defendant had given no evidence in this matter. There is nothing in the C.P.R. which suggests that the Court should hold otherwise. As to the material aspects of the case, the Court prefers the evidence advanced on behalf of the Defendant. In addition, the Court accepts that Defendant's evidence that she did not understand that the sum of \$400,000.00 given to her by way of cheque was supposed to be for the sale of her share of the said lands.

THE LAW AND CONCLUSIONS

117. Having examined the several authorities cited on behalf of the parties, the Court notes that there is some overlapping of issues. For example, where there is presumed undue influence, it can be rebutted by showing that the complainant had independent legal advice. The law is set out in **Snell's Equity** (13th Edn.)(2000) at paragraph 38-09 as follows:

Equity grants relief in respect of gifts and other transactions procured by undue influence. The precise form of relief is dictated by the concern to achieve practical justice for both parties. Usually it takes the form of setting the transaction aside and ordering an account of profits. But if it is not possible to restore the parties to their former positions equitable compensation may be ordered instead. As in other contexts, equity intervenes as a result of some unconscionable conduct on the part of the defendant. "It is brought into play whenever one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them." It does not save people from the consequences of their own folly, but will save them from being victimized by other people. "Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief." Nor will relief be forthcoming where all that is shown is inequality of bargaining power.

Cases where the doctrine operates may be divided into two classes. Class 1 consists of cases of actual or express undue influence. "In these cases it is necessary for the complainant to prove affirmatively that she entered into the impugned transaction not of her own free will but as a result of actual undue influence exerted against her. Class 2 consists of cases of presumed undue influence. "In these cases it is sufficient for the complainant to establish the existence of a relationship of trust and confidence between her and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused the relationships in procuring her to enter into the

impugned transaction. Once such a relationship has been established, the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction with her 'full, free and informed thought'." Class 2 is subdivided into categories. "Class 2A consists of certain well-known relationships which are by presumption of law irrebutably treated as relationships of trust and confidence. Class 2B consists of other cases where the complainant establishes by affirmative evidence that she was accustomed to repose trust and confidence in the wrongdoer."

118. Further, at paragraph 38-11 of **Snell's Equity** (supra), as to the doctrine of presumed undue influence, it is stated:

In the second class of case, where influence is presumed from some relationship between the parties, the onus is on the party taking the benefit to prove that it was not procured by undue influence. In such cases "the Court interferes not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom from being abused." There are three matters to be considered: the type of benefit, the relationship which gives rise to the presumption, and the circumstances necessary to rebut it.

119. It is not only gifts which are liable to be set aside, but also transactions arising out of contracts. A transaction will not be set aside on the ground of presumed undue influence unless it is manifestly to the disadvantage of the person influenced. What is required is a gift so large or a transaction so improvident "as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act". An example is a sale at an undervalue. [**Snell's**, paragraph 38-12].

120. As to fiduciary relationships, to fall within Class 2B, there has to be found a degree of trust and confidence such that "the party in whom it is reposed, either because he is or has become an adviser of the other or because he has become entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to

influence him into effecting the transaction of which complaint is later made”. The degree of trust or confidence need not amount to domination; simple reliance is sufficient. But there has to be a sufficient degree of trust or confidence. The mere existence of a fiduciary relationship will not inevitably raise the presumption, as fiduciary relationships cover a wide range. In those cases where the fiduciary relationship is alleged to arise from the reposing of trust or confidence there is normally no substitute in this branch of the law for a “meticulous examination of the facts” to determine whether the relationship exists. [Snell’s, paragraph 38-13].

121. The law of abuse of confidence has been set out at paragraph 38-25 **Snell’s Equity** (supra). All transactions whereby persons in fiduciary positions procure a benefit for themselves will be set aside.

122. As to the law of unconscionable bargain, it is succinctly set out at paragraph 38-27 **Snell’s Equity** (supra) as follows:

A contract may be set aside in equity if one party lacks sufficient mental capacity, if that lack of capacity is unknown to the other party, and there is in the conduct of the latter unfairness amounting to equitable fraud which would have entitled the former to rescind the contract even if he had been sane. But, while a transaction will not be set aside merely because it is improvident, the intervention of equity does not stop short at want of mental capacity. Under a well-established jurisdiction, equity will set aside a purchase from a poor and ignorant vendor at a considerable undervalue, where the vendor acts without independent advice, unless the purchaser satisfies the court that the transaction was fair, just and reasonable. It has been said that “poor and ignorant” may nowadays be understood as “member of the lower income group” and “less highly educated”, the latter requirement being applied in particular to the person’s understanding of property transactions. The jurisdiction will not be exercised unless the purchaser was guilty of unconscionable conduct; it is not sufficient that the parties had unequal bargaining power or that the terms of the bargain were more favourable to one party than to another.

123. The well-known case of **Inche Noriah v Shaik Allie Bin Omar** [1929] A.C. 127 was cited by both parties. In that case, a Malay woman, who was of great age and wholly illiterate, executed a deed of gift of landed property in Singapore in favour of her nephew, who had the management of all her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the donor's property, and did not bring home to her mind that she could more prudently, and equally effectively, benefit the donee by bestowing the property upon him by will. It was held by their Lordships of the Judicial Committee of the Privy Council that the gift should be set aside. It was held that where the relations between a donor and donee raise a presumption that the donee had influence over the donor, the Court will set aside the gift unless (as laid down in **Allcard v. Skinner** (1887) 30 Ch. D. 145, 171) the donee establishes that it was the spontaneous act of the donor, acting in circumstances which enabled him to exercise an independent will, and which justified the Court in holding that it was the result of a free exercise of the donor's will. If the evidence establishes the fact above stated it should not be disregarded merely because the donor did not receive independent legal advice. On the other hand the receipt of independent legal advice may rebut the presumption although it is not acted upon. But to have that effect it must be given with a knowledge of all the relevant circumstances, and be such as a competent and honest adviser would give if acting solely in the interest of the donor.

124. The case of **In re Craig, deceased, Meneces and Another v Middleton and Others** [1971] v Ch. 95 was also cited to the Court. In that case in 1958, C.'s wife died, and under her will C. inherited her whole estate amounting to about £18,000, and thus he became worth about £40,000. Two months after her death, C. engaged the first defendant, M., as his secretary and companion. He was then aged 84 and, within one month of employing M., he gave her £1,000 worth of defence bonds which was followed by various other gifts. At the time of his death in 1964, his estate had been reduced to about £9,500. and the total value of his gifts to M. was £27,951 5s. 8d. The plaintiffs, the residuary beneficiaries under C.'s will dated February 24, 1960, made a claim to have the gifts set

aside on the ground of undue influence. Ungood-Thomas J. held that, since none of the gifts to M. could be accounted for on the ground of the ordinary motives on which ordinary men acted and as there was a relationship of confidence between M. and C. such that she was in a position to exercise undue influence, there was a presumption of undue influence on the part of the donee which she had failed to rebut by showing that the gifts made by C. had been made to her after full, free and informed discussion resulting in the removal of her influence over him.

125. In the judgment of the Court, Mrs. Maharaj has correctly submitted that an examination of the evidence in the case shows that the Defendant was a sickly, aged, illiterate person, without education and knowledge of business transactions. She was being badly treated by her own son, Preetam, and turned to the Claimant, whom she perceived would take the place of a good and caring son to assist her to get back into her property. According to Mrs. Maharaj, not only did she repose trust and confidence in the Claimant but she also placed trust in Mr. Campbell.

126. Mrs. Maharaj has also correctly submitted that the granting of the Power of Attorney by the Defendant in the circumstances set out in the evidence of the Claimant and of Mr. Campbell demonstrated the absolute trust and confidence that the Defendant reposed in the Claimant. The Defendant gave her rights over to the Claimant by virtue of a general Power of Attorney although Mr. Campbell admitted that he had not explained the effect of the document to her. By the Claimant's own admission, the Defendant had become attached to him. In fact, he said the Defendant's whole family had become attached to him. According to the Claimant, from the Defendant's conversations and dealings with him, the Defendant regarded him more as a son than Preetam. According to him, from the Defendant's dealings with him, she relied on him and trusted him. She had given him all her information and all her documents.

127. In addition, the Court agrees with Mrs. Maharaj's submission that, based on Mr. Etienne's evidence, the extent of his independent legal advice was his reading the document to the Defendant (who was illiterate and hard of hearing) and his asking both

parties if they understood. According to Mr. Etienne, he then handed the document to the relative with the child (presumably Vashti) to read for herself. It is not in dispute that the Claimant was also in the room when Mr. Etienne was allegedly giving the Defendant “independent legal advice.”

128. The Court also agrees with Mrs. Maharaj’s submissions that the Defendant did not have the benefit of any, let alone, independent legal advice and that when she affixed her thumb print to the Memorandum of Transfer she had no understanding that what she was doing was parting with her property, her home, her inheritance for a sum of \$800,000.00; no understanding that in doing so she would no longer have her home that she and her husband had built and on which they had given their children permission to build their homes; no understanding that when a property was being sold that the purchase price that is, the consideration, should be paid before or at the time when the transaction was being completed and certainly before it was registered. Mrs. Maharaj has correctly submitted that nobody told the Defendant and nobody advised her.

129. Having regard to the authorities cited earlier, the Court agrees with the Defendant that this is a case of presumed undue influence. The Defendant reposed trust and confidence in the Claimant who abused the relationship and, through the relationship, took advantage of her in having her enter into a conveyance of her share of the said lands to him. Further, the Court finds that the impugned sale was at considerable undervalue and that the Claimant has failed to prove that the Defendant entered into the impugned transaction with her “full, free and informed thought”.

130. Further, the Court finds that a case of unconscionable bargain has been made out. The Claimant, the purchaser, has taken advantage of the Defendant, a poor and ignorant vendor, in circumstances where the sale was at a considerable undervalue and the vendor acted without independent legal advice.

131. The Court has also examined the case of **Tufton v Sporni** [1952] 2 The Times L.R. 516. In that case, the purchaser of a house on terms grossly unfair to him, sought to have

the transaction set aside on the ground of undue influence. The house was bought for the purpose of a Moslem cultural centre to be promoted by a committee comprising the purchaser, the seller and a third party. The judge of first instance found that undue influence - the domination of the purchaser by the seller – was not proved. The purchaser appealed on the ground that the Court of Equity had a broad jurisdiction to relieve a person from a bargain made with another where that other person stood in such a relation to the first person that he owed him a duty to make full disclosures of all material facts. It was held by the Court of Appeal that since the parties had joined together for the purpose of furthering a charitable or altruistic objective, in all the circumstances of the case there was a fiduciary relationship between them. The purchaser reposed confidence in the seller which was abused and the transaction was accordingly to be set aside.

132. According to Sir Raymond Evershed M.R., extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief. It is, therefore, necessary to examine the circumstances which led to and surrounded the transaction, and to discover therefrom the nature of the relationship between the parties [page 519]. Having looked at the case of **Tate v Williamson** 2 Ch. App. 55, Jenkins L.J. said at page 526, that although the principles enunciated in the case applied to cases of gift, there was, in his view, no distinction for this purpose between a gift, a purchase at an undervalue, and a sale at an excessive price, where the donee or the person making the sale or effecting the sale, as the case may be, stands in a fiduciary relationship to the person making the gift to him, selling to him or buying from him.

RELIEF

133. In the circumstances of this case and in the judgment of the Court, this is a suitable case for a Court of Equity to set aside the transaction. Accordingly, the Court does not consider it necessary to consider the other legal points raised by the Defendant. As to the issue of costs, having regard to the complexity of the issues, the proper appearance of

Senior Counsel on behalf of the Defendant, the fact that the Claimant has failed on his claim and the Court will grant relief on the Defendant's counterclaim, the Court will order that the costs of the claim and the counterclaim be assessed by the Court pursuant to C.P.R. Part 67.12. According to C.P.R. Part 67.5, the award of prescribed costs is a general rule only.

134. As to the issue of damages, the Court will make no order as to damages in the light of the fact that the Defendant has not proved any loss.

ORDER

It is hereby ordered as follows:

- (1) The Claimant's Fixed Date Claim filed on the 23rd January, 2007 is hereby dismissed.
- (2) There shall be judgment for the Administratrix ad Litem on the Defendant's Counterclaim filed on the 2nd April, 2007.
- (3) A declaration is hereby granted that the Memorandum of Transfer dated the 22nd February, 2006 and registered as No. T20060308000195963 on the 8th March, 2006 was executed and obtained by the Claimant from the Defendant by undue influence and at an undervalue and as an unconscionable bargain.
- (4) The said Memorandum of Transfer dated the 22nd February, 2006 and registered as No. T20060308000195963 on the 8th March, 2006 is hereby set aside.

- (5) The Claimant shall convey to the Administratrix ad Litem or to whomsoever she may direct that one half share of that certain piece or parcel of land situate in the Ward of Cunupia in the Island of Trinidad comprising Four Acres Three Roods and Thirty Eight Perches (less approximately three roods and thirty eight perches acquired by the Government of Trinidad and Tobago) which said piece or parcel of land is delineated in the plan attached to the Crown Grant in Volume LXI Folio 529 also described in the Certificate of Title in Volume DCCCLXXIV Folio 113 and now described in Certificate of Title in Volume 4745 Folio 299 and bounded on the North by lands now or formerly petitioned for by Sookhaee and by Crown Land on the South by a space reserved for a road 50 links wide and by a public road 130 links wide on the East by Crown Lands and on the West by the public road 130 links wide freed and discharged of and from all charges and encumbrances, such reconveyance to be settled by Attorneys representing the Administratrix ad Litem. The Claimant shall pay all costs of the conveyance including stamp duty, legal fees (including the legal fees of Attorneys representing the Administratrix ad Litem) and registration costs. Should the Claimant fail and/or refuse and/or neglect to execute and/or sign the memorandum of transfer and/or any document made necessary by this Order, the Registrar of the Supreme Court is hereby empowered and/or authorized by the Court to execute and/or sign same.
- (6) The sum owing by the Claimant pursuant to the Court's order at paragraph (5) hereof shall be set off against the sum of \$400,000.00 previously paid by the Claimant to the Defendant.
- (7) The Claimant shall pay to the Administratrix ad Litem costs of the Claim and Counterclaim to be assessed by the Court on a date to be fixed.
- (8) The sum owing by the Claimant pursuant to the Court's order at paragraph (7) hereof shall also be set off against the said sum of \$400,000.00 previously paid by the Claimant to the Defendant.

(9) The Administratrix ad Litem shall pay to the Claimant the remaining balance, if any, of the said sum of \$400,000.00 after the set-offs ordered by the Court at paragraphs (6) and (8) hereof.

(10) Liberty is granted to each party to apply.

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MAUREEN RAJNAUTH-LEE
JUDGE