REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Civil Appeal No. 276 of 2012
Claim No. C.V. 2007-01382

BETWEEN

DR. ROHIT DASS

Appellant/First Defendant

AND

ROSEMARIE MARCHAND

NICHOLAS AZARD MARCHAND

NAOMI ANDREA MARCHAND

Respondents/Claimants

PANEL

JUSTICE OF APPEAL MENDONÇA
JUSTICE OF APPEAL PEMBERTON
JUSTICE OF APPEAL des VIGNES

DATE OF DELIVERY: 16th July, 2018

Appearances:

For the Appellant: **Mr. R. L. Maharaj, S.C. and Ms. V. Maharaj instructed by Ms. N. Badal**

For the Respondent: **Mr. HRM Seunath, S.C. and Mr. K. Neebar instructed by Ms. C. Soonilal**

I have read the Judgment of Pemberton J.A. and I agree with it and have nothing to add.

/s/ **A. MENDONÇA J.A.**

I have read the Judgment of Pemberton J.A. and I agree with it and have nothing to add.

/s/ **A. des VIGNES J.A.**

JUDGMENT

[1] **INTRODUCTION**

This is an appeal from the decision of the trial judge in which he upheld the claim filed by Rosemarie Bertille Marchand, Nicholas Azard Marchand and Naomi Andrea Marchand, the Claimants ("RBM, NAM the son and NAM the daughter" and collectively referred to as "RBM and her children"), by setting aside the deed of conveyance made on 26th June 2006, between them and Rohit Dass, the First Defendant ("RD"), ("the 2006 deed") thereby returning to them, the property situate at Lot No. 128 Freeport Mission Road, situated in the ward of Chaguanas ("the property"), together with the dwelling house standing thereon. There were several grounds of appeal filed, which can be condensed into two main issues to be determined on this appeal, which are,

1. ***Whether the trial judge was plainly wrong to find that RD wrongfully or unlawfully procured the 26 June, 2006 conveyance from RBM and her children?***

2. ***Whether the trial judge ought to have determined the nature of the agreement between RBM and Premchand Rambeharry ("PR") and its effect if any on the outcome of the litigation before him?***

[2] I must state upfront that there was no plea or argument that the conveyance was procured by RD's and/or Victor Hosein's (VH's) undue influence over RBM and her children, NAM the son and NAM the daughter. There was no cross appeal.

[3] In keeping with the well stated remit of a court of appeal especially when issues of credibility of witnesses fall to be considered, and upon consideration of the totality of the facts and evidence led and tested in this case and upon the application of the relevant legal principles, I agree with the trial judge that the deed of conveyance made on 26 June 2006, between the parties should be set aside and the property be returned to RBM and her children. In relation to the agreement between RBM and PR, the trial judge did not examine in any great detail the nature of the agreement between RBM and PR and whether it would have had an inimical effect on the result of the litigation in relation to the RBM and her children. He did not see its existence as it was, as impacting negatively on the litigation before him in which the pertinent issue was the validity of the 26 June, 2006 conveyance. The trial judge treated with this agreement in his evaluation of RBM's credibility. I agree with this approach since the agreement was not an agreed issue for trial between the parties and there were no submissions made before him. In addition, the other party to the agreement, PR was neither joined in the litigation nor was called as a witness. These are my reasons for agreeing with the trial judge.

[4] **BACKGROUND**

In or about 2006, RBM had been in RD's employ, seeing to the cleaning of and assisting in the running of his office. On 24th February 2006, RBM, together with her children became seised and possessed of the property by virtue of a deed of gift from RBM's mother, Augustina Violet Marchand ("AVM"). By a deed of conveyance dated 26 June 2006 RD became seised and possessed of the property. The services of Mr. Victor Hosein ("VH"), an Attorney at Law, the Second Defendant, were retained for the preparation of this conveyance.

[5] After approximately four (4) months of employment with RD, RBM left and took up employment with PR at his business establishment. By this time RBM suffered great disquiet over the 2006 sale and conveyance. She confided this to her new employer PR and they both unsuccessfully approached VH to re-convey the property to RBM.

[6] After this adventure, PR and RBM proceeded to PR's Attorney at Law who crafted an agreement for PR to fund RBM and her children's litigation to recover the property. The agreement also spoke to the passing of the title in the property to PR, should RBM and her children be successful in their quest. RBM and her children filed these proceedings against RD and VH, with the aim of setting aside the conveyance and recovering the property.

[7] **THE PROCEEDINGS**

The facts of this case were carefully reduced in the trial judge's judgment and there is no need to repeat them in any great detail.

RBM'S AND HER CHILDREN'S CASE

On 30th May 2006, AVM, RBM's mother expired. At that time, RBM was employed by RD as a cleaner at his office. RD approached RBM five days after the death, indicating that he was willing to purchase the property for **$600,000.00.** As part of the terms of purchase, RD held out certain enticements,

a. that RBM would have permanent employment with RD until the time of her retirement
b. an increased salary.

She withstood this initial advance by informing him that she and her children would have no alternative accommodation. At that time, RBM claimed that she was not enjoying good health. She was in grief for her mother, and this contributed to her fragile mental and emotional state. In fact, RBM claimed that she displayed various medical and mental conditions which resulted in her becoming an outpatient of the St. Ann's Mental Hospital, under the care of Dr. Garnet Sant.

[8] Despite this, RD was persistent and threatened to dismiss her should she not accept his offer to purchase the property. RD informed him that she had to have her children's participation. As part of the deal, RD offered further inducements to RBM for her and her children to convey the property to him,

c. a life interest in the property for them,

d. their use of the upstairs portion of the property as living accommodation and

e. a guarantee of RBM's free medical care, free prescriptions and authorisation for her to collect medications through the CDAP programme of the Ministry of Health.

As far as NAM the son and NAM the daughter are concerned, the inducements were,

f. that the property was subject to a mortgage, which was in arrears and that it was up for sale by the bank.

Eventually, RBM and her children agreed to convey the property to RD.

[9] In June 2006, RD introduced VH to RBM. RD represented that VH was his Attorney at Law. They met with VH, who informed that the purchase price should be kept below $350,000.00 to avoid paying a significant amount in stamp duty. RD informed VH not to prepare an Agreement for sale, but instead to prepare a deed of conveyance as soon as possible. RD informed that he was prepared to pay to NAM the son and NAM the daughter the sum of $30,000.00 each for their share and interest in the property.

[10] On the following day, RD transported the vendors, RBM and her children, to VH's office. RD did not remain at the office. Each of them attended on VH individually who informed them that he was acting as the Bank's Attorney at Law and that the Bank held a mortgage over the property. Both NAM the son and NAM the daughter stated that they were each being paid the sum of $30,000.00 out of the sale price. When it was her turn, RBM received a cheque for $200,000.00. They each signed a one page document but were not allowed to read it before signing it. They were not given copies of the signed document. RBM and her children executed the deed. Neither RBM nor her children had independent legal advice on this transaction.

[11] Sometime in July 2006, RBM requested VH to give her a copy of the document which she signed at his office. She was informed that RD had the document. She returned to RD and renewed her request for the document. This met with a barrage of abuse and a threat of termination of employment. These unhappy differences culminated in August 2006, when RD forcibly removed RBM and NAM the daughter from the property. The premises were padlocked and several of their personal belongings which were at the premises have not been recovered as at the time of filing of the claim. These amounted to the sum of $75,000.00.

[12] Thereafter, RBM continued to make enquiries about the balance of the monies due and owing to her on the sale of the property. RD then countered there were further downward adjustments to be made to the purchase price,

a. $100,000.00 reduction to take into account that the actual acreage transferred was less than that bargained for,
b. $60,000.00 reduction being stamp duty on the deed, and
c. $2,000.00 for cleaning the premises.

RBM remained in RD's employ until they parted ways on 11th September 2006.

[13] RBM claimed that up to the time of filing her claim, she had received $307,800.00 for the sale of the premises and not the $600,000.00 as agreed. On 27th September 2006, RBM's Attorney wrote to RD requesting that the premises be re-conveyed to RBM. On 9th October 2006, RD responded to that letter.

[14] On 1st May 2007 RBM, NAM and NM filed an action against RD, to set aside the deed of conveyance dated 26th June 2006 or alternatively, damages for breach of contract in the non-completion of the purchase of the disputed premises. RBM also prayed relief against VH for fraudulent misrepresentation and/or fraudulent inducement in effecting the sale of the property. The Claimants each filed witness statements in the action. Additionally, Gizelle Singh of the Special-Anti Crime Unit of Trinidad and Tobago ("SAUTT"), Toney Beepat, Auctioneer/Valuator and Kirt De Coteau, Scientific Officer of the Forensic Science Center all filed witness statements on behalf of the Claimants.

[15] **RD's DEFENCE**

RD claimed that the agreement between RBM and her children and himself was for the sale of the property for the sum of **$340,000.00.** He paid RBM and her children the sum of **$307,800.00** and has made repeated requests for RBM to collect the balance of the money to complete the transaction. These requests have not been fulfilled. Instead he was presented with this suit which he characterised as one *"of people who have reconsidered their position after selling the property and now want to resile from*

their bargain since he has spent considerable sums of money to develop the property to what it is today".[1]

[16] In RD 's defence filed in these proceedings, he asked the court to strike out the statement of case as it disclosed no cause of action against him, and that it was frivolous and vexatious, by reason of RBM and her children's "failure to specifically plea(d) particulars of undue influence" as required by law. Notwithstanding this and in the alternative, RD pleaded that on 30th April 2006, he employed RBM as a Secretary/Receptionist and she appeared to be in good health. He averred to a visit made by RBM before the hiring when she consulted with and received treatment from him for joint pains. He further stated that it was RBM who introduced him to VH, but did not share the circumstances of the introduction.

[17] On 30th May 2006, RBM approached RD for him to purchase the property, as she was indebted to persons who threatened her life. RBM offered a selling price of **$340,000.00** and not **$600,000.00**. RD noted that one month elapsed, between the time of RBM's offer of sale to his acceptance of same. He denied that he,

a. pursued RBM to purchase the property,
b. threatened to dismiss RBM from his employ if she did not sell the property,
c. induced or coerced her to sell the property,
d. made any offers of carving out a life interest for her children,
e. shared with her his plans for the proposed use of the building,
f. promised to give her free medical care and or authorisation to collect free medicines under the C.D.A.P. programme,
g. had any conversations concerning a mortgage of the property with the children or any party to this action.

RD averred that he met with the children, individually and collectively on separate occasions. They discussed the sale of the property at each meeting and they individually agreed to sell the property to him.

[1] Interestingly although photographs and permissions to develop were attached to the Defence, no statement of expenses incurred or present valuations were a feature of this case.

[18] RD further denied,

h. introducing VH and RBM and moreover having any previous dealings with VH. In fact it was RBM who introduced him to VH. He contended that throughout the transaction, VH represented RBM and her children.

i. that VH advised him to keep the stated price of the transaction at $350,000.00.

j. telling RBM that he was paying $30,000.00 to NAM the son and $30,000.00 to NAM the daughter.

RD said that RBM and her children asked him to take them to VH's office the day of the transaction. He further,

k. disclaimed any knowledge of RBM's excursion to VH's office at the end of July 2006,

l. denies the verbal abuse and threats to terminate her employment.

In fact, he states that it was RBM who without notice or reason, left the employ of RD and took up employment with PR. Further denials were,

m. that her leaving had anything to do with her enquiries of him relating to the payment of the balance of the purchase price due and owing,

n. that he forcibly removed RBM and NAM the daughter from the disputed premises.

He informed that he wanted to have the premises cleaned and repaired and requested them to vacate the premises. In response, the RBM and her children left the premises, taking with them all of their belongings save items that could not be of use to anyone. He requested that the items be removed but this did not happen. He finally dumped them in March, 2007.

[19] RD reiterated that *"there was never any agreement that the price of the property was $600,000.00"* or that there was any attempt to reduce the price by $100,000.00 or at all, or that the stamp duty fees of $60,000.00 or the cleaning fees of $2,000.00 be taken into account in the price reduction.

[20] RD filed a witness statement in the action, in addition to four other witness statements. The witness statements included: Roopchan Ramjattan, a maintenance contractor employed to clean the disputed property; Michelle Gangadeen, a Nurse employed at RD's clinic; Beulah Gangadeen, a close friend of RBM and Michelle Gangadeen's mother; and Ramesh Dhaniram, a building contractor employed by RD to conduct renovations at the property.

[21] **VH's DEFENCE**

VH passed away before the completion of these proceedings. On 1st June 2007, VH filed his defence. VH indicated that he was unaware of RBM's health condition. His denials were as follows:

a. that he was RD's Attorney at Law.

On the 8th June, 2006, RBM and RD visited his chambers when RBM informed him that she wished him to represent her and her children's interest in the sale of the property. He stated that *"the First Defendant (RD) concurred with the first Claimant (RBM) in this and agreed to this and indicated that he did not want a lawyer of his own."*[2] VH informed RD of his right to separate legal representation but that advice went unheeded. RD executed a document reflecting his decision to forego separate legal representation. At that meeting, RBM instructed VH to oversee the conveyance of the property at a selling price of **$340,000.00**.

[22] b. that he indicated to RBM that the selling price should be kept below $350,000.00 to avoid stamp duty.

RBM presented a valuation dated 20th February 2006 which reflected a value of $340,000.00, together with other documents.

Further,

c. that he received and acted upon instructions from RD with respect to the preparation of a deed as against the preparation of an agreement for sale.

RBM instructed VH to prepare a deed of conveyance to be completed on or before the 26th June 2006. She further insisted that she did not require a down payment. On that day, he requested that the children, NAM the son and NAM the daughter attend at his chambers to confirm the sale.

[23] They did so on the 12th June 2006, when they confirmed the instructions for the sale. The children visited his offices again on the 16th June 2006.

d. that he told the children that there was a mortgage over the property or that he was the Attorney at Law for the bank.

In fact, the official records show that the property was unencumbered.

[2] See para. 2 of the Defence filed by VH on June 01, 2007 p. 18 of the Record of Appeal.

[24] On 26th June 2006, the children, NAM the son and NAM the daughter visited VH's offices to execute the deed of conveyance. Prior to that, RBM had arrived at the offices in possession of three cheques. These cheques were made out to each vendor in unequal amounts. VH pointed this out and they responded that they instructed RD to have it done so. VH advised each of the vendors of their rights in this conveyance[3] and the deed of conveyance was read aloud to them. VH received a fee of $3,000 from RD for his services.

e. that RBM requested a copy of the deed at the end of July 2006;

VH however avers that *"the First Claimant (RBM) requested RD's deed of conveyance and was informed that it was not available."* He agreed that a survey was done wherein it was revealed that the property contained 346 feet less and the vendors agreed to reduce the purchase price by $20,000.00.

[25] On 20th September 2006, RBM and PR visited VH's office. RBM indicated that PR offered her $500,000 for the purchase of the property and she wanted RD to re-convey the property to her. VH informed RBM to visit RD with the request, as RD was now the vested beneficial owner. VH testified that on 17th January, 2007 RBM revealed to him that *"she had a secret and clandestine agreement with RD in which VH and (her children) would be told that the selling price would be $320,000.00 when the property was really being sold to RD for $400,000.00 by secret agreement between RBM and RD. It was agreed that the $60,000.00 would be given to RBM by RD after the execution of the said Deed and that it should remain unknown to VH and (her children).* RBM told VH on that day that RD "*reneged on their secret agenda and refused to pay her $60,000.00".* This caused her to file this action "*to implicate"* VH and to have the deed set aside. VH filed a witness statement in support of his defence, together with two others, those of Rehana Ramgobin, his Legal Secretary at the time of the conveyance, and Faizal Hosein, Attorney at Law.

[3] Each of the vendors signed a statement which read: *We the undersigned do hereby state that we were advised by Mr Victor Hosein Attorney-at-Law to do a valuation of our property described in Deed No DE 2006 0090 9905 and which we are selling to Dr Rohit Dass for $320,000.00. However we do not see the need for this valuation as we have an arrangement with Dr Dass already.*
We were also advised by Mr Hosein that we can take a draft copy of the deed of Conveyance to any lawyer of our choice for advice but we do not see the need for this as we are satisfied with the contents of the Deed of Conveyance that Mr Hosein has now read to us.

[26] **ISSUES FOR TRIAL, THE TRIAL JUDGE'S FINDINGS AND ORDER**

The trial was heard by Rampersad J. The trial judge referred to the agreed issues as identified by the parties for his determination. These issues are as follows:

1. Whether the claimants were tricked and/or induced by the defendants into conveying their premises to RD?
2. Whether the claimants were fraudulently induced or misrepresented in selling the premises to RD?
3. Whether there existed as between RBM and RD a relationship of employer and employee?
4. If so, whether RD exercised undue influence upon RBM in the sale to him of the subject premises from RBM and her children?
5. Whether RD was in breach of the contract for sale?
6. Whether there existed as between RD and VH the relationship of Attorney at Law and client?
7. Whether RD failed to complete the contract of sale?
8. Whether RD took RBM's premises and converted it to his own use?
9. What was the purchase price which RD paid for the subject premises?

[27] **INCONSISTENCIES IN THE PARTIES' CASES**

In treating with these issues, the trial judge expressed his concern about the inconsistencies in both parties' cases.

RBM'S CASE

The trial judge considered the inconsistencies in RBM's evidence surrounding - the agreement between herself and RD, the reason for RBM giving RD the deed of gift from her mother; the agreement with PR; and the Tony Beepat valuation. I shall summarise the trial judge's concerns with respect to more salient heads.

1. The agreement between RBM and RD, which was fraught with uncertainty as to the sale price and the terms of the sale. The trial judge observed the many versions surrounding the $600,000.00 which appeared in the pleadings,[4] which were not mentioned in RBM's

[4] The pleadings spoke to an offer of $600,000.00 coupled with a life interest and free medical attention and medication.

witness statement or under cross examination[5] and her eventual conclusion that she would not accept any money now for the premises as she would not be selling it to anyone. The judge as well noted pre action correspondence from RBM's Attorney at Law[6]. He further noted the circumstances in RBM's witness statement which explained how she was tricked into signing the deed,[7] which were not mentioned in any correspondence.

2. The fact that RBM gave her mother's deed to RD for, what is seems, no good reason. The judge found that "*rather strange"* that she would do that if not for RD to do a search of the title.
3. As far as the agreement with PR is concerned, the trial judge noted that the purchase price did not seem to be clearly stated in the agreement. He noted that RBM disclaimed signing the agreement presented to her in the court. She stated that PR was simply paying her lawyer's fees because he was an investor. She however admitted that she was not forced or threatened to sign that document and that by the words in the agreement she agreed to convey the said property to the investor. The trial judge noted NAM the son and NAM the daughter were not questioned on the agreement.

[28] **RD'S CASE**

Those inconsistencies which the trial judge adverted to were *inter alia,* who was VH really acting for; what was the agreed price of the land; who was present at VH's office on 8th June, 2006; if both sets of the alleged waivers of even date were signed by RD and by RBM and her children; the nature and of the Deed dated 26th June 2006; the reason for the sale and RD's knowledge of the state of RBM's health at the relevant time and receipt of independent legal advice. His conclusions to that end could be summarised as follows:

1. That VH was acting in RD's interest and was not *"looking after the interests of the claimants since their interests was not protected at all especially in light of the fact that the deed was*

[5] At first RBM indicated that she could not recall discussing the $600,000.00 price with RD. On the second day, her testimony shifted from that to a clear memory that the $600,000.00 represented the offer she was given plus the life interest to stay on the premises and that RD would use downstairs as an office. She denied as well that that sum had anything to do with the agreement with PR.

[6] This formed part of the agreed bundle speaking to the $600,000.00 purchase price without the other conditions of sale

[7] This was based on information of an imminent foreclosure by the mortgagee bank and the money that she was receiving was the surplus from the sale,

registered with a receipt clause acknowledging receipt of $320,000.00 when in fact that was not the position".

2. The price of the land fluctuated. Rehana Ramlogan, who typed the deed of conveyance testified that she was instructed to put $340,000.00 as the purchase price and she could not explain why the deed displayed the price of $320,000.00. RD's first statement of evidence stated the sale price of $340,000.00 but that changed to $320,000.00 one month prior to RBM accepting that as the purchase price. This the trial judge found was in contradiction to his own assertion that the asking price was $340,000.00 adjusted to take into account the results of the survey, which was conducted after the execution of the deed of conveyance, on 6th July, 2006.
3. That Rehana Ramgobin, RBM, RD and VH were present at the meeting of 8th June, 2006. NAM the son and NAM the daughter visited VH's offices on 16th June and 12th June respectively.
4. As far as the documents which were allegedly signed:

a. The alleged instructions dated 8th June 2006

RD consented to VH acting for both himself and RBM and her children and his "*declining to have independent legal counsel"*, in the face of VH "*representing the interest of*" RBM and her children". The document further stated that RBM and RD "*have therefore agreed to use"* VH's services "*in this conveyance".*

The trial judge was of the view that the document did not exist at that date as RD claimed in his witness statement. The judge described this document as "*contrived*" by RD and/or VH "*to try to establish some sort of full disclosure in relation to legal advice".*

b. The waiver dated 26th June 2006

RBM and her children declined to have a valuation of the property to be sold or to exercise their "right" to take a draft copy of the deed of conveyance to any lawyer of their choice to obtain a second opinion.

The trial judge found that given all of the evidence, RBM and her children did not sign this document, which he styled "a *manufactured document of convenience to assist the case for the defendant".*

c. The deed of conveyance dated 26th June 2006

The deed prepared by Rehana Ramgobin contained a consideration of $340,000.00. The deed signed by RBM and her children contained a consideration of $320,000.00. The trial judge examined

the Schedule to the deed and found these words instructive "*comprising TWELVE THOUSAND SIX HUNDRED SQUARE FEET but now found to comprise TWELVE THOUSAND TWO HUNDRED AND FIFTY-FOUR FEET by a recent survey done … on 6th July 2006*". The trial judge opined that "*the document purportedly signed on 26th June 2006* ***could not*** *have been the same document which was registered on 18th July 2006 since the plan referred to in the schedule to the deed was not available on 26th June 2006.* There is no evidence that this change was authorised by RBM and her children.

5. The reason for the sale as alleged by RD, was NAM the daughter's pilferage of a gold chain and that the people were after her. This was not put to either RBM or NAM the daughter, so that this was neither substantiated nor denied.
6. As far as RD's knowledge of RBM's state of health, the trial judge noted that RD, by his defence, admitted to having treated RBM prior to her being employed by him, but in the same document made denials speaking to her history of numerous breakdowns, that she was a diabetic; suffered from high blood pressure, or that she had received periodic treatment at the St. Ann's Hospital. The trial judge opined that, *"As any good doctor would have done, he would have had to have ascertained her medical history so that it seems that (RD) deliberately attempted to mislead the court about his knowledge of her state of health".*
7. As far as whether at that first meeting on 8th June 2006, VH suggested to RBM that she obtain independent legal advice is concerned, the trial judge looked at Rehana Ramgobin's witness statement which stated that she was present at the meeting and that she had never seen RBM before, but the fact of the suggestion to obtain independent legal advice was absent. On cross examination, her memory failed with respect to whether RD's had visited VH's office in the past.

[29] The trial judge in considering all of the pleadings, witness statements and cross examination, evidence and submissions, concluded that the reason for the sale was one which did not cast RD in a favourable light. The reason had nothing to do with any impending doom which RBM faced[8]. It was that RD, RBM's employer and doctor, being aware of RBM's mother's death and her mental state, *"came up with a ploy to get the premises"* from RBM upon her refusal of his offer to purchase the property. The trial judge

[8] See paras. 125 – 131 of the Judgment of Rampersad J.

made certain findings of fact to support his premise. It is useful to set those out now.[9] They are as follows:

1. RBM was RD's employee from 30th April 2006 so that *"the relationship of employer and employee applied when the transaction was negotiated and when it culminated in the signature of the deed of 26 June 2006";*
2. RBM was treated by RD prior to her employment. There was a doctor/patient relationship existing between them which continued after the commencement of her employment, when she collapsed on the job and was treated by him;
3. RBM had a history of mental issues including mental retardation and depression and was prone to forgetfulness and bad judgment, which the trial judge said can be determined from the medical reports as well as from RBM and NAM's evidence;[10]
4. That RD and RBM went to VH's office where she was informed of the mortgage on the premises. The judge opined that at the very least, RD took advantage of RBM who was his employee and his patient;
5. That upon RD's request, the children visited his offices on the day that their mother collapsed and it was only then that they were informed of the sale;
6. That the children did not act independently, but acted upon RBM's instructions in that they took instructions from their mother;
7. That RD dropped off the vendors to VH's offices; that they each went separately and independently into his office and signed a document showing only an attestation clause in relation to them alone, individually. Further, the trial judge noted that RD admitted in cross-examination that he "dropped off all three 3 claimants together and that he had given RBM an envelope with the cheque";
8. That RBM and NAM the daughter were evicted from the premises and at that time RD was the registered owner of the premises;
9. That RD did not sign the alleged waiver dated 8th June 2006 on that date; and
10. *"On a balance of probabilities, and bearing in mind all the evidence before the court, the claimants did not sign the alleged instructions dated 26th June, 2006."*

[9] See para. 131 at pp42-43 of the Judgment of Rampersad J.
[10] See the Medical Reports as well as evidence from RBM herself and NAM the son.

[30] Based on that premise, and supported by his findings, the trial judge identified the following issues and pronounced upon them as follows:

1. ***Whether the Claimants were tricked and/ or induced by the Defendants into conveying their premises to the First Defendant?***

   On a balance of probabilities, the Claimants were tricked into conveying the property to RD.

2. ***Whether the Claimants were fraudulently induced or misrepresented in selling the premises to the First Defendant?***

   For there to have been a sale there must have been a meeting of the minds. There was no meeting of the minds so that RBM and her children did not agree to sell the property to RD.

3. ***Whether there existed as between the First Claimant and the First Defendant a relationship of employer and employee?***

   There is no doubt that this relationship existed and RD admitted it.

4. ***And if so, whether the First Defendant exercised undue influence upon the First Claimant in the sale to him of the subject premises from the Claimants?***

   a. Taking into account the existence of the employer/employee and doctor/patient relationships, and bearing in mind RBM's medical issues and the fact that the children did not act independently, even if the court were wrong to find trickery/inducement existed and that there was in fact a sale, there was no doubt that the presumption of undue influence arose.

   b. There can be an inference of manifest disadvantage from the circumstances of the case; that the evidential burden to validate this transaction shifted to RD and that burden was not discharged; *"As a result, even if this court was wrong in deceit, this court is of the view that the deed of conveyance was procured by the undue influence exerted …"* by RD on RBM who "*received a largely disproportionate share of the alleged proceeds of sale in relation to the premises"*.

5. ***Whether the First Defendant was in breach of the contract of sale?***

   There was no contract of sale between the parties so that RD could not in breach of contract.

6. ***Whether there existed as between the First Defendant and the Second Defendant the relationship of Attorney at Law and Client?***

   "*There is no doubt that having paid fees for the deed of conveyance and in light of the preferential treatment meted out by the second named defendant to the first named defendant that the relationship of attorney-at-Law and client existed between them both.*"[11]

7. ***Whether the First Defendant failed to complete the contract of sale?***

   The trial judge found that RD failed to complete the alleged sale. Since the court held that there was no contract of sale there was nothing for him to complete.

8. ***Whether the First Defendant took the First Claimant's premises and converted it to his own use?***

   Yes.

9. ***What was the purchase price for which the First Defendant bought the premises?***

   There was no agreed purchase price.

10. **CONCLUSION AND ORDER**

    Even if there was no inducement, Rampersad J. concluded that sale of the property was procured by "***unacceptable means***[12]". The court could not overlook the fact that RD, *"an educated professional, sought to purchase premises from a grieving, mentally ill employee".* In such circumstances, the law presumes that one party had influence over the other and the complainant need not prove that he actually reposed trust and confidence.

[11] See para. 138 of the Judgment of Rampersad J.
[12] See page 46 para 142-143 of the Judgment of Rampersad J.

The trial judge ordered that the deed be set aside and the property be returned to RBM and her children, with damages to be paid by both RD and VH to be assessed and consequential orders. Costs were to be paid by both defendants to the claimants to follow the assessment of damages.

[31] **CHALLENGES AND GROUNDS OF APPEAL**

RD has appealed against Rampersad J.'s decision. It is prudent to set out in some detail the challenges which RD mounted so as to give context. Generally RD complained about the trial judge's acceptance of RBM's evidence over that given by RD and VH. These are the challenges to the trial judge's findings of fact. I must mention that the challenges (as amended) were lengthy and I have condensed them to what I now describe as follows:

1. The relationship between VH and RD and RBM and her children, that RD as opposed to RBM was VH's client.
2. The authenticity of documents material to the matter –
    a. RD's statement of 8th June 2006 that he decided to forego separate legal representation.
    b. RBM's and her children's statement of 26th June 2006 that they were advised to obtain a valuation and they did not see the need to do so and that they agreed to forego separate legal advice on the transaction.
    c. The deed of conveyance of 26th June 2006 executed by RBM and her children conveying the property to RD.
3. The entire process by which the 2006 deed of conveyance was procured was tainted in that RD and VH behaved fraudulently in the transaction –
    a. They concocted a story that the property was encumbered with a mortgage.
    b. They tricked and/or fraudulently induced and/or unduly influenced RBM and her children into selling the property.
    c. That RBM and her children were not offered and/or did not receive independent legal advice.
4. There was no agreement for sale of the property between RBM and her children and RD and that there was no agreement as between RD and RBM for the sale of the property for the sum of $320,000.00.
5. Acceptance of RBM's and Dr Garnet Sant's evidence of:

a. RBM's mental health condition at the time of the sale.
b. That RD was aware of the existence, nature and extent of RBM's mental health problems.

6. That *"to the extent that the Judge found that (RD and VH) made material misrepresentations to (RBM and her children) … this is challenged (the judge vacillates between finding on the one hand that there was no meeting of the minds and therefore no sale, and on the other hand that there was a sale but that consent was procured by way of undue influence or misrepresentation."*.
7. The sale was procured by *"unacceptable means"* as alternative to a finding of undue influence making the deed void or voidable.
8. That the deed be set aside.

[32] The Amended grounds of appeal introduced another ground of champerty. The trial judge's findings and conclusions were challenged both in terms of fact and law on the following bases:

i. failure to consider the effect of the champertous funding agreement on the proceedings and whether it rendered the proceedings an abuse of process;
ii. failure to enquire into the details of the agreement; and
iii. failure to recognise that the agreement was contrary to public policy.

Further the trial judge erred when he:

iv. failed to draw any or any sufficient conclusions generally regarding RBM's credibility with respect to,
    i. the existence of the champertous funding agreement;
    ii. the adverse findings concerning the funding agreement – whether she signed the agreement as produced in the court;
    iii. the adverse findings concerning the purported agreement for the sale of the property for $600,000.00 in addition to the various inducements ("*the latter being effectively abandoned in evidence at the trial")*; and
    iv. the allegation of conspiracy *inter alia* between RD and VH.
v. failed to properly analyse evidence concerning the agreed price for the sale of the property and the instructions dated 8th June 2006;
vi. placed weight on Dr. Sant's letter in the absence of medical evidence;

vii. found trickery and/or fraudulent inducement and/or undue influence or that there was deceit which vitiated any agreement for sale and the deed conveying the property to RD and that there was no agreement for sale of the property for $320,000.00; and

viii. failed to find that there was a voluntary agreement for sale.

RD prayed that this court allow the appeal and dismiss RBM's and her children's claim and award him his costs both in the court below and for the appeal.

[33] **ISSUES ON APPEAL**

The appeal raises two main issues to be examined by this Court:

1. ***Whether the trial judge was plainly wrong to find that RD wrongfully or unlawfully procured the 26 June, 2006 conveyance from RBM and her children?***

2. ***Whether the trial judge ought to have determined the nature of the agreement between RBM and PR and its effect if any on the outcome of the litigation before him?***

Both Counsel treated the court to very helpful submissions both in writing and on their legs. I do express my appreciation for their assistance and ask to be forgiven if I refer to the submissions in an encapsulated form.

[34] **ISSUE 1:** ***Whether the trial judge was plainly wrong to find that RD wrongfully or unlawfully procured the 26 June, 2006 conveyance from RBM and her children?***

This issue will be examined in three areas:

1. the trial judge's assessment of RBM's evidence when the evidence is looked at in its entirety and the weight which was attached to it;
2. the weight to be attached to Dr. Garnet Sant's testimony; and
3. the trial judge's assessment of all of the evidence in relation to the finding that the 26th June, 2006 deed was tainted.

[35] **RBM'S EVIDENCE AND HER CREDIBILITY**

Mr. Maharaj, SC submitted that the trial judge failed to analyse the whole of the evidence as he was required to do and had gone plainly wrong on the evidence as a whole. Counsel highlighted the various instances where RBM's testimony was inconsistent and contended that the trial judge failed to attach

any weight to the negative credibility findings which he made especially in relation to the purported agreement between RBM and RD for the sale of the property for $600,000.00. He noted that the arrangement with PR was *"dubious"*, which when taken together with RBM's evasiveness in cross-examination, ought to have indicated to the trial judge that RBM's credibility was in question. RBM made numerous allegations against various professionals which served to make her case look *"more incredible"* and was seemingly unable to recall other aspects of the transaction. Mr. Maharaj highlighted that RBM's pre-action protocol letter varied from her claim, a fact which the trial judge ought to have considered.[13]

[36] Mr. Seunath, SC submitted that the trial judge considered all the evidence as it related to credibility and made observations and comments on those observations. In relation to the conflict between the pre-action protocol letter and the pleadings, he submitted that the trial judge had to make a determination, as the decider of fact and based on the agreed issues, what was going to be tried. Counsel indicated to the Court that the main issue was whether the trial judge had to set aside the deed of conveyance.[14]

[37] **THE TRIAL JUDGE'S JUDGMENT**

The trial judge spoke to the inconsistencies and concerns, which he had about both RBM's claim and evidence and RD's defence and evidence. These were set out in detail above, but I shall summarise them now. At paragraphs 88 to 93 of the judgment, the trial judge addressed RBM's claim and identified these areas:

1. that RBM, at a meeting with RD and VH, during which VH enquired after the ownership of the disputed property, that when the question of a sale agreement was raised and RD stated that no sale agreement would be drawn up, that RBM was of the opinion that the sale of another property was being discussed between RD and VH. This the judge found made *"made absolutely no sense"* since that would have been contrary to the previous conversations and the production of the deed of gift from her mother;[15]

[13] Court Transcript. P. 21.
[14] Id. at 43-4.
[15] See Record of Appeal p. 452.

2. the trial judge noted that allegations made in RBM's statement of claim with respect to free medical treatment and medication, as being part of the purchase consideration were not repeated in her witness statement;[16] and
3. during cross-examination, RBM's testimony was contradictory as to her willingness to sell the property.[17]

[38] At paragraphs 107 to 114, he also lays out inconsistencies and concerns with RD's case. He noted:

1. concerns with who VH was acting for. The judge indicated that VH's witness statement does not speak to RBM introducing him to RD and it seemed more likely that Mr. Faizal Hosein, the Attorney at Law retained for the conveyance between RBM's mother and herself, would have been RBM's more probable choice.[18] The trial judge indicated that the unusual circumstances suggested that RD was not seeking the interest of RBM and her children;
2. the price of the property; RD's credibility as to the purchase price of $340,000.00 is shaky as Ms. Rehana Ramgobin, indicated that she was instructed to put $340,000.00 as the purchase price but was unsure of how it changed to $320,000.00.[19] Whilst RD testified that this reduction was to facilitate the survey, there is no evidence to confirm this;[20]
3. who was actually present for the meeting on 8th June 2006;
4. what documents were signed; The trial judge presented a detailed review of the instructions dated 8th June 2006, the document dated 26th June 2006 and the deed dated 26th June 2006. He indicated that VH did not refer to this document in his witness statement and based on the evidence of Ms. Ramgobin and other inconsistencies, it was obvious that the document was fabricated by RD.[21] Discrepancies were also noted in the document of 26th June 2006 including the difference in the font used in the deed of the same date, each of which had no witnesses, dissimilarities in signatures and RD's not having produced the original document in court.[22] This document was believed to

[16] Id.
[17] Id. at 452-3.
[18] Id. at 456.
[19] Id. at 458.
[20] Id.
[21] Id. at 461.
[22] Id. at 462-3.

have been manufactured by RD. The deed itself presented some difficulty as it contained inconsistent dates and was unnaturally formatted;[23]

5. what was the reason for the sale; The trial judge found no merit in RD's version that RBM sold the property due to an outstanding debt due and owing because of an alleged larceny committed by NAM the daughter;[24] and
6. what did RD know of RBM's health; With regard to RBM's health, the trial judge determined on a balance of probabilities that RD was aware of RBM's medical history, having treated her when she collapsed in his office, ascertained her medical history and deliberately attempted to mislead the court about his knowledge of her state of health.[25]

[39] The learning is clear that unless the trial judge was plainly wrong that his finding cannot stand; this Court will not interfere with the finding. [26]

[40] **RBM'S CREDIBILITY AND SUPPORTING EVIDENCE**

Mr. Maharaj put in issue RBM's credibility but made no specific mention of the judge's findings on RD's credibility. Counsel contends in his principal submissions that "*the cumulative effect of these errors of the Judge calls into question his overall conclusions on the facts and the law".* These errors and failures were identified as,

1. The trial judge's treatment of RBM's evidence about the funding agreement, (which I shall deal with in more detail later);
2. RBM's credibility in relation to the alleged conspiracy between her Attorney at Law and VH;

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[23] Id. at 463-4.

[24] Id. at 464-5.

[25] Id. at 454-6.

[26] **BEACON INSURANCE COMPANY LIMITED v. MAHARAJ BOOKSTORE LIMITED [2014] UKPC 21** per Lord Hodge referring to the dicta of Lord Neuberger with regard to the consideration, which should be afforded to a trial judge's finding of primary fact. Lord Neuberger stated,

> ***It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.***

Lord Hodge continued,

> ***Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and evaluation of the evidence as a whole.[26]***

In the submissions in response, on this issue, Counsel reminded the court of,

3. RBM's credibility in relation to the contradictions in evidence on:
    a. the agreement for sale for the price of $600,000.00;
    b. the fact of a default mortgage to which the property was subject;
    c. the true sale price;
    d. the disciplinary proceedings which she brought against her former Counsel.

Further, Mr. Maharaj took issue with the trial judge's findings with respect to RD's instructions of 8th June 2006.

[41] Generally, Mr. Seunath took no issue with the trial judge's findings or decision. I ask to be excused if I do not reproduce his submissions. The question for this Court is, given all of the circumstances and looking at the evidence in the round, can it be said that the trial judge was plainly wrong when he preferred the explanation that RD, RBM's employer and doctor, being aware of the death of her mother and her mental state, came up with a ploy, that is to tell her that the said property was subject to a mortgagee sale because the mortgage was in arrears, to get the premises from her after she refused to accept his offer to purchase the premises? To answer that question, I shall look at the trial judge's treatment of all of the evidence given by the witnesses. I have set out his findings above and will not repeat them. The trial judge acknowledged RBM's inconsistent evidence and evasive behaviour on the witness stand. He also made a study of RD's testimony both evidence in chief and cross examination. The trial judge determined on the balance that RBM gave a more probable account of the events leading up to her and her children's signature on the 26th June 2006 deed. He came to his decision on the evidence as a whole. I do not find that there was any misunderstanding of the evidence on his part.

[42] **WAS DR. SANT'S EVIDENCE TO BE REGARDED AS EXPERT EVIDENCE AND AS INADMISSIBLE HEARSAY EVIDENCE?**

With respect to Dr. Sant's evidence in particular, which was specifically addressed by Mr. Maharaj, Counsel was aggrieved by the trial judge's reliance on Dr. Sant's evidence. He objected to the weight which was attached to Dr. Sant's medical report. Mr. Maharaj indicated that Dr. Sant's evidence was not in compliance with Part 33 of the **CPR**[27]**.** In his written submissions, Counsel focused on Dr. Sant's evidence but his oral submissions dealt with both Dr. Sant's and Dr. Shafe's evidence. He complained

[27] Part 33 speaks to the procedural requirements of expert evidence.

that both were inadmissible due to the lack of the service on the Defendant of a hearsay notice. Mr. Seunath submitted that the letter from Dr. Sant was an agreed document which was included in RBM's witness statement and in her evidence on cross-examination and was admitted for the truth of its contents, so there was no need to prove the document. Counsel indicated that the trial judge dealt with RBM's medical condition extensively in paragraphs 129 and 130 of the judgment. Counsel further submitted that the Dr. Shafe's report was also an agreed document as it was annexed to RBM's witness statement and remained unchallenged.

[43] **ANALYSIS AND CONCLUSION**

The judge was careful to point out that Dr. Sant's evidence would not be treated as expert evidence. This evidence was that of a medical practitioner who saw RBM and gave his findings. Since the evidence was not treated as expert evidence, then the provisions of Part 33 of the **CPR** are not applicable. There was no dispute as to whether Dr. Shafe was an expert for these proceedings.

[44] The other issue as posed by Mr. Maharaj is this, was Dr. Sant's and later Dr. Shafe's evidence inadmissible hearsay so that no weight ought to have been attached to them? To me, the real issue confronting this Court is, was the trial judge plainly wrong in admitting and giving weight to the evidence of the two doctors and if so, could his findings on RBM's mental state stand on the basis of all of the other evidence? Neither Drs. Sant nor Shafe appeared to be cross examined on their testimony. At first blush, their evidence constitutes hearsay evidence, whether the documents are agreed or not[28]. The documents may be admitted as documents, but not for the truth of their contents. Section 37 of the **EVIDENCE ACT** however provides that the statements made in the documents even though hearsay, may be admissible. If it is the intention of the parties to rely on the contents of the documents, Part 30.2(1) **CPR** determines that such a party wishing to exercise any rights under the Act must serve a hearsay notice. There is no dispute that this was not done in relation to either Dr. Sant or Dr. Shafe.

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[28] See **EVIDENCE ACT** Chap. 7:02 at section 37 (1) "*In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to Rules of Court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."*

CPR Part 30.1 (2) *"'Hearsay evidence' means a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated".*

Part 30.2(1) *"Any party who wishes to give hearsay evidence which is admissible only by virtue of section 37 … of the Act must serve on every other party a hearsay notice.*

The trial judge did not consider either the law or the rules of procedure. He placed the emphasis on whether the reports formed part of the agreed or un-agreed documents. The trial judge held that once the document was an agreed document, it need not be proved at trial and this was the basis for admitting the Doctors' reports into evidence. He did not consider that the Doctors were not presented for cross examination; that their evidence was untested and that no hearsay notice was served on the other side. This was plainly wrong. The Doctors' evidence was inadmissible and no weight ought to have been attached to it.

[45] Having found that, can this Court find that there was no or no sufficient evidence remaining for the trial judge to have come to the finding that he did, that RBM and her children were tricked into parting with their property? The other evidence left was RBM's own evidence and the inference that RD as RBM's doctor prior to and at the relevant time, ought to have known of her medical history. RBM testified under cross examination that she: has a history of nervous breakdowns; is forgetful, had doctors who would have made diagnoses to that effect; that she was suicidal and had to be committed to the mental institution and that she was at the time of the trial an outpatient of the institution. She continued, that after her mother's death she was depressed and she was always sedated. None of this evidence was challenged. The trial judge concluded that, "*On a balance of probabilities, it seems more likely than not that (RD) would have been aware of (RBM's) medical history especially since he treated her on the day when she collapsed in his office. As any good doctor would have done, he would have had to have ascertained her medical history…"*

[46] The trial judge came to his conclusions and findings having had the benefit of hearing and observing the witnesses in cross examination. As was stated in **BEACON** (cited above), an appeal court will be hesitant to trouble a trial judge's findings which are based on his assessment of primary facts made on his consideration of the evidence as a whole[29]. As Lord Neuberger stated, and I think it is instructive to spell this out, *"the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges."*. Even though I have found that the trial judge was mistaken to admit and rely on the doctors' evidence, that mistake, in the face of all of the other evidence was not material enough to undermine his findings and conclusions. He was entitled to do so given all of the

[29] For further emphasis see Lord Neuberger in ***IN RE B (A Child) (CARE PROCEEDINGS: THRESHOLD CRITERIA) [2013] 1 WLR 1911*** at para. 53.

other evidence led and probed in this case. There is no ground therefore to disturb the trial judge's decision to prefer RBM's version of events to RD's version of events.

. [47] **THE TRIAL JUDGE'S ASSESSMENT OF ALL OF THE EVIDENCE IN RELATION TO THE FINDING THAT THE 26 JUNE 2006 DEED WAS TAINTED BY TRICKERY AND/OR WAS FRAUDULENT INDUCEMENT AND/OR WAS PROCURED BY UNDUE INFLUENCE OF RD OVER RBM AND HER CHILDREN**

The burden of proof once these allegations are raised lays with the person asserting. Trickery and fraudulent inducement are self-explanatory. In the case of undue influence, it is well recognised that there is no easy formula or method to describe it. That party must show that "*such influence existed and had been exercised, i.e. that he had no means of forming an independent judgment, and that the transaction resulted from that influence."*[30] In particular, in the case of undue influence, the starting point is that the party who alleges undue influence must prove it. In many cases, there may not be sufficient direct evidence upon which the party alleging undue influence can rely. The law therefore *"allows the complainant to have recourse to an evidential presumption of undue influence. This presumption arises* ***only if the complainant can prove certain facts.****"*[31] If the complainant proves those facts the presumption operates to shift the burden of proof to the defendant to show that the complainant entered into the transaction freely and as an informed person.

[48] In order to substantiate a plea of presumed undue influence, five elements must be satisfied:

1. That there was a pre-existing and **special relationship** existing between the wrongdoer and the injured person, in which the wrongdoer acquired influence over the injured party[32].
2. That special relationship infers that the injured person reposed **trust and confidence** in the wrongdoer.
3. That it is fair to presume that the wrongdoer **abused the relationship** in procuring the injured party to enter into the transaction sought to be impugned.

[30] George Treitel "***The Law of Contract"*** 12th Ed. Para. 10-009.

[31] Id. at para. 9-001.

[32] See **ROYAL BANK OF SCOTLAND, PLC v. ETRIDGE (No.2) (HL (E)) [2002] 2 A.C. 773** where Lord Scott of Foscote outlined the principles of law to be applied and the practice that should be followed in ***"surety wife".*** The case at bar does not fall into that specified category, but I shall adopt and examine the issues which I think are relevant in the broadest sense in this case. (Emphasis mine)

4. Further, that the wrongdoer gained an **advantage** from the transaction sought to be impugned and
5. That the transaction sought to be impugned was to the injured person's **manifest disadvantage**.[33]
6. Further, a person relying on the presumption of undue influence must prove that the transaction is **not readily explicable** by the relationship between the parties.

Once these requirements are satisfied, the presumption is raised and the Court presumes that the transaction was procured by the undue influence of the wrongdoer over the injured party. As with all presumptions in law, this can be rebutted by the defendant bringing evidence to show that the injured party entered the transaction using free will and informed thought.

[49] Mr. Maharaj noted that the standard of proof remains on the balance of probabilities on RBM and that the more outrageous the allegations, the more evidence was required to uphold them. Counsel indicated that the Court ought to have carefully analysed the evidence so as not to sully the professional careers of VH and RD.[34] Further, Mr. Maharaj relied on **NOBLE v. WILKINSON**[35] in which Lord Goff, referring to Lord Justice Moore-Bick's dicta indicated that *"in cases of fraud, when considering the credibility of witnesses always test their veracity by reference to the documents in the case and also to pay particular regard to their motives and to the overall probabilities".* Mr. Seunath submitted that the trial judge considered the relevant evidence in determining that RD unduly influenced RBM to sell the property for $320,000.00. Counsel submitted that the trial judge examined the discrepancies on both sides and concluded that there was no true agreement for the sale, as there was no meeting of the minds.[36]

[50] **ANALYSIS AND CONCLUSION**

After the trial judge's analysis and determination of the issues of credibility, he found that on a balance of probabilities, a case lay in RBM's and her children's favour on the grounds of trickery, fraudulent inducement and in presumed undue influence. He found on the evidence that RD did in fact trick RBM and her children into conveying the property to him.[37] I can find no fault with that finding.

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[33] See **BARCLAYS BANK PLC v O'BRIEN AND ANOTHER [1994]1 A.C. 180**
[34] Submissions of the Appellant. Para. 81.
[35] **App. No. A01YQ508.**
[36] Court Transcript. P. 45.
[37] See Record of Appeal p. 470.

[51] The judge continued that RD fraudulently induced RBM into selling the property as there was no meeting of the minds, a requisite element of a contract. Again, this finding is borne out by the evidence and is unassailable.[38]

[52] Further, on the ground of undue influence, the trial judge found as follows:

1. That there were pre-existing and **special relationships** existing between RD and RBM, that of employer/employee and doctor/patient , in which RD acquired influence over her [39];
2. The children were not the decision makers in the transaction, RBM was the decision maker and they followed her lead;
3. Those special relationships infer that RBM reposed **trust and confidence** in RD;
4. It was fair to conclude on the evidence that RD **abused the relationship** in procuring RBM and her children to enter into the transaction sought to be impugned;
5. Further, that RD gained an **advantage** from the transaction sought to be impugned as the said property was bought at an undervalue;
6. That the transaction sought to be impugned was to RBM's and her daughter's **manifest disadvantage**[40] in that they "*lost their interest in this premises where they had lived so many years without any obvious alternate option for accommodation"* and RBM received *"a largely disproportionate share of the alleged proceeds of sale in relation to the premises"*;
7. Further, RBM being a person relying on the presumption of undue influence has proved that the transaction is **not readily explicable** by the relationship between herself and her children and RD.

The trial judge therefore found that "the *evidential burden to validate the transaction shifted onto the first named defendant and in light of all of the matters and inconsistencies referred to above, this court is of the view that that burden was never discharged." The trial judge concluded as follows:*

> *As a result, even if this court was wrong on the deceit, this court is of the view that the deed of conveyance was procured by the undue influence exerted by the first named defendant on the first named claimant who, from all the evidence before the*

[38] Id. 470-471.

[39] See **ROYAL BANK OF SCOTLAND, PLC v. ETRIDGE (No.2) (HL(E)) [2002] 2 A.C. 773** where Lord Scott of Foscote outlined the principles of law to be applied and the practice that should be followed in ***"surety wife".*** The case at bar does not fall into that specified category, but I shall adopt and examine the issues which I think are relevant in the broadest sense in this case. (Emphasis mine)

[40] See **BARCLAYS BANK PLC v O'BRIEN AND ANOTHER [1994]1 A.C. 180**

court, received a largely disproportionate share of the alleged proceeds of sale in relation to the premises.[41]

[53] Can the Court find in these circumstances that the trial judge was plainly wrong in his assessment of the evidence and application of the law so as to displace his findings? I think that the trial judge correctly analysed the evidence, found the facts and applied the law in the area to the facts as found to arrive at the conclusion that a presumption of undue influence arose. Similarly, I agree with the trial judge's finding that on the totality of all of the facts, RD had not discharged the evidential burden placed on him to displace the presumption of undue influence. The finding that the 2006 deed was tainted and ought to be set aside is correct and will not be disturbed.

[54] **ISSUE 2:** ***Whether the trial judge ought to have determined the nature of the agreement between RBM and PR and its effect if any on the outcome of the litigation before him?***

Two further issues spring from this main issue. They are:

a. ***What effect does this have on the action between RD and RBM and her children?***
b. ***Should the court stay the proceedings as an abuse of process or remit the matter to the trial judge for fuller ventilation?***

[55] **JURISDICTION OF THE COURT**

Before the Court can proceed to examine the issue of the nature of the funding agreement and whether it was tainted with champerty, it must first determine whether the issue is properly before the Court. Taking guidance from **BEACON**, I reiterate that, *"occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence".*[42] The issues of maintenance and champerty were not referred to in any of the pleadings nor in the parties' agreed issues to be determined. The trial judge examined the agreement the relevance of which, he determined, was in relation to RBM's cross examination in the overall assessment of inconsistencies in RBM's case as affecting her credibility. I note as well that the agreement was not raised in RD's cross-examination. Whilst VH alluded to the funding agreement in his pleadings and witness statement, he died prior to the trial and this evidence remained untested. Mr. Maharaj submitted that the issue raises

[41] Id.
[42] *Op. cit.* at fn. 26.

the question of illegality as being contrary to public policy and a court should not shy away from its duty to pronounce on the agreement and to rule on the consequences if called upon to do so. Mr. Maharaj and Mr. Seunath were permitted to make their submissions and I shall deal with them.

[56] ***Whether the trial judge ought to have determined the nature of the agreement between RBM and PR and its effect if any on the outcome of the litigation before him?***

Mr. Maharaj spent the majority of his submissions on this issue and strongly advocated that the agreement between RBM and PR was champertous. Counsel framed his submission on the premise that "*the trial judge erred in law in failing to consider the effect in the proceedings on the champertous funding agreement".*[43] Mr. Maharaj submitted that prior to the written agreement between RBM and PR, there was likely an informal agreement, which prompted RBM to leave RD's employment. Counsel stated that it was evident from the agreement at Clause 2 that RBM and her children were required to transfer the property to PR if they met with success in the litigation. For that transfer, they were to be paid $120,000.00 together with the monies expended on the litigation in the High Court.

[57] Mr. Maharaj submitted that the agreement goes even further than the classic case of maintenance and is, in fact, *ex facie* illegal and champertous. Counsel noted that PR was indeed receiving *"a division of the spoils"* as he was going to get the fruits of the judgment.[44] The following were the reasons for his submissions, which I wish to summarise where I can:

(a) The agreement was a fairly egregious form of maintenance;

(b) By RBM's evidence, PR is personally involved, that he knew RBM for many years. He is not only financing the litigation but he enjoys a relationship with her, that of employer and employee;

(c) PR's only motive was to make a profit since he is asking not for "*a slice of the recoveries",* but as it were the entire pie – the conveyance of the property to him;

(d) PR's benefit under the agreement is disproportionate to the risks he faced by the champertous agreement. Counsel based this on the RD's evidence of the valuation of the property at $2,683,400.00 (not a finding made by the trial judge);

[43] See p 3 Lines 3-5 of the Transcript dated 5th June, 2017.
[44] Id. at 6.

(e) RBM's interest is not just in relation to the relief claimed but the payment of $120,000.00 if the claim was successful. This provided a *"mega incentive"* for her to tell lies and embellish the evidence to prove her case; and

(f) PR maintained significant control over the proceedings since they were required to consult with him if settlement discussions were afoot.

Based on the above and relying on **Chitty on Contracts**[45]**,** the **OASIS, TRENDEX**[46] and **CLICO**[47] cases, Mr. Maharaj, submitted that the funding agreement did *"taint the proceedings so as to amount to an abuse".* He faulted the trial judge in failing to consider this as it was clear from the evidence and maintained that he made a serious error of law.

[58] In Mr. Seunath's initial submissions to the Court, he took the position that the case has nothing to do with maintenance and champerty.[48] However, at the hearing of the appeal, Counsel seemed to have adopted the neutral position that the matter, at the minimum, may constitute "*a classic case of maintenance"*[49]*.* In any event, Mr. Seunath submitted that the doctrines of maintenance and champerty were introduced by RD as a *"side wind"* in the proceedings and the trial judge sufficiently addressed the issue in his judgment.

[59] Mr. Seunath further argued that the agreement is not champertous merely because PR will receive a benefit. Counsel indicated that the maintenance element occurred when PR assisted RBM and her children in funding the litigation; however, champerty would have only occurred if there was an agreement "*to share in the proceeds of the action"*.[50] He indicated that there were *"no damages or monetary compensation"*[51], in other words, *"no spoils to be shared"*[52]*.* PR simply acquired the right to purchase the subject property; the benefit reaped by the agreement was PR's option to buy the property.[53]

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[45] Vol. 1 para. 16-050.
[46] **OASIS MERCHANDISING SERVICE LTD (1977) 2 WLR 764** and **TRENDEX TRADING CORPORATION v. CREDIT SUISSE. [1980] 1 QB 629.**
[47] **CLICO INVESTMENT BANK LIMITED v. TRANSPORT AND MARINE ENTERPRISES LIMITED. Civ. App. No. 134 of 2003.**
[48] Respondents' Submissions. P. 8. May 5, 2017.
[49] Id.
[50] Id. at 7.
[51] Id.
[52] Id.
[53] Court Transcript. *Op. cit.* at p. 51.

[60] Counsel then submitted that not every champertous agreement offends public policy. The mere possibility of a funder making a profit out of an agreement with the litigant does not mean that the agreement is champertous. The court ought not to find that this agreement is illegal, as it did not offend public policy. PR provided the financial resources to enable RBM and her children to attain justice and in return he acquired the right to purchase to property. Mr. Seunath indicated to the Court that there was no opportunity or need for PR to *"suppress or procure the suppression of evidence"*, affect the testimony of witnesses, inflate damages or undermine the ends to justice in any way.[54] Counsel stated that nothing in the agreement could be found to be contrary to public policy and further, the element of risk takes the agreement out of its being champertous. He argued that there was a genuine commercial interest in the agreement and PR will only benefit if RBM is successful. Champerty can only be found in the instance of a guaranteed success in litigation. Counsel maintained that PR was merely trying to help RBM, his employee, and he has an option to purchase the property in the event that she is successful, which took the unlawfulness out of the agreement. Mr. Seunath submitted that PR took a *"gamble"* in funding the litigation and the case did not amount to trafficking in litigation.[55] Counsel indicated that there are situations where litigants need to be supported in order to have access to justice and it must first be determined that the maintenance is unlawful, before any other issue can be addressed.[56]

[61] **EVIDENCE – THE AGREEMENT AND RBM'S TESTIMONY**

The agreement was dated 5th February 2007 as between RBM and her children and PR. The agreement styled PR as "*"the Investor".* This agreement stated that PR agreed to bear all of the expenses of the subject litigation in the High Court since RBM and her children were unable to fund them. These sums were unquantified.[57] An examination of the Record of Appeal reveals that under rigorous cross

[54] Respondents' Submissions. *Op. cit.* at fn. 48.

[55] Court Transcript. *Op. cit.* at pp. 55-6.

[56] Id. at 57.

[57] *2. The Owners shall in the event that they are successful in prosecuting the said High Court action convey the said parcel of land to the Investor and in that event the Investor shall pay to the Owners the further sum of One hundred and twenty thousand dollars ($120,000.00) which together with the expenses and charges paid and discharged by the Investor in accordance with the said parcel of land:* 3. This agreement shall come into effect as and from the date of the first payment by the Investor of any of the expenses fees costs charges and disbursements in accordance with Clause I and the Owners shall not from such day enter into any negotiation or agreement for the sale of the said parcel of land to any other person.

4....

5. In the event that there are negotiations entered into between the Owners and the said Rohit Dass for the settlement of the said High Court proceedings and the said Rohit Dass has agreed to pay to the Owners a further sum as

examination, RBM did not stray from her view that PR merely funded the litigation, as an investor. In the face of Clause 2 of the agreement, he maintained that she did not agree to sell the property to PR if she succeeded on the claim. She testified that if the agreement stated that, that was not her intention when it was signed. She was clear that she did not owe PR any money. She did admit, however, that she told PR that she would fight the case to the end and that he will get the sum of $100,000.00.

[62] **THE TRIAL JUDGE'S FINDINGS ON THE AGREEMENT**

After hearing the evidence on the agreement, the trial judge noted that, *"whatever may have been the intention of the parties, it does not seem to have been clearly stated as to exactly what the purchase price would be in the event that the claimants were successful."* He further noted that RBM *"seemed to have been making every effort to try to avoid what was stated in the agreement".* She eventually admitted that by the words in the agreement, she agreed to sell the property to RD. Be that as it may, even though her children signed that agreement, the trial judge noted and the record bears this out, neither of the children was questioned on the agreement and no submissions were made on the issue either.

[63] **LAW**

MAINTENANCE AND CHAMPERTY

Halsbury's Laws of England informs that maintenance is *"an agreement by one person to finance another's litigation without having any genuine or substantial interest in the outcome of the litigation"*[58]. Champerty, on the other hand, is a type of maintenance, *"with the added factor of a division of the spoils"*. Generally, any agreement between persons, which amounts to maintenance or champerty, is illegal, though not criminal.[59] Halsbury's Laws further states,

> *As to maintenance:*
> *(1) If there is a sufficient community of interest between the parties an agreement will be valid even though it would otherwise be champertous as, for example, an agreement to divide the proceeds of a claim otherwise than in accordance with strict legal rights.*
>
> *(4) In addition to a sufficient community of interest, other justifications may exist, such as a charitable motive, or a blood relationship.*

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consideration for the purported conveyance to him of the said parcel of land the Owners shall consult with the Investor with respect to the settlement figure which in any event shall not be less than $292,000.00 and in the event that agreement is arrived in manner aforesaid the owners shall receive a sum not exceeding $100,000.00 of such settlement figure and the difference or balance thereof shall be paid to the Investor.

[58] Para. 438. Vol. 22. (2012).

[59] Id.

(5) *In accordance with the general rule for illegal contracts, the effect of maintenance is that the contract affected is* ***unenforceable between the parties to it, but it is no defence to the action being maintained and the court will not stay the proceedings being maintained unless they amount to an abuse of process.***

As to champerty:

(a) *It has been described as maintenance with the added factor of* ***a division of the spoils****, but in the light of the statutory developments in relation to conditional fees it has been acknowledged that there may be champerty without maintenance and the* ***real concern is a policy against a person who is in a position to influence the outcome of litigation having an interest in that outcome****.*

(b) *….*

(c) *As with maintenance a contract which is unlawful for champerty cannot be enforced between the parties to it****, but it seems that it is no defence to the action which is the subject of the champertous agreement and the courts have no power to stay the proceedings.***[60]

[64] **ANALYSIS AND CONCLUSION**

Whilst it is true that the trial judge's deliberations did not focus on the issue of champerty as it was not raised at trial, I am of the view that the evidence led and the trial judge's observations are still of value to my deliberations. The question to be decided is, *from the terms of the agreement and RBM's testimony, can the court now determine the nature of the agreement*?

[65] To me, whether a bargain has been struck between two parties is a mixed question of fact and law In other words, to strike down the agreement, there must be a factual matrix to which, when the principles of law are applied would lead to that conclusion. That factual matrix must comprise in this instance, all evidence before the court, documentary and oral. Is there such evidence here? I shall address Mr. Maharaj's reasons which he has urged on the Court to determine the nature of the agreement between RBM and PR.

1. That it was likely that an informal arrangement existed between RBM and PR and that PR was, by that agreement, getting the fruits of the judgment;

These conclusions cannot, with respect, be drawn based on the documentary evidence or from RBM's oral testimony. These assertions remain in the realm of speculation.

2. The agreement was a fairly egregious form of maintenance;

Nothing turns on this point.

[60] Id.

3. By RBM's evidence, PR is personally involved, that he knew RBM for many years. He is not only financing the litigation but he enjoys a relationship with her, that of employer and employee;

The evidence is that RBM, at the time of the litigation, was employed with PR. There is no evidence as to PR's personal involvement. The document says that PR is financing the litigation and this is confirmed by RBM's testimony under cross examination. She describes PR as an *"investor"*.

4. PR's only motive was to make a profit since he is asking not for "*a slice of the recoveries"*, but as it were the entire pie – the conveyance of the property to him;

This submission as to PR's motive is not supported in the evidence or by the document and is speculation. I note here that PR was neither joined in the proceedings nor called as a witness.

5. PR's benefit under the agreement is disproportionate to the risks he faced by the champertous agreement since based on the RD's evidence, the valuation of the property was $2,683,400.00;

The valuation was not a finding made by the trial judge and RD's evidence on this score could well stand some scrutiny. Again, since PR the funder was not a participant in this trial how can we say that his benefit under the agreement was disproportionate? I think that this lack of evidence will make it difficult to base a finding of illegality or even justify a cause for the case to be remitted to the trial judge for re hearing.

6. RBM's interest is not just in relation to the relief claimed but the payment of $120,000.00 if the claim was successful. This provided a *"mega incentive"* for her to tell lies and embellish the evidence to prove her case;

This is in direct contradiction to RBM's continued insistence under cross examination that she had no intention of selling her property to PR and that she wanted back her property. This was so even in the face of the document which she eventually admitted to signing but which she said did not reflect the intentions of both her and PR. The only way of disproving this would be to bring evidence of PR's intention. This was not done. The parties had every opportunity to do this and it was not taken.

7. PR maintained significant control over the proceedings since they were required to consult with him if settlement discussions were afoot.

Nothing to me, turns on this so as to taint the agreement. Counsel placed reliance on **OASIS** to support his point. In that case, the court had to consider the validity of a *prima facie* champertous agreement. Peter Gibson LJ in his judgment, agreed with the trial judge's classification of the routes by which, a

person *"may seek to dispose of, and another person may seek to acquire, the prospect of benefitting from current or future litigation against a third party."* These routes are:

i. The transfer of property carrying with it the right to prosecute any cause of action closely related to that property, such as an assignment of debt – which is not champertous;

ii. The assignment of a bare cause of action or bare right to litigate – which in light of **TRENDTEX** may be champertous; and

iii. The assignment of damages or other monetary compensation that may be awarded in an action in which judgment has not yet been given - in which no question of unlawful maintenance or champerty arises.

[66] Given that dicta, the question is, does this case fall within **TRENDTEX** so that the agreement may be struck down as champertous? Warner J.A. in the **CLICO** case explained the salient issue in **TRENDTEX** and other authorities on the question and summarised the relevant principles as follows:

1. The modern doctrine of champerty is one of public policy; public policy is not fixed and changes with the passage of time;
2. Trafficking in litigation remains unlawful;
3. The question whether an agreement to fund litigation in return for a share in the proceeds of litigation has a tendency to corrupt public justice is to be determined in light of the facts of each case;
4. Whenever there is a profit element **beyond the amount of the funder's pre-existing loss,** that may **not necessarily** be unlawful; the court must look at the agreement and the circumstances in which it was made. The court may, but need not, conclude that the agreement was champertous; and
5. All the aspects of the transaction are relevant. The court ought therefore to place such transaction under careful scrutiny.

[67] The quality and lack of evidence plague this case. Given RBM's testimony that the agreement did not reflect the intention of the parties and the lack of PR's testimony to either corroborate or counter that, it cannot be concluded that the terms of the funding agreement are certain or even enforceable. Further, it is clear that PR took a risk when he provided the funds to RBM, who had no funds to finance the litigation. What was PR's pre-existing loss? There is no indication as to the cost of the litigation. There

is no objective valuation of the property. The prospect of excessive profit may properly be taken into account in deciding whether the commercial motive was genuine[61] and in **CLICO[62]** Warner J.A., indicated that *"the court can use its own judgment to determine whether a percentage uplift is disproportionate".[63]* There simply is no evidence to work with and I am not convinced that this should result in a referral to the trial judge to try this issue. Finally, there is no contract between PR and RBM with regard to the funding agreement which RD is attempting to use as a tool in his litigation arsenal. This was the scenario in the **CLICO CASE** in which the alleged agreement was not held to be champertous.

[68] Offence to public policy manifests when litigation is unlawfully maintained. Lawful maintenance occurs when the maintainer has a *"common interest"* in the litigation with the person who is a party to the litigation.[64] According to RBM, PR's involvement in the case was to enable her to pay her lawyer's fees, that is, to afford her access to justice. In the case at bar, the express terms of Clauses 3 and 5 mandate that PR is the final decision maker before the matter may be concluded. Is that by itself evidence that PR has a common interest in the litigation to the extent of rendering the agreement champertous and illegal? I should think that to maintain that argument, RD would have had to do more than simply allege that the agreement was champertous and seek to prove that from the slim evidence in this case. He was required to produce more cogent evidence to support his case.

[69] The trial judge further noted that neither of RBM's children was questioned on the agreement to which they were signatories. No other assistance was offered to the court. I observe that PR was not joined as a party to this suit, neither was he called as a witness for either side. The question is, could the court, without more than looking at the document, determine that an agreement was struck between the two parties? Since it is fundamental to assessing the nature of the document, that an agreement existed between the parties, I am of the view that I can go no further on this. In the circumstances, I am loathe to conclude that the trial judge should have examined and made a finding on this issue, which did not arise either on the facts or evidence in this case.

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[61] **BROWNTON LTD. V. EDWARD MOORE INBUCON LTD. [1985] 3 ALL ER 499.**
[62] **CLICO**. *Op. cit.* at fn. 47.
[63] Id. at para. 63.
[64] Id.

[70] **CONCLUSION AND DISPOSITION**

The trial judge, having exercised his discretion and having weighed the evidence before him, dealt with the evidence thoroughly, applied the correct principles of law and adopted the correct approaches to analysing the evidence and coming to his findings. I cannot say that he was plainly wrong. Indeed to the contrary. I agree with his findings, conclusion and disposition of this matter. To that end, I would dismiss the appeal and affirm the decision of the trial judge.

[71] At the end of the oral submissions, my brothers Mendonca J.A. and des Vignes J.A. enquired whether RBM, if successful on this appeal, should refund to RD the monies which she collected from the sale, that is, the sum of $308,000.00. Mr. Maharaj's view was that if the agreement was struck down as champertous, then the court will have no agreement to consider and that there was no need to determine entitlement or disentitlement to the monies had and received. In Counsel's view, "*the purity of justice has been tarnished by the agreement and the Court does not want the proceedings to have life. And the Court of Appeal cannot give it life, whether it means that the Appellant would lose money or the Respondent would lose money, the proceedings have come to an end".* It seems therefore that Mr. Maharaj was content not to alter what had flowed under the agreement and sale of the property. There was no need therefore to consider a refund of monies to RD.

[72] Mr. Seunath opined that "*equity would demand that he be refunded the money. … Even if it is fraudulent or unfair in terms of getting her to sell the property, I think equity would demand that he be refunded what he has paid because she took … she has benefitted from it…".* In relation to the monies paid to the children, Mr. Seunath conceded that the same will apply to them. The sum therefore to be repaid by RBM and her children to RD is $308,000.00.

[73] Since the Court determined that the agreement between RBM and PR was not champertous and would not be struck down, it is open to the court to consider Mr. Seunath's submission, which in all of the circumstances will meet the justice of this case.

ORDER

1. The Appeal be and is hereby dismissed.
2. The Appellant to pay the Respondents' Costs of the appeal, determined in amount of 2/3 of the costs awarded below.
3. The Respondents to pay to the Appellant the sum of $308,000.00 being the return of the purchase price paid as a result of the setting aside of the deed executed on 26th June, 2006.

/s/ Charmaine A. J. Pemberton
Justice of Appeal.