IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2005/462

BETWEEN:

CLOTIDE HARRY

Claimant

And

VERCILLIA KANGAL

Defendant

Appearances:
Mrs. Shirley Lewis for Claimant
Mr. Kenneth Foster Q.C. for Defendant

…….

2005: OCTOBER 29
2006: JUNE 2
JULY 13
2007: FEBRUARY 1
FEBRUARY 28
MARCH 27

…….

JUDGMENT

FACTS

[1[The Claimant is a very elderly lady in her 80's with poor health and poor eyesight. She owned and resided on a portion of land at Rouarne, Vieux Fort which is now the subject of this dispute. The Defendant, a secretary in a lawyer's office is her niece.

[2] The Claimant desirous of having someone to care for her in her old age, sought out her niece who she had not seen for over 20 years and offered the Defendant her rather sizeable property in exchange for the Defendant caring for her until her death.

[3] The Defendant executed a Promissory Note and a Deed of Sale over the property with the result that the Defendant received the property prior to the Claimant's death. The Claimant now seeks to recover the property and has come to the Court asking for a declaration in the following terms:

(1) That the Defendant did wrongfully and, or fraudulently, and or carelessly and or recklessly made a certain statement to the Claimant, thereby inducing her to sign a certain paper to her detriment

(2) That the Deed of Sale executed before Kenneth Foster on the 18th February 2002 and registered in the Land Registry on March 7th 2002 be declared null and void and be improbated.

(3) That the lands registered in the Land Registry as Block and Parcel 1622B 10 be declared the lands of the Claimant

(4) That the Registrar of Lands give effect to the above changes

(5) Damages

(6) Interest

(7) Costs

(8) Further and other relief

Evidence

[4] The Claimant gave oral testimony on her own behalf.

[5] The Claimant states that she told the Defendant that she would "make a will for her to look after me and when I die she would take the land". She says " I don't know what kind of paper I make. I told her I would make a will". She continues that the Defendant brought a paper and she asked her what was the paper. She told the Defendant that she could not sign the paper because she could not read. The Defendant told her to sign the paper. She asked the Defendant to bring someone to "see the paper for me". The Defendant told her that she didn't want anybody to know her business. The Claimant states that she signed the paper because the Defendant told her that if she did not sign that she would not have anyone to look after her.

[6] It is the evidence of the Claimant that she signed the paper at her home, that she signed two papers, that she never signed any papers in Castries and that the Defendant never read any papers to her. The Claimant denies going to the lawyer's office to sign any paper.

[7] She states that she asked the Defendant for her land papers but that the Defendant told her that she could not get them nor did she receive any money from her. She says that the Defendant told her that her land papers were lost. She admitted signing two (2) "long papers" (indicating the Deed of Sale) and when shown the Statutory Declaration states

that she signed it because the Defendant told her that her land paper was lost and the Claimant repeated that she cannot read or write.

[8] She says that when Mr. Joe came to her house, she asked the Defendant if she (the Claimant) should not have a witness but the Defendant said that she did not need one.

[9] She states that she went to Ms. Branch's house in Castries to look for her papers, that when she signed the paper at her home in Rouarne, the Defendant, Mr. Joe and Ms. Branch were present. She asked for her cousin to be witness but the Defendant told her that she did not need a witness.

[10] She denied that Ms. Branch told her that her other nieces and nephews would be angry with her for giving land to the Defendant and that she told Ms. Branch that she did not care what people said about what she did because she had wanted to do that for a very long time. She denied saying that the same way her mother gave her the land that she was going to do the same for the Defendant. She says that it is not true because she bought the land. She says that she wanted to give the land to the Defendant when she died but that the Defendant went behind her back and did a Deed of Sale and she wanted to have her land back.

[11] She says that she told the Defendant that if she would feed her, when she died that the Defendant would take the land. She says that the Defendant did not come to visit her, that she had promised to fix up the house and put lights (electricity) in it but the Defendant never did. She says that the Defendant would stop in or her way to Vieux Fort.

[12] Under cross examination the Claimant denied visiting the lawyer's office. She admitted complaining that her niece was not giving her any food and was not looking after her. She stated that she told the Defendant that she "would put her in my will. If I am sick or if I have a stroke, to look after me". She also admitted complaining that her niece was not giving her any food and was not looking after her. She stated that she told the Defendant that she "would put her in my will, if I am sick or if I have a stroke, to look after me". She also admitted that after she signed the paper, the Defendant brought her three (3) chairs but that it was the Defendant's brother who had come to live with her. She was not comfortable with him because he smoked marijuana. She thought that it was not a "good thing" for the Defendant to send the boy because he could not look after her, that she needed a girl.

[13] The Defence called three (3) witnesses.

[14] The first witness was Ms. Branch, the Defendant's aunt and a retired Government pharmacist. She testified that the Defendant brought the Claimant to her home around 12 noon on Friday 15th January, 2002 to stay until the end of the working day saying that the Claimant had come to town to do some business. Ms. Branch states that when the Defendant left, the Claimant told her that she had given the Defendant her land papers. Ms. Branch asked why she was giving it to the Defendant, that she had so many nieces and nephews, that it was going to cause trouble. She says that the Claimant told her that the Defendant was not married nor was she, that the Defendant had no children nor did she, that the others had husbands and children to take care of them. She says that the

Claimant stated that she had always wanted to do that and now that it was done, she felt free.

[15] Ms. Branch states that she did not see the Claimant give the papers to the Defendant. She took the Claimant to her house that evening accompanied by the Defendant. She states that when they were leaving to return to their homes that the Claimant told the Defendant that she would not be able to come to town because her knees were hurting, so the Defendant should bring the papers and she would sign them.

[16] Ms. Branch testified that on 28th January she took the Defendant and Mr. Gustave to the Claimant's home where Mr. Gustave read "something" to the Claimant and when he was finished he asked the Claimant whether she had understood what he had said to her, she said "yes" and he asked her to sign. The Claimant, the Defendant, Mr. Gustave and Ms. Branch all signed the document.

[17} Under cross examination the witness could not remember when she discovered that the Defendant was her niece. She stated that she was about 2 to 3 yards away when Mr. Gustave read the document to the Claimant, that she did not pay much attention but she could hear his voice.

[18] She stated that from the beginning she had reservations about the Claimant giving the land to the Defendant and admitted that she expressed these reservations but not in the presence of the Defendant.

[19] The Defendant was next to give her evidence.

[20] In her testimony she recalled 18th January 2002 getting a telephone call while she was at work informing her that her aunt was in town and looking for her. When she met up with her aunt, she gave her a plastic bag with some documents in it. She took her aunt to the lawyer and told him that her aunt had come to give her some land to take care of her. The lawyer offered to do the transaction. The Defendant took the Claimant to her (the Defendant's) house where the Claimant stated that she had not told her brother that she had come to town and when the Defendant asked why, the Claimant said that she did not want her brother to know what she was doing.

[21] The Defendant told the Court "she gave me the plastic bag with some documents to hold for her". The reason why she gave the Defendant the documents was because she had never given her father a share of the land at Rouarne, that the land had to be shared among the brothers and sisters, that she had given her sister her share but had never given her father anything out of the land. The Claimant told the Defendant that her mother had given her the land but she did not give her mother any money at the time, that she could not face the Defendant's father or the Defendant's brothers and sisters so she came to the Defendant to give her the land.

[22] The Defendant claims to be a "little reluctant" because she knew that the Claimant would give people things and take care them back.

[23] The Defendant also stated that the Claimant said that she was giving the documents to the Defendant because she wanted to move in with a male friend whose daughter was married and they had come to her from the land.

[24] The Defendant next testified that she went down to see her aunt on 28th January accompanied by Mr. Gustave and Ms. Branch, that she prepared a Promissory Note and told the Claimant that since she (the Claimant) had promised to give her the land to take care of her if she would sign the promissory note, that the Claimant agreed in the presence of the two witnesses.

[25] The Defendant states that she went and told her father what had transpired between herself and the Claimant, that her father stated that he did not agree that the Claimant was giving her the land to take care of her and reminded her of an occasion when the Defendant was six (6) years old, that the Claimant had given the Defendant's brother a cow and had taken it back. That the Defendant said is the reason why she did the promissory note.

[26] The Defendant related that she started to take care of the Claimant and made arrangements for her brother to stay with the Claimant, that in February 2002, the Claimant called her and asked her to have the lawyer prepare a Deed of Sale in her favour, that she did have the Deed prepared in her office and informed the Claimant. The Claimant complained that her knees were hurting but that she would "come up the right time".

[27] According to the Defendant, the Claimant came to town on 18th February 2002, she took her to the lawyer's office and there the lawyer read the document to the Claimant. The Claimant said that she did not want to do a Deed of Donation, but a Deed of Sale, the same way her mother had given her the land. The Defendant states that it was the Claimant who asked her to put a value of $20,000.00 on the property, that her own Deed had $2,000.00. The lawyer then asked the Claimant if she could sign, the Claimant said yes and she did so in the presence of the Defendant and the lawyer.

[28] Under cross examination the Defendant stated that she had been working with the lawyer's office for 8 years. She admitted not being close to her aunt the Claimant that she had pre typed the note before she went to the Claimant's house and that when she had typed "my land" on the document, she did not intend a donation. The Defendant stated that when the Claimant said that she wanted her to take care of her until death that she did not understand that she wanted a will, she did not tell her a will.

[29] The Defendant stated that the Claimant gave her all her documents. She denied that she had wanted the Claimant's land. She admitted not showing the Promissory Note to the lawyer before having it signed and could give no reason for not doing so but that she showed it to him before the Deed of Sale was prepared and he told her that he hoped everything was ok.

[30] The Defendant explained that after the Deed of Sale had been signed she sent it to be registered but that there was a query about the land certificate and when a search was made at the Land Registry none could be found and so a Statutory Declaration had to be

done. She denied that the Deed was registered before the Statutory Declaration was made. The Defendant stated that she got the Claimant to sign the Statutory Declaration and then took it to the Justice of Peace for his signature.

[31] When shown the copy of the Land Register and the Statutory Declaration, the Defendant admitted that the Register showed that the land had been registered on 7th March, 2002 and the Statutory Declaration was dated 12th March 2002.

[32] The Defendant admitted that before she got the land she had not seen the Claimant for over 20 years.

[33] The third and final witness for the Defence was Joseph Gustave, the Defendant's friend. He told of accompanying the Defendant and Ms. Branch to the Claimant's house where he read the document to her and had the document signed. He said that the purpose of the visit was to have the Claimant sign a promissory note in relation to her passing on all of her land papers to the Defendant. In his words "the transaction appeared free and voluntary. Ms. Harry's reaction was one of cordiality. Her general attribute was that she was wanting for that to happen: it was one of welcome". He said that after that he and the Defendant would visit the Claimant three times a week.

[34] Under cross examination Mr. Gustave said "My understanding of the promissory note clearly indicates that Ms. Harry has promised to give her land papers to her niece Ms. Kangal and through the giving of it she would take care of her until her death. In other

words my understanding is that a mental process has developed and as a result through this process the person would like to convey those thoughts of what their intentions were".

[35] He said that he and the Defendant stopped visiting the Claimant after the Defendant received information that the Claimant was trying to reclaim the land.

[36] He stated that he was not at present at the lawyer's office when the Deed of Sale was signed but when shown his Witness Statement, he changed his story and said "on recollection I was present".

Submissions

[37] Counsel for the Claimant submits that the Defendant on being made aware of the Claimant's inability (for whatever reason) to decipher the contents of the paper which she had presented for the Claimant to sign, ought to have taken her to a lawyer's office so that the paper could be read or ought to have allowed the Claimant to take it to her cousin for the cousin to read it for her.

[38] Counsel argues that the principle of "non est factum" should be applied here because the Deed of Sale that was prepared was radically and substantially different to a will which it was the Claimant's intention to make and therefore the Deed was null and void.

[39] Counsel in citing the case of Saunders v Anglia Building Society (1971) AC 1004 suggested that if the Claimant did in fact sign, she signed unaware of the contents of the

document, that her mind did not accompany her outward act and that the document which she signed is fundamentally different from that which she intended to make.

[40] Counsel contends that the Deed was executed at the Claimant's residence and had it been executed before a Notary, the following steps would have been taken by the Notary:

a) take instructions from the Claimant;

b) prepare documents per those instructions

c) explain contents of deed to ensure the Claimant's understanding of it;

d) read deed over to Claimant in the language which she felt more comfortable with;

e) obtain the Claimant's signature

[41] That had these steps been taken, the Claimant would have corrected the Notary as to the document viz, a will, that she had intended to make.

[42] Counsel submitted that in the same way that the Statutory Declaration had been executed i.e. taken to the Claimant at her home to be signed and then to the Justice of the Peace for his signature – that that was the same manner in which the Deed of Sale had been executed and so it should be improbated.

[43] Counsel maintained that the plea of "non est factum" was justified and cited the following statement from the judgment of Lord Reid in the Saunders case (supra):

> "the essence of the plea is that the person executing believed that the Deed had one character or effect whereas its actual character or effect is quite different and he can have no such belief unless he has taken steps or been given information establishing a belief".

[44] With respect to the Promissory Note, Counsel for the Claimant asserts that the document appears to be a jumble of ambiguous words which do not satisfy the legal requirements attached to a document of its nature. Counsel then quoted from Bullen and Leake and Jacob's Precedents of Pleadings 12th edition at page 761 where a promissory note is defined as :

> "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer".

[45] Counsel is of the view that had this document been shown to the Notary, he would have had occasion to explain to the parties the difference between the various legal documents viz a will, a donation, a deed of sale and a promissory note. The document does not assist the Court in ascertaining the Claimant's intention, because "the construction of the document must be as near to the minds and apparent intention of the parties as is possible and as the law will permit". In addition, in keeping with the learning to be found in Halsbury's Laws of England 4th edition, Volume 12 at paragraph 1460:

"The intention must be gathered from the written instrument read in the light of such extrinsic as in admissible for the purpose of construction. The function of the court is to ascertain what the parties meant by the words which they used…….".

[46] Counsel asked the Court to acknowledge that no money was paid to the Claimant as stated in the Deed and that this constitutes a misrepresentation of the truth.

[47] Counsel for the Defendant on the other hand succinctly submits that the two (2) relevant documents - the Promissory Note and the Deed of Sale – had the proper and correct signatures of the Claimant and that there was no attempt or suggestion that these signatures were forgeries. The two (2) documents are therefore valid as to their authenticity and content in which case, the Deed of Sale would obtain priority as being the one and only document which was registered first in time and therefore first in law. This equitable maxim clears the way as proof that the Defendant is the rightful owner.

Issues

[48] I am of the view that there are two possible issues to be determined:

a) whether the plea of "non est factum" can be sustained

b) whether there was an instance of undue influence

Non Est Factum

[49] A plea of non est factum if successful renders a transaction void and there is therefore a heavy burden on the party who seeks to invoke the remedy. It is to be kept within narrow limits and a man should not be permitted to try to disown his signature simply by asserting that he did not understand that which he had signed: per Donovan LJ in Muskham Finance Ltd., v Howard (1963) 1QB 904.

[50] In the case of Lloyd's Bank plc v Waterhouse (1993) 2 Family Law Reports 97 at 111, Lord Justice Purchase stated that for a plea of non est factum to succeed, three (3) things had first to be established by the party pleading it, viz:

a) that he was under a disability;

b) that the document which was signed was "fundamentally different" or "radically different" or "totally different" from the document which he thought he was signing; and

c) that he was not careless ……or that he did not fail to take precautions which he ought to have taken in the circumstances to ascertain the contents or significance of the documents he was signing.

[51] It should be noted that the plea of non est factum is not available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser: per Lord Reid in Saunders (supra) at page 1016.

[52] In the case at bar there are three (3) documents exhibited to which the Claimant appended her signature. There is no doubt nor denial that she signed the so called

Promissory Note, the Deed of Sale and the Statutory Declaration – in that order. There is no doubt either that the Claimant in signing these documents was aware that they affected her legal rights and had implications for her land. What however is in doubt and which the Court must determine is whether the Claimant in signing the Promissory Note and the Deed of Sale intended to sign documents of their nature or whether she intended to sign a radically, fundamentally or totally different document.

[53] In the Saunders case (supra) a 78 year old aunt gave the deed to her house to her nephew intending to make an immediate gift to him with the condition that she would live in the house for the rest of her life. Her nephew needed to raise money on the house and his business associate was collaborating with him on the venture. The business associate asked the aunt to sign a document but because she had broken her spectacles, she could not read it. She asked what it was and was told it was a deed of gift of the house to her nephew. She executed it in that belief. The document was in fact an assignment of the house by her to the business associate who subsequently mortgage it to a building society. When the business associate defaulted on his mortgaged payments, the building society sought to obtain possession of the house. The widow brought an action against the business associate and the building society, pleading non est factum and asking for a declaration that the assignment was void. The House of Lords held that the plea of non est factum which would make the assignment void had not been established, that the widow having signed what was obviously a legal document upon which money had been advanced on the faith of it being her document, could not now disavow her signature.

[54] That case turned upon the effect of the actions of the widow on the third party viz the building society. As against the business associate however the document was found to be voidable as having been induced by fraud.

[55] In our case, the Claimant is very elderly and in her unchallenged statement unable to read. She expressed the intention to leave her property for her niece after her death on condition that she looks after her. Throughout her evidence and even cross examination she was adamant that she wanted to leave her property to her niece after her death. On no occasion did she express any wish to execute any kind of deed and when the "paper" was brought for her to sign, she was astute enough, to request to have her cousin look at it and read it for her. As stated by Lord Justice Purchase in Waterhouse (supra) she was not careless. She sought to take the precaution of having someone other than the Defendant and her associates read the document to her. She was however dissuaded by the Defendant on the grounds that she (the Defendant) did not want anyone to know her business.

[56] It should be noted that the Defendant at no time refuted or challenged the Claimant's claim that on a number of occasions she asked to have her witness present or to read the document. Neither is there any evidence that the Defendant herself made any such suggestions and that the Claimant refused the offer.

[57] Lord Pearson in Saunders (supra) stated that ;

> "the doctrine of non est factum inevitably involves applying the subjective rather than the objective test to ascertain the intention. It takes the

intention which a man has in his own mind rather than the intention which he manifests to others (the intention which as reasonable men they would infer from his words and conduct").

[58] What we have in the present case is an old woman who has not seen this niece for over 20 years but with a wish that her niece could care for her in her old age. I accept her evidence as truthful when she said "I told Vercillia that she could feed me and when I die she could take the land" and "I said I would make a will for her to look after me and when I die she would take the land". It seems improbable to me therefore that the Claimant intended to make an absolute gift of her property to the Defendant while she was still living. In my opinion there is a sufficient discrepancy between her intentions and her act".

[59] The Promissory Note which the Claimant was induced to sign read:

"I CLOTIDE HARRY, gave my niece Vercillia Kangal my land, and all my land papers to take care of me, until death".

[60] This document as read to the Claimant and signed by her appears to only partially give effect to her intentions. The evidence of the Defendant and Mr. Gustave indicates that it was merely read to her and she signed but Ms. Branch also testifies not being involved in the transaction and being some distance away and merely hearing "something", read to the Claimant, states that the Claimant was asked if she understood what had been read to her. I reject this evidence as given by Ms. Branch. It is clear that no one sought to ensure that the Claimant understood what she was signing.

[61] Mr. Gustave in an eager attempt to assist the Defendant's cause made in my opinion a telling statement. He said:

> "My understanding of the promissory note clearly indicates that Ms. Harry has promised to give her land papers to her niece Ms. Kangal and through the giving of it she would take care of her until her death. In other words my understanding is that a mental process has developed and as a result through this process the person would like to convey those thoughts of what this intentions were".

[62] What this "clearly indicates" to me is that he like the Claimant " has in his own mind" that the handing over of the land papers by the Claimant was a mere promise which would take effect on the Claimant's death. I am not convinced that by signing this document the Claimant was consenting to hand over her property to the Defendant. In the words of Lord Wilberforce in Saunders (supra) at page 1026:

> "In my opinion a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended".

[63] It is my considered opinion that the Claimant signed this note believing that it was merely a promise to give the Defendant the land when she died.

[64] Having considered the document in those terms and treated it as a document of legal effect, I must now state that I am in agreement with Counsel for the Claimant that given the legal definition of a promissory note (at paragraph 44) the document which purports to be a promissory note does not have the salient characteristics.

[65] It is evident that the Defendant drafted the document without recourse to her employer but using what little knowledge gleaned from her work as a legal secretary and, motivated by greed, worked quickly to ensure that the Claimant's promise was validated in writing and in the presence of two (2) witnesses especially in light of her father's doubts and her own reservations about there being a gift due to the Claimant's supposed propensity to take back her gifts.

[66] The evidence with respect to the execution of the Deed of Sale is contradictory. The Defendant states that it was executed in the lawyer's office and in his presence; the Claimant denies this.

[67] Regardless of who may be speaking the truth on this occasion, the considerations are the same as when the Promissory Note was examined above: was this the document the Claimant intended to sign?

> "It is expected that the person who signs a document must exercise reasonable care and what amounts to reasonable care will depend on the circumstances of the case and the nature of the document which it is thought is being signed".

per Cotton LJ in National Provincial Bank of England v Jackson (1886) 33 Ch 1.

[68] However while reasonable care is expected of the signer:

> "…….the plea of non est factum ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By "sufficiently understanding" I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be".

[68] Thus was the opinion of Lord Pearson in Saunders (supra) at page 1034.

[69] In my judgment our case is a "proper" case for relief to be given to the Claimant. She is old, illiterate and was induced to sign the document while being dissuaded from seeking her own witness. She was inveigled into signing a document of a character radically different from the one she wished and intended to sign. She cannot either be said to have "sufficiently understood" the document because I do not accept that it was read over or explained to her so that she could have detected the "fundamental difference" between

the actual document she signed – the Deed of Sale – and the one she believed and intended it to be - a will.

[70] It is my view that that given the "nature of the document", the "reasonable care" to be exercised should not only relate to the signer (the Claimant) but having regard to the circumstances of this case, also to the lawyer in whose presence the Defendant states the Deed was executed. It is easy however to believe and accept from the evidence adduced before the court that the Deed was taken by the Defendant to the Claimant to be signed and was not in fact signed in the lawyer's office. This not only because the lawyer if scrupulous, would have been expected to read and explain the document to the Claimant and having done so, for the Claimant to query the type of document, but taking into account the Defendant's admitted previous behaviour in having the Claimant sign documents. In her testimony the Defendant explained that when she needed to have the Statutory Declaration, signed that she took it to the Claimant's house, had it signed and then took it to the Justice of Peace for his signature. This action in my opinion would invalidate the document because the jurat made reference to the document having been signed in the presence of the Justice of the Peace.

[71] The Deed of Sale speaks to "a consideration of $20,000.00 paid at the execution hereof by the Purchaser or Vendor". The Defendant admits that she never gave the Claimant any money but cleverly seeks to place the blame for that on the Claimant by explaining that it was the Claimant who suggested that sum because that was the way her own Deed had been done when she got the land from her own mother. I believe the Claimant when she said that she had bought the land. I am of the view that that statement regarding the sum

to be inserted in the document was of the Defendant's own making, based upon her knowledge as a legal secretary and that she made that statement solely to hide her own misdeeds.

[72] I am not satisfied that the Claimant executed the Deed of Sale as and for her deed. It is my opinion it was engineered by the Defendant to secure her hold on the Claimant's land. I am fully of the opinion that the document which the Claimant expected to make was one in which the Defendant would succeed to the Claimant's property on her death. In the result therefore there is a fundamental difference in substance and in character between the Claimant's intention (what she thought she was signing) and her act (what she signed).

[73] In the premises I find the Claimant's plea of non est factum has succeeded and I now declare the Deed of Sale null and void.

Undue Influence

[74] Undue influence according to the legal authorities exists wherever there is a relationship of trust and confidence by the donor in the donee and the question is not whether the donor knows what she was doing, had done or proposed to do, but how the intention was produced.

[75] While there is no presumption merely because the Claimant is old, it is because of the nature of the gift that the court must be satisfied before the gift will be enforced. According to Ungoed Thomas J in In re Craig deceased (1971) Ch 95:

> "What has to be proved to raise the presumption of undue influence is first a gift so substantial (or doubtless otherwise of such a nature) that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act; and secondly a relationship between donor and donee in which the donor has such confidence and trust in the donee as to place the donee in a position to exercise undue influence over the donor in making such a gift".

[76] See also the case of Allcard v Skinner (1887) 36 Ch. D 145 where Lindley LJ said that what must be shown is:

> "some unfair and improper conduct, some coercion from outside, some over – reaching, some form of cheating, and generally, though not always, some personal advantage by a donee placed in some close and confidential relation to the donor".

[77] Following the case of In re Brocklehurst Estate (1978) chapter 14 it would appear that certain questions must be answered:

1. Would an ordinary person actuated by ordinary motives in the position of the Claimant have made a gift to the Defendant of the property in question?

2. Was the relationship between the Defendant and the Claimant such that if the Defendant had been so minded she could have exerted some influence on the Claimant to grant the property to her?

3. Has the Claimant in relation to the grant of the property been independently advised.

[78] As stated previously, the facts in our case reveal a frail old woman needing care in her later years seeking out a niece with whom she has not been in contact for over 20 years. Her intention as she clearly states was to bargain with the Defendant – you look after me and I will give you my property when I die. This was a spontaneous act on the Claimant's part.

[79] In Goldsworthy v Brickell (1987) Ch 378, Nourse LJ said that it must be proved that the transaction is:

> "the spontaneous act of the donor or grantor acting in circumstances which enable him to exercise an independent will and which justify the court in holding that the gift or transaction was the result of a free exercise of his will".

[80] The Claimant's spontaneous act in relation to the Defendant was brought to an end when the Defendant seeking to capitalize on the offer, coerced the Claimant into signing a document. This changed the tenor of the transaction so that nothing which transpired after that could be termed a free exercise of the Claimant's will.

[81] But while it is incumbent upon the Defendant to prove that she had not taken advantage of her position with the Defendant or "had been assiduous not to do so", it is yet necessary for the Claimant to establish that the "scheme" was manifestly disadvantageous to her.

[82] Slade J in giving the judgment of the Court of Appeal in Bank of Credit and Commerce International SA v Aboody (1992) 2AER 955 categorized a manifest advantage as:

> "if it would have been obvious as such to any independent and reasonable person who considered the transaction at the time with knowledge of all the relevant facts".

[83] Ms. Branch, the Defendant's witness is as close to being an independent witness as there could be in the circumstances. After hearing of the intentions of the Claimant, she expressed her misgivings about the wisdom of the transaction and while her concerns were for the other nieces and nephews of the Claimant, it is evident that she considered that it would not work to the benefit of the Claimant.

[84] I refer to the case of Cheese v Thomas (1994) 1 WLR 129. In that case the plaintiff and his great nephew, the defendant, entered into an agreement whereby the defendant would mortgage the plaintiff's house but the plaintiff would live there until his death. When there was default in the payment of the mortgage, the plaintiff sought to set aside the agreement between himself and the Defendant. The trial judge found that the relationship between the two of them was of a fiduciary character: they were close, the Defendant was considerably younger and he had business experience and a degree of actual influence over the plaintiff. Undue influence was therefore to be presumed. The judge held that the transaction was manifestly disadvantageous to the plaintiff who did not enter into the transaction after full, free and informed thought. He had insufficient advice and understanding to make a proper judgment. When the Defendant appealed this decision, the Court of Appeal determined that the trial judge was correct in his determination to set aside the transaction.

[85] In the instant case, the Claimant also did not have sufficient advice nor is there any evidence that she had the benefit of independent legal advice. This would be crucial if the Defendant is to prove that she had not unduly influenced the Claimant.

[86] The evidence before the Court as given by the Defendant is that when the Claimant came to the lawyer's office and the Defendant informed the lawyer that the Claimant wished to make a gift of her land to the Defendant, the lawyer offered to do the transaction. When the Defendant prepared the Deed of Sale, the lawyer read the document to the Claimant, asked her if she could sign and she signed. Nowhere in the Defendant's recounting of the instances of the Claimant being in the presence of the lawyer is there any indication that it

was suggested to the Claimant that she seek independent legal advice. So too in the case of the so called Promissory Note. It was read to the Claimant and she was told to sign.

[87] The case of Inche Noriah v Shaik Allie Bin Omar (1929 AC 127 is instructive In that case, a Malay woman "of great age" and wholly illiterate executed a deal of gift of landed property in Singapore in favour of her nephew who had the management of her affairs. She had independent advice from a lawyer who acted in good faith but he was not informed that the property comprised in the gift was almost her entire estate nor did he make it clear to her that she could almost equally benefit her nephew by will. The gift was set aside by the Privy Council. Lord Hailsham LC said:

> "It is necessary for a donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person to completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing, and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption".

[88] One final question necessarily falls to be considered: whether there was fair consideration. In this case, the consideration was $20,000.00. The Defendant readily admitted that it had

never been paid to the paid to the Claimant. Indeed the property had not been even valued by the Defendant. I do not believe the Defendant when she attributed to the Claimant the decision regarding the value to be inserted in the Deed. I do not believe that she asked the Claimant's opinion.

[89] Lord Scarman in the case of National Westminister Bank v Morgan (1985) 1 AER 821 said that in setting aside for undue influence:

> "The wrongfulness of the transaction must therefore be shown. It must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transaction of a gift. A relationship can become a relationship in which one party assumes a role of dominating influence over the other. In Poosathuri case, the Board recognized that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be persuaded to have been procured by undue influence".

[90] See also Kerr on Fraud and Mistake 7th edition at page 225 where it is stated:

> "The fact that a transaction may have been imprudent, precipitate or may have been entered with without independent professional advice is as material as mere inadequacy of consideration if the parties were on equal terms and in a situation to act and judge for themselves, and fully understand the nature of the transaction and no evidence can be adduced of the exercise of undue influence. But inadequacy of consideration or

absence of independent professional advice become a most material circumstance when one of the parties to a transaction is from age, ignorance, distress, incapacity, recklessness, weakness of mind, body or disposition or from humble position or other circumstance unable to protect himself".

[91] Having seen and heard the witnesses, I preferred the evidence given by the Claimant. She was simple and straightforward, often repetitive, but without a hint of subterfuge not wavering even under cross examination. By contrast the Defendant sought to cover all of her bases, at times over explaining with the result that she exposed her chicanery I formed the view that she weaved her tale to fit the circumstances. The witnesses for the Defendant impressed me as being partisan although Ms. Branch tried very hard to appear unbiased. Mr. Gustave proved himself to be the Defendant's very good friend and in his effort to assist her case even resorted to untruths e.g. he suggested that he had not been present at the lawyer's office but when referred to his witness statement, immediately recalled being there and this in spite of the Defendant's testimony that it was she, the lawyer and the Claimant who were the only ones present.

[92] I am of the view that the Defendant having exerted undue influence on the Claimant, the transaction will be set aside.

ORDER

1) That the Deed of Sale executed before Kenneth Foster on the 18th February 2002 and registered in the Land Registry on 9th March 2002 is hereby declared null and void
2) That the Land Register be rectified to reflect that the Claimant is the owner of Block and Parcel 1627B 10
3) That the Registrar of Lands act so as to give immediate effect to these changes.
4) That cost are awarded to the Claimant to be agreed or assessed.

SANDRA MASON Q. C.

High Court Judge