



[2016] JMSC Civ. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 06802 OF 2009

**IN THE ESTATE of LEANDO
HARTLEY late of Hope Bay in the
parish of Portland, Cultivator,
deceased, intestate.**

BETWEEN BEVERLEY LEWIS 1ST CLAIMANT

AND HARRIET HARTLEY 2ND CLAIMANT

AND CLEVELAND HARTLEY DEFENDANT

**Mr. Joseph Jarrett; instructed by Messrs. Joseph Jarrett and Company: for the
Claimants**

Mr. Thomas Ramsay; instructed by Messrs. Ramsay Stimson: for the Defendant

HEARD: 22nd & 23rd February & 14th March 2016.

IN OPEN COURT

CORAM: G. FRASER, J.

***Registration of Titles Act, Sections 68, 70 & 71;
Indefeasibility of Registered Title; Fraud and proof
thereof; Undue influence; Non est factum.***

INTRODUCTION

[1] At the outset I wish to declare that I have read the submissions tendered on behalf of the Claimants and the Defendant. I have had regard to the evidence of all the witnesses called on both sides and if I do not specifically mention every iota of evidence or every case cited; this is not a reflection of me having disregarded anything.

[2] This is a claim made by the two daughters of Leando Hartley (herein after the deceased) against their brother; whom they accuse of obtaining the deceased's property by fraud. The chronology of events in this matter is indeed interesting and will impact the Court's assessment of the evidence and therefore I will attempt to set out in brief the sequence of events hereunder:

1. That up to June 2008, the deceased was the sole registered proprietor of land part of THE HOPE AND GRAHAM HALL in the Parish of Portland registered at Volume 1405 Folio 95 of the Register Book of Titles and being the land formerly comprised in Volume 1295 Folio 721 of the Register Book of Titles.
2. That the deceased was illiterate but could sign his name and sometimes made his mark an X in substitution of a signature.
3. That in or around September 1997, the deceased by a written document; authorized Beverly Lewis the 1st named claimant to conduct his business and personal affairs on his behalf.
4. That acting on the above authorization, in or around May 1999, the 1st claimant repaid the outstanding mortgage on the subject property and accordingly had the outstanding mortgage number 275715 discharged in full from her personal funds. She subsequently collected the original duplicate Certificate of Title with the endorsement of the discharge of mortgage thereon. The said Certificate of Title has remained in her possession with the knowledge and approval of her father.

5. In March 1998, an Instrument of Transfer was executed by the 1st claimant and the deceased purporting to transfer the subject property to the Claimants, Defendant and deceased as joint tenants. The said Instrument of Transfer however, remains incomplete; being undated, un-witnessed and unsigned by the 2nd claimant and the Defendant.
6. The Defendant says that an interest in the said land was legally transferred to him by Instrument of Transfer By Way of Gift No. 1539885, dated the 26th day of March, 2008, (pursuant to Section 88 of the Registration of Titles Act), whereby the said land was transferred by the deceased to himself and the Defendant, as joint tenants, (pursuant to Section 90 of the Registration of Titles Act).
7. Prior to the execution of the said Instrument of Transfer By Way Of Gift the deceased had discovered that the Duplicate Certificate of Title registered at Volume 1295 Folio 721 of the Register Book of Titles, in which the said land was originally comprised, could not be found. As a consequence of this, the deceased instructed the said Messrs. Heron S. Dale & Co., Attorneys-at-Law, to prepare an Application No. Miscellaneous No. 1439238 on his behalf for (a) the cancellation of the said Certificate of Title, the Duplicate of which had been lost, and (b) the issue of a new Certificate of Title in substitution thereof, (pursuant to Section 82 of the Registration of Titles Act). As a consequence of the said Application, the said Certificate of Title registered at Volume 1405 Folio 95 was issued in substitution for the original Certificate of Title.
8. That some months before the death of the deceased the Claimants allege that it was discovered that the Defendant's name was endorsed on the said Title with their father as joint tenants under and by virtue of Transfer No. 1539885 which was duly registered on the said Certificate of Title on the 18th day of June, 2008.
9. When the deceased was taxed as to this discovery of the transfer and endorsement of the Defendant's name on the title; he expressed "shock and disbelief". He allegedly confided in the 1st claimant that "at no time was he informed that he was transferring his title from his name into the joint names of

himself and the Defendant and did not recall signing any such document or putting his "x" against his name".

10. That Leando Hartley purportedly placed his "X" against a Will on the 15th of August 2009 which was made just a few days before his death, bequeathing the said property to the two Claimants and the Defendant jointly. This Will is not properly attested relative to the deceased making his mark, and therefore does not conform to the requirements of the Wills Act.

11. The deceased died on the 17th day of August, 2009, and subsequent to his death, the Defendant gave instructions to his Attorneys-at-Law, Messrs Ramsay Stimpson, to prepare the necessary documents to note the death of the deceased on the said Certificate of Title.

12. Towards this end, an assessment of the estate duty payable on the interest in the said land passing on the death of the deceased was made by the Commissioner, Taxpayer Audit & Assessment Department, (TAAD), pursuant to the Defendant's Application, and the estate duty amounting to ninety-six thousand and thirty-one dollars fifty-six cents (\$96,031.56), was paid.

13. An application was made by the Defendant; to the Registrar of Titles on the 14th day Of September, 2010, to have the death of the deceased noted on the said Certificate of Title.

14. On the 10th day of September, 2009 a Caveat No. 1615459 was lodged on behalf of the Claimants and endorsed on the said Certificate of Title.

THE CLAIMANTS' CASE

[3] This matter was commenced by way of a **Fixed Date Claim Form**; filed on 3rd December 2009, seeking the following Orders and Declarations:

1. A declaration that the Estate of Leando Hartley is the absolute owner of all that parcel of land part of THE HOPE AND GRAHAM'S HALL in the Parish of Portland registered at Volume 1405 Folio 95 of the Register Book of Titles.

2. A declaration that the transfer of the said land by the deceased to the Defendant was fraudulently induced by the Defendant, who procured same by undue influence and misrepresentation and the Transfer, is thereby void.
3. An order that the endorsement of the Transfer on Certificate of Title of the said land be cancelled and the Registrar of Titles effect the necessary cancellation and the absolute ownership of the land be restored to Leando Hartley.
4. An order that the Defendant by himself, his servants and/or agents be restrained from entering on the said land, entering into contract for the sale thereof, charging or otherwise dealing with the said land, prior to cancellation thereof by the Registrar of Titles.
5. In the event that the signature of the Defendant is required to give effect to the orders herein and the said Defendant is unwilling, unable or neglects to sign any requisite documents, then the Registrar of the Supreme Court of Judicature of Jamaica is hereby empowered to sign the said documents on behalf of the Defendant herein.
6. An order that the Claimants are entitled to immediate possession of the said land for the purpose of securing the same for the benefits of the estate of Leando Hartley and its beneficiaries.

[4] The Amended Particulars of Claim filed on the 27th May, 2013 set out the particulars of undue influence and /or fraud in the following terms:

- (a) The Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, had dominated the deceased's will and abused the relationship of confidence he had reposed in the Defendant.
- (b) The Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, fraudulently misrepresented to the deceased the nature of the documents being signed by the deceased and thereby took advantage of the illiterate state of the deceased.

(c) Alternatively, the Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, fraudulently added his name to the Certificate of Title by way of the said Transfer by way of gift, marked with an "X" thereon purporting to be that of the deceased but which was in fact a forgery. The "X" on the document was never the "X" of the deceased.

(d) The Defendant knew that the deceased had always maintained that the property is to devolve to all three of his children in equal shares.

[5] The Claimants further allege that the Defendant never enjoyed a close relationship with his father, the deceased since migrating to the United States of America over twenty (20) years ago, where he now permanently resides having never returned to Jamaica since that time. That the Defendant never contributed to the care, maintenance and wellbeing of the deceased and failed to attend his funeral or to offer any support, financial or otherwise, regarding the funeral arrangements and settling of funeral of the deceased.

[6] That the Claimants on the other hand; are the only persons who have been jointly responsible and have attended to and ensured that the needs of their father, financial or otherwise, were always met and they have always maintained a close and loving relationship with him.

[7] It is the belief of the Claimants that through misrepresentation and undue influence exercised by the Defendant and /or his agents in Jamaica that the transfer was effected, whether directly or indirectly, and thereby the Defendant has abused the deceased's trust and confidence. That having seen the transfer document the Claimants do not believe that the X entered on the document is the X of the deceased, because although he was illiterate he could sign his name and has never been seen to place his X instead of his usual signature. Therefore they are convinced that the transfer was a forgery perpetrated by the Defendant and /or his agents in Jamaica.

THE DEFENDANT'S CASE

- [8] The Defendant, who is now the sole surviving registered proprietor of the said land, denies that the transfer of an interest in the said land by the deceased to the Defendant was fraudulently induced and procured by undue influence and misrepresentation and says that the said Transfer was valid.
- [9] The Defendant says that an interest in the said land was legally transferred to him by Instrument of Transfer made by way of Gift No. 1539885, dated the 26th day of March, 2008, pursuant to Section 88 of the Registration of Titles Act. Whereby the said land was transferred by the deceased to himself and the Defendant, as joint tenants, pursuant to Section 90 of the Registration of Titles Act, which was duly executed by the deceased by making his "X", in the presence of Ms. Ivy Ferguson, a Justice of the Peace for the parish of Portland, pursuant to Section 152 of the Registration of Titles Act.
- [10] That at the time of the execution of the said Instrument of Transfer, the deceased was lucid, and this is borne out by the certificate endorsed by the said Justice of the Peace on the face of the Instrument of transfer by way of gift, that it was signed by him **"after the same was carefully read over and explained to him and he expressed himself as having understood same"**.
- [11] The Defendant denies that he acted in any fraudulent manner whatsoever, and says that all that has been done by the said deceased was of his own volition without any undue influence exerted by him, or any fraudulent misrepresentation made by him and says further that the said Last Will and Testament dated the 15th May 2003 and the said Instrument of Transfer No. 1539885 signed subsequently by the said deceased both indicates that the said deceased intended the said land to be vested in the Defendant.
- [12] Referring to sections 68, 70 and 71 of the Act, counsel, Mr. Ramsay on behalf of the Defendant; submitted that save and except in a case where fraud is established, a registered proprietor assumes immunity against any adverse claim

to land. Fraud, within the context of the Act, he argued, means actual fraud and the indefeasibility of the title operates as a bar to an action for recovery of possession of land.

[13] The Defendant is therefore putting the Claimants to strict proof of the claim and has further submitted through counsel that it is incumbent on the Claimants to prove that the Defendant's registered title, (which is held absolutely by him free of all encumbrances except those specifically set out in Section 70 of the Registration of Titles Act), has been defeated by fraud as defined in ***Edward Lynch and Dennis Lynch v. Dianne Ennevor and Eli Jackson*** (1982), 19 J. L. R., pages 174 and 175.

[14] The case of ***Beanland v. Bradley*** (1854) 2 Sm. & G. 339¹, among others, was also cited in support of these submissions. In that case the Court had held that "There is no presumption of undue influence in the gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death". It was counsel's further submission that none of the arguments and contentions raised by the Claimants in their evidence is sufficient to establish the allegation of fraud so as to impeach the registered title.

THE LAW

[15] Section 68 of the Act grants to a registered proprietor an absolute title; sections 70 and 71 of the Act also accords to a registered proprietor an unimpeachable certificate of title but imposes fraud as the only factor which would affect the title's validity. The latter sections clearly demonstrate that the registration of a certificate of title, unless fraudulently obtained, stands impervious. The sections provide as follows:

"70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or

¹ As cited in ***Halsbury's Laws of England*** Third Edition, Volume 17, page 679.

otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such encumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:..."

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[16] In *Gardener and Others v Lewis* [1998] 1 WLR 1535, their Lordships, speaking to the effect of sections 68, 70 and 71 of the Act, had this to say at paragraph 7:

"From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that

land has been included in the title because of a ‘wrong description of parcels or boundaries’

- [17] Fraud, within the context of the Act, means actual fraud, not constructive or equitable fraud. *In Assets Co Ltd v Mere Roihi and others* [1905] AC 176 (PC), the Court dealt with the issue of fraud, as it relates to a registered title: “Sects. 46, 119, 129 and 130 of the *Land Transfer Act*, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189, and 190) [these sections are substantially similar to the *Registration of Titles Act* in this jurisdiction; in relation to the indefeasibility of a certificate of title]. The Court there indicated “... that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud.”
- [18] The Claimants’ general allegations of fraud as outlined by Mr. Jarrett in his submissions are not convincing. Arguably, the familial relationship between the Defendant and the deceased father is not evidence showing some dishonesty or fraudulent scheme by that Defendant where the deceased transferred the property to himself and the Defendant as joint tenants.
- [19] Fraud, it should be remembered, has to be specifically pleaded and it has to be done with particularity. In addition to that, learned counsel submitted, that the nature of the alleged fraud was by way of deceiving the deceased as to the nature of the transaction; would have required a conspiracy between Mr. Herron S. Dale, the attorney-at-law, who prepared the instrument of transfer and the Justice of the Peace, Ms. Ivy Ferguson, who witnessed the deceased’s signature on the document. Not one iota of evidence was advanced in support of such a conspiracy, no assertion or particulars of any conspiracy was made in the statement of case or in the evidence that the attorney-at-law or the JP was in any way complicit in the alleged deception

Attorneys-at-law dealing with civil litigation have traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord Selborne LC in

John Wallingford v Mutual Society and the Official Liquidator (1880) 5 App Cases 685 at page 697 stated the general rule, He said:

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.”

In ***Associated Leisure Ltd and others v Associated Newspapers Ltd***, [1970] 2 All ER 754 at pages 757-8; Lord Denning MR (as he then was) cautioned that fraud should not be pleaded unless there was “clear and sufficient evidence to support it”. Similarly in ***Donovan Crawford and Others v Financial Institutions Services Ltd*** [2005] UKPC 40, the Privy Council emphasized the standard in respect of the issue of fraud in civil litigation. The Court adumbrated at paragraph 13 of its judgment that “***It is well settled that actual fraud must be precisely alleged and strictly proved.***”

ANALYSIS OF EVIDENCE

[20] I note the provisions of rule 8.9(1) of the Civil Procedure Rules (CPR) which requires a claimant to include all the facts on which the claimant relies. I also note that the Court of Appeal has determined, in the context of that rule; that even if fraud is not expressly pleaded there ought to be averment of the facts which are consistent with fraud. In other words, the allegations must suggest fraud and there must be evidence to support the allegations. In ***Harley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley and Others*** [2010] JMCA Civ. 46, Harris JA said, at paragraph [57]: “The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleadings must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to

be adequate evidentiary material to establish that the interest of a Defendant which a claimant seeks to defeat was created by actual fraud.”

ACTUAL FRAUD

[21] Was Fraud alleged and proven in this case? This is the question that this Court is enjoined to determine. Significantly I have noted that there were no specific pleadings or particulars in relation to fraud or undue influence alleged in the original pleadings; however the Amended Particulars of Claim filed on the 27 May, 2013 sought to set out the particulars of undue influence and /or fraud in the following terms:

(a) The Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, had dominated the deceased’s will and abused the relationship of confidence he had reposed in the Defendant.

(b) The Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, fraudulently misrepresented to the deceased the nature of the documents being signed by the deceased and thereby took advantage of the illiterate state of the deceased.

(c) Alternatively, the Defendant, aided and assisted by family members residing in Jamaica, including Denise Hartley, fraudulently added his name to the Certificate of Title by way of the said Transfer by way of gift, marked with an “X” thereon purporting to be that of the deceased but which was in fact a forgery. The “X” on the document was never the “X” of the deceased.

(d) The Defendant knew that the deceased had always maintained that the property is to devolve to all three of his children in equal shares.

[22] Although the amended particulars do allege fraud; to my mind this was done in very broad and vague terms there was no particularizing of any act or acts done by the Defendant, Miss Denise Hartley or indeed any other person from which the Court could directly or inferentially conclude that fraud was perpetrated.

The evidence in Chief before the Court on behalf of the Claimants came in the form of the Witness Statements of Beverley Lewis and Harriet Hartley, both dated the 31st of August, 2015. There was not much of a cross examination conducted by the Defendant's Counsel. The brief cross examination of these two witnesses was geared towards determining their presence in Jamaica at the material time when the Instrument of transfer was executed by the Deceased, and consequently whether they could from their own knowledge say that the deceased did not sign the transfer document or was misled in doing so.

[23] The Court also had the benefit of the Expert Evidence of Mr. George Dixon which came in the form of his examination in chief and his cross-examination on his report dated the 6th of January, 2016.

The testimony of Mr. Dixon included details of his training, qualifications and experience. Mr. Dixon explained that the documents which he consulted in order to compare the deceased's signature or his X were dated between 1997 and 2009 and would have included the following:

1. Copy of statutory Declaration bearing known signature/handwriting of Leando Hartley dated 25th November 2006 – labeled **K1**
2. Copy of last will and testament bearing known signature/handwriting of Leando Hartley dated 15th May 2003 - labeled **K2**
3. Copy of letter addressed to whom it may concern; bearing known signature/handwriting of Leando Hartley dated 3rd September 1997 – labeled **K3**
4. Copy of last will and testament bearing known signature/handwriting of Leando Hartley dated 15th August 2009 – labeled **K4**.

[24] Subsequently, only the document marked **K4** was utilized by Mr. Dixon in the comparative analysis of the questioned document; because it was the only known writings of the deceased that contained his signature in the form of an "X". Mr. Dixon further explained that he utilized the method of the '7S', that is; slant, size, space, speed, slowness, style and stroke. He had concluded that "it is my professional opinion that the document labeled Q1 which bears the mark (X)

does not appear to have been written by the author of the document labeled K4 (x). However it is my recommendation that more specimens with the letter X be provided to make a conclusive opinion”.

[25] Part 32.3(1) and (2) of the Civil Procedure Rules, 2002; provides that it is the duty of an expert to help the Court impartially on the matters relevant to his or her expertise and this duty overrides any obligations to the person by whom he or she is instructed or paid. An expert is expected to aid the court impartially by furnishing information so that the tribunal can make its own independent assessment by applying the information to the facts as proved in the case. In *Davie v Edinburgh Magistrates* [1953] SC 34 at page 40, Lord President Cooper stated that “their duty is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence.” Of course the court is not obliged to accept the opinion of an expert, even if it is un-contradicted. The court must come to its own conclusions bearing in mind that expert testimony is only a part of the evidence in the whole case.

[26] Counsel for the Defendant took issue with the fact that Mr. Dixon relied on a document (Q1) that was received from Counsel for the Claimants and declared it to be “a known sample of the deceased’s handwriting”. A document that only the 1st named Claimant alleged to have been signed by the deceased in her presence alone. Counsel Mr. Ramsay also criticized Mr. Dixon’s examination and analysis and the cogency of his opinion. Mr. Dixon in cross examination explained that handwriting can be affected and vary over time if the person has been sick with arthritis or has had a stroke. That in the event the person had any of these conditions the signature would change; it would not be so well defined neither would the strokes be as bold as that which obtained for the document **Q1**. Further, and in any event, Counsel, Mr. Ramsay submitted, that the said report/evidence of the Handwriting Expert was equivocal, and could take the

matter no further, as the expert had said that he required more samples in order to provide a conclusive report.

[27] Having carefully considered the expert evidence adduced in this trial; and in particular Mr. Dixon's response to the Court that his "findings were inconclusive". I find as a matter of fact that the conclusions of the expert witness are lacking in cogent, unreliable and not at all supportive of the Claimants' allegations of fraud and or forgery. I therefore have declined to rely upon such evidence and have disregarded it.

As a matter of law the Claimants bear the legal onus of proof. The quality of the evidence that is required in proof of the allegation of fraud in civil proceedings, and, in particular, where the allegation relates to a person's interest in registered land; must be cogent and credible. It is my view that the whole evidence adduced by the Claimants herein has not attained the requisite standard. In fact I would say it falls way short of the standard to be met by the Claimants in order to discharge the legal burden of proof in establishing their claim.

[28] Although an allegation of fraud in civil proceedings must be proved on the balance of probabilities, the authorities have established that the evidence in support of it must be proportionate with the seriousness of the allegation made. In this case the allegation made essentially involves the ascription of the charge of a criminal offence. For all intents and purposes the more serious the allegation of fraud before the court for determination, the more arduous it will be for the party who bears the burden of proving the truth of that allegation to persuade the court of the probability of its truth.

[29] I have had the opportunity to read a number of judgements dealing with this issue which I will refer to as the known authorities (*Miller v Minister of Pensions* [1947] 2 All ER 372 at 373–374; *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970; *Re Dellow's Will Trusts*; *Lloyds Bank Ltd v Institute of Cancer Research and Others* [1964] 1 All ER 771 at 773 and *Re H and R (Minors)* [1996] AC 563.). These authorities have established that the gravity of

the issue becomes a part of the circumstances which the court must take into consideration in deciding whether or not the burden of proof has been discharged. Therefore, the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

- [30] I have also garnered valuable guidance on this issue of proof in the decision of Rowe, J. (as he then was) in the case of ***John Chin v Watson's (Off-Course Betting) Ltd*** (1974) 12 JLR 1431, where he cited with approval the following excerpt from ***Kerr on Fraud and Mistake*** (7th ed.) page 672:

The law in no case presumes fraud. The presumption is always in favour of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established. Circumstances of mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief not merely suspicion.

- [31] Undoubtedly the fraud that is required to be clearly and conclusively proved by cogent and credible evidence in order to vitiate the registered transfer in question has long been settled on strong and binding authority that has been followed by courts in this jurisdiction. In ***Harley Corporation Guarantee Investment Company Ltd v Daley and Others*** [2010] JMCA Civ. 46, Harris JA noted several of the authorities on the subject when considering the question whether there was sufficient evidence of fraud, to impeach the transfer of registered land to a third party. At paragraph [52] of the judgment, she indicated that:

“The true test of fraud within the context of the [Registration of Titles] Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud”.

- [32] This test has been laid down in ***Waimiha Sawmilling Company Limited v Waione Timber Company Limited*** [1926] AC 101 by Salmon LJ, when at page 106, he said: “***Now fraud clearly implies some act of dishonesty***”. Lord

Lindley in *Assets Co. v. Mere Roihi* [1905] AC 176 (PC), states that fraud in actions seeking to affect a registered title:

“means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud”.

[33] *In Stuart v Kingston* (1923) CLR Starke J, at page 359, stated:

“No definition of fraud can be attempted, so various are its forms and methods...But we must say this: fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of the person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a “party to fraud” (sec. 187), in the plain ordinary and popular meaning of those words is not protected by reason of registration under the Act.”

Knox CJ, in the same case, described the kind of conduct that would amount to fraud as *“personal dishonesty”* or *“moral turpitude”*.

[34] I have closely examined the evidence put before me in this case within the context of the foregoing principles of law and find that the allegations by the Claimants that the deceased expressed “shock and disbelief”, concerning the signing of the instrument of transfer, is at best conflicted. I say this because Mrs. Lewis further said in her witness statement that when her father was taxed he said he “did not recall signing any such document or putting his X against his name”. To further compound the uncertainty the deceased is reported to have also uttered that if he “had signed an instrument of transfer, he was under the impression and was led to believe that the document was in furtherance of his care, maintenance and wellbeing”.

[35] While the pleadings made by the Claimants at paragraph (b) of the Amended Particulars of Claim are consistent with the assertions in their witness statements that the deceased had been deceived as to the nature of the document that he was signing, there is no evidence of the conspiracy that is intimated. There are, no allegations made against the lawyer Mr. Heron Dale neither the Justice of the Peace Miss Ivy Ferguson in this regard, nor were any allegations made against these two persons in the particulars of claim. There is no evidence adduced which suggests that the Lawyer or the Justice of the Peace sought to deceive the deceased; and based on the allegations of fraud alleged by the Claimants then there must have been a conspiracy involving these two other persons.

[36] Contrary to the Claimant's conspiracy theory, according to the Instrument of Transfer; the Justice of the Peace had "carefully read over and explained to him (the deceased) and he expressed himself as having understood the same". My interpretation of this certificate is that the deceased indicated to the Justice of the Peace that he understood the contents and purport of the document he was to sign. In the absence of any evidence to the contrary; I therefore conclude that Mr. Leando Hartley the deceased could not have been mistaken as to the nature of the document that he signed, because Ms. Ferguson did tell him what the document was about and explained it to him. If the Claimants are saying that did not happen; and I believe that is the thrust of their case then why were the Justice of the Peace, The lawyer and Miss Denise Hartley not all joined as Defendants, after all there is a conspiracy alleged in which they all must have participated to bring about the alleged fraud. In a case where an allegation is intimated one would expect to see all the conspirators joined as co-Defendants in the claim.

UNDUE INFLUENCE

[37] Although, on the assessment of the evidence I have eliminated fraud by way of deception, it is still necessary for me to address my mind to the issue of undue influence, as a subset of the issue of fraud. I do so because in recent decisions

actual undue influence has been characterized as a species of fraud. In **CIBC Mortgages plc v Pitt** [1993] 4 All ER 433, Lord Browne-Wilkinson said at page 439:

“...Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right...”.

In **Re London & Globe Finance Corporation** (1903) 1 Ch 728, deceit can amount to fraud; according to Buckley J at page 732:

“To deceive is to induce a man to believe a thing is true which is false which a person practicing the deceit knows or believes to be false.”

[38] The Claimants are also relying on the case of **Moses Robinson v Cynthia Nunes** (1994) 31 JLR. In that case Robinson the Plaintiff / Claimant, an elderly man, blind and illiterate, was the registered proprietor of a parcel of land. In 1988 the Defendant who was the plaintiff’s daughter told the plaintiff that it was necessary for him and her to sign a document in order to secure a loan from L.H., for the purpose of carrying out repairs to the premises. The plaintiff was not advised to obtain independent legal advice and upon finding out that the document was really a transfer sought to have it set aside. The Court adumbrated that:

1. The presumption of undue influence arises out of a fiduciary relationship where confidence and trust is reposed by one person in another. In the instant case, the evidence made it abundantly clear that the Defendant exerted a dominating influence over her elderly, ailing, impecunious father to whom she owed a fiduciary duty.
2. The presumption may be rebutted if it is proved that the transaction was to the disadvantage of the person exercising the dominating influence or if the

disadvantaged party received independent legal advice, which must be given with knowledge of all the relevant circumstances and must be of a nature that any competent and honest adviser would give. The Defendant failed to rebut the presumption as the transaction was not disadvantageous to her nor did the plaintiff, obtain independent advice;

3. The principle of *non est factum* can only apply if the document actually signed is fundamentally different from that which the person intended to sign as was the case here the plaintiff being unaware of the true nature of the document which he signed. The Defendant obtained the property by falsely representing to the plaintiff that he would be signing a loan document.

[39] In relation to Miss Denise Hartley, the particulars of fraud alleged as also the submissions of Mr. Jarrett are that she was instrumental in inducing the deceased to execute the said document. Mr. Jarrett further submitted that Denise Hartley and her sister Delva have a very close relationship with the Defendant and the Claimants believe that it was this connection which was used by the Defendant to fraudulently transfer the subject property into the joint names of himself and their father. Save and except to point to the evidence of Denise Hartley that she was in regular contact with the Defendant by phone; there is not one iota of evidence to substantiate this belief held by the Claimants. A belief to be valid and cogent must be substantiated by facts from which the basis of the belief can be ascertained by the court; failing which the belief is no more than spurious allegations.

[40] The deceased on the evidence was not established to be a person subjected to undue influence by Miss Denise Hartley, she was not married to him, she did not stand in a fiduciary relationship to him and she clearly did not conduct business on his behalf. She at best would accompany him when he went to Western Union or the Post Office; but he would conduct his business himself. If she did sign any document for and on his behalf, he would be present and would authorize her

actions. There are no complaints as to Denise's behavior in respect of such transactions done via Western Union or the Post Office.

[41] The evidence does not indicate that Denise Hartley would conduct business on behalf of the deceased; on the contrary it discloses that as far back as 1997 the deceased had authorized the 1st Claimant to conduct personal and business affairs on his behalf. The relationship between Denise Hartley and the deceased would not be a relationship in which undue influence can be presumed, but evidence of actual undue influence would be admissible for the Court's consideration. If such evidence is adduced and proved, the question is whether it could invalidate the deceased's execution of the Instrument of Transfer.

[42] Undue influence may be the basis for rendering invalid the execution of a document by a person under such influence. *In Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417, Lord Browne-Wilkinson outlined the principle of rendering such actions invalid. He said, at page 423b:

"A person who has been induced to enter into a transaction by the undue influence of another ('the wrongdoer') is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed."

Both *Barclays Bank v O'Brien* and the case of *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 dealt with the setting aside of mortgage instruments that were said to have been signed by virtue of undue influence.

[43] The principle of setting aside transactions based on undue influence, as set out in those cases, is also applicable to Jamaica. Sections 70 and 71 of the *Registration of Titles Act* does restrict, except in the case of fraud, the setting aside of transactions with the registered proprietor of land. Section 70 supports the principle of the indefeasibility of registered titles while section 71 seeks to protect persons who deal with the registered proprietor.

[44] I have noted that there was a paucity of evidence proffered in regard to undue influence. Despite the pleading of undue influence purportedly practiced by Denise Hartley who was said to be of a domineering disposition; the Claimants made no mention of those matters in their witness statements. In cross-examination Miss Denise Hartley was asked about her sister Delva and she agreed that Delva was her predecessor responsible for the care of the deceased. She also admitted that she had not seen the Defendant in about 30 years since she was a child but she would speak to him on the phone. There were no questions asked as to the nature or content of those conversations; but Counsel Mr. Jarrett is now inviting me to speculate and to determine that the conspiracy was born out of these frequent communiqué between the Defendant and Denise Hartley. Significantly there was no effort made to establish any instance where Denise would have actually exerted any undue influence over the deceased.

[45] In considering the whole evidence carefully, I do not find that the deceased was dependent on Miss Denise Hartley or his son in any way, the deceased did not entrust to either of them his business affairs; the evidence from the Claimants is very different from that scenario. I therefore, cannot properly consider that Miss Denise Hartley whether on her own behalf or acting as agent of the Defendant exerted any undue influence by virtue of dependency. A fair assessment of the evidence as a whole leads me to the conclusion that undue influence was not a relevant element in the execution of the instrument of transfer. Based on all the above, it is my finding that Mr. Leando Hartley's execution of the document of transfer was not as a result of fraud.

NON EST FACTUM

[46] For those reasons also, Mr. Leando Hartley would not be able to rely on the principle of *non est factum* (it is not my deed). That principle applies if a person signs one kind of document when he thinks he is signing another. The claimant Mrs. Lewis reporting hearsay as to what her father told her alleges that this was the circumstance that obtained in this case; but there is other documentary

evidence that indicates otherwise. I would therefore ascribe very little weight to these alleged utterances made by the deceased. I say this having regard to the contradictory statements allegedly made by the deceased and as reported by the Claimants; there is no firm position on the Claimants' case as to whether or not the deceased signed the document. I also base my decision on the fact that at the time the deceased is alleged to have made these utterances the medical evidence indicates that he was then suffering from memory lapses.

CONCLUSION

[47] The analysis of the circumstances surrounding Mr. Leandro Hartley's execution of the instrument of transfer reveals that the Claimants' assertions that they were attended by fraud are unfounded. The evidence reveals that the Justice of the Peace informed the deceased of the nature of the document and he gave the appearance that he understood. The Claimants cannot be heard to say, therefore, that the deceased was unaware of what he was signing. Nor can they appropriately say that he was tricked by the Defendant, the Lawyer, the Justice of the Peace or Miss Denise Hartley acting on the Defendant's behalf; into believing that he was signing something other than an instrument of transfer. There is no evidence which speaks to his medical condition at the time when the document was signed and which indicates that he was other than lucid and of sound mind. The evidence available speaks to before and after the material time with significant gaps in between.

[48] The Claimants cannot properly ask this Court in all the circumstances of the case; to say that the deceased acted under undue influence from the Defendant or anyone else. I am therefore led to conclude that there is no convincing, indisputable and conclusive evidence of actual dishonesty and/or moral turpitude on the part of Mr. Cleveland Hartley or anyone acting on his behalf; that could and did establish fraud on a balance of probabilities. Similarly, there is no credible evidence to support the allegation of undue influence, mistake or anything else that the Claimants seek to rely on to impeach the transfer. This

leads me to conclude that there is nothing in the circumstances that could have served to vitiate the transaction that led to the registered transfer of the property to the deceased and Defendant as joint tenants.

[49] The document, having been properly signed and registered, operated to create a joint tenancy that did not previously exist. The entry of the transfer in the Register Book of Titles, evidencing the creation of a joint tenancy, therefore, remains valid and effectual for all intents and purposes. Accordingly, the operation of the rule of survivorship or the *jus accrescendi* principle in favour of the Defendant will continue to subsist as it did at the time of the death of Mr. Leonard Hartley and therefore the deceased was not at liberty to dispose of his interest in the subject property as he saw fit by a will.

DISPOSITION

1. In light of the foregoing, the orders and declarations sought in the Fixed date Claim filed on the 3rd December 2009; are refused
2. Judgment is therefore entered for the Defendant
3. Cost is awarded to the Defendant in an amount to be agreed or taxed