



[2017] JMSC Civ 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV00890

BETWEEN	MAUREEN BEVERLEY SIMPSON (Executor of Estate WINNIFRED SIMPSON, deceased)	1st CLAIMANT
AND	DOREEN RICHARDS (Executor of Estate WINNIFRED SIMPSON, deceased)	2nd CLAIMANT
AND	RONALD SIMPSON	1st DEFENDANT
AND	PATSY SIMPSON	2nd DEFENDANT

Subject to editing

IN OPEN COURT

Crislyn Beecher-Bravo and S. Tennyson Hanson for the claimants

Jeromha Crossbourne and Renee Freemantle for the defendants

Heard - June 5,6,7,8,9, July 17, 31 and November 2, 2017

Land – Transfer by way of gift by elderly parents to adult child – Whether Undue Influence Proved – Whether Fraud Proved – Whether Donor had Requisite Mental Capacity – Whether Transfer Inequitable and Unconscionable – Registration of Titles Act.

CAROLYN TIE, J (AG)

The Claim

- [1] The subject of the claim herein are two properties which were once owned jointly by Dudley and Winnifred Simpson, the parents of the first claimant and the first defendant, (herein after referred to collectively as the parents), and which were transferred to both defendants by way of gift.
- [2] Mrs Winnifred Simpson died on November 23, 2009 and was predeceased by her husband on June 23, 2003. The claimants are the executors of her estate, a Grant of Probate having been entered on January 16, 2013.
- [3] The essence of the claim is that these properties were transferred to the defendants, contrary to the expressed intentions of the parents, either through fraud or as a result of the defendants exerting undue influence over both parents and after the death of Dudley Simpson, over Winnifred Simpson, who had become mentally impaired and unable to appreciate the implications of transferring property. The claimants claim that the transactions were intrinsically inequitable and unconscionable.
- [4] The claimants seek the following remedies:
 - (a) A Declaration that all those parcels of land registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Register Book of Titles are beneficially owned by the Claimants as the Executors and on behalf of the Estate of Winnifred Simpson, deceased.
 - (b) An order that the transfers of all those parcels of land registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Register Book of Titles to the Defendant's be set aside.
 - (c) An order that the Defendants deliver up the Duplicate Certificates of Title to all those parcels of land registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Register Book of Titles to the Claimant's Attorneys-at-Law within fourteen (14) days of the date of

this order, failing which the Registrar of Titles is directed to cancel the said Certificates of Title and to issue a new Certificates of Title to the said properties in the names of the Claimants as the Executors in transmission of the Estate of Winnifred Simpson, deceased.

- (d) An order that the Defendants transfer the titles for the said properties registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Register Book of Titles into in the names of the Claimants as the Executors in transmission of the Estate of Winnifred Simpson, deceased.
- (e) That the Registrar of the Supreme Court is empowered and directed to execute on behalf of the Defendants any document or documents required to facilitate the transfer of the said properties registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Register Book of Titles into the names of the Claimants as the Executors in transmission of the Estate of Winnifred Simpson, deceased.
- (f) That the Defendants be restrained and an injunction granted restraining them from taking any step or steps by way of sale, assignment of rights, title or interest which they now purport to have in any of the said properties registered at **Volume 1255 Folio 97** and **Volume 1351 Folio 987** of the Registered Book of Titles or from doing any act or acts whatsoever to create any rights, title or interest to themselves, jointly and/or severally or to any other person or persons in the said properties or generally acting to the prejudice of the Claimants and/or the Estate of Winnifred Simpson, deceased with regard to the said properties save and except as ordered by this Honourable Court.
- (g) Costs.

- (h) Such further and/or other relief(s) and/or directions as this Honourable Court may deem to be just.

The Defence

- [5] The defendants deny that the transfers of the parcels of land to the defendants were improper. They deny the existence of fraud as regards the transfer made by both parents. They further deny that they exerted undue influence over both or either parent as regards either transfer or that Winnifred Simpson had become mentally unfit to make reasoned decisions.
- [6] The defendants assert that the transfers were not inconsistent with the expressed intentions of the parents.

The Issues

- [7] The questions that ultimately arises for determination are:-
- (i) Whether the transfer of property to the defendants by both parents was obtained through fraud;
 - (ii) Whether the transfers were obtained as a result of undue influence being exerted over both or either parent by the defendants;
 - (iii) Whether the transfers are intrinsically inequitable and unconscionable.

The Evidence

- [8] There is no dispute that during their lifetime the parents acquired the following properties-
- Property registered at volume 1015 folio 364 of the Register Book of Titles on which a family home was constructed, herein after referred to as the first property.

- Property registered at volume 1255 folio 97 of the Register Book of Titles on which, for the purposes of this case, there were two houses and a commercial building, herein after referred to as the second property.
- Property registered at volume 1351 folio 987 of the Register Book of Titles, which title was issued on a parcel of land which had been subdivided from the second property, herein after referred to as the third property.

[9] It is also agreed that whilst alive the parents had indicated their intentions as regards the children benefitting from these properties. The parties are ad idem that the first property on which the family house had been constructed was always intended for Gloria, a daughter.

[10] As regards the second property, the parties are settled that it was the stated intention of the parents that Maureen and Ronald would each receive a house on that property and in fact that each took possession of same. The disagreement as regards this property primarily surrounds the commercial building, with the claimants contending that it was designated for Maureen, whilst the defendants insisting that it was for Ronald.

[11] The parties are also agreed that at some point all members of the nuclear family migrated to Canada, beginning with Dudley Simpson and followed by Ronald and thereafter the rest of the family. The parents returned to Jamaica, as did Ronald who subsequently met and married the second defendant in December 2002. The sisters remained in Canada but would visit Jamaica from time to time.

The case for the claimants

[12] The case for the claimants was presented through six witnesses, namely the two daughters of the parents (Maureen Simpson and Gloria Jean Simpson), Kayanna Boothe, an alleged caregiver for Winnifred Simpson, Lennox Henry a relative of the Simpsons, Shalise Porteous, the Senior Deputy Registrar of Titles and

manager of the legal applications branch at the Titles Office, and Dr. Sheldon Brown.

[13] The claimants allege that the transfer of the third property by both parents to the defendants on December 6, 2005 was effected either through fraud, or in the alternative was as a result of the defendants exerting undue influence over the parents.

[14] According to the sisters, the parents trusted Ronald and relied heavily on him as he was the only child living in Jamaica and lived in close proximity to them. The evidence was that the parents were around 73 years old when the transfer of the third property was made and contrary to their usual modus operandi as regards important matters, failed to inform the sisters of same. The sisters say that their parents' failure to indicate their intention to transfer property to the defendants was suspect. They described their family as one in which their parents were very open with them, with their father being the head of the household making the major decisions, which decisions were supported by their mother.

[15] Their belief that this transfer was not authentic is further bolstered by their contention that the parents were not fond of the second defendant, the wife of Ronald, and would not have made a transfer by way of gift to include her.

[16] The evidence as regards the presence of fraud rested largely on that elicited from Shalise Porteous. In outlining the procedure involved at the Titles Office when transferring property, she explained that a transfer instrument must be signed by each proprietor purporting to transfer his interest as well as by the transferee, which signatures must be witnessed in accordance with section 152 of the Registration of Titles Act. She indicated that a transfer instrument will be rejected where each transferor fails to sign. It was also pointed out that the Duplicate Certificate of Title must be submitted along with payment of the appropriate registration fee and the transfer tax certificate. Additionally, the Transfer Instrument must be stamped at the Stamp Office with the relevant duties paid.

- [17]** She testified that the system of processing transfers was manual until replaced with an electronic one somewhere between 2003 and 2004. On the manual system a transfer lodged would be registered within 21 days. Transfers that had been recorded manually were never placed on the electronic system that was implemented. The Aumentum, as the electronic system is called, requires relevant information regarding the transaction being inputted by personnel after the payment of the relevant fees. As regards the accuracy of the Aumentum record, whilst admitting that the possibility of errors could not be eliminated, it was her position that the most likely type of error that could be made when inputting information was a spelling error. Once the transaction is deemed registrable by a legal officer, it would thereafter receive an electronic signature as well as a physical signature on the Certificate of Title and on the instrument of transfer itself.
- [18]** As regards the transfer registered on the third property she revealed that the actual transfer documents have not been located which she deduced could have been misplaced whilst being moved between the various departments. She testified that Aumentum indicates that Dudley and Winnifred Simpson transferred property to Ronald and Patsy Simpson as joint tenants, which transfer was lodged on December 6, 2005 by Dudley Simpson.
- [19]** She pointed out that a person lodging a transfer at that time was not required to show identification and would only have been requested to present same if an issue arose on the transaction itself, for instance as regards a signature or seal of the Justice of the Peace.
- [20]** She informed that the practice as regards the lodging of transfers by persons who were not attorneys was varied sometime between 2010 to 2012 to require, inter alia, the presentation of identification. This was as a result of the significant levels of fraud being perpetrated at the office.
- [21]** As regards the transfer of the second property which was purportedly effected by Winnifred Simpson to the defendants in April 2008, the claimants presented

evidence that their mother was in no state of mind to conduct such a transaction at that time.

- [22]** Maureen revealed that she first realised that something was amiss on a visit to Jamaica in February 2004 when she found her mother's house to be uncharacteristically messy. Her mother was also urinating on herself. As a result she got medical help for her and employed a care giver, the first of many, to reside and care for her on a full time basis. From then onwards both sisters testified of their mother's mental and physical deterioration which necessitated constant care, for which they alone ensured. The sisters explained that their mother was eventually relegated to wearing diapers. By 2008 she was unable to recognise them.
- [23]** They complained Ronald would interfere with and frustrate the care givers resulting in the various care givers leaving. This they surmised was done to facilitate the defendants' access to their mother. They claimed that he did not assist in the care or maintenance of their mother but would instead deprive their mother as he would collect and encash her widow's pension cheques from Canada and utilise same for his own benefit.
- [24]** Kayanna Boothe and Lennox Henry also supported the position that Mrs Winnifred Simpson was physically and mentally unwell. Ms. Boothe declared that she assisted in caring for her from as early as 2006 and regarded herself as a part of the family, describing her relationship with Gloria to be that of mother/daughter. She said that around 2004, before she started assisting in her care, she noticed that Winnifred would urinate and defecate on herself and on the floor and was eventually reduced to wearing adult diapers. Her mental condition started deteriorating as she became forgetful, would wander away from home, and would not speak of current events but instead of past memories. Mr. Henry supported this picture, indicating that she started to deteriorate in 2006 wandering away from home, not recognising people, speaking gibberish, and urinating on herself. As did the sisters, both portrayed Ronald in

uncomplimentary terms as regards his lack of care towards, and interest in his mother but maintained that he exerted great influence over her.

- [25]** Maureen sought to curtail her brother's selfish ways by obtaining a certificate of incapability completed by Dr Sheldon Brown, which resulted in the cheques being sent directly to her in Canada.
- [26]** Dr. Sheldon Brown testified to treating Mrs. Winnifred Simpson during the period 2003 to 2009 and explained how he came to prepare the said certificate of incapacity.
- [27]** He give evidence that he prepared same at the request of and based on information provided by her daughter Maureen, without examining the patient. He disclosed that he completed the form as a means of trying to assist Maureen, to facilitate the release of pension funds which he considered to be in the best interest of the patient. He stated that he honestly believed that Winnifred Simpson had been diagnosed with senile dementia by another doctor, as stated by her daughter. He accepted that he never conducted any medical test on her to diagnose a mental condition such as senile dementia, nor had he ever treated her same.
- [28]** He indicated that prior to the preparation of the certificate of incapacity, he had personally examined her in March and June 2006 when he found that her memory was not as sharp as persons of her age. He however conceded that he made no mention of this in the medical report he subsequently prepared in October 2015.
- [29]** In addition to the evidence that Winnifred Simpson did not have the mental capacity to transfer property in 2008, evidence was also presented that Ronald exerted much influence over her. Ms. Boothe testified of Winnifred Simpson obeying Ronald without question. Mr. Henry also indicated the Ronald had great influence over his mother.

- [30] The claimants further challenged the contention of the defendants that Mrs. Winnifred Simpson transferred the second parcel to the defendants by taking issue with notion that Justice of the Peace Keith Jones witnessed her signature on any instrument of transfer. The basis of this challenge was an allegation by Gloria that he had attempted assaulting her as a child and as such her mother never tolerated his presence.
- [31] Additionally, the sisters contend that the transfer was contrary to the intention of their mother which was reflected in her last Will and Testament and thereby supports the position that she did not transfer second property to the defendants. As regards the second property, the Will devised the family home along with 3.34 acres of the land to Gloria. The middle home, the commercial building and 3.34 acres of land were devised to Maureen, whilst a life interest in the third home was devised to the first defendant as well as 3.34 acres of land with a remainder interest to his son.
- [32] This Will was apparently executed when Maureen took her mother to Justice of the Peace Mr. Arthur Phidd during her visit to Jamaica in February 2004 when she discovered that her mother was not well. The court was presented with the Last Will and Testament of Winnifred Simpson which was executed on the 8th day of March 2004 and which was witnessed by Mr Arthur Phidd.
- [33] The sisters also found the transfer of the second property suspect by the behaviour of Ronald at a family mediation session held in May 2010 where the Will was read out to Ronald and at no time did he indicate that the properties had been transferred.

The case for the defendants

- [34] Not surprisingly the picture painted by the defendants was in stark contrast to that of the claimants. The defendants' case was presented through three witnesses, namely the defendants themselves and a Justice of the Peace who

allegedly witnessed the signature of Mrs Winnifred Simpson on the instrument of transfer as it relates to the second property.

[35] Ronald Simpson outlined his understanding of his parents' expressed intentions as regards the three properties in issue. He accepted the claimants' contention that the first property with the family home was intended for Gloria. As regards the second property his evidence was that the house that existed on the property at the time of its purchase by the parents was intended for Maureen whilst the commercial building and the house that had been constructed post acquisition were intended for him.

[36] He explained that whilst living in Canada, he contributed to the development of the house and commercial building on the land by sending money to his father in Jamaica. On his return to Jamaica he lived with his parents until his home, which had been tenanted, became vacant. He then took possession of that home and continues to reside there at present. Since his return to Jamaica in 1999 he has utilised the commercial building in one form or the other. He has done significant work to the property between 2003 and 2004, to include fencing the entire property based on the boundaries his father had shown him and his wife prior to their marriage.

[37] According to him Maureen also took possession of the property allotted to her, did work to same and rented the said property.

[38] As regards the third property, his account was that sometime around 2002 his father indicated that he would give him and his wife a parcel of land that had been surveyed off from the second parcel of land as a wedding gift. As a result all three went to the Registrar of Titles office in Kingston where his father introduced them to an individual who took care of his land matters by the name of Mr Rodgers. He recounted that he and Patsy were given documents to sign to effect the transfer. Because they were unable to pay the 'transfer money' however, the matter was put on hold. He subsequently returned to Mr Rodgers in 2005, paid the money and thereafter collected the title.

[39] As regards the second property he explained that his mother transferred same to him and his wife to formalise the intention of the parents. He stated that this was triggered, on the advice of an attorney, when he was forced to commence proceedings in the Resident Magistrates Court against persons who entered the commercial building purportedly having entered into a lease with Maureen. This transfer was initially executed in October 2007. Because of an objection as regards to the assessment of the property, the defendants sought the assistance under the Land Administration and Management Programme. This led to a fresh transfer dated April 3, 2008.

[40] He denies exerting undue influence over his parents and contends that they were always independent. He states that his mother reared chickens up to 2008, sold eggs and only got help for the actually butchering. He assisted his mother by taking her to the doctor as well as with grocery shopping and paying her utility bills until 2005 when Maureen took over the later tasks.

[41] He intimated that it was Maureen who exerted influence over their mother and by way of illustration he pointed to two occurrences. He testified that she diverted the payment of their mother's pension cheques from Jamaica to herself in Canada. He also accused her of intervening in payments that were being made to him by Digicel as regards a tower that was erected on the property intended for him by obtaining a power of attorney allegedly from their mother on July 4, 2005. As a result payment was subsequently made in the names of Gloria and herself.

[42] He rejected the image portrayed of his mother's mental and physical condition on the claimants' case and asserted that she was mentally alert and suffered only from arthritis.

[43] He denies interfering with any of the three helpers Maureen hired to assist their mother. He indicated that there was a particular occasion when he witnessed the helper speaking harshly to his mother and she left after being reprimanded by him. He maintains that he had no involvement with the other helpers leaving and

that Maureen in fact dismissed the last helper in August 2009. Thereafter he hired a helper who remained with his mother until her death.

- [44] The second defendant, Patsy Simpson, wife of the first defendant, generally corroborated the evidence of her husband. She also related that Dudley Simpson had pointed out the boundaries of land intended for them and their subsequent trip to Kingston regarding the title for property that was subdivided and given to them. She dismissed any allegations of involvement or knowledge of anyone going to the office of the Registrar of Titles pretending to be Dudley Simpson.
- [45] She explained that since Ronald's parents had given Ronald property she invested money into the development of this property. She recalled walking the property with her husband and father in law where he, Dudley Simpson pointed out the boundaries to them. Thereafter she and her husband fenced the land, built an extensive pig house to facilitate the rearing of pigs as well as a goat pen.
- [46] She refuted that either her husband or herself exercised any undue influence over the parents, as well as the description given by the claimants' witnesses as to the mental and physical condition of Mrs Winnifred Simpson.
- [47] Keith Jones, a Justice of the Peace, testified as to witnessing the signature of Mrs Winnifred Simpson on the Instrument of Transfer of the second property to the defendants. He related that he witnessed her signing a document titled "The Registration of Titles Act Transfer" in 2007 and 2008 and explained that his usual approach prior to witnessing a signature was employed in that he read through the document to her and enquired whether that was her wish.
- [48] He denied ever attempting to assault Gloria when they were children and that Mrs Winnifred Simpson had banned him from visiting the house.

The Law as regards fraud

- [49] The Registration of Titles Act confers an indefeasible interest upon a registered proprietor of land (section 68), save and except in the case of fraud (section 70). It is therefore conclusive evidence that the person named in the title as the proprietor is the proprietor, save and except in instances of fraud.

Section 68 which establishes the indefeasibility principle states as follows

*“No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall be, subject to the subsequent operation of any statute of limitations, be **conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.**” (Emphasis mine)*

- [50] Section 70 which provides the exception to the above stated principle states as follows:

*“Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or 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 incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances 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.” (Emphasis mine)*

- [51] The indefeasibility principle and the impact of fraud on same are also evident in section 161(d) of the Act which states as follows:

S161 “ No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person

registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say-

(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;”

[52] The Act itself provides no definition for fraud. The definition for same however has been established in numerous authorities, many of which accept the dicta of Lord Lindley in **Assets Co Ltd v Mere Roihi** [1905] A.C. 176 at 210;

“...that by fraud in these Acts is meant actual fraud, i.e. 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. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. . . . The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

[53] From the above, the following principles can be extracted:-

- (i) Fraud involves an element of dishonesty.
- (ii) The fraud must be actual as opposed to constructive or equitable.
- (iii) In order to invalidate a registered title, the fraud in issue must be brought home to the registered owner or to his agent.
- (iv) Abstaining from enquiries which may have revealed a fraud in circumstances where suspicions have been aroused may constitute a fraud on the part of the registered owner.

- (v) Presentation for registration of a forged or fraudulently or improperly obtained document does not amount to fraud if the person so presenting honestly believed that the document was genuine.

[54] Any allegation of fraud must be specifically pleaded and sufficiently particularized. This has been the accepted legal position for well over a century as evident in **Davy v. Garrett** (1877) 7 Ch. D. 473, as per Thesiger, L.J. at 489:

“In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts”.

[55] Indeed Selborne, L.C. in **Wallingford v. Mutual Society** 5 App. Cas. 685 at 697 stated 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”.

[56] Furthermore, in addition to being strictly pleaded and particularised, the allegations must be strictly proved on the clearest, most cogent and indisputable evidence on a balance of the probabilities as noted by McDonald Bishop, J (as she then was) in **Linel bent (Administrator of the Estate of Ellen bent, deceased) et al v Eleanor Evans** (CL 1993/B115). The learned judge in examining the nature of the evidence required to established fraud in civil proceedings, relied on the dictum of Rowe J, (as he then was) in **Chin v Watson’s (Off Course Betting)** 1974, 12 JLR, 1431, wherein he stated thus “... fraudulent conduct must be distinctly proved and it is not allowable to leave it to be inferred from the facts (**Davy v Garret** cited: after following the guidance given by Lord Wentbury in **McCormick v Grogen** (1869) LR4,HL82, the learned judge noted that while it is true that fraud can be proved from circumstantial evidence that proof must be of the clearest and most indisputable evidence.”

[57] Given the legal requirements as regards proving an allegation of fraud, the evidence will be examined as regards each allegation of fraud as pleaded.

Particulars of Fraud

[58] The particulars of fraud as contained in the amended particulars of claim are as follows-

- (i) Acquiescing in engrossing or causing to be engrossed signatures on an Instrument of Transfer purporting to be that of the deceased and/or the said Dudley Simpson when it was well known to the Defendants that the signatures were not those of the deceased and/or the said Dudley Simpson;
- (ii) Fraudulently using an Instrument of Transfer purportedly executed by the said Dudley Simpson after he was deceased to transfer the third parcel of land into their names;
- (iii) Purporting to be, or having someone purporting to be, the said Dudley Simpson attend at the Office of the Registrar of Titles and lodge the Instrument of Transfer and supporting documents and thereby procure the transfer of the said third parcel of land into the joint names of the Defendants;
- (iv) Presenting or causing to be presented for registration a fraudulent document;
- (v) Fraudulently obtaining the transfer of the said third parcel of land out of the names of the parents and into the names of the Defendants;
- (vi) Falsely representing that the parents had agreed to make a gift of their interest in the said third parcel of land to the Defendants.

The claimants' submissions

[59] The claimants' assertion of fraud as it relates to the transfer of the third parcel of land focuses on the execution of the transfer instrument as well as to that which transpired at the Registrar of titles office.

[60] As it relates to the execution of the Instrument of Transfer itself it was urged on behalf of the claimants that there were fatal deficiencies in the requirements for same as stipulated by the Senior Deputy Registrar of Titles. According to the claimants, there was an absence of evidence that either Winnifred or Dudley Simpson signed the instrument of transfer or that any of the signatures of the transferors or transferees were witnessed in accordance with the dictates of section 152 of the Registration of Titles Act. It was also argued that it had not been established that Mr Rodgers satisfied the criteria of the legislation as regards witnessing the signatures.

[61] The claimants also submitted that there was non compliance with the requisite procedure at the Registrar of Titles office as regards the lodging of transfers as outlined by Ms Porteous. Furthermore, the records at the said office indicate the Instrument of Transfer was lodged by Dudley Simpson in the year 2005, a clear impossibility given the agreed evidence that he died in the year 2003.

[62] The claimants also draw on other aspects of the evidence to support the allegation, namely-

- the absence of a requirement at the office of the Registrar of Titles at that time for persons lodging transfers to present identification;
- the absence of the transfer document itself;
- the prevalence of fraud at the Registrar of Titles Office at that time;
- the fact that a transfer lodged in December 2002 would not have been reflected on the Aumentum system
- the failure of the parents to utilise an attorney
- the questionable character of Mr. Rodgers as the defendants are unable to give details about him

[63] The claimants further pointed out that there were inconsistencies in the evidence of the first defendant as to when the transfer was lodged. He initially indicated that it was lodged in 2002 but under cross examination indicated that it was lodged in 2005. The claimants pointed out that if it were lodged in 2002 the manual system would have been in operation at the Titles Office and hence the lodging of the transfer would not have been reflected on the electronic system. The transfer is however recorded on the electronic system and reflects that the said transfer was lodged in 2005 by Dudley Simpson at a date subsequent to his death.

The defendants' submissions

[64] The defendants contended that none of the witnesses who testified on behalf of the claimants can speak directly to the circumstances surrounding the execution of the Instrument of Transfer or the lodging of same. They have therefore presented no evidence on the execution of the transfer, the lodgement of same or the collection of the Title. Consequently there is no evidence as regards matters pleaded as it relates the signatures on the transfers not being those of Dudley or Winnifred Simpson, or that a fraudulent document was presented for registration or that there was a fraudulent representation that the parents had gifted their interest to the defendants.

[65] The defendants asserted that in these circumstances, the sole issue which remains is whether the claimants have proved that someone purporting to be Dudley Simpson fraudulently presented the instrument of transfer.

[66] They argued firstly that there is no satisfactory evidence as regards fraud in relation to the lodging of the transfer. They argued further that even if there was evidence of fraud as regards the presentation of the transfer itself, this would not invalidate the transfer and render it liable to be set aside if the Instrument of Transfer itself was found to be valid and legal.

[67] They submitted that the evidence of Ms. Porteous was that a transfer would not be registered if the legal and procedural requirements were not met. From her evidence it was evident that one of two transferors could attend to lodge the transfer of the interest of both proprietors and also that there was no requirement to present proof of identity.

[68] They submitted that the heart of the claimants' contention of fraud is that the records on the electronic system at the office of the Registrar of Titles indicate that the transfer was lodged on December 6, 2005 by Dudley Simpson, who would have been deceased at that time. They asserted that this in and of itself is not indicative of fraud for the following reasons:-

- The possibility of a data entry error cannot be eliminated;
- There is no proof that the person lodging the transfer pretended to be Dudley Simpson as the provision of the name of Dudley Simpson by the person lodging the transfer could have been a genuine mistake without any element of dishonesty. There would have been no need for anyone to pretend to be Dudley Simpson since anyone could have lodged the transfer and could have done so without authorization;
- Even if it were established that someone did purport to be Dudley Simpson, it has not been established that the defendants were a party to this.

[69] It was argued that under the Registration of Titles Act a transfer can be effected after the death of the transferor provided that it was executed prior to death. Hence the registration of the instrument of transfer in the instant case subsequent to the death of Dudley Simpson is not an indication of fraud. Furthermore, it was maintained that the evidence did not establish that the transfer was lodged by someone purporting to be Dudley Simpson and that this

person would have been acting in concert with the defendants or on the instruction of the defendants.

[70] They insisted that the account given by Ronald had the ring of truth as regards the property being given as a wedding gift, that his father who owned many parcels of land initiated the trip to Kingston and introduced him to Mr. Rodgers as the person who took care of his land business, whom Ronald assumed worked at the Titles' Office. It was asserted also that the explanation for the delay in having the transfer effected, being insufficiency of funds, was also believable.

Analysis

[71] It is settled law that fraud must be specifically pleaded and distinctly proved. No issue has been taken as regards the pleadings and indeed the court accepts that the pleadings are in order.

[72] The various particulars of fraud can be conveniently examined in two broad categories. Firstly, whether the claimants have established the presence of fraud as regards the obtaining and execution of the instrument of transfer and secondly, whether the claimants have established the presence of fraud as regards the lodging of the Instrument of Transfer.

[73] On the matter of fraudulent activity as regards the instrument of transfer itself, the thrust of the claimants' contention was that there was no indication that Winnifred or Dudley Simpson signed the documents or that their signatures or those of the defendants were witnessed in accordance with the dictates of section 152 of the Registration of Titles Act.

[74] The claimants having alleged fraud, the burden is on them to prove same. I am satisfied that they have presented no evidence that Winnifred or Dudley Simpson did not sign the instrument of transfer. The instrument of transfer itself having not been located at the Registrar of Titles Office, the absence of which has not been attributed to the defendants, the issue of the authenticity of the signatures on the instrument was unexplored.

- [75] On a totality of the evidence, the defendants are the only witnesses who testified as to the execution of the instrument of transfer. Whilst it is not for the defendants to prove their bona fides, there is nothing on their evidence to indicate that there was any mal fides on their part in this regard. There is no evidence arising on the defendants' case on which the claimants could rely as establishing that Winnifred and Dudley Simpson did not sign the instrument of transfer, or that their signatures were not appropriately witnessed.
- [76] The first defendant indicated that he did not see his mother sign. As regards his father, he explained that at the Titles Office, his father having introduced them to Mr Rodgers, and having spoken to Mr. Rodgers, Mr Rodgers produced a transfer and instructed 'us' to sign. There is no indication as to whether this included his father, Dudley Simpson. The second defendant's account is that she and Ron signed the transfer. As regards Dudley Simpson, she indicated that she did not see him sign. There is therefore no evidence on which it could be concluded that Dudley and Winnifred did not sign the transfer.
- [77] As regards the signatures on the Instrument of Transfer, it was argued on behalf of the claimants that it has not been established that they were witnessed in accordance with the dictates of the relevant legislation. Again, it is for the claimants to prove that the signatures of Winnifred or Dudley Simpson were not witnessed in accordance with the dictates of the legislation. They have presented no evidence in this regard. As regards the signatures of the defendants, Ronald indicated that Mr Rodgers was present when he signed. Further, the evidence of Ronald was that he was unaware if Mr Rodgers was an Attorney at Law or a Justice of the Peace. It therefore cannot be concluded that the signatures were not witnessed in accordance with the dictates of the statute.
- [78] Given the evidence of Ms. Porteous that a transfer would not be registered if the legal and procedural requirements were not met, prima facie, there was nothing improper on the face of the document.

- [79]** As per the particulars of fraud as pleaded, I therefore find that the claimants have failed to prove that there was “acquiescing in the engrossing or causing to be engrossed the signatures on an instrument of transfer purporting to be that of the deceased and/or the said Dudley Simpson when it was well known to the Defendants that the signatures were not those of the deceased and/or the said Dudley Simpson.”
- [80]** It also flows from this that it cannot be concluded that a fraudulent document existed and that there was the “presenting or causing to be presented for registration a fraudulent document” by the defendants.
- [81]** The allegations of fraudulent activity as it relates to the lodging of the Instrument of Transfer largely relate to the information on the Aumentum system as regards when it was lodged and by whom, as well as the deficiencies that existed within the system at the Registrar of Titles Office which resulted in a high incidence of fraud.
- [82]** On my assessment of the evidence it is clear that the Aumentum system cannot be regarded as infallible given that it merely contains information inputted by an employee and does not include copies of the documents that were lodged or any documentation which may have been completed by the person actually lodging the transfer. It is therefore evident that the system rests on the accuracy of this individual inputting the information, which individual is unidentified. As with any system which depends on the accuracy of human beings, the possibility of human error is live.
- [83]** Even if one were to dismiss the possibility of a data entry error, the manner in which the lodging of this transfer took place, on the defendants’ account, does not necessarily lend to a conclusion that fraudulent activity was involved.
- [84]** On the defendants account the process of lodging the transfer commenced in 2002 at the instigation of Dudley Simpson when he took them to Kingston to the Titles office to Mr Rodgers who handled his land matters. The transfer process

was halted because of financial challenges and was concluded in 2005, again with the involvement of Mr Rodgers, when the necessary fees were paid. This evidence was not shaken under cross examination nor did the claimants present any evidence to the contrary.

[85] The provision of the name of Dudley Simpson by the person lodging the transfer could reasonably be a result of the protracted and disjointed process and the participation of this Mr. Rodgers throughout. The process having commenced in 2002 by Mr. Dudley Simpson with the involvement of Mr. Rodgers and having been concluded after his death, again with the involvement of Mr. Rodgers, makes it conceivable why the record states that Mr. Dudley Simpson lodged the transfer. Whether for this reason or not, it could reasonably have been a genuine mistake given all the circumstances. It does not necessarily lend to a conclusion of fraud. Even if it did, it does not lend to a conclusion that the defendants were involved in this fraudulent activity given their evidence that it was Dudley Simpson who took them to the office and introduced them to Mr Rodgers.

[86] I do not find favour with the claimants' assertion that the parents' failure to employ the services of an attorney at law purportedly used in the past as being supportive of their contention of fraud. Firstly, there was no evidence that the parents used an attorney in each and every land transaction. But even if that had been the case, their failure to not so do as regards the transfer in issue would not be indicative of fraudulent activity and could have arisen for a variety of legitimate reasons.

[87] The claimants also extrapolated from the deficiencies that existed within the system at the Registrar of Titles Office and the resultant high incidence of fraud to conclude that there was fraud in the transfer in issue.

[88] On this matter, it must be clearly stated that the high incidence of fraud at that time in the Titles Office cannot be used to colour the analysis of the evidence in this particular case. Any conclusion of the existence of fraud must be based on specific evidence as regards this particular transfer. Also, no negative imputation

can be made as regards the defendants as it relates to the inability to locate the transfer documents.

[89] The various weaknesses that existed in the system at the Registrar of Titles Office do not establish or assist in establishing that there was fraudulent activity present in the transfer in issue and that the defendants were so involved. The lack of a requirement of the person lodging the transfer to show identification does not establish that anyone, and in particular the defendants purported to be, or had someone purport to be the said Dudley Simpson to lodge the Instrument of Transfer at the Office of the Registrar of Titles to procure the transfer of the third parcel of land into the joint names of the Defendants (as per the pleadings).

[90] The claimant's contention that the defendants did not comply with the established procedure at the Titles Office, as set out by Ms Porteous, because he was unable to recall certain details of what transpired is flawed. The fact that the first defendant does not remember going to a desk at the Titles Office and presenting identification and his inability to provide details as regards the particulars of Mr Rodgers, such as his first name cannot be deemed to be a failure to comply with the procedure or a slight against his credibility. His inability to recall that which took place over a decade ago cannot be regarded as a failure on his part to comply with the procedures at the Titles Office.

[91] On the totality of the evidence, it has not been established by the claimants that there was any fraudulent activity as regards either the execution of the instrument of transfer or the lodging of same by anyone and in particular by the defendants. The mere suspicion of fraud cannot amount to proof of same.

[92] I find that the various particulars of fraud as itemised have not been proved on a balance of the probabilities.

Undue influence/ inequitable and unconscionable transactions.

[93] The claimants also allege that the gifts of both parcels of land were procured by undue influence exercised by the defendants over the parents. As a

consequence, the claimants contend that the transactions were inequitable and unconscionable.

[94] The particulars of same are pleaded as follows:-

- (b) The first defendant was the son of the deceased and the said Dudley Simpson and the second defendant their daughter in law and in the circumstance the first and/or second defendants were therefore in a relationship of mutual trust and confidence with them jointly and/or severally;
- (c) The deceased and or the said Dudley Simpson were elderly persons and were vulnerable to undue influence based on the fact that the first defendant was the eldest of their children, the only one of their children living in Jamaica at the material time and someone who lived in close proximity;
- (d) The first defendant kept the deceased isolated and under his direct authority and control including taking steps to prevent her from having a care giver;
- (e) Any transfer of the second and or third parcels of land to the defendants was not for monetary value but was by way of gift;
- (f) Such transactions would be manifestly unfair to the deceased and/or the said Dudley Simpson and/or the Estate of Winnifred Simpson;
- (g) The deceased and or the said Dudley Simpson received no independent legal advice prior to embarking upon any of the said transactions;
- (h) The transfer of the second and third parcels of land and in particular the transfer of the second parcel of land would have taken place at a time when the deceased was mentally impaired and not in a position to make such a decision with a full understanding of its implications;

- (i) The transfer of the second and/or third parcels of land would be intrinsically inequitable and unconscionable and ought to be set aside in equity.

The relevant law as regards undue influence and unconscionable transaction

[95] It is settled law that equity will intervene in transactions to give redress where there has been some unconscionable conduct on the part of the defendants.

[96] Undue influence arises where one party to a transaction has coerced the other, or has exercised such domination over the other, that the other's independence of decision was substantially undermined. It often arises where one party to a transaction has exploited the influence that exists as a result of the relationship between them, to direct the conduct of the other by compromising the free will and judgment of the latter.

[97] As Lindley LJ pointed out in **Alcard v Skinner** (1877) LR 36Ch D 145, the '*courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors' but rather seeks to protect people from being forced, tricked, or misled in any way by others into parting with their property...*'

[98] According to Lord Millett in **National Commercial Bank of Jamaica Limited v Hew** (2003) UKPC 51, at paragraph 30, the doctrine involves two elements.

"First there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must be abused."

[99] He stated further that,

"The necessary relationship is variously described as a relationship of trust and confidence or of ascendancy and dependency. Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient But the existence of the necessary relationship may be proved as a fact in any particular case."

[100] Where this relationship has been established, it must then be determined whether the influence was abused. Lord Millet explained thus, “However great the influence which one person may be able to wield over another, equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people.”

[101] This was essentially the approach adopted by Sir William Blackburne in **Kenneth Charles Hart et al v Susan Anne Burbridge et al** [2013] EWHC 1628, at paragraph 37 wherein he stated,

“The principles applicable to undue influence are well established.... In the case of presumed undue influence the court’s willingness to intervene to reverse the effect of the influence is triggered by proof on a balance of probabilities of essentially two matters, the burden of proof again lying on the person complaining of the undue influence. The first is that the person at whose expense the impugned transaction was made reposed trust and confidence in the recipient of the benefit conferred by the transaction or that the latter acquired ascendancy or control over the former. The second is that the transaction is of such a size or nature as to call for an explanation as being not readily explicable by the relationship of the parties. Once that stage is reached the burden of proof shifts to the person seeking to uphold the transaction to demonstrate on a balance of the probabilities that the transaction was the result of the free exercise by the transferor of an independent will.”

[102] As indicated by Lord Hailsham LC in **Inche Doria v Shaik Allie Bin Omar** [1929] AC 129 at 135. *“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 so completely as to satisfy the court that the donor was acting independently of any interference 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.”*

[103] The approach is therefore three pronged as regards establishing a presumption of undue influence. Firstly, the claimants must prove that a relationship capable of giving rise to the necessary influence exists, that is a relationship of trust and

confidence or of ascendancy and dependency. Secondly, the claimants must establish that the influence generated by the relationship was abused, in that the transaction is of such a size or nature as to call for an explanation as being not readily explicable by the relationship of the parties. Thirdly, once these have been established, the burden of proof shifts to the person seeking to uphold the transaction to demonstrate on a balance of the probabilities that the transaction was the result of the free exercise by the transferor of an independent will.

[104] A transaction may be regarded as unconscionable where the terms are so unjust or overwhelmingly one sided in favour of a party who has superior bargaining power over the other. It is often viewed as one that no person who is mentally competent would enter into and no fair and honest person would accept.

[105] In the case of **Leslie Augustus Watt (by Lloyd Barnett, his next friend and Guardian Ad Litem) v Lelieth Watts et al** [2013] JMCC Comm.15, Mangatal J, relied on Snell's Equity, 31st edition, paragraph 8-44 as regards the implications of an individual's lack of capacity when transacting. It states thus

"A gift will be set aside if it is shown that the donor lacked the requisite mental capacity. For these purposes mental capacity means 'in each case whether the person concerned is capable of understanding what he does and by executing the deed in question when its general purport has been fully explained to him.' The doctrine applies to Wills, contracts and gifts although the degree of understanding required depends on the nature of the transaction...Once it is demonstrated that the donor lacked capacity in this sense the burden of proof shifts to the donee to demonstrate that the donor had the necessary understanding to validate the gift. If the donee fails to discharge the burden of proof, the transaction will be set aside. It has been suggested that a transaction entered into without the requisite mental capacity is void. But it is submitted that the better view is that such a transaction is only liable to be set aside where the donee has knowledge of the incapacity."

[106] From this it can be distilled that the claimants must prove that the Winnifred Simpson lacked the requisite mental incapacity and hence did not understand the implications of the gift and that the defendants were aware of her challenge.

The claimants submissions

[107] As regards the transfers of the second and third parcels, the claimants urged that they have proved on a balance of the probabilities that;

- Dudley and Winnifred Simpson reposed trust and confidence in the defendants or that the defendants acquired ascendancy or control over them, and
- the transaction is of such a nature as to call for an explanation as being not readily explicable by the relationship of the parties.

[108] The claimants submitted that Ronald, being the oldest child, had always been held in high regard by his parents and by virtue of the relationship they shared with him, he influenced them, at a time when they were of advanced ages, to transfer the parcels of land to him and his wife, contrary to the often expressed intentions of the parents.

[109] This trust they argued was evident from the late 1970's when their father entrusted him with the care of this sisters when they migrated to Canada and the parents were in Jamaica. They indicated that when Ronald returned to Jamaica he lived with them initially and thereafter lived in close proximity to them in the house they gave him and hence the parents relied heavily on him as the only child living in Jamaica.

[110] They submit that the parents would not have transferred the third property to the defendants as a wedding gift since the defendants had not even informed them of their wedding until the day prior and furthermore because the parents did not like Patsy Simpson.

[111] The second property they submit was not a genuine gift by Winnifred Simpson as she did not have the mental capacity to so do at the time of the transfer and further was contrary to her wishes as evident in her last Will

and Testament. They intimate the transfer to be suspect given that the first defendant's relationship with the family was strained with him hardly ever visiting his mother, not contributing to her well being financially or otherwise and instead depriving her and deliberately sabotaging the hired care givers. It was argued that this was done to isolate Winnifred Simpson so that he, Ronald, would have authority and control over her.

[112] They also maintained that after the death of Dudley Simpson, the evidence was that Winnifred Simpson would obey Ronald without question (according to Ms Booth) and that he had great influence over his mother (according to Mr. Henry).

[113] They declared that both transfers are questionable since the parents never spoke of transferring property to the defendants and also because they were effected without the use of attorneys which the parents had otherwise utilised.

The defendants' submissions

[114] The defendants submitted that there was a disparity between the submissions made on behalf of the claimants and the evidence presented on the claimants' own case. The evidence they demonstrated that the defendants did not share the type of relationship with the parents needed to establish that there was undue influence exerted over the parents in transferring the properties. The claimants' own evidence is that their father was an independent minded individual. Further, the claimants' contention of a strained relationship between the parents and the defendants where the defendants hardly associated with the parents is antithetical to a conclusion that there was a relationship that existed between them in which Ronald had influence over them.

[115] The defendants argued that this was also true as regards the described

relationship between he and his mother post their father's death. The thrust of the evidence on the claimants' case was the defendants did nothing as regards the care and maintenance of Winnifred Simpson and that Ronald would hardly visit her and she would not visit him. This the defendants maintained was contradictory to the type of relationship required exist for undue influence to be presumed and even calls into question the opportunity Ronald would have had to unduly influence her.

[116] In addition, it was submitted that on a fulsome review of the evidence, it has not been established that their mother lacked the mental capacity to understand the implications of gifting the second property and hence it cannot be concluded that the said gift was intrinsically inequitable and unconscionable.

Analysis

[117] The fact that a parental relationship existed, and that the parents were at the relevant time senior citizens, does not necessarily equate to the existence of a relationship wherein their adult son was capable of exercising influence over them. Indeed the world has seen many leaders of the ages of the parents at the time of the transfers in issue. Hence the fact of their ages is not conclusive of being susceptible to influence, although it is acknowledged that older persons may be more susceptible to influence. The nature of the relationship must be carefully scrutinised to determine whether the claimants have established the first component in proving that there was undue influence at play, that is, that a relationship capable of giving rise to the necessary influence existed.

[118] Given the evidence presented on behalf of the claimants, the relationship that existed between Ronald and the parents when they were both alive was examined distinctly from the relationship that existed between mother

and son subsequent to the death of father.

[119] It is apparent from the evidence that the relationship that once existed between Ronald and his parents prior to his marriage deteriorated post his nuptials.

[120] It was Maureen's evidence for instance that Ronald was able to exert undue influence over their parents who relied heavily on him since he was the only child in Jamaica and he lived with them for a while on his return to Jamaica. The evidence however is that the relationship changed after Ronald's marriage to the second defendant. Their marriage took place in December 2002 and according to Maureen and the other witnesses, it resulted in a souring of the relationship between him and the entire family. In fact according to her, he did not inform them of the wedding until the day prior nor did he invite them to the ceremony. So even before the transfers took place, according to her, there was this unhealthy relationship. She nonetheless contended that he continued visiting his parents and they continued to rely heavily on him. Her evidence however is silent as to the manner in which they relied heavily on him in this soured relationship.

[121] The other sister Gloria described the relationship between Ronald and the family as 'terrible' after the wedding. She testified that his relationship with the family changed in a negative manner and he displayed great hostility and aggression towards the family. Lennox Henry indicated that Ronald did not speak to his father and would 'not really' speak to his mother.

[122] Whilst the claimants submitted that the parents relied heavily on Ronald, the evidence presented on their own case cast a contrary picture. The relationship depicted was one that was strained in which Ronald paid scant regard towards his parents. There was no evidence which supported the assertion that they relied heavily on him. There were no tangible examples

of the manner in which they relied on him.

[123] In addition to examining the relationship shared between parents and son, the personalities of the parents were also considered.

[124] On the claimants' case their father was an independent man who was the head of the household, as stated explicitly by Gloria, and who took care of his own affairs. There was nothing on the evidenced to suggest that he was incapable of making reasoned decisions or that he was dependent on anyone. Maureen herself indicated that she had no need to help her father financially as he was capable of doing so on his own and collected his own pension.

[125] As regards the mother, the evidence on the claimants' case was that she was a devoted wife who supported the position taken by her husband. She was also described as being a sensible, proud and intelligent woman, with good business sense prior to becoming ill.

[126] The basis of the assertion that both parents relied heavily on the defendants seems to be grounded in the fact that he was the only child living in Jamaica, as well as the fact of the ages of the parents, (they being in their seventies at the time of the transfers) and the proximity of the residence of Ronald in relation to theirs.

[127] I am of the view that this is insufficient to make such a conclusion, given the clear evidence of the actual relationship that existed and also the evidence as regards the nature of each parent.

[128] There was a dearth of evidence to support the notion that Dudley Simpson was reliant on Ronald neither was there any evidence from which it could be deduced that Mrs Winnifred Simpson was reliant on him during the lifetime of her husband. There was no illustration of this dependence by the parents on him. The evidence does not conjure up an image of a

relationship of reliance by the parents and is in fact inconsistent with the description of Dudley Simpson being independent and head of the household. I do not find the claimants' witnesses to be credible as regards the bald claim that the parents relied heavily on Ronald. I am therefore of the view that the claimants have not proved that either Dudley Simpson or Winnifred Simpson was reliant on the defendants at the time of the transfer of the third parcel.

[129] The claimants have failed to prove that a relationship capable of giving rise to the necessary influence existed, that is a relationship of trust and confidence or of ascendancy and dependency.

[130] As regards the relationship that existed between mother and son after the death of the patriarch, the claimants' submitted that Mrs Winnifred Simpson was very dependent on the defendants as they lived in close proximity to her.

[131] The evidence as presented by the claimants was that the relationship between Ronald and the family was not good after his marriage. According to Lennox Henry he would 'not really' speak to his mother post his nuptials. There was no evidence of a reconciliation of this relationship. In fact the evidence suggested that there was limited contact between Ronald and his mother. The claimants' case was that Ronald hardly visited his mother. Kayanna testified that she would 'see him visit once or twice for the month or none at all' and that this was only to tell her, Kayanna, to leave the house. Lennox Henry testified that Ronald did not go to his mother's place very often. According to him his visits were 'not regular, once a month or once a year.'

[132] The evidence also was that Ronald and his wife were disinterested in the wellbeing of Mrs Winnifred Simpson whose physical and mental health started deteriorating after her husband died. They failed to render any

assistance be it financial or otherwise and instead would seek to deprive her and frustrate the caregivers whom the sisters had employed.

[133] Furthermore, not only was the first defendant distant and uncaring towards their mother, but according to Gloria, with her mother's deterioration, she (Winnifred Simpson) became aggressive towards the defendants. She had initially divulged that her mother became aggressive generally and would even fight her (Gloria) off when she tried assisting her to bathe. She reneged from this position and stated that their mother was aggressive towards the defendants.

[134] I am of the view that the overall picture painted by the evidence does not lend to a conclusion of dependency of mother on Ronald or a relationship of trust. The bare declaration that Mrs Winnifred Simpson became very dependent on the defendants after the death of her husband is inconsistent with the general tenor of the evidence as regards the character of the relationship that existed. The thrust of the evidence when considered in total was that of an unhealthy relationship wherein Ronald alienated himself from the family and essentially ignored his mother who was ailing and needed assistance. It is difficult to fathom the manner in which she relied on him given that the claimants' case is that all her needs were provided for by the sisters to include helpers who lived at her home. It is also difficult to appreciate the grounds upon which it is alleged that Ronald kept his mother isolated and under his direct authority and control. It is also challenging to comprehend the opportunity Ronald would have had to exert this undue influence over her given his lack of contact with her and also the presence of live in helpers that the sisters employed.

[135] I am of the view that the statements by the witnesses as regards dependency by Winnifred on Ronald were made without giving a basis on which the court can adopt them as accurate. The pronouncement of

Kayanna Booth for instance that Mrs Winnifred obeyed everything Ronald told her without question was unsubstantiated by any such instance of this happening and was found to be not credible or convincing. Similarly, the declaration by Lennox Henry that Ronald and his mother were very close and that he 'had great influence over her' was explained under cross examination to mean that Ronald had great love for her.

[136] I find no basis upon which I can accept the position that Mrs Winnifred was reliant on Ronald or that he was able to exert influence over her. It is also inconsistent with the general picture that was painted of a terribly strained relationship wherein she was aggressive towards the defendants and they were uncaring towards her.

[137] I also can find no evidence to support the particulars pleaded as it relates to the parents, either together or individually, sharing a relationship of mutual trust with Patsy Simpson their daughter in law given the evidence that they disliked her.

[138] The claimants have therefore failed to prove that a relationship capable of giving rise to the necessary influence existed, that is, a relationship of trust and confidence or of ascendancy and dependency.

[139] The question of the mental health of Winnifred Simpson was also examined to determine whether she was mentally able to make reasoned decisions. In this regard the parties presented diametrically opposed evidence.

[140] The evidence presented by the claimants' witnesses was that she experienced a decline in her mental and physical health following the death of her husband. According to them she would urinate and defecate on herself, had challenges recognising persons, became forgetful and eventually would wander away from home and speak gibberish. The

claimants contend that she lacked the mental capacity at the time that she signed the transfer for the second parcel of land.

[141] Dr Sheldon Brown testified to treating Mrs Winnifred during the period 2003 to 2009. He also prepared a certificate of incapacity on July 31, 2006 and October 10, 2009, admittedly without the benefit of examining her. He candidly explained that he prepared it based on information provided by Maureen and did so to facilitate the release of pension funds to Maureen herself.

[142] He accepted the history given by Maureen, apparently due to his high regard for Dr. Lindo, who allegedly made the diagnosis. The history given was that Winnifred Simpson was diagnosed by Dr. Lindo as having senile dementia and was prescribed the drug 'aricept' which is commonly used in the treatment of this illness. Interestingly, the first claimant denied so informing. The doctor acknowledged that he never conducted an examination to make a diagnosis of a mental condition such as senile dementia nor had he ever treated her for same. In the said certificate of incapacity he commented further, 'this patient was recently assessed as having further deterioration of memory and intellectual skills. She was deemed incapable of making responsible personal financial decisions.'

[143] According to the doctor, he personally examined her in March and June 2006 at which time he found that her memory was not as sharp as was customary and commonly observed in persons in her age range. He however accepted that he did not state this in the medical report that he prepared for counsel for the claimants in October 2015.

[144] I have reviewed and considered the evidence as regards the mental capacity of Winnifred Simpson in its entirety. I am of the view that the evidence contained in the certificate of incapacity cannot be relied on to assist the claimants' case given his failure to make his own assessment of

her mental condition. His acceptance of the history provided by the first claimant as regards a diagnosis made by another doctor is flawed in every regard. He clearly did not consider that her integrity could be either not wholesome or that the information provided by her could be inaccurate.

[145] I find it disconcerting that he, having not examined Winnifred Simpson, would have acted on information provided by Maureen and declared her to have senile dementia and that he further commented that that she did not have the mental capacity to make rational decisions relating to her affairs. He clearly had no legitimate basis to have made those findings.

[146] His sole conclusion after personally examining her was that her memory was below that of persons in her age group. This certainly does not establish that she was mentally incompetent.

[147] The reliance by the claimants on this doctor to give evidence in this regard is particularly suspect in light of the fact that there was no explanation provided as to why the report of incapacity was not obtained from the doctor who allegedly diagnosed her or why evidence from him was not forthcoming.

[148] The evidence of Dr. Brown therefore did not assist the claimants in establishing that Winnifred Simpson was of diminished mental capacity. I did however find that his evidence as regards the occasions that he treated her casted doubt on the evidence given by the claimants' witnesses as regards her mental and physical condition.

[149] According to the doctor, he treated her before her death on December 2008 for hypertension and osteoarthritis and prior thereto in 2007 for a urinary tract infection. It is curious that he would not have noticed the obvious signs of mental deterioration that the various witnesses for the claimants testified to. Her talking 'gibberish' and not knowing her foot from

a broomstick, as Lennox Henry indicated, would have been patently obvious to the doctor. It was Maureen's evidence that by 2008 her mother's mental condition had completely deteriorated. If this were in fact the case, I find it unbelievable that the doctor would not have observed this. The physical ailments that he treated her for also did not appear as debilitating as the claimants' witnesses described.

[150] It is also telling that the evidence regarding Winnifred Simpson's attendance during the proceedings in the Resident Magistrates court commenced by Ronald and speaking to the Judge was never challenged. Maureen evidence was that she had retained counsel to represent her in the proceedings. Certainly if Winnifred Simpson was mentally incompetent as the claimants witnesses described, she would have been unable to so do.

[151] I was of the view that each of the claimants' witnesses who testified as to the nature of the relationship between the parents and the defendants had an interest to serve. There was clearly no love lost between these witnesses and the defendants. Admittedly, the relationship between the sisters and the defendants had deteriorated and was virtually non existent. They also conceded to disliking Patsy Simpson. Gloria accepted that there was an incident in which she herself bit Ronald as a result of him assaulting her which matter was reported to the police. Kayanna's evidence must also be viewed in the context that she views herself as being like a daughter to Gloria, which may suggest where her loyalty rests. Similarly the relationship between Lennox Henry and the defendants was also poor and he had in fact been successfully sued by the second defendant for slander for which he was ordered to pay damages.

[152] Having scrutinised the evidence there were also clear inconsistencies and discrepancies in the evidence as regards the mental health of Winnifred

Simpson.

[153] Maureen for instance in her witness statement indicated that she first noticed the mental deterioration in her mother in 2005. Under cross examination however she indicated that it was actually in February 2004. Gloria stated that she noticed the problem in 2005 and that was when she and her sister hired a caregiver. Kayanna in her witness statement indicated that she noticed that Winnifred Simpson's mental condition had started to deteriorate in 2006, some months after she started caring for her. In her evidence she indicated that she noticed that something was wrong when she started wandering away which was in early 2005. Lennox Henry in his witness statement indicated that she started to deteriorate mentally in 2006 when she started wandering away from home which began some two years after the death of her husband.

[154] I find the evidence as presented by the claimants that Winnifred Simpson was mentally unfit to make reasoned decisions to be unreliable. In fact if the court were to accept the evidence that she was mentally compromised from 2004 as Maureen stated, this would call into question her competence in executing the very Will that the claimants seek to have enforced.

[155] The evidence presented by the defendants was that Mrs Winnifred was mentally well and for the most part physically well save for the arthritis and high blood pressure that she experienced. The Justice of the Peace who witnessed Winnifred Simpson's signature on the transfer testified that he would pass by her home from time to time and they would have conversations. He detected no deficiency as regards her mental health. As regards his witnessing of the document, he explained that he confirmed with Winnifred that she understood what she was signing. He said that he read the document to her and told her that she was transferring the property from herself to her son and enquired if this was her wish to which

she responded in the affirmative. He says that he understood that it was being transferred from mother to son and son was married to Patsy who was also present and who also signed.

[156] I am of the view that a more balanced and accurate view of Winnifred Simpson's mental condition is that provided by Justice of the Peace Keith Jones, even though he is a friend of the first defendant. I found him to be forthright in his evidence.

[157] I accept that he interacted with her from time to time and found no discernable challenge as regards her mental competence during these interactions. I accept also that he read and explained the transfer document that he witnessed to her and that his impression was that she understood same. His explanation, whilst not including that the property was being given to both her son and his wife, is in my view of no moment on a totality of the evidence and given my findings as to her mental competence and also my findings as regards the nature of the relationship that existed between mother and son. From his explanation it was clear that she appreciated that she was divesting herself of the property, and by extension her estate.

[158] Having determined that the claimants have failed to establish that she was mentally unfit and by extension that the defendants capitalised on a mentally compromised Winnifred Simpson, and having also determined that the claimants have failed to establish that a relationship capable of giving rise to undue influence existed, I find that the claimants have failed to pass the preliminary hurdle in their quest to establish that the defendants exerted undue influence over the parents.

[159] But even if the claimants had established the first limb in proving undue influence (that the relationship between Ronald and the parents and thereafter between Ronald and mother was one in which trust and

confidence was reposed in him or that he had acquired ascendancy or control over them), I find that they would have failed in the second limb, that is in establishing that the transaction was of such a size or of such a nature as to call for an explanation as being not readily explicable by the relationship between the parties.

[160] I find the claimants' description of the relationship between Ronald and his parents and thereafter with his mother to be exaggerated and not credible. I reject that there was the level of acrimony between himself and his parents and later on with his mother as enunciated in the claimants' case.

[161] I have arrived at this conclusion having analysed the evidence as a whole. I accept Ronald's testimony that he lived in the house his parents intended for him on his return to Jamaica once it became vacant and lives there at present. His being allowed to reside in this house which was still owned by his parents is indicative that the relationship was in all likelihood not as described on the claimants' case.

[162] I find that his not inviting his family to his wedding did not destroy his relationship with his parents. He explained that he and his wife wanted to keep the wedding small and hence only his best man and his wife's maid of honour were invited.

[163] I find also that his visits were not as infrequent as suggested on the claimants' case. Since Maureen and Gloria both live in Canada, they are understandably unable to speak fully to this. Gloria however agreed that she would see Ronald visit the family home on her trips to Jamaica and that their mother would go to his house and would do so even after their father had died. I find the evidence of both Kayanna Boothe and Lennox Henry that Ronald scarcely visited his mother to be questionable. Both gave estimates of the frequency of the visits. She indicated that he would come by once or twice per month or none at all. Lennox on the other hand

opined that the visits to the mother would be once a month or once a year. I am of the view that this wide range given did not have the ring of truth and gave the court the impression that the evidence was being misrepresented as regards the relationship that existed.

[164] The evidence of Ronald was that the relationship with his mother was very good. He described it as being a loving one in which they would talk a lot about relatives and friends. I find it believable that he used to assist her by taking her to the doctor, grocery shopping and paying her utility bills until Maureen took over same. I do not find his assisting her to be indicative of dependency. In any event this stopped in 2005, some years before her transfer of the second parcel.

[165] I find that the evidence does not satisfactorily support the stance that the relationship was unhealthy and acrimonious.

[166] As regards the gifts themselves, I am of the view that the size and the nature of same are explicable by the relationship between the parties and by the circumstances regarding the transfers of the properties.

[167] It is agreed by the parties that it was always the expressed intention of the parents that their various properties would be given to the children. There was never an indication on the claimants' case that the parents reneged from this position as a result of this alleged change in behaviour by Ronald towards them. The fact that it was always the stated intention of the parents that the children would ultimately be the beneficiaries of the properties militates against any inferences of unfairness as regards a gift being made as opposed to a transfer for monetary value.

[168] On the evidence the parents had expressed their intention as regards the first and second properties. The first being the family home was for Gloria. The first claimant contends that it was the intention of the parents that she

should receive the commercial building and one of the houses on the property, whilst the first defendant would receive the other house. On the other hand, the first defendant insists that the reverse is true; that he was to get the commercial building and one of the houses and the first claimant would receive the other house. On the face of it therefore, the fact of one child receiving the commercial building and a house is not in and of itself unreasonable. The gift as it relates to the second property was certainly within the scope of what the parents had indicated as their general intention.

[169] It is clear from the evidence on both sides that the parents spoke about the specific buildings that each child would receive. The evidence was silent as to the intention of the parents as regards the distribution of the land itself. It therefore cannot properly be maintained that the gifts were contrary to their intentions.

[170] I find that the property in issue having been developed by both defendants to include fencing, and their utilisation of the land for the rearing of their animals, as well as the commercial building, which I accept to be true, were reasonable bases for the transfer of same to them.

[171] The fact that all children have benefitted from the properties also augments my conclusion that the gifts were not mystifying.

[172] I also do not find that either transfer was unfair to the parents as alleged in the pleadings in light of their expressed intention that the children would ultimately benefit from same and also in light of the fact that there was no evidence that the land was being used by the parents and hence that the transfers placed them in a disadvantageous position.

[173] In all the circumstances the gift of the second property is not prima facie surprising or inexplicable for the following reasons:-

- This was a gift that passed from one family member to another;
- The gift was within the scope of the agreed expressed intention of the parents as regards their properties, that is that they should inure to the benefit of their children. The fact that it was not sold is understandable;
- The defendants had expended money on developing the property and had been utilising the property;
- The gift did not deprive the sisters from otherwise benefitting. It is agreed that each sister received a home;
- The transfers did not place the parents in a disadvantageous position.

[174] I am also of the view that no negative conclusions can be drawn from the fact that the transfer was initially executed in October 2007 by Winnifred Simpson and thereafter a fresh transfer was executed in April 3, 2008 given his explanation which has not been challenged.

[175] As regards the third property the evidence of the defendants is that it was a wedding gift to them. This is also prima facie not a surprising or inexplicable gift given all of the circumstances.

[176] On the facts as I have found them to be as regards both transfers, the burden of proof has not shifted to the defendants to demonstrate that the transactions were as a result of the free exercise by the transferors of an independent will. I am however satisfied that on the evidence both Dudley and Winnifred Simpson acted on their own free will.

[177] The claimants have raised a number of issues which they contend cast a shadow over the legitimacy of the gifts.

[178] They submitted that the contents of the last Will and Testament of Winnifred Simpson are indicative of her true intention and that the supposed gift of the second parcel of property to the defendants was therefore not legitimate. It is trite that the execution of a Will does not dispose of property. Farwell J in **Re Baroness Llanover** [1903] 2 Ch 330 at 335 expressed it in this way:

“Now it is to my mind plain that a testator does not settle or dispose of any property by his will unless and until such will is brought into effectual operation by his death.”

The fact that a Will had been executed in 2004 does not suggest that the subsequent transfer was not her true desire.

[179] The argued also that the sisters ignorance of the transfer was unusual and suspect. The fact that the sisters were not made aware of the transfers by the parents is inconsequential in my view. Even though the sisters testified that their parents always kept them informed it appears that this was not always the case. It was clear that Maureen, who appeared to be the more dominant of the sisters, had not been made aware of the transfer of property to William Campbell by her parents prior to same. Her evidence was that she became aware of the transfer before her father’s death.

[180] The circumstances surrounding the transfer of the second parcel have also been raised by the claimants as a matter of concern. It was argued that the signing of the second transfer at Ronald’s house was suspect and indicative that it was not of his mother’s free will. His explanation was that she came down to his house because her house was full of people as a result of Jean (Gloria) renting same. He indicated that he was against them being there as it made his mother uncomfortable and as such he didn’t want a confrontation with them. He stated also that as they were strangers to him and he didn’t want them to be aware. I am of the view that this is a reasonable explanation and does not lead to the conclusion that

she was being coerced or not acting freely.

[181] It was also raised that the transfer was made after court proceedings had been instituted by Ronald in relation to Maureen changing the locks to the commercial building in 2007 and renting out same. According to Maureen she hired an attorney to represent herself and the tenants. Ronald indicated that his mother attended court on his behalf regarding the property and spoke to the Judge. He explained further that whilst the court proceedings were ongoing, his mother signed the transfer of the property so that it could be formally given to him. I am of the view that there is nothing to indicate that his mother did not do this of her own free will or that he either influenced her to attend court on his behalf.

[182] The claimants contend that later that year a meeting was held to include Ronald where the Will of Winnifred Simpson was read and he made no mention of the transfer that had been made to him by her. He accepted that he did not speak of the transfers in the meeting but also added that they were aware of the transfer. An examination of the evidence as a whole and the conduct of the sisters may shed light on his stance in this regard. The evidence emanating from the claimants' case was that he was excluded from various decisions concerning their mother. There was no discussion or informing him that the sisters would hire helpers for their mother. There was no discussion with him or informing him that her widower's cheque was being diverted to Maureen. There was no discussion or informing him that the payments he received from digicel as a result of a lease agreement for a cell tower being on the land would be halted and diverted to the sisters as a result of a power of attorney obtained from their mother.

[183] Even if they were not aware of same as they say, his not revealing that the transfers had been made in the meeting would not be satisfactory evidence

that he was culpable for something as regards the transfer.

[184] It was further submitted that Winnifred Simpson had not sought independent legal advice and hence the defendants have failed to establish that she acted of her independent will. I have already determined that the circumstances were not as such to require the defendants justifying the transfer. Even if the defendants had been required to justify the transaction, the obtaining of legal advice by the donor is but one way in which the defendants could establish that the transfers were made free of undue influence. The evidence which I have accepted is the Justice of the Peace explained the transaction to her by reading the document to her and enquiring whether she understood.

[185] I am of the view that even if it had been established that there was a relationship capable of giving rise to undue influence, the size and nature of the gifts do not call for an explanation as being not readily explicable by the relationship between the parties.

Conclusion

[186] Having considered the evidence in its entirety and having paid keen attention to the demeanour of the witnesses, as well as the submissions of counsel and the various authorities, I am satisfied as follows:-

1. The claimants have not proven on a balance of the probabilities fraud against the defendants;
2. The claimants have not proven on a balance of the probabilities the exertion of undue influence by the defendants as regards either transfer as they have failed to establish that a relationship capable of giving rise to the necessary influence existed, that is a relationship of trust and confidence or of ascendancy and dependency. Even if they had so proved, they failed to further

establish that the influence generated by the relationship was abused, in that the transaction is of such a size or nature as to call for an explanation as being not readily explicable by the relationship of the parties. The defendants were therefore not required to demonstrate that the transaction was the result of the free exercise by the transferor of an independent will, but nonetheless presented evidence that a Justice of the Peace had established that she understood her actions and that she acted independently.

3. The claimants have not proven on a balance of the probabilities that Winnifred Simpson lacked the requisite mental capacity
4. The claimants have not proven on a balance of the probabilities that the transfer were inequitable or unconscionable.

[187] In the circumstances judgment is entered in favour of the defendants with costs to be agreed or taxed.