

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2014-00362

BETWEEN

**SAVITRI JAGDIP SINGH** also called **SAVITRI JAGDIPSINGH**  
also called **SAVITRI ALI**

1<sup>st</sup> Claimant

**SAROJ JAGDIP SINGH** also called **SAROK JAGDIPSINGH**  
also called **SAROJ JANKEE SEHILA INDARSINGH**

2<sup>nd</sup> Claimant

**GOWRIE JAGDIP SINGH** also called **GOWRIE JAGDIPSINGH**  
also called **GLORIA GOWRIE ROOPNARINE**

3<sup>rd</sup> Claimant

**SEETA JAGDIP SINGH** also called **SEETA JAGDIPSINGH**  
also called **RADICA ALI**

4<sup>th</sup> Claimant

**TEELUCK JAGDIP SINGH** also called **TEELUCK JAGDIPSINGH**

5<sup>th</sup> Claimant

**PARMOUTI JAGDIP SINGH** also called **PARMOUTI GITA JAGDIPSINGH**

6<sup>th</sup> Claimant

**DULARIE JAGDIP SINGH** also called **DULARIE JAGDIPSINGH**  
also called **DULARIE PERSAD**

7<sup>th</sup> Claimant

**LEELA JAGDIP SINGH** also called **LEELA STACY JAGDIPSINGH**

8<sup>th</sup> Claimant

**DEONATH JAGDIP SINGH** also called **DAVID JAGDIP SINGH**

9<sup>th</sup> Claimant

AND

**DOODNATH JAGDIP SINGH** also called **DOONATH JAGDIPSINGH**  
also called **DOODNATH STEVE JAGDIPSINGH**

1<sup>st</sup> Defendant

**DAVI BALKARAN**

2<sup>nd</sup> Defendant

**AFZAL HOSEIN**

3<sup>rd</sup> Defendant

**AZIM HOSEIN**

4<sup>th</sup> Defendant

**FIAZ HOSEIN**

5<sup>th</sup> Defendant

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**  
**APPEARANCES**

Mr. Eduardo Martinez instructed by Farai Hove Masaisai of Hove & Associates for the Claimants

Mr. Ronnie Bissessar instr. by Ms. Reeyah Chattergoon for the Defendants

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## JUDGEMENT

### Background

1. The claimants, 9 children of the deceased Jagdip Singh (the deceased), claim against their brother the first defendant and his wife, the second defendant, primarily in respect of a building (the building) and land (the land or the Penal land ) at Penal Junction, Penal. (together referred to as “the property or the Penal property”).

2. The estate of the deceased includes other parcels of land at San Francique but the issues in relation to these have apparently been resolved, each party recognizing a one tenth share in each of the children of the deceased. The third, fourth and fifth defendants are the former owners of the land, but the action did not proceed against them. Accordingly, where the term “defendants” is used it refers solely to the first and second named defendants.

3. The property was owned by their father, the deceased. In 1970 for \$15,000.00 he purchased inter alia, a building on the land, which was at that time rented by the previous owner of the building,. He expressly acknowledged that the building was on rented land and that the landlord had at that time refused to transfer the tenancy of the land to him.

4. He operated a parlour and a bar in that building, and also resided there with his family prior to his death in 1976. He left a will. Under his will his wife, (the mother), was the executrix. His property, including the family operated business thereon, (see paragraph 16 witness statement of the first defendant), was left to his wife, the mother, for her lifetime and thereafter it was to go to all his 10 children as joint tenants.

5. A grant of probate was granted to their mother Ramkumari Jagdipsingh, (the mother) as executrix on the 2<sup>nd</sup> day of December 1977.

6. On the 26<sup>th</sup> day of October 1983 the mother, in her capacity as executrix of the estate of the deceased filed a supplemental affidavit with an Inventory attached to it. The Inventory listed the Penal Junction Property together with the tenancy in the Penal Land as forming the most valuable asset of the estate of the deceased.

7. In 1987 the mother commenced High Court action against the owners of the land allegedly seeking a declaration that she be acknowledged as a tenant of the land.

8. In 1996 the High Court proceedings were compromised by the payment of \$500,000.00 and the transfer of the land by the owners. That transfer was made to the mother and the first defendant, her eldest son, in their personal capacities. Upon the death of the mother therefore the property vested automatically in the first defendant.

9. The claimants claim that under the terms of their father's will they were all entitled to share ownership in the property.

10. They contend that the transfer to the 1<sup>st</sup> Defendant and their mother of the Penal property to be held in their personal capacities as Joint Tenants was wrongful and in breach of trust.

11. The first defendant claims that he is entitled to retain the benefit of that transfer and has refused to acknowledge any interest of the claimants.

12. He claims inter alia:-

i that they have **no locus standi** to challenge the transfer, not having demonstrated that they have applied for Letters of Administration of any type,

ii. that they have **not** sufficiently **pleaded fraud** which they need to establish in order to set aside a transfer under the Real Property Act ,and that

iii. that they are debarred by the doctrine of **laches** from obtaining any relief.

13. He also claims that his father **never had a tenancy** in the land at the time of his death and therefore it could not be the subject of his estate. Accordingly, he contends that the transfer to his mother and himself was valid and unimpeachable.

14. He also contends that the building on the land at the time of his father's death was not the same as that existing at the time of the transfer and accordingly even the building did not form part of his father's estate.

## **Issues**

15.

- a. Whether the claimants have sufficient standing to challenge the transfer.
- b. Whether the claimants are debarred by the doctrine of laches from challenging the transfer.
- c. Whether the claimants have sufficiently pleaded fraud as to be able to rely on it.
- d. Whether the deceased held any tenancy in the Penal Property such that the tenancy in the land formed part of the deceased's estate.
- e. Whether the building on the land formed part of the deceased's estate.
- f. Whether the acquisition of a fee simple interest in the Penal land had the effect of removing the land from the estate of the deceased.
- g. Whether the Claimants waived their entitlement under the Will of the deceased and/or promised the 1<sup>st</sup> Defendant their respective interests in the Penal Property.
- h. Whether the Memorandum of Transfer under the Real Property Act can be set aside.
- i. Whether the Memorandum of Transfer under the Real Property Act should be set aside.
- j. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant must **account** to the Claimants for the income received from the Penal Property from the date of their mother's death to the date of Judgment.

## **Findings and Conclusion**

### **Tenancy**

16. A tenancy obviously formed part of the estate of the deceased. His executrix was sufficiently convinced of this to institute High Court proceedings against the landlords.

17. Further, she was sufficiently convinced of this to include the alleged tenancy in a supplemental or amended inventory.

18. It was the claim to a tenancy, which claim the deceased also had at the time of his death, (as demonstrated by its inclusion in the amended inventory), which enabled the resistance by the executrix to the contrary claims by the landlords, and which in turn enabled the compromise under which payment was eventually made for the freehold.

19. The assertion by the first and second defendants that the tenancy was not part of the deceased's estate cannot be sustained in light of these matters.

20. Contemporaneous documentation produced to allegedly demonstrate that the landlords at certain points in time wished to deny that any tenancy existed does not change the fact that it was the deceased's occupation of the land and his ownership of the building thereon, ( in which he operated his business, including a bar), that enabled a. the claim by the executrix to a tenancy and b. the conversion of that claim into the compromise agreement under which the freehold was obtained.

21. It is unnecessary to determine, years after the fact, whether the deceased actually had a tenancy, as his interest in the land, whatever it might have been, derived from his occupation and ownership of the building and de facto possession of the land. The defendants cannot pretend otherwise when his executrix recognized this and included that alleged tenancy as an asset of his estate.

22. The assertion that the building as presently constituted was not the same as it was when the deceased was alive, and therefore does not form an asset of his estate, is an argument of desperation.

23. The original building and the business thereon were clearly and indisputably part of his estate. The income from the business went into improving the original building. There is no evidence of any other source of income. The undistributed estate itself provided the resources to improve it. However the improved estate of the deceased, improved during the lifetime of the mother pursuant to her life interest, is still the estate of the deceased.

#### **Whether fraud sufficiently pleaded**

24. The claimants have pleaded undue influence. They have pleaded that their mother was illiterate, and that her relationship with the first defendant was such that she relied upon him and trusted him. This is not in dispute. That trust and reliance on the first defendant extended to the point of granting him an extensive Power of Attorney.

25. Once undue influence is established based on actual wrongdoing there is no difference between that and fraud. The pleading point therefore must fail.

**Whether the absence of a grant in favor of the claimants means that they have no locus standi to challenge the transfer**

26. The Real Property Act is clear as to who can challenge a transfer to a registered proprietor. It refers to any person deprived of land by fraud. Fraud includes acts of dishonesty. It can even include wilful blindness. The claimants allege that they have been deprived of their legitimate share in the Penal property by undue influence, dishonestly and improperly applied to their mother.

27. They are claiming that they have been deprived of their beneficial interest to a collective nine tenths share of the Penal Property and bar business.

28. I find this clearly was the case and this dishonesty is no different from dishonesty described as fraud. In fact undue influence, especially actual undue influence, is more direct dishonest behavior than willful blindness, which itself can suffice to constitute fraud.

29. The claimants therefore clearly qualify as persons entitled to bring an action to set aside a transfer under the Real Property Act as undue influence is a species of fraud. In this case actual undue influence and presumed undue influence, both of which the first defendant has been guilty of, are sufficiently dishonest behavior to fall squarely within the meaning and requirement for proof of fraud. The need for a grant of representation of some type is not a requirement under the Real Property Act for their claim to recovery of their interest in the land.

**Undue influence**

30. I find that actual undue influence has been established as well as presumed undue influence, based on the following:

- (i) The mother was illiterate. She placed her thumb print on the Memorandum of Transfer.
- (ii) There is no evidence that the Memorandum of Transfer was read over to her, or that it was explained to her that it was a transfer to first defendant and to her in their own right - and not in her capacity as executrix. She clearly took her obligations as executrix seriously - obtaining a grant of probate and filing an amended inventory to include the tenancy.

- (iii) Given that the mother as executrix recognized the building and the tenancy as assets of the estate, a transfer of the freehold to herself in her own right is not consistent with her previous actions. This highly suspicious transaction can only be accounted for by the Memorandum of Transfer not having been read over to her and /or by a failure to explain its effect to her, and in particular that when she dies it would all go to the first defendant, and not to the 9 siblings despite the terms of the deceased's will. The only person present at the time of execution of the Memorandum of transfer who testified at trial was the first defendant. He was facing allegations of undue influence of his mother in relation to that transfer. Yet he did not indicate in his evidence in chief in relation to this highly suspicious transaction that the Memorandum of transfer was ever read over or, more importantly, explained to his illiterate mother, or that she was advised of the opportunity to obtain independent legal advice.
- (iv) There is no suggestion or evidence that she had independent legal advice - separate from that of the first defendant, whose interests were quite different. His interest in having her execute a transfer to himself and to her in her own personal capacity rather than as executrix mandated that she receive legal advice separate from him.
- (v) The relationship of trust and confidence reposed in the first defendant was clearly thereby abused when this highly suspicious transaction was effected.
- (vi) The mere omission to read and explain this transfer would be all that was necessary to enact the travesty of a Memorandum of Transfer by which the property became vested in first defendant, in breach of trust and completely at variance with his father's wishes, as clearly expressed in his will, and to the detriment of all his siblings.

### **Laches**

31. As discussed hereunder the doctrine of Laches simply cannot apply in the circumstances of this case to deny the claimants relief.

### **Whether the Claimants waived their entitlement under the Will of the deceased and/or promised the 1<sup>st</sup> Defendant their respective interests in the Penal Property**



32. The 1<sup>st</sup> Defendant alleged in the vaguest possible terms that the Claimants indicated that they did not want any interest in the property and that they told him so on different occasions. However this is simply not credible, and it is unsupported and uncorroborated by any evidence. It is more akin to a wishful interpretation by the defendants of the inactivity of the claimants .It is undisputed that in the year of purchase, the property was in a very busy commercial spot and was being used both for business and residence. It is not disputed that the proceeds from the bar were used for the benefit of all the siblings, for example the purchase of air fares for them.

### **Orders**

33. **It is ordered as follows:**

- i. **It is ordered** that no more than four of the Claimants, to be agreed among themselves, be nominated and appointed the Executors of the estate of the deceased, and administrators of the estate of the mother within 21 days, on or before June 28<sup>th</sup> 2016.
- ii. It is ordered that a bank account be opened in the name of the executors of the deceased so nominated for the benefit of the estate of the deceased.
- iii. **It is ordered** that the First and Second Defendants be restrained with immediate effect from intermeddling with the estate of the deceased, or from collecting any rents whatsoever from the tenants of the property situate at Penal Junction Penal (the property).
- iv. **It is ordered** that the memorandum of transfer No. 47 dated the 16th day of April 1996 and registered in Volume 3833 Folio 357 with respect to All that parcel of land comprising Seven Thousand Nine Hundred and Sixty-Nine Square Feet (he land) be the same more or less delineated and coloured pink in the plan registered in Volume 2479 Folio 85 be **rectified** to reflect
  - (a) the conveyance of the property to the mother AS executrix OF THE ESTATE OF THE DECEASED JAGDIPSINGH, and
  - (b) the **deletion and removal** of the First defendant as transferee of the land

within 21 days ,that is on or before June 28<sup>th</sup> 2016, in default of which the Registrar is empowered to execute the Memorandum of rectification with immediate effect, save that

the rights of any third party mortgagee accrued pursuant to any Deed of Mortgage are to remain unaffected by this order.

- v. **It is ordered** that all leases and tenancy agreements in respect of the property be **assigned** by the Defendants within 21 days, that is on or before June 28<sup>th</sup> 2016, to the Claimants nominated in accordance with (i) above in their capacity as Executors of the Estate of the deceased, and that
- vi. **It is ordered** that all payments in respect of rent be made by the respective tenants by cheque or certified cheque to the executors nominated in accordance with (i) above for credit to the account to be opened pursuant to ii. above in the name of the estate of the deceased.
- vii. It is ordered that, in the **alternative** to orders **iv.** only, the Defendants are to pay to the Claimants within 21 days, that is on or before June 28<sup>th</sup> 2016, the entire sum of \$6.3 million, (being 90 % of the value of the property as at the date of the last valuation **plus \$2,210, 895.00- being 90 % of all rental income derived therefrom** from the 26th day of February, 2012 to June 30<sup>th</sup> 2016 as estimated by the Farell valuation. Such payment is without prejudice to the right of the defendants to **subsequent** reimbursement of expenses, corroborated by independently produced documentation or substantiated , (pursuant to order xi), to the satisfaction of the Executors. hereunder. (Order xii., which relates to income received from the property from the 26th day of February, 2012 to June 7<sup>th</sup> 2016 is to apply whether or not payment of **\$6,300,000.00** is now made for the property).
- viii. It is ordered that pending re-conveyance and assignment of the leases the defendants are to pay over any and all rents received from the property from today June 7<sup>th</sup> 2016, without any deduction, to the Claimants nominated pursuant to i. above in their capacity as Executors of the Estate of the deceased.

- ix. **An Injunction is granted** restraining the Defendants from selling, transferring, or effecting or creating any further charges or encumbrances on the Penal property and/or howsoever otherwise disposing of it.
- x. **It is ordered** that the First Defendant and the Second Defendant do indemnify the estate of the deceased and the mortgagee in respect of any and all sums due and owing in respect of any sums now outstanding on the principal sum and interest on any loans obtained by way of any Deed of Mortgage subsequent to the death of the mother and all related costs.
- xi. **It is ordered** that the First and second named Defendant do produce and/or provide to the Claimant within 21 days, that is on or before June 28<sup>th</sup> 2016, a full **account** of a. all **income** from i. tenants of the property and ii. Profits from the bar operated by the defendants thereon , and
- b. only such **expenses** as are **supported** by receipts, invoices or suitable supporting documentation **produced by independent third parties** in relation to the property for the period 26<sup>th</sup> day of February, 2012 to June 7<sup>th</sup> 2016 including a charge for reasonable cost of labour in managing the bar business,
- xii. **It is ordered** that the First and Second Named Defendants do **pay** to the estate of the deceased within 21 days, on or before June 28<sup>h</sup> 2016,
- a. 90 % of all **rental income** received from the subject property from 26<sup>th</sup> day of February, 2012 to June 7<sup>th</sup> 2016, with liberty thereafter to subsequently claim reimbursement from the estate of the deceased in respect only of such **expenses** as are **supported** by receipts, invoices or suitable supporting documentation **produced by independent third parties** in relation to the property for the period 26<sup>th</sup> day of February, 2012 to June 7<sup>th</sup> 2016.
- b. 90 % of all **profits from the bar** from 26<sup>th</sup> day of February, 2012 to June 7<sup>th</sup> 2016 with liberty to claim from the nominated executors **subsequent** reimbursement of a reasonable monthly cost of labour for managing the business of the bar.

- xiii. **It is ordered** that the First and second named Defendants be immediately restrained from dealing with or making withdrawals from Scotiabank account **4015280**, save for the issue therefrom of manager's cheques payable to the estate of the deceased and / or to the claimants nominated and appointed pursuant to i above in their capacity as legal personal representatives of the estate of the deceased.
- xiv. It is further ordered that all the bank statements for Scotiabank account **4015280** and the current balance on this account be disclosed within 7 days from the date hereof, on or before June 14<sup>th</sup> 2016.
- xv. The first and second named defendants are to pay to the claimants costs on the basis prescribed by the Civil Proceedings Rules for a claim in the sum of **\$8,510,895.00**.
- xvi. In default of compliance by the defendants with orders ii. – xiii above on or before September 1<sup>st</sup> 2016 the claimants are to be at liberty to put up for sale by public auction the property comprising all that parcel of land comprising Seven Thousand Nine Hundred and Sixty-Nine Square Feet be the same more or less delineated and coloured pink in the plan registered in Volume 2479 Folio 85 being portion of the lands described in the Crown Grant in Volume 78 Folio 591 and also described in the Certificate of Title in Volume 1499 Folio 377 and shown as Lot number 6 in the general plan filed in Volume 2283 Folio 269 and now described in Certificate of Title in Volume 2479 Folio 87 and bounded on the North by Road Reserved thirty feet wide and by lot 5 on the South by San Fernando Siparia Erin Road one hundred links wide and by Crown Lands (Police Station) on the East by Lot 5 and by San Fernando Siparia Erin Road one hundred links wide and on the West by a Road reserved thirty feet wide. (hereinafter called “the Penal Property”), with the reserve price being 90% of the value in the Farrell Valuation dated April 10<sup>th</sup> 2015.
- xvii. Liberty to apply.

## **Analysis and Reasoning**

### **Undisputed Facts**

34.

- a. Jagdip Singh (“the deceased”) executed his will on the 23<sup>rd</sup> day of December 1975 in which he devised all of his property to his wife, Ramkumarie Jagdip Singh (the mother), for the term of her natural life, and after her death to all of the Claimants and the First Defendant as joint tenants.
- b. The Deceased died on the 30<sup>th</sup> day of January 1976.
- c. On the 2<sup>nd</sup> day of December 1977 Ramkumari Jagdip Singh received a Grant of Probate in the estate of the deceased Jagdip Singh.
- d. On 13<sup>th</sup> February 1996 the 1<sup>st</sup> defendant and Ramkumari executed an agreement for sale with the owners to purchase the Penal Lands for \$500,000.00 ;
- e. By Memorandum of Transfer dated the 16<sup>th</sup> day of April 1996 and registered in Volume 3833 Folio 357 the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> named Defendants (the former owners – who took no part in this action) transferred the Penal Property to Ramkumari Jagdipsingh and the 1<sup>st</sup> Defendant as Joint Tenants in their personal capacities..
- f. The First and Second Defendants have been collecting all the rental income generated from the various tenants of the Penal Property together with the profits from the bar business run thereon from the date of Ramkumarie Jagdipsingh’s death February 26<sup>th</sup> 2012 to the present date.

## **Issues**

### **Whether the deceased held any tenancy in the land at Penal Junction**

35. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim that the deceased had no tenancy in the land on which the building stood as the previous owner refused to accept the deceased as the tenant. They exhibited as DJ 9 several Notices to quit and letters in an attempt to establish this.

36. Those documents either:-

- a. predated the purchase by the deceased, and /or

b. were not addressed to the deceased, and /or

c. did not refer to the parcel of land and the building, or the bar business occupied by the deceased, but rather referred to lands at the back of the shop. Notably, that latter letter, subsequent to the purchase, threatened an injunction, not eviction.

37. Further all purported evidence that his mother held the tenancy in her own right was discredited by the supplemental inventory that she filed. The fact is that from the date of purchase to the date of the death of the deceased, the deceased's occupation of the land, with his family, and the operation of his bar business, pursuant to the purchase from Mr. Chin, were never further challenged.

38. Whether or not there existed a tenancy however, it was the claim to a tenancy by the deceased which permitted the claim to its conversion to a statutory tenancy, and in turn enabled the acquisition of the freehold in the compromise of the High Court proceedings based thereon. At the very least the claim to a tenancy, even if not an actual tenancy, was part of the deceased's estate.

### **What effect does the mother's acquisition of the fee simple interest have on the estate of the deceased**

39. During the mother's lifetime she acquired a fee simple interest in the property. She was able to purchase the freehold interest in the Penal land for \$500,000.00 in a compromise of High Court Action against the landlords.

40. It was submitted that Ramkumari Jagdipsingh was able to purchase the fee simple interest in the land based on the fact that the deceased had purchased and occupied the building standing on the land. But for his occupation of the lands she would not have been able to negotiate its purchase from the land owners. This is obviously correct. This was no mere personal arrangement. As the executrix of the estate she would have held any interest by the deceased in that land in trust for the benefit of the children of the deceased. Any conversion of that interest to a freehold interest would also be subject to this trust. It matters not whether that interest was:-

- a. a tenancy ,or
- b. simply a claim to a tenancy.

Whatever it was it enabled the mother's claim, as executrix of his estate, to a claim to a statutory tenancy upon passage of the Land Tenants Security of Tenure Act, and further enabled the acquisition of the freehold as part of the compromise of that High Court Action.

41. That compromise had to necessarily be based on:-

- a. the ownership of the building by the estate,
- b. the occupation of the property by persons entitled under the estate.

This enabled the claim to be made to a tenancy, and in turn to a statutory tenancy, which in turn enabled the compromise purchase of the freehold. There was nothing personal to Ramkumari Jagdipsingh about any of this.

42. Suspiciously however, at the time of the transfer from landowners, only the mother's and the 1<sup>st</sup> named Defendant's names were placed on the Certificate of Title, and as Joint Tenants. The 1<sup>st</sup> named Defendant now claims to own the entire disputed property despite his other nine (9) siblings all being mentioned as beneficiaries entitled under their deceased father's will, which he knew prior to the purchase, when he carried his mother, whom he knew to be illiterate, to a lawyer's office.

43. There is no evidence that the document to which she allegedly affixed her thumb print was even read over to her. There is certainly no evidence that she received independent advice that what she was doing was, on the face of it, contrary to the will of her deceased husband, of whose will she was the executrix, and of whose estate she was the beneficial owner of a life interest only.

44. There is no evidence that Ramkumari Jagdipsingh shared with the first defendant any of the peculiar beliefs about personal entitlement to the tenancy or the freehold that the defendants now proffer to justify the claim to personal entitlement to the property.

45. As executrix of the deceased's estate, and as a trustee thereof, the mother would have held the property on trust for the Claimants and the 1<sup>st</sup> Defendant.

46. The **Conveyancing and Law of Property Act Chap 56:01** provides:

*s.62 (1) **A contingent remainder** shall be deemed to be capable of taking effect notwithstanding the **determination** by forfeiture, surrender, or **merger of any preceding estate of freehold** in the same manner in all respects as if such **determination** had not happened.* (all emphasis added)

### **Whether the Memorandum of Transfer can be set aside**

47. This depends on whether the First Defendant became a registered proprietor of the Penal Junction Property through fraud.

48. The First Defendant was aware of his deceased father's will, which gave a life interest to his mother with the remainder to all the Claimants and himself.

49. The mother was illiterate. The Memorandum of Transfer was signed using the thumb print of the mother. The Memorandum did not have at its foot, the words "same having been read over to her and she appeared to have fully understood same" or their equivalent.

50. The bar was operated by the deceased at the time of his death. It was an asset of the estate - a family business. Income from the bar and rental income from the property, also assets of the estate, were the only sources of income demonstrated by the defendants. The First Defendant testified that he worked in the bar from 8 am to 2 am. He could not therefore have earned money from working elsewhere. All loans for the improvement of the property necessarily had to have been secured by the property or its income, and repaid from the income of the estate.

### **Law – Fraud**

51. Section 143 (b) of the Real Property Act provides:

*143.(b) No action of ejectment or other action 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:*

.....

*(b) **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. In **Venice Arthur Charles v. Harold Seeratan & Other CV 2008-02579**, delivered on the 2<sup>nd</sup> November, 2012, the effect of section 143 (b) was considered as follows:

*“no action for the recovery of any land shall lie against the registered proprietor except in the case of a person deprived of any land by fraud, as against the person registered as the proprietor of such land through fraud.*

*The intervenor must establish that she is such a person deprived of land by fraud, and that the claimant is a person registered as the proprietor of land through fraud.”*

53. In **Wattley, James v Lopez, Ronald, G.; Jules, Daniel; Hosein, Faizal; Andrews, Junior H.C.845/2014. CV.2014-00845** delivered on January 2015, the issue of fraud was examined further as follows: - (all emphasis added)

**What constitutes fraud:**

Assets Company Ltd v Mere Roihi (1905) AC 176, at p210: (All emphasis added)

“by fraud in [these Acts] is meant actual fraud, i.e. **dishonesty of some sort**, not what is called constructive or equitable fraud ... [T]he **fraud which must be proved** in order to invalidate the title of a registered purchaser for value ... must be **brought home to the person whose registered title is impeached** or to his agents. Fraud by persons **from whom he claims** does not affect him unless knowledge of it is **brought home to him** or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making enquiries 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.”

54. This is not the case here. It is the first defendant's conduct which is challenged, not that of any person from whom he claims. He is not one step removed from the allegation of fraud. It is conduct which has been brought home directly to him.

55. As the eldest son who was **literate**, upon whom his mother **relied**, the first defendant can hardly claim not to have been in a position of influence and ascendancy. She was taken to a lawyer's office to sign a Memorandum of Transfer. He would be expected at the very least to ensure that the document was read over to her. He can hardly claim that the transaction was not a suspicious transaction, carrying as it does the following clear hallmarks of suspicion for which he was directly involved, implicated, and responsible:-

- i. Being in a relationship of trust, confidence and ascendancy as demonstrated by his being a beneficiary of an extensive Power of Attorney from his mother.
- ii. Abusing that relationship by carrying his illiterate mother to a lawyer to execute a Memorandum of Transfer, after himself executing the preceding agreement for sale as her attorney, pursuant to a Power of Attorney.
- iii. Having his illiterate mother execute a document which was not read over to her,
- iv. Not advising his illiterate mother of the opportunity to obtain independent legal advice, where his interests in seeking the property for himself conflicted with the duty of his mother to ensure that the estate of the deceased, including that property, was preserved for the benefit of all the children of the deceased.
- v. Not ensuring that his illiterate mother obtain such advice where the effect of executing that document involved his illiterate mother a. doing something manifestly to the benefit of the person carrying her to the attorney and benefitting from the execution of that document, and b. where, as here, the document on the face of it, involved his illiterate mother acting in breach of fiduciary duty to an estate which she was entrusted to represent.

56. In this case the first defendant cannot honestly state that he believed the transfer to himself and his mother in their **personal** capacities, of land:-

- a. on which stood a building which belonged to his father,
- b. for whom his siblings were also beneficiaries under his will,
- c. in respect of which his mother was the executrix, and

d. entitled only to a life interest,  
could be a genuine document.

57. Even apart from the obfuscations and justifications raised by him with respect to the land, he must have known at least that he **could not** be entitled to the **building** in his own right, and that if his mother died that his siblings would get nothing, despite the will of his father. The alleged verbal waivers of his siblings of their interests in the property are completely unsubstantiated.

58. His mother was illiterate. There is no evidence the Memorandum of Transfer was even read over to her.

59. There is absolutely no reason to believe that his mother knew that this property had been transferred to her and the first named Defendant solely in their personal capacities, and that the effect of that was that she had in fact enabled the transfer after her death to the first defendant.

60. The first named Defendant laid the foundation for that transfer to them both in their personal capacities when he utilised the Power of Attorney that she gave him to execute the agreement for sale to them both in their personal capacities.

61. I find that procuring her thumb print on that Memorandum of Transfer must have been the result of the exercise of undue influence, both actual and presumed.

62. The means by which this dishonest result was achieved falls within the classic descriptions of undue influence, both actual and presumed. I find that such undue influence in this case constituted an act of dishonesty tantamount to fraud. This dishonesty is attributable entirely to the first defendant.

63. There is absolutely no evidence that his mother, who had always previously acted to benefit all her children from the estate, save for this single instance of executing the Memorandum of Transfer, even shared the convoluted and self serving belief of the first

defendant that he alone could now benefit from the most valuable asset of the estate of the deceased.

### **Undue influence**

64. In **Macquarie Bank Ltd vs. Sixty-Fourth Throne Pty Ltd** – [1998] 3 VR 133 Tadjell J.A. of the Supreme Court of Victoria described wilful blindness as:

**“..a form of designed or calculated ignorance,”**

65. But this is not a case of wilful blindness. This is a case of undue influence and clear dishonesty. It involved the main asset of the deceased passing into the care, control, and ownership of the first defendant by what was in effect, a trick.

66. It is clear that the First Defendant fully intended the result that occurred on the death of his mother - the acquisition, ownership, possession, and retention of the former family home and businesses and the land on which it stood against all his siblings/ Claimants. It is clear that that must have been the intention of the first defendant at that time as it is clearly his intention now – hence the need for this action.

67. The First Defendant knew a will existed conferring the eventual ownership of the deceased’s interest in the property to all the children.

68. He knew that he and his mother used the monies generated from the businesses located on the property and the profits from the bar, all assets of the estate of the deceased, for purchasing the freehold when the opportunity arose, as he and his mother had no other source of income. The purchase price of \$500,000.00 was allegedly paid, as to \$200,000.00 by the mother and the First Defendant, with the remaining \$300,000.00 from a mortgage. The only source of income for each was the rental income and profits from the family bar business which were assets of the estate of the deceased.

69. He knew that his mother was executrix of the estate and held it in trust during her lifetime, pending distribution to him and his siblings after her death, in accordance with his father’s wishes.

70. He knew that his mother trusted him, even to the extent of giving him a Power of Attorney.

71. He knew she was illiterate.

72. He knew that she did not receive separate independent legal advice on the effect of the Memorandum of Transfer as there is no evidence that she did.

73. In those circumstances, the Memorandum of Transfer must be **rectified**.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant should account to the Claimants for the income received from the Penal Property from the date of Ramkumarie's death.**

74. It is clear that the bar formed part of the estate of the deceased. Despite renovations to its surroundings and housing, that bar and its income were for the benefit of the mother during her lifetime, and thereafter to the siblings of the first defendant as well as himself. Any retention of the **profits** of that business in excess of his one tenth share would be unjustifiable and dishonest.

75. Since the death of the mother the First and Second Defendants have been the only persons benefitting from the estate. Therefore First and Second Defendant must be accountable to the Claimants for all incomes collected from the Penal property since the date of death of the mother. They cannot possibly claim to retain the benefit of that dishonest conduct.

76. The First Defendant would be accountable to the Claimants for the undistributed but collected rent. To date the estimated collected rent is \$51,350.00 per month based on the valuation of GA Farrell & Associates Ltd from the date of the death of Rajkumarie (26<sup>th</sup> February 2012) to the June 2016. However that includes an estimated rent of \$5000.00 per month for the residence occupied by the defendants. This figure should not be included in the estimated monthly rental income as the first defendant is a beneficiary under the will and entitled to a one tenth share as beneficial co owner. Rental income for the property would therefore be \$46350.00 per month from 26<sup>th</sup> February 2012 to June 2016. For 53 months that would be \$2,456,550.00 collected by the defendants and not accounted for.

77. The First Defendant also stated that he repaid loans that he took from the bank for the renovations. If he did, he must have used monies received from the bar, and rent collected from the businesses at the Penal Junction property to do so. If he actually did subsequent to February 26<sup>th</sup> 2012 he may claim to set off against this income such expenditure for the benefit of the estate and estate property as is substantiated to the satisfaction of the representatives of the estate of the deceased, appointed in accordance with this court's order as below.

### **Undue influence**

78. In **Lincoln Robinson v Cecelia Changoor** H.C 247 of 2010 delivered. **July 18<sup>th</sup> 2011** the doctrine of undue influence was examined . Dicta of Nicholls LJ in **Royal Bank of Scotland –v- Etridge (No.2) [2001] UKHL 44** were cited and the key elements of the doctrine were extracted. The doctrine was revisited in the case of **Sadiqua Boos v Saadia Lee Ying** Claim No. 1056 of 2015 delivered **May 20<sup>th</sup> 2016** as follows:-

*At Paragraph 836 Categories of Undue Influence in Halsbury's Laws of England<sup>1</sup> it is stated that:*

*“Undue influence may arise in the context of gifts or contracts. Cases in which a gift or contract has been set aside on the ground of undue influence have traditionally been divided into two categories:*

*(1) those cases where the court has been satisfied that the gift or contract was the result of **actual influence** expressly used for the purpose (actual undue influence);*

*(2) those cases in which the **relationship** between the parties at the time of or shortly before the making of the gift or contract has been such as to raise a presumption of influence (presumed undue influence).*

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<sup>1</sup> Halsbury's Laws of England/Misrepresentation (Volume 76 (2013))/4. Undue Influence And Other Voidable Transactions/(1) Undue Influence, Duress And Unconscionable Bargains/(Ii) Undue Influence/A. Scope of Doctrine Of Undue Influence/836. Categories of Undue Influence.

*The second category has been further subdivided into: (a) those cases in which the relationship falls into one of the well-established categories of relationship, such as solicitor and client, where the relationship as such raises the presumption of the existence of influence; and (b) those cases where, if the complainant proves the **de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of that relationship raises the presumption of undue influence.***

*A transaction may be set aside for undue influence even where the person who actually benefited by the transaction is a different person from the one who exerted undue influence to bring it about.” [All emphasis added]*

*In the case of **CV 2006-03599 Seeraj v Seeraj** - delivered 21<sup>st</sup> June 2010, the court dealt with the issue of undue influence. The guidance referred to in **Snell’s Equity 31<sup>st</sup> edition** is largely derived from **Royal Bank of Scotland plc v Etridge (No. 2)**, which was reaffirmed as recently as 2015 by the Judicial Committee of the Privy Council in **Alcide v Desir [2015] UKPC 24**.*

*In **Seeraj** the deceased, prior to her death, purported to transfer the premises in dispute by deed of gift to herself and the defendant as joint tenants. The court had to consider whether the deed of gift was the product of undue influence and therefore liable to be set aside. From paragraph 30 of the judgment the law was set out extensively (all emphasis now added):-*

*“30. The law on undue influence has been clarified in recent decisions and is set out and summarized in Snell’s Equity 31<sup>st</sup> edition as follows. The principles are set out at some length hereunder –*

*[Extracts from Snell’s Equity 31<sup>st</sup> Edition]*

*“But in **Royal Bank of Scotland plc v Etridge (No. 2)** the Court of Appeal and the House of Lords have now confirmed that the basis of the doctrine is not absence of consent but **proof of wrongdoing**. Despite this clarification of the principles, however, the scope of undue influence still remains uncertain. The*

Court of Appeal has recently confirmed that the presumption of undue influence can still arise even where the “wrongdoer” is able to satisfy the court affirmatively that his conduct was unimpeachable and that there was nothing sinister in it.”

At page 712 “it is brought into play whenever **one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them**; and Etridge [6]-[7]: “The law will investigate the manner in which the intention to enter into the transaction was secured...**If the intention was secured by unacceptable means, the law will not permit the transaction to stand**”

Paragraph 8-09 page 204-205

“The doctrine of undue influence enables C to obtain relief where **he or she has been induced by the influence of D** to enter into or participate in a transaction in circumstances where the court considers that **the influence was exerted improperly or unfairly....** The kind of conduct which will attract the Court’s intervention may involve threats or other overt acts of coercion. But **the Court may also intervene where D has exercised no overt pressure on C because he or she has such a power of influence that this is unnecessary....** cases where the doctrine operates are conventionally divided into two classes. The first class consists of cases of **actual undue influence**. The second class consists of cases of **presumed undue influence**. The legal burden of proving undue influence remains on C throughout but if C establishes the existence of a **relationship of influence and the nature of the transaction is so suspicious that it calls for an explanation, this satisfies the evidential burden of proving undue influence and the burden moves to D to provide a satisfactory explanation for the transaction.** **In the absence of a satisfactory explanation the inference of undue influence can be drawn and the legal burden of proof will be satisfied even if there is no direct evidence of undue influence...** Further, where the relationship between the parties falls into one of a number of recognised categories of **parent and child, guardian and ward, trustee and beneficiary, solicitor and client or medical or**



*spiritual adviser and patient or follower a relationship of **influence is presumed**. This is an irrebuttable legal presumption (as opposed to an evidential one) **although in order to establish undue influence it remains necessary in all cases for C to establish that the transaction called for an explanation on the basis that it was “immoderate or irrational” or cannot “be reasonably accounted for on the grounds of friendship, relationship, charity, or other motives on which ordinary men act”**.*

79. The First Named Defendant carried his mother to a lawyer. There his mother engaged in a transaction at the end of which she had effectively given property, that she held in trust for all her children, to the first Named Defendant after her death. If she had received competent independent legal advice, she would necessarily have been strongly advised to consider whether there were actually any advantages of such an arrangement to anyone except the first named defendant, involving her as it did in a breach of trust.

*Paragraph 8-12*

*“Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a **measure of influence**, or ascendancy, of which the ascendant person then takes **unfair advantage**... In cases of this latter nature **the influence one person has over another** provides scope for misuses **without any specific overt acts of persuasion**. The relationship between two individuals may be such that, without more, **one of them is disposed to agree a course of action proposed by the other**. Typically this occurs when one person **places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests.**”*

80. This is precisely the case here. A relationship of influence has been clearly established. The transaction is highly suspicious. No satisfactory explanation has been provided for it.

Paragraph 8-13 page 208

*Actual undue influence*

*“In cases where no overt pressure is exerted **actual** undue influence may be proved by adducing **evidence of the relationship of ascendancy** and by the court drawing the **inference** that C was acting under D’s direction without any independent thought... If actual undue influence is proved the transaction will be set aside **even if the transaction was not clearly or obviously disadvantageous to the victim**”.*

81. In fact it is clear that there was a relationship between the mother and the First Defendant, her eldest son, which can categorically be described as a relationship of ascendancy. I find that there is sufficient evidence that the transaction was entered into as a result of **actual** undue influence. There was clearly a relationship of ascendancy and, given the effect of this transaction and its irrationality, the inference must be drawn that the deceased was acting under the direction of the First Defendant without any independent thought.

Paragraph 8-14

**Presumed undue influence**

*“But in many cases across the spectrum C cannot point to any overt acts or statements from which the court can make direct findings of undue influence and the relationship between the parties is not one of domination or complete ascendancy. **Even if C is, therefore, unable to prove undue influence directly, undue influence may be presumed upon proof of (1) a relationship of influence and (2) a transaction which excites suspicion or calls for explanation.** “Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.” **The onus then shifts to D to provide a satisfactory explanation and to satisfy the court that C was free from D’s influence altogether or that any reliance placed by C upon D was not abused.** If D is unable to provide a satisfactory*

*explanation then the court may draw the inference that C was induced to enter into the transaction and the legal burden of proof is discharged".*

82. With regard to presumed undue influence, as I have found, there was clearly a **relationship of influence** by the First Defendant over the deceased, by virtue of which he was entrusted with matters involving the deceased's financial affairs. Clearly the deceased placed trust and confidence in the First Defendant in relation to the management of her financial affairs.

83. Furthermore the **transaction definitely excites suspicion**. It not only calls for, but in fact demands explanation. No satisfactory explanation has been provided for this transaction. In those circumstances the burden shifted to the First Defendant to provide a satisfactory explanation that the deceased was free from the First Defendant's influence altogether or that any reliance placed by the deceased upon the First Defendant was not abused. The explanations provided are anything but satisfactory.

*Paragraph 8-15*

*"It is also important to emphasize that the fact in issue which is the subject of the presumption is not the existence of a relationship of influence but that this relationship has been wrongfully abused. In Barclays Bank Plc v O'Brien it appeared to be suggested that proof of a relationship of influence was sufficient to give rise to the presumption of undue influence and that any exercise of influence by one party over another (and, in particular, husband over wife) would be wrongful. This suggestion has now been rejected. Further, there is bound to be a substantial overlap between actual and presumed undue influence particularly in cases of actual undue influence which involve no overt pressure. Where the court finds on the evidence, therefore, that there has been no express or actual undue influence it is not open to the court to infer undue influence from the nature of the relationship between the parties. The claim must be dismissed."*

84. I do not infer undue influence merely from the relationship between the deceased and the First Defendant alone. I find that that relationship was wrongfully **abused** in that

the deceased had no independent advice, legal or otherwise, and that there is no independent evidence that she was advised of the opportunity to obtain such advice.

*Paragraph 8-21*

*“All transactions whereby benefits are conferred on parents by their children are objects of the court’s jealousy especially where the parent has been guardian of the child’s property. For example, where a daughter made over property to her father without consideration shortly after attaining her majority, the father was required to show that the daughter was a free agent. The presumption operates even after the marriage of the child, but normally lasts only a short time after he or she attains full age. **There is no presumption of a relationship of influence by a child over a parent and such a relationship must be established on the facts: Avon Finance Co. Ltd v Bridger (1979) [1985] 2 All E.R. 281 (son and elderly parents).**”*

85. As I have indicated, in this case there is no presumption of undue influence merely from the nature of the relationship.

*Paragraph 8-28 Nature of transaction*

*“In **National Westminster Bank plc v Morgan** it was held that the presumption of undue influence will not arise unless the transaction is manifestly to the disadvantage of the person influenced. In **Royal Bank of Scotland plc v Etridge (No. 2)** the House of Lords declined to depart from their earlier decision although they considered that because of its ambiguity the expression “manifest disadvantage” should be discarded.” **Accordingly, the presumption does not arise unless the nature of the transaction is sufficiently unusual or suspicious to require D to provide an explanation: “so something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.***

86. The disadvantage to mother by having her execute the Memorandum of Transfer by her thumb print without any evidence of it having been explained or read over to her was that she was effectively placed in a situation of breach of trust and breach of her fiduciary obligations as Executrix, effectively disinheriting all 9 of her other children. This was a precarious, uncomfortable and legally exposed position, in which, with the benefit of knowledge of the transaction and its effect, she could not possibly have wished to find herself.

*Paragraph 8-30 Rebutting the presumption*

*“In the case of gifts, the presumption may be rebutted by affirmative proof that “the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor’s will” Put more shortly, D must establish that the gift was made as a result of “full free and informed thought about it”*

*Paragraph 8-31*

*“The most obvious way for D to rebut the presumption is to prove that C received independent legal advice. The normal standard of the advice required to rebut the presumption is that S, C’s adviser, explained the nature and consequences of the transaction to C with full knowledge of the relevant circumstances.” [Emphasis mine]*

87. While this may be the most obvious way of rebutting any presumption, it is not always essential. In this case however, given the effect of this transaction - potential breach of trust, the need to ensure that the deceased had independent legal advice was critical.

88. This demanded that the deceased receive independent legal and financial advice from an adviser with full knowledge of this highly suspicious features of the transaction.

89. The Defendant asserts and agrees that Ramkumari clearly reposed trust and confidence in the First Defendant, having given him a power of attorney over her financial and property affairs since 27<sup>th</sup> May 1994.

### **Findings**

90. Actual and Presumed undue influence have been proven by the Claimants as:

- i. There was a relationship of ascendancy between the First Defendant and the mother.

I find that there was such a relationship of ascendancy. The trust reposed in the First Defendant was clearly demonstrated by, inter alia, the mother granting him an extensive Power of Attorney to act on her behalf.

- ii. The mother was misled by the First Defendant as to the true nature of the transaction.

In light of the matters set out herein I find that the mother could not have been fully informed, and must have been misled, as to actual nature and consequences of the transaction by which she enabled the First Defendant ultimately to become the sole owner of the property.

- iii. There was unequal bargaining power between the deceased and the First Defendant.

I find that there must have been as the deceased did not have the benefit of independent legal advice.

- iv. There is no evidence that the mother acted with the benefit of any independent legal advice.

In fact there is no evidence that the mother acted with the benefit of any legal advice, or was even advised of the need for independent legal advice or provided with the opportunity to obtain such advice. She went to execute a Memorandum of Transfer that had been prepared pursuant to an agreement for sale that the First Defendant had executed on her behalf pursuant to the Power of Attorney that he held. That agreement for sale, unexecuted by her, had laid the groundwork for the subsequent transfer to them both in their personal capacities.

Even if she did it is certainly not clear whether the mother was provided with **full knowledge** of the relevant circumstances, namely that by transferring to her in her personal capacity she would be acting in breach of trust and in breach of her duties as executrix of the estate of the deceased, and enabling the vesting of the property after her death, bar business and all, in the first defendant exclusively.

In those circumstances it is far more likely than not, that only if there were excessive trust and confidence reposed by the deceased in the First Defendant could this transaction be explained.

- v. The mother placed her trust and depended on the First Defendant to look after her affairs and interests in the property and the First Defendant betrayed this trust by preferring his own interests.

For the reasons set out above I so find. In fact I expressly find that the First defendant took advantage of the position of trust that he was placed in so as to advance his own personal pecuniary interests in acquiring the property, but to the significant economic disadvantage of the intended beneficiaries of the deceased's estate.

- vi. The property was the main asset of the deceased and its effective conveyance to the First Defendant, bypassing the terms of his father's will, calls for an explanation and excites suspicion.
- vii. The First Defendant has failed to provide the Court with a proper explanation for the transaction.

91. The reason why the deceased allegedly would wish to suddenly abandon her obligations as trustee in favour of benefitting the first defendant exclusively has never been convincingly explained. The suggestion hinted at, that as he was her eldest son, the deceased wished to favour him, at the expense of his sisters, and that his brothers had already been provided for, rings hollow, involving, as it does, the mother's having to act in breach of trust to do so.

## Acquiescence

92. Certainly there is no evidence of any acquiescence. The claimants' entitlements under the estate of the deceased began at the date of death of the mother and the termination of her life interest.

93. The evidence is that they only saw the **terms** of the memorandum of transfer in 2011. It is only then that it became clear that the First defendant and the mother had somehow conveyed to themselves in their personal capacities. The effect of this was then brought home by the defendants' claiming ownership of the entire property.

94. The explanation for delay for the period from 29<sup>th</sup> February 2012 (Ramkumari's death) to the date of the filing of the claim in 2014 was that the claimants did not want to institute any proceedings for a period of one year after Ramkumari's death on religious grounds.

95. Whether or not this is accepted the fact is that it is a minimal delay. If this were a claim in contract or tort it would be well within any 4 year limitation period. Coupled with the fact that there were efforts to resolve this consensually as a family matter, that there is no limitation period in relation to undue influence or fraud, and that there is absolutely no evidence that the defendants acted to their detriment based on any delay by the claimants, there is absolutely no reason to deny any relief to the claimants on the basis of alleged delay.

96. In **Erlanger v The New Sombrero Phosphate Company and Others [1873] 2 App Cas. 1218**. At pgs.1279-1280 Lord Blackburn explained -

*"In Lindsay Petroleum Company v. Hurd (1), it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be **practically unjust to give a remedy**, either because the party has, by his conduct done that which might **fairly** be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet **put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted**, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, **which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of***



**limitations, the validity of that defence must be tried upon principles substantially equitable.** *Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.* " I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, **it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change, which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.**" (emphasis mine)

97. The position was restated in the case of **Frawley v Neil 5th April 1999 Times Law Reports**

*"The modern approach to the equitable doctrine of laches, whereby the court would not uphold beneficial rights whose assertion or enforcement had been unreasonably delayed by their claimant, was not to inquire into all the circumstances to see whether they fitted within the principles established in previous cases, but rather to ask whether, broadly considered, the claimant's actions were such as to render it unconscionable for him to be permitted to assert his beneficial rights."* [Emphasis Added]

98. I do not consider that laches arises here as a complete defence for the reasons set out hereunder, namely:

- i. that the actions of the defendants required explanation,
- ii. that laches is an equitable defence, and the First defendant has certainly not acted equitably,
- iii. that the defendants were still in a position to assist the court and to respond to the claim against them,

- iv. that it was always open to the court to assess the evidence and consider the effect of delay in relation to the weight of specific evidence,
- v. that there is no evidence , save for mere assertion , that the claimants waived their interest in the property or the estate,
- vi. that the evidence in fact is to the contrary, namely that they continuously benefitted from the estate in the form of inter alia payment made for airline tickets, and occupation of the property when they visited,
- vii. that any delay in these circumstances could not have legitimately caused the defendants to have altered their position to their detriment as they had no reason to legitimately belief that they were actually solely entitled to the estate , the suspicious transaction notwithstanding,
- viii. that the interest of the claimants vested upon the termination of the life interest of the mother in 2012. It could not possibly be equitable to consider that the minimal delay after the death of the mother would preclude the claimants from asserting their rights under their father's will after the death of their mother,
- ix. that any allegation of delay prior to the death of the mother , by waiver based upon the claimants not wishing to finance the proposed purchase of the freehold in the property when it became available, is misconceived .Their financial contribution was not necessary as the freehold was purchased from the assets and income of the estate itself,
- x. that the actions of the claimants were not in the circumstances such as to render it unconscionable for them to be permitted to institute these proceedings.

## **Findings and Conclusion**

### **Tenancy**

99. A tenancy obviously formed part of the estate of the deceased. His executrix was sufficiently convinced of this to institute High Court proceedings against the landlords.

100. Further, she was sufficiently convinced of this to include the alleged tenancy in a supplemental or amended inventory.

101. It was the claim to a tenancy, which claim the deceased also had at the time of his death, (as demonstrated by its inclusion in the amended inventory), which enabled the resistance by the

executrix to the contrary claims by the landlords, and which in turn enabled the compromise under which payment was eventually made for the freehold.

102. The assertion by the first and second defendants that the tenancy was not part of the deceased's estate cannot be sustained in light of these matters.

103. Contemporaneous documentation produced to allegedly demonstrate that the landlords at certain points in time wished to deny that any tenancy existed does not change the fact that it was the deceased's occupation of the land and his ownership of the building thereon, (in which he operated his business, including a bar), that enabled a. the claim by the executrix to a tenancy and b. the conversion of that claim into the compromise agreement under which the freehold was obtained.

104. It is unnecessary to determine, years after the fact, whether the deceased actually had a tenancy, as his interest in the land, whatever it might have been, derived from his occupation and ownership of the building and de facto possession of the land. The defendants cannot pretend otherwise when his executrix recognized this and included that alleged tenancy as an asset of his estate.

105. The assertion that the building as presently constituted was not the same as it was when the deceased was alive, and therefore does not form an asset of his estate, is an argument of desperation.

106. The original building and the business thereon were clearly and indisputably part of his estate. The income from the business went into improving the original building. There is no evidence of any other source of income. The undistributed estate itself provided the resources to improve it. However the improved estate of the deceased, improved during the lifetime of the mother pursuant to her life interest, is still the estate of the deceased.

### **Whether fraud sufficiently pleaded**

107. The claimants have pleaded undue influence. They have pleaded that their mother was illiterate, and that her relationship with the first defendant was such that she relied upon him and trusted him. This is not in dispute. That trust and reliance on the first defendant extended to the point of granting him an extensive Power of Attorney.

108. Once undue influence is established based on actual wrongdoing there is no difference between that and fraud. The pleading point therefore must fail.

### **Whether the absence of a grant in favor of the claimants means that they have no locus standi to challenge the transfer**

109. The Real Property Act is clear as to who can challenge a transfer to a registered proprietor. It refers to any person deprived of land by fraud. Fraud includes acts of dishonesty. It can even include wilful blindness. The claimants allege that they have been deprived of their legitimate share in the Penal property by undue influence, dishonestly and improperly applied to their mother.

110. They are claiming that they have been deprived of their beneficial interest to a collective nine tenths share of the Penal Property and bar business.

111. I find this clearly was the case and this dishonesty is no different from dishonesty described as fraud. In fact undue influence, especially actual undue influence, is more direct dishonest behavior than willful blindness, which itself can suffice to constitute fraud.

112. The claimants therefore clearly qualify as persons entitled to bring an action to set aside a transfer under the Real Property Act as undue influence is a species of fraud. In this case actual undue influence and presumed undue influence, both of which the first defendant has been guilty of, are sufficiently dishonest behavior to fall squarely within the meaning and requirement for proof of fraud. The need for a grant of representation of some type is not a requirement under the Real Property Act for their claim to recovery of their interest in the land.

## **Undue influence**

113. I find that actual undue influence has been established as well as presumed undue influence, based on the following:

- (i) The mother was illiterate. She placed her thumb print on the Memorandum of Transfer.
- (ii) There is no evidence that the Memorandum of Transfer was read over to her, or that it was explained to her that it was a transfer to first defendant and to her in their own right - and not in her capacity as executrix. She clearly took her obligations as executrix seriously - obtaining a grant of probate and filing an amended inventory to include the tenancy.
- (iii) Given that the mother as executrix recognized the building and the tenancy as assets of the estate, a transfer of the freehold to herself in her own right is not consistent with her previous actions. This highly suspicious transaction can only be accounted for by the Memorandum of Transfer not having been read over to her and /or by a failure to explain its effect to her, and in particular that when she dies it would all go to the first defendant, and not to the 9 siblings despite the terms of the deceased's will. The only person present at the time of execution of the Memorandum of transfer who testified at trial was the first defendant. He was facing allegations of undue influence of his mother in relation to that transfer. Yet he did not indicate in his evidence in chief in relation to this highly suspicious transaction that the Memorandum of transfer was ever read over or, more importantly, explained to his illiterate mother, or that she was advised of the opportunity to obtain independent legal advice.
- (iv) There is no suggestion or evidence that she had independent legal advice - separate from that of the first defendant, whose interests were quite different. His interest in having her execute a transfer to himself and to her in her own personal capacity rather than as executrix mandated that she receive legal advice separate from him.
- (v) The relationship of trust and confidence reposed in the first defendant was clearly thereby abused when this highly suspicious transaction was effected.

- (vi) The mere omission to read and explain this transfer would be all that was necessary to enact the travesty of a Memorandum of Transfer by which the property became vested in first defendant, in breach of trust and completely at variance with his father's wishes, as clearly expressed in his will, and to the detriment of all his siblings.

### **Laches**

114. As discussed hereunder the doctrine of Laches simply cannot apply in the circumstances of this case to deny the claimants relief.

### **Whether the Claimants waived their entitlement under the Will of the deceased and/or promised the 1<sup>st</sup> Defendant their respective interests in the Penal Property**

115. The 1<sup>st</sup> Defendant alleged in the vaguest possible terms that the Claimants indicated that they did not want any interest in the property and that they told him so on different occasions. However this is simply not credible, and it is unsupported and uncorroborated by any evidence. It is more akin to a wishful interpretation by the defendants of the inactivity of the claimants. It is undisputed that in the year of purchase, the property was in a very busy commercial spot and was being used both for business and residence. It is not disputed that the proceeds from the bar were used for the benefit of all the siblings, for example the purchase of air fares for them.

### **Orders**

116. **It is ordered as follows:**

- i. **It is ordered** that no more than four of the Claimants, to be agreed among themselves, be nominated and appointed the Executors of the estate of the deceased, and administrators of the estate of the mother within 21 days, on or before June 28<sup>th</sup> 2016.
- ii. It is ordered that a bank account be opened in the name of the executors of the deceased so nominated for the benefit of the estate of the deceased.
- iii. **It is ordered** that the First and Second Defendants be restrained with immediate effect from intermeddling with the estate of the deceased, or from collecting any rents whatsoever from the tenants of the property situate at Penal Junction Penal (the property).

iv. **It is ordered** that the memorandum of transfer No. 47 dated the 16th day of April 1996 and registered in Volume 3833 Folio 357 with respect to All that parcel of land comprising Seven Thousand Nine Hundred and Sixty-Nine Square Feet (he land) be the same more or less delineated and coloured pink in the plan registered in Volume 2479 Folio 85 be **rectified** to reflect

(a) the conveyance of the property to the mother AS executrix OF THE ESTATE OF THE DECEASED JAGDIPSINGH, and

(b) the **deletion and removal** of the First defendant as transferee of the land

within 21 days ,that is on or before June 28<sup>th</sup> 2016, in default of which the Registrar is empowered to execute the Memorandum of rectification with immediate effect, save that the rights of any third party mortgagee accrued pursuant to any Deed of Mortgage are to remain unaffected by this order.

v. **It is ordered** that all leases and tenancy agreements in respect of the property be **assigned** by the Defendants within 21 days, that is on or before June 28<sup>th</sup> 2016, to the Claimants nominated in accordance with (i) above in their capacity as Executors of the Estate of the deceased, and that

vi. **It is ordered** that all payments in respect of rent be made by the respective tenants by cheque or certified cheque to the executors nominated in accordance with (i) above for credit to the account to be opened pursuant to ii. above in the name of the estate of the deceased.

vii. It is ordered that, in the **alternative** to orders **iv.** only, the Defendants are to pay to the Claimants within 21 days, that is on or before June 28<sup>th</sup> 2016, the entire sum of \$6.3 million, (being 90 % of the value of the property as at the date of the last valuation **plus \$2,210, 895.00- being 90 % of all rental income derived therefrom** from the 26th day of February, 2012 to June 30<sup>th</sup> 2016 as estimated by the Farrell valuation. Such payment is without prejudice to the right of the defendants to **subsequent** reimbursement of expenses, corroborated by independently produced documentation or substantiated, (pursuant to order xi), to the satisfaction of the Executors. hereunder. (Order xii., which

relates to income received from the property from the 26th day of February, 2012 to June 7<sup>th</sup> 2016 is to apply whether or not payment of **\$6,300,000.00** is now made for the property).

- viii. It is ordered that pending re-conveyance and assignment of the leases the defendants are to pay over any and all rents received from the property from today June 7<sup>th</sup> 2016, without any deduction, to the Claimants nominated pursuant to i. above in their capacity as Executors of the Estate of the deceased.
- ix. **An Injunction is granted** restraining the Defendants from selling, transferring, or effecting or creating any further charges or encumbrances on the Penal property and/or howsoever otherwise disposing of it.
- x. **It is ordered** that the First Defendant and the Second Defendant do indemnify the estate of the deceased and the mortgagee in respect of any and all sums due and owing in respect of any sums now outstanding on the principal sum and interest on any loans obtained by way of any Deed of Mortgage subsequent to the death of (mother) and all related costs.
- xi. **It is ordered** that the First and second named Defendant do produce and/or provide to the Claimant within 21 days, that is on or before June 28<sup>th</sup> 2016, a full **account** of:
  - a. all **income** from i. tenants of the property and ii. Profits from the bar operated by the defendants thereon, and
  - b. only such **expenses** as are **supported** by receipts, invoices or suitable supporting documentation **produced by independent third parties** in relation to the property for the period 26th day of February, 2012 to June 7th 2016 including a charge for reasonable cost of labour in managing the bar business,
- xii. **It is ordered** that the First and Second Named Defendants do **pay** to the estate of the deceased within 21 days, on or before June 28<sup>h</sup> 2016,



- a. 90 % of all **rental income** received from the subject property from 26th day of February, 2012 to June 7<sup>th</sup> 2016, with liberty thereafter to subsequently claim reimbursement from the estate of the deceased in respect only of such **expenses** as are **supported** by receipts, invoices or suitable supporting documentation **produced by independent third parties** in relation to the property for the period 26th day of February, 2012 to June 7<sup>th</sup> 2016.
  - b. 90 % of all **profits from the bar** from 26th day of February, 2012 to June 7<sup>th</sup> 2016 with liberty to claim from the nominated executors **subsequent** reimbursement of a reasonable monthly cost of labour for managing the business of the bar.
- xiii. **It is ordered** that the First and second named Defendants be immediately restrained from dealing with or making withdrawals from Scotiabank account **4015280**, save for the issue therefrom of manager's cheques payable to the estate of the deceased and / or to the claimants nominated and appointed pursuant to i above in their capacity as legal personal representatives of the estate of the deceased.
- xiv. It is further ordered that all the bank statements for Scotiabank account **4015280** and the current balance on this account be disclosed within 7 days from the date hereof, on or before June 14<sup>th</sup> 2016.
- xv. The first and second named defendants are to pay to the claimant costs on the basis prescribed by the Civil Proceedings Rules for a claim in the sum of **\$8,510,895.00**.
- xvi. In default of compliance by the defendants with orders ii. – xiii above on or before September 1<sup>st</sup> 2016 the claimants are to be at liberty to put up for sale by public auction the property comprising all that parcel of land comprising Seven Thousand Nine Hundred and Sixty-Nine Square Feet be the same more or less delineated and coloured pink in the plan registered in Volume 2479 Folio 85 being portion of the lands described in the Crown Grant in Volume 78 Folio 591 and also described in the Certificate of Title in Volume 1499 Folio 377 and shown as Lot number 6 in the general plan filed in Volume 2283 Folio 269 and now described in Certificate of Title in Volume 2479 Folio 87 and

bounded on the North by Road Reserved thirty feet wide and by lot 5 on the South by San Fernando Siparia Erin Road one hundred links wide and by Crown Lands (Police Station) on the East by Lot 5 and by San Fernando Siparia Erin Road one hundred links wide and on the West by a Road reserved thirty feet wide. (hereinafter called “the Penal Property”), with the reserve price being 90% of the value in the Farrell Valuation dated April 10<sup>th</sup> 2015.

xvii. Liberty to apply.

Dated the 7<sup>th</sup> day of June 2016

**Peter A. Rajkumar**  
**Judge**

The Court is indebted to counsel for all parties for the diligence of their research and the thoroughness and detail of their written submissions and to Judicial Research Counsel E. Ali for her contribution to the judgement.