



[2017] JMSC Civ. 125

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04646

BETWEEN	PHYLLIS GORDON	CLAIMANT
AND	PAMELA GORDON	DEFENDANT

APPEARANCES

Ms. Allison Lawrence instructed by Nigel Jones and Co for the Claimant

Ms. Kimberley Downer instructed by Grayson & Co for the Defendant

Heard: April 4, 2017, July 4, 2017 and September 15, 2017

**CONTRACT LAW - BREACH OF CONTRACT - INTENTION TO CREATE LEGAL RELATIONS-
CONSIDERATION - TRANSFER OF PROPERTY - FRAUDULENT MISREPRESENTATION - FRAUD -
SECTIONS 70 & 71 OF THE REGISTRATION OF TITLES ACT - RESCISSION OF CONTRACT.**

CORAM: STEPHANE JACKSON-HAISLEY J., (AG.)

BACKGROUND

[1] The Claimant, Phyllis Gordon, having once lived in the United Kingdom, returned to the land and parish of her birth, Trelawny, Jamaica over thirty years ago. She left behind her three children including the Defendant herein, Pamela Gordon. She is an elderly woman and is registered as disabled at the Jamaica Council for Persons with Disabilities. In light of her disability, she is unable to care for herself. Having regard to her condition, she made arrangements for her care and assistance, not with a stranger, but with her own daughter, the Defendant. According to the Claimant, she entered into a

legally binding contract with the Defendant, who agreed to take care of her and in return she agreed to add the Defendant's name to the Certificate of Title for a property belonging to the Claimant which is located at Lot 60 Green Park in the parish of Trelawny.

- [2] The Claimant avers that in accordance with the contract she added the Defendant's name to the Certificate of Title, thereby transferring a half share of the property to the Defendant but that the Defendant has failed to provide the Claimant with the requisite care and assistance and has in fact neglected her. Further, she asserts that the Defendant made a false representation to her that she would provide such care when she knew that she had no intention to do so. She asks that the Court declare this transfer null and void on the grounds of fraudulent misrepresentation.

THE CLAIM

- [3] On October 2, 2014 the Claimant filed a Fixed Date Claim Form seeking the orders set out below:
- i. A declaration that the transfer of property located at Lot 60 Green Park in the parish of Trelawny, registered at Volume 136 Folio 674 of the Register Book of Titles, to Pamela Gordon as joint tenant be set aside as having been procured by Fraudulent Misrepresentation;
 - ii. An Order that the Defendant deliver up the title to the property located at Lot 60 Green Park in the parish of Trelawny, registered at Volume 136 Folio 674 of the Register Book of Titles, to be transferred in the name of the Claimant;
 - iii. An Order that the Defendant transfer the title for the said property to the Claimant; and
 - iv. Costs
- [4] In support of her Fixed Date Claim Form the Claimant relies on three affidavits, the first filed October 2, 2014, the second filed February 4, 2016 and the third filed March 25, 2016. In summary, the evidence contained in her affidavits is that she entered into an

agreement with the Defendant that the Defendant would leave the United Kingdom and come to live with her in Jamaica and would take care of her physically. Further, that it was agreed that the Defendant would arrive in Jamaica in September of 2011. According to the Claimant, at that time the Defendant was unemployed and living with an elderly gentleman in the United Kingdom. In consideration of services to be rendered by the Defendant she agreed to add and in fact did add the Defendant's name to the Certificate of Title for property located at Lot 60 Green Park in the parish of Trelawny. She alleged that despite this, the Defendant failed to move in with her during the agreed period of the year 2011, but instead moved in, in 2013 to live with her at Lime Klim Way, Falmouth, Trelawny. She indicated further that in 2012 she sent the sum of 2000 pounds sterling to the Defendant to cover the transportation cost of the journey to Jamaica but she failed to come until 2013. Additionally, she stated that when the Defendant finally came in 2013, she only resided with her for five months during which time she failed to even give her a bath.

[5] She said she gave the Defendant full access to all the monthly pension she received amounting to a total of 1200 pounds sterling. She stated further that after the Defendant neglected her and moved out her house, the Defendant gave a Notice to Quit to the tenant in the upstairs section of the property at Lot 60 Green Park and thereafter moved into the upstairs section of the premises and rented the downstairs. Further that the Defendant collected all the rental income and has therefore denied her access to this property and deprived her of the monthly income from this property.

[6] The Claimant also pointed out that the Defendant frequently allowed her boyfriend to come on the premises without her permission and that on one occasion she had to lock the padlocks to deny him access. She alleged that in December 2013 the Defendant neglected her and moved out of the premises leaving her unattended forcing her to employ the services of another person to take care of her. Further, that in January 2014 her grandson Joel Gordon Blake moved in with her and started assisting in her care.

[7] In her first affidavit she alleged that as a result of the Defendant's failure to fulfil the condition upon which the transfer was executed she is asking the court to declare the

transfer void and cause the property to be transferred to her as the sole proprietor. In the second affidavit she indicated that the Defendant made false representations that she would move to Jamaica to reside with her and take care of her, based upon which she added her name to the Certificate of Title.

[8] In support of her case she also relied on the affidavit evidence of Joel Gordon Blake, her grandson and son of the Defendant. He also stated that it was in 2011 that the Claimant and the Defendant agreed that the Defendant would move to Jamaica to reside with the Claimant in exchange for the Claimant adding the Defendant's name to the Certificate of Title. He alleged that he was present when they entered into the agreement and supported the Claimant's account that despite the Claimant transferring the sum of 2000 pounds sterling to the Defendant for her airfare in 2012, she did not come to Jamaica until June of 2013. He stated further that by December 2013 the Defendant left the Claimant to take care of herself, contrary to what was agreed and as a result the Claimant had to hire another person to take care of her and that he moved into the premises to assist in caring for the Claimant.

[9] The Defendant at first appeared in person and filed a Defence in which she agreed that she came to live with the Claimant in June 2013 but stated that the agreement was in fact for her to come in 2013 and not 2011 as alleged by the Claimant. She also pointed out that it was the Claimant who asked her to leave the premises after the Claimant assaulted and imprisoned her. The Defendant also filed a Counter Claim claiming the following reliefs:

- “1. Reimbursement for shipping cost of belonging (sic) and furniture for four thousand pounds sterling;
2. Reimbursement for flights to Jamaica for five hundred and ninety-nine pounds sterling;
3. Reimbursement for BMW vehicle sold five thousand pounds sterling;
4. Reimbursement for all the items that had to be given away because either I would have been charged extra at Customs and could not afford to pay for a full container to ship these items;

5. UK lost (sic) of earnings to date, salary part time eighteen thousand pounds sterling;
6. Removal cost of my belongings from her residence thirty-five thousand Jamaican dollars;
7. Rent from tenants for income in Jamaica;
8. Reimbursement for tenant's outstanding water bill paid ten thousand Jamaican dollars;
9. Reimbursement for clearance of land twenty thousand Jamaican dollars;
10. Electrical and plumbing work to residence one hundred thousand Jamaican dollars;
11. University fees for change of career- six thousand pounds sterling;
12. National Insurance contribution for two years as worked twenty-eight years and requires two years payment for full UK pension which was agreed by Claimant upon return early;
13. Reimbursement for fire damages wooden louvres to windows sixty thousand Jamaican dollars agreed by Claimant;
14. Replacement of fire damages front door as agreed by Claimant forty -two thousand Jamaican dollars.
15. Reimbursement tot fire damage to painted exterior walls one can of five gallon paint thirteen thousand dollars;
16. Reimbursement for all travel cost to court twelve thousand Jamaican dollars to hire of vehicle on all occasion where necessary;
17. Any Court cost that might be incurred through these actions."

[10] The Claimant also filed a Reply to the Defence, the essence of which was repeated in her further affidavits. This is a matter which was commenced by way of a Fixed Date Claim Form and therefore the filing of a Defence and Reply was procedurally incorrect. In fact, at the First Hearing of the Fixed Date Claim Form the Court gave directions for the Defendant to file an Affidavit in Response. The matter thereafter proceeded along the usual course that matters commenced by way of Fixed Date Claim Forms usually proceed. However, since the Defence, Counter Claim and Reply were not withdrawn I will still consider the particulars contained therein to the extent that I find them relevant.

[11] The Defendant filed an Affidavit in Response on June 8, 2016 wherein she pointed out that it was while on a visit to Jamaica in 2011 that she and the Claimant had discussions about the property. Further, that the Claimant promised to give her the property as that is what her father would have wanted and told her that she would put her name on the title as a joint tenant so that when she passed away she would acquire it without the hassle of having to probate her Will to get it.

[12] She indicated further that it was in 2013, after learning that her mother's health was deteriorating, that she spoke to her mother and they arrived at an agreement that she would come to Jamaica to take care of her and that her mother would provide her with certain items which were set out in her affidavit as follows:

“i. I would live in a section of her mother's home at Lime Kilm, Falmouth

ii. My son Joel Blake would not live at her mother's home as he was verbally abusive to her;

iii. My mother would transfer her Nissan Tiida vehicle into my name;

iv. I would receive my father's pension of 200 per month from my mother;

v. I would receive the rental funds from Lot 60 Bescott Street from her mother;

vi. I would receive airfare from my mother to go and return from England in order to attend my daughter's graduation in June 2014;

vii. My mother would provide monies for me in her Will in order to purchase kitchen and laundry appliances as I had to leave my own appliances in the United Kingdom in order to migrate to Jamaica;

viii. My mother would reimburse shipping costs of my furniture and other belongings from the United Kingdom to Jamaica; and

ix. My mother would pay the remaining contributions for me to receive my pension.”

[13] According to the Defendant, as soon as the Claimant advised her in January 2013 that she would like her to come to Jamaica she immediately started making preparations to do so and further that in June 2013 she arrived in Jamaica and started taking care of

the Claimant. Further, that despite that, the Claimant did not live up to her part of the agreement.

[14] She also indicated that in January 2014, she received information that the Claimant was spreading false rumours about her stealing her money and so she confronted her and the Claimant became angry and took a heavy crystal glass jug and struck her with it several times. This resulted in her moving out to stay elsewhere for a few days. Further, that during that time, she called the Claimant who told her she wanted her out of her house and that she only returned to collect her belongings. She added that on her return, the Defendant padlocked the grill on the verandah thereby preventing her from leaving, and leaving her with no option but to call the police who came and intervened.

[15] She alleged also that in July of 2014 the Defendant asked her to sign a document transferring the property back to her and she refused. She denied ever fraudulently misrepresenting any information to anyone, especially her mother. She alleged that the Defendant did not fulfil her part of the agreement in that she did not do the following:

“(a) Transfer her vehicle into my name;

(b) Give me my father’s pension of 200 per months;

(c) Give me the rental funds from Lot 60 Bescott Street from my mother;

(d) Give me the airfare to go and return from England in order to attend my daughter’s graduation in June 2014;

(e) Reimburse shipping cost of my furniture and other belongings from United Kingdom and travelling costs from United Kingdom to Jamaica.”

[16] In a Supplemental affidavit filed October 27, 2016, she exhibited a copy of a State Pension Statement Summary which showed that she did not attain the maximum thirty qualifying years needed to get the full basic pension as well as her last salary slip. In addition, she exhibited a copy of her itinerary and receipt for her trip to Jamaica, a copy of her acceptance letter from the Greenwich School of Management, a copy of a receipt from the said school and a copy of a Decree Absolute in which she is referred to as Burton.

- [17]** The Claimant filed an Affidavit in Response in which she denied ever telling the Defendant that she wanted to settle her affairs or that she wanted to give the property to the Defendant as a gift or that she didn't want her to have the hassle of having to probate her Will. Further, she denied ever promising to transfer her Nissan Tiida motor vehicle to the Defendant or to give her, her late husband's pension or to pay her airfare to attend her daughter's graduation. She also said that in January 2014 she checked her account balance and discovered only 400 pounds sterling remaining in the account. As a result, she confronted the Defendant about it and she got upset and left the house for a few days. She stated further that the allegations made by the Defendant that she was physically abusive to her are blatant lies however she admits locking the padlock on the veranda grill.
- [18]** At trial the affidavits mentioned earlier were allowed to stand as the evidence in chief of the witnesses. All witnesses were subjected to cross-examination. During cross-examination of the Claimant, she maintained much of what she had said in her affidavits. She admitted that she and the Defendant shared a good relationship in 2010 and 2011 and that she genuinely loved her. She however denied that she placed her name on the Certificate of Title as a gift. It was suggested to the Claimant that the 2000 pounds sterling that she had sent to the United Kingdom was to help with her granddaughter's graduation and she denied this and insisted that it was for the Defendant's airfare.
- [19]** She maintained that the agreement was for the Defendant to come to Jamaica in 2011 and not 2013. It was suggested to her that she also agreed to transfer her Nissan Tiida to the Defendant but she denied that. It was further suggested to her that she also agreed to give her pension funds of 200 pounds sterling but she denied this as well. She admitted however that she agreed to give the Defendant the rental proceeds from the property. She denied agreeing to provide airfare for the Defendant to attend her daughter's graduation or to reimburse her the cost to ship her furniture from the United Kingdom. She agreed that the Defendant cooked for her, went to the supermarket, pharmacy and bank for her but denied that she took her to the Doctor or Optician.

- [20]** She even spoke of an occasion when she was ill and the Defendant did not stay in her bedroom with her. She said further that during the six months the Defendant only looked after her on and off and that the Defendant defrauded her of her money, but denied that she went around telling people that the Defendant defrauded her. When she was asked if she hit the Defendant with a glass jar she explained that she was drinking some water in a glass and that she hit her with it and threw it at her. She denied that she told the Defendant to leave or that she wanted to live on her own but she admitted that after she hit the Defendant with the glass jar, the Defendant left the premises. She also admitted towards the end of her cross-examination that she doesn't remember everything that happened.
- [21]** The Claimant's witness, Joel Blake, was subjected to minimal cross-examination. He continued to assert that he was present when the agreement was made in 2011 between the Claimant and the Defendant and that it was made in person and not over the phone and that they all discussed it together. He however could not give a "physical date" as to when the Defendant was to commence caring for the Claimant.
- [22]** During cross-examination of the Defendant, she denied that the topic of her mother's care was raised in 2011. She explained that it was in 2013 after a friend of hers visited Jamaica and discussed with her, the Claimant's state, that the subject of the Claimant's care arose. She insisted that it was in 2011 whilst on a two week holiday in Jamaica that the Defendant told her of her intention to give her the property during her life time as she could not afford to pay property taxes. It was suggested to her that she was estranged from her father so he would not have wanted her to benefit from the property and she denied this. She explained that after hearing from her friend, she spoke to the Claimant on the telephone who spoke about being abused by her grandson. Further, that she told the Claimant that if she needed her, all she had to do was pick up the phone and she would come. According to the Defendant, she also professed her love for the Claimant during that conversation.
- [23]** She was questioned about a course of study that she was pursuing and she said that she was accepted to pursue the course and actually took up the offer. It was suggested

to her that in 2011 she had nowhere to live hence her mother made the offer to her. She agreed that she was experiencing financial difficulties as she was a student and had limited income, but denied that it was because of this that her mother made the offer for her to come to Jamaica to care for her. She insisted that the Claimant had told her that she would benefit from her father's pension and denied that she allowed her mother to think that she would care for her, despite never having the intention to do so. It was suggested that she even purchased a roundtrip ticket as she never intended to stay in Jamaica and she responded that she did purchase a round trip ticket but only because it was the cheapest ticket. She denied that when she came to Jamaica she barely spent any time with the Claimant and that at times she completely ignored her. It was also suggested that she never bathed the Claimant and she explained that the Claimant never asked her to do so as she always bathed herself. She said that whilst living with the Claimant, she cooked, cleaned the house and brought anything to the Claimant that she wanted and even took her to the Doctor on occasions.

Submissions on behalf of the Claimant

[24] Counsel for the Claimant asked that the Court consider four main issues, the first being whether or not the Defendant was in breach of the contract. She submitted that there was in fact a valid contract in place and relied on the dicta of Mangatal J in **Paul Collins v Air Jamaica Limited** Claim No. C.L. 1995/C-203 in which she examined the elements of a contract. She contended that there are several breaches by the Defendant, in particular her failure to come in 2011 as agreed and her exclusion of the Claimant from the rental property and deprivation of the income therefrom. Further, that the inactions of the Defendant and her failure to fulfil her obligations under the contract between herself and the Claimant are to be deemed a breach of the contract. The next issue that she requested that the court consider is whether the Defendant procured an interest in the property by fraudulent misrepresentation. She asked the Court to examine the legal definition of fraudulent misrepresentation as enunciated in the case **Derry v Peak** (1889) S.T.R. 625 as well as the provisions of section 3(1)(a) and 3(2) of the Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013. She asked the Court to find as a fact that the Defendant represented to the Claimant that she would move to

Jamaica in order to take care of the Claimant and that the Claimant acted on this representation and transferred an interest in the property to the Defendant. She submitted that the actions of the Defendant demonstrate that she had no intention of caring for her mother as she had indicated and that all of her actions show her intention from the outset was a fraudulent one.

[25] The next question for the Court, she submitted is whether the Claimant can set aside the transfer of property on the grounds of fraudulent misrepresentation. She pointed out that section 70 of the Registration of Titles Act accords an unimpeachable certificate of title to a registered proprietor that can only be set aside on the grounds of fraud, and submitted that based on the Defendant's fraudulent misrepresentation, the validity of the Defendant's title can be set aside on the grounds of fraud. Reliance was placed on the authority **Assets Co. Ltd. v Mere Roihi** (1905) AC 176 wherein fraud as it related to a registered title was defined to mean actual fraud i.e. dishonestly of some sort, not what is called constructive or equitable fraud. She asked that the Court find that the Defendant acted dishonestly in her actions and so the transfer made should be set aside.

[26] The final question that counsel for the Claimant contended should be considered is whether the title can be voided. Reliance was placed on section 178 of the Registration of Titles Act 2005 in submitting that the Certificate of title should be declared void based on the fraud of the Defendant.

Submissions on behalf of the Defendant

[27] Counsel appearing for the Defendant submitted that the central issues to be determined are whether the Defendant acquired an interest in the property by fraudulent misrepresentation and whether or not either the Claimant or the Defendant is in breach of the oral contract. In reliance on the case **Stuart v Kingston 32 CLR 309** she pointed out that the fraud which can invalidate a registered title is actual fraud on the part of the person whose title is impeached and actual fraud is "fraud in the ordinary popular acceptance of the term i.e. dishonesty of some sort".

[28] Counsel also pointed out that the provisions of sections 70 and 71 of the Registration of Titles Act identify fraud as the only fact which could affect the validity of a title. She relied on a line of cases which enunciate the principle that actual fraud must be precisely alleged and strictly proved. She argued that it is not clear in this case what was the misrepresentation of fact and that there is no evidence that the Defendant made a representation with the knowledge that it was false or that the representation was made with the intention for the Claimant to rely on it to the Claimant's detriment. Further, the documentary evidence relied on does not prove fraud as the title clearly states it was given as a gift. She asserted further that there is no evidentiary material on which to prove fraud.

[29] Counsel contended that it was in fact the Claimant who breached the contract and so the Defendant would be entitled to the fulfilment of the terms of the agreement by the Claimant. She highlighted the fact that the Claim is not one for breach of contract and so even if the Court accepts the Claimant's evidence as to a breach of the contract by the Defendant, no Damages should follow as this was not specifically pleaded. She pointed out that the Defendant performed the terms of the agreement that she was required to perform and that there was no agreement as to the specific time that she should have arrived in Jamaica. She further submitted that, in any event, there was a waiver and acquiescence of that term if the Court finds that that was a part of the contract, as the Claimant readily accepted the Defendant when she arrived in Jamaica.

[30] Further, that there was repudiation of the contract on the part of the Claimant in that she failed to give the Defendant the promised consideration, physically abused the Defendant and told her to leave the house thereby bringing the contract to an end.

[31] ISSUES

1. Was there a binding contract between the parties?
2. If there was in fact a binding contract, was this contract breached and if so, by whom?

3. Did the Defendant procure an interest in the property by Fraudulent Misrepresentation and if so should the Defendant's interest in the property be set aside and the transfer rendered void?

Was there a binding contract between the parties?

[32] Both parties have indicated that there was in fact an agreement between them and in fact both parties are seeking remedies as a result of breach of contract. However, this does not relieve me of my duty to consider whether or not the elements of a binding contract were in existence. In the unreported consolidated cases of **Paul Collins v Air Jamaica Limited and Christine Lyn v Air Jamaica Limited** CLAIM NO. C.L. 1995/C-203 and CLAIM NO. C.L. 1994 / L162 which were cited by counsel for the Claimant, Mangatal J. provides a reminder of the elements of a binding contract. These include not only an agreement but also an intention to create legal relations and consideration. A discussion on these pertinent elements was also conducted by Harris J in the case of **Keith Garvey v Ricardo Richards** [2011] JMCA Civ.16 wherein she outlined in the clearest of terms the elements of a binding contract. This is how she put it:

"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence. Ordinarily, in determining whether a contract exists, the question is whether the parties had agreed on all the essential terms. In so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship."

[33] In that case the learned Resident Magistrate found that there appeared to have been an oral agreement but the terms were not fully fleshed out. The Court of Appeal quashed this decision and found that there was no contract because although the parties had an arrangement, the terms were vague. In coming to this decision the Court took into account the fact that there was no evidence that the parties had agreed upon any specific period within which the services should be carried out and also that there was

no evidence of any fixed amount for remuneration. The Court therefore concluded that no definitive terms had been negotiated which would have had a contractual effect and so there being no agreed terms, there was nothing to show that the parties intended to create legal relations.

[34] The principle that can be gleaned from this case is that in order to satisfy a court that there is an intention to create legally binding contractual relationships there should be an agreement on all the essential terms. Put another way, there should be certainty. The need for certainty of contract has also been addressed in the Privy Council decision of **Western Broadcasting Services v Edward Seaga**, Privy Council Appeal No 43 of 2005 where Lord Caswell in reliance on **Chitty on Contracts**, 29th ed. (2004) para 2-110, pointed out at paragraph 19 of the judgment that it is trite law that although parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete. Although the facts of that case were entirely different from the present case, the principle highlighted is generally applicable to contracts.

[35] In deciding whether or not the parties possessed the requisite intention to create a binding contract the question is essentially one of fact. In the case **RTS Flexible Systems Ltd. V Molkerei Alois Muller GmbH & Co. KG UK (Productions)** 2010 3 ALL ER 1 Lord Clark set out the applicable test at paragraph 45 of the judgment to be as follows:

“whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon what was communicated between them by words or by conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

[36] The test that I have to apply is an objective one. In the present case several important aspects of the agreement were uncertain or at best vague. Firstly, there seemed to have been no agreement as to the commencement date. Although the Claimant has sought to say that the agreement was for the Defendant to arrive in Jamaica in 2011, she does not say the basis on which she came to this understanding. Was this what she

thought or was this expressly stated or agreed to by the Defendant? Although the Claimant's witness Mr. Gordon has asserted that he was present in 2011 when the agreement was entered into he cannot say with any certainty when it was agreed that the Defendant should arrive. The Defendant has asserted that it was in 2013 that she first entered into discussions with the Claimant about coming to Jamaica. However, I do not accept the Defendant's account on this point. This was a move that required her giving up her life in the United Kingdom and I think that it would have been difficult for her to settle her affairs and move to Jamaica within six months of being asked to do so.

[37] Therefore, I accept the account of the Claimant and her witness that the discussions commenced from as far back as 2011; however I am of the view that no firm date was agreed on as to when the contract would commence. I have also taken into account the fact that the Claimant had indicated that it was in May of 2012 that she sent the Defendant the funds to pay for her airfare and also that the Defendant's arrival in Jamaica would be dependent on how much time it would require for her to sort out her affairs. Similarly, none of the parties has indicated for how long this agreement was intended to remain in place. Was this an arrangement until death? There is no evidence on either part that this was ever discussed. I accept that the parties had entered into negotiations from 2011 but there were still terms of the contract that were left to be agreed upon. The terms of this agreement were not fully 'fleshed out' then or even up to the time of the Defendant's arrival in Jamaica.

[38] Even more critical is that the subject matter of the contract lacked certainty. Both parties are agreed that the Defendant was to care for the Claimant and the Claimant was to receive this care, however there is no indication as to the nature of the care that was to be provided. The Claimant seemed to have expected that the Defendant would bathe her and even sleep in the same room with her if she became ill. This might have seemed obvious to the Claimant but it seems these matters were not within the contemplation of the Defendant and there is no indication that these matters were ever discussed. The questions as to whether care included cooking for the Claimant, cleaning the house, going to the bank and pharmacy for her, taking her to the Doctor or

not were not settled. I find that there was no certainty as to what this care was to consist of and that at best the contract was vague in that regard.

[39] There is also the issue of the nature of the consideration. Both parties are agreed that there would be compensation paid to the Defendant in exchange for her caring for her the Claimant. The Claimant said that the consideration was the transfer of a half interest in the property to the Defendant whereas the Defendant says it was several other items of value that constituted the consideration. According to the Claimant, the agreement with the Defendant preceded her registering the Defendant's name on the title. According to the Defendant the Claimant told her that she wanted to give her the property as a gift as that is what her father would have wanted and that the Claimant thereafter arranged to have her name registered on the title. She said it was sometime after this that she received information that the Claimant was not well and so agreed that she would come to Jamaica to take care of her and the Claimant in exchange would provide her with other items of value to include her father's pension, rental funds for the property as well as her the Claimant's Nissan Tiida. On the Defendant's part she would be giving up furthering her education, the possibility of a job in the United Kingdom and her pension benefits.

[40] I accept that a number of things were discussed as it relates to the benefit that was to accrue to the Defendant. I am of the view though that there was an agreement for the Claimant to transfer half share of the property from 2011 which is why the transfer was effected from 2011. I do not accept the Defendant's account that this was given to her because that is what her father would have wanted and to save on property taxes. I accept that the Claimant gave her this half share in the property as an incentive for her to come and care for her.

[41] The Defendant indicated that several items of value were part of the consideration and although the Claimant seems to be adamant that the consideration was the transfer of the half share of the property to the Defendant she does not deny providing to the Defendant several of the items of value mentioned by the Defendant. In particular, she mentioned that she gave her pension funds of 1200 pounds sterling. She also did not

deny that she allowed the Defendant to use the downstairs section of the house and to collect the rent from the house. She also spoke about assisting the Defendant with airfare to travel to Jamaica. It would no doubt have been necessary for the Defendant to have an income whilst in Jamaica and also to have transportation not only for her benefit but also to transport the Claimant when needed. Hence, I have no doubt and in fact I find as a fact that some of these items of value were discussed by the parties and were in fact to be provided to the Defendant as between mother and daughter but there was no contemplation as to the consequence of a failure to provide them. It seemed to have been based more on love, faith and trust.

[42] The lack of certainty is even more significant because of the nature of the relationship shared by the parties. This agreement was made within the context of a domestic situation and so the question as to whether there was in fact an intention to create legal relations is a live one. The law acknowledges that in social and family situations there is usually a presumption that there is no intention to create legal relations. In order for a binding contract to be created there must be a common intention of the parties to enter into legal obligations. In fact, there is a strong presumption against the enforcement of domestic contracts and so there would be an added burden to prove that there is this intention. It would be possible to rebut this if one can show certainty and a high degree of precision.

[43] Guidance as to how to treat with this issue can be gleaned from the case **Jones v Padavatton** [1969] 1WLR 328, where a mother and daughter entered into an agreement for the mother to pay the daughter \$200 per month to go to London to study for the bar. The daughter was required to give up her job which was a well paying job which she did and proceeded to London and the mother bought her a house with rooms that she could let for rental income. The daughter failed to complete her studies and the mother sued her for recovery of possession of the house.

[44] The main questions that arose for the Court's determination as set out by Danckwerths L. J. were as follows:

“(1) Were the arrangements (such as they were) intended to produce legally binding agreements, or were they simply family arrangements depending for their fulfilment on good faith and trust, and not legally enforceable by legal proceedings? (2) Were the arrangements made so obscure and uncertain that, though intended to be legally binding, a court could not enforce them?”

[45] He also highlighted the presumption against an intention to create legal relations that exist in domestic arrangements by saying;

“Of course, there is no difficulty, if they so intend, in members of families entering into legally binding contracts in regard to family affairs. A competent equity draftsman would, if properly instructed, have no difficulty in drafting such a contract. But there is possibly in family affairs a presumption against such an intention (which, of course, can be rebutted).”

[46] Danckwerths L.J. found that the arrangement between the mother and daughter was a domestic arrangement which raises the presumption that there was no intention to create legal relations, a presumption for which there was no evidence to rebut. I have set out below some of the factors that the Court took into account:

“.....Mrs. Jones and her daughter seem to have been on very good terms before 1967 so much so that the mother was arranging for a career for her daughter which she hoped would lead to success. This involved a visit to England in conditions which could not be wholly foreseen. What was required was an arrangement which was to be financed by the mother, and was such as would be adaptable to circumstances, as it in fact was. Then there was a later arrangement with respect to the house which the Court found was not a completely fresh arrangement, but an adaptation of the mother's financial assistance to her daughter due to the situation which was found to exist in England. It was not a stiff contractual operation any more than the original arrangement.”

[47] The arrangement in the present case seems to have similar characteristics. It seems to be that this was an agreement that was based on mutual trust, good faith, honour and love as between a mother and a child, without any set parameters within which the terms would be carried out. Additionally, I find that there was a lack of certainty with respect to all pertinent aspects of the agreement and that there is no evidence upon which to rebut the presumption of a lack of an intention to create legal relations and therefore I find that in these circumstances no binding contract was created.

[48] In light of that the Counter Claim which is also based on breach of contract would also fail. The Counter Claim though had even more problems. I have noted that although the Defendant claimed several items from the Claimant, there is a lack of evidence to support most of the items and the sums she has claimed. The Counterclaim also fails

If there was in fact a binding contract, was this contract breached and if so, by whom?

[49] In light of my finding that there was no binding contract, this issue is now redundant, however in the event I am wrong on the first issue, I will consider briefly which party would have been guilty of a breach of the contract. According to the Claimant, the Defendant's failure to come to Jamaica in 2011 constituted a breach of contract. However, I have already found that there was no firm agreement as to the time of commencement of the services to be rendered, hence, it is my view that the failure of the Defendant to come in 2011 did not constitute a breach of the contract. In any event, I also find favour with the submissions advanced by counsel for the Defendant that if there was in fact this term in the contract, there would have been a waiver and acquiescence of that term as the Claimant readily accepted the Defendant when she arrived in Jamaica in 2013.

[50] According to the Claimant, the nature of the breach is that in 2013, the Defendant neglected her and moved out of the property. The Defendant on the other hand has said that the reason she left the premises was because of an argument and altercation which they both had which resulted in the claimant hitting her. When the Claimant was first confronted with these allegations she vehemently denied them. However, in cross-examination she admitted that she did hit the Defendant. The Claimant seemed to be prone to either forgetfulness or exaggeration and so I find that the Defendant was more credible generally and on this point. On a balance of probabilities, I prefer the account of the Defendant over that of the Claimant and accept that the Defendant did in fact hear rumours that the Claimant was accusing her of stealing her money and so confronted her about this. I accept that when confronted the Claimant became angry and used a

large and heavy crystal glass to hit the Defendant which resulted in the Claimant being injured. I accept that this resulted in the Defendant leaving the premises.

[51] I accept that subsequently the Defendant called the Claimant who told her that she wanted her out of her house. I accept that the Defendant returned to the premises to collect her belongings and the Claimant locked the back exit and put a padlock on the grill thereby preventing the Defendant from leaving the premises and the police had to be called to intervene. I find as a fact that the situation created by the actions of the Claimant made it difficult for the Defendant to perform the contract. As a result of this, the Defendant had to resort to living elsewhere and so failed to perform the contract. Despite the fact that the Defendant left the home of the Claimant, I find that it was because of the situation created by the Claimant and so the Claimant would be responsible for the breach of the contract.

Did the Defendant procure an interest in the property by Fraudulent Misrepresentation and if so should the Defendant's interest in the property be set aside and the transfer rendered void?

[52] I note that the Claimant's Claim is not for breach of contract but rather for Fraudulent Misrepresentation. Since I have found that there is no contract strictly speaking I am not required to delve into the issue of Fraudulent Misrepresentation as this is based on there being a contract. However, in the event I am wrong in respect of that issue I will consider whether or not the Defendant procured an interest in the property through Fraudulent Misrepresentation as well as the issues that flow from that. In considering that issue it is essential to understand exactly what is meant by Fraudulent Misrepresentation.

[53] Fraudulent Misrepresentation is referred to as the Tort of Deceit. The elements of Fraudulent Misrepresentation are set out in **Derry v Peak** (1889) 14 App. Cas. 337. Harrison J in the Jamaican case **Bevad Limited v Omad Limited** SCCA No 133/05 at page 8 of the judgment after discussing **Derry v Peak** synopsised the elements of the tort in these terms:

1. There must be a false representation of fact. This may be by word or conduct;
2. The representation must be made with the knowledge that it is false, that is, it must be wilfully false or made in the absence of belief in its truth. **Derry v Peek** (supra); **Nocton v Lord Ashborne** [1914-1915] All E. R. 45.
3. The false statement must be made with the intention that the claimant should act upon it causing him damage.
4. However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. **Derry v Peek** (supra.); **Clarke v Dickson** [1858] 6 C.B.N.S. 453; 35 Digest 18,100.

[54] Where a person has been induced to enter into a contract as a result of a Fraudulent Misrepresentation by the other contracting party, he may rescind the contract or claim damages or both (**see Chitty on Contracts, 27th edition, 6-026**). At common law the right to rescind was confined to cases in which the misrepresentation was fraudulent or in which there was a total failure of consideration but in equity there was a right to rescind even for innocent misrepresentation. The effect of rescission of a contract is also dealt with in **Chitty on Contracts at paragraph 6-064** and is enunciated as follows:

*“It is clear from **Johnson v Agnew** ((1980 A.C. 367) itself that rescission for fraud is rescission ab initio, and will therefore prima facie have retrospective effect, though it has been submitted that such rescission will not deprive the representee of a right to damages for fraud, because that right arises in tort, and not out of contract.”*

[55] The question in the present case is whether the Defendant procured the transfer in her favour through Fraudulent Misrepresentation. If the Claimant can prove Fraudulent Misrepresentation by the Defendant, it would render the contract void ab initio and could therefore be set aside. This is also in keeping with the provisions of section 70 of the Registration of Titles Act which provide for the limited circumstances under which a title can be defeated. If there is found to be actual fraud in light of a misrepresentation of fact, then the Claimant can seek rescission and a transfer effected could be declared

void. The effect of fraud on such a contract for the transfer of land is that it can defeat a registered title.

[56] For the Claimant to succeed she must establish that there was a false representation by the Defendant. One of the elements required to establish misrepresentation is that there must be a false statement of fact or law and not an opinion or estimate of future events. The promise by the Defendant to care for the Claimant was clearly one which would be a future event so under those circumstances if found to be false could not even amount to a misrepresentation. Additionally, the Claimant would have to prove that at the time the Defendant entered into this contract with her she had no intention to care for her, however the actions of the Defendant are to the contrary. The undisputed evidence is that she left her home and gave up her livelihood in the United Kingdom and came to Jamaica to live with the Claimant and in fact did reside with her and did in fact render some care to her, albeit not at the standard expected by the Claimant. Under those circumstances, the Claimant would be hard pressed to prove that the Defendant had no intention to care for her

[57] In any event the events which led to the Defendant's removal from the premises are disturbing. The Defendant claimed that the Claimant hit her causing her injury. The Claimant although initially seeking to deny this admitted this in her evidence and in fact agreed that this was so and even seemingly sought to justify it. Under those circumstances the Claimant would have put the Defendant in a position where she could not perform this contract even if she had intended to. The Defendant has pointed out that after this confrontation with the Claimant she left the premises. I accept that this was what caused the Defendant to leave the premises and therefore rendering her incapable of continuing to perform the contract.

[58] Brooks J in the unreported decision of **Earle Alexander Shim v Sylvia May Shim and Elizabeth German** delivered 16th May 2008, considered the issue of Fraudulent Misrepresentation and after examining the dicta of Lord Hershell in **Derry v Peek** went on to highlight the following:

*“In Horizon Resorts Services Ltd., Norma Lee-Haye and Jackson C. Wilmot vs. Ralph Taylor Suit C.L. H 176 of 1996 (delivered 18/1/2001) F. A. Smith, J. (as he then was) reiterated that this tort should not be advanced lightly and a court will require clear evidence of it. He cited as authority for 12 the proposition, the case of **Hornal v. Neuberger Products Ltd.** (1957) 1 Q.B. 247. Jones J. in **Oman Ltd. v Bevad Ltd.** Suit C.L. 009 of 2002 (delivered 15/11/2005) relied on Hornal for the principle that: “The standard of proof required to prove fraud in a civil matter is on a balance of probabilities. However, a court when considering a case of fraud in a civil matter will, of course, require a higher degree of probability than in a case of negligence.”*

[59] Taking into account the standard of proof required and the high degree of probability, the Claimant has failed to prove the elements required for Fraudulent Misrepresentation by the Defendant. I am ever more stretched to find any evidence of fraud which has as high a standard. In fact, the well known case of **Harley Corporation Guarantee Investments Company Limited v Estate Rudolph Daley et.al** [2010] JMCA Civ. 46, which was cited by counsel for the Defendant, highlights that ‘with regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice’. There must be clear evidence to support allegations of fraud. In this case, not only is there no clear evidence but equally no evidence to support the allegation of fraud and so for these reasons the Claimant’s case must fail.

[60] Judgment is for the Defendant. As previously stated and for the reasons already explored the Defendant’s Counter Claim also fails. Judgment on the Counter Claim is for the Claimant. In all the circumstances each party is to bear her own cost.