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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B383/1998

BETWEEN	ALBERTHA GWENDOLYN BOOTHE	PLAINTIFF
A N D	STIBEL GREEN	DEFENDANT

Ms. Susan Richardson and Ms. Judith Clarke for plaintiff.

Jacqueline Cummings for defendant instructed by Archer, Cummings & Co.

Heard: 12th – 15th March, 2001, 1st June, 2001 and 18th March, 2002

Campbell, J.

The plaintiff claimed recovery of possession of premises known as 7 Bowie Road in Charlton District in the parish of St. Catherine. The defence filed does not admit that the Plaintiff is the registered owner of those premises, and further denies that the defendant is a tenant at will at the said premises. The defence states that if the Court finds that the Plaintiff is entitled to possession, then more hardship will be felt by the defendant in granting the Order for possession than in refusing the Order.

The Defendant has counterclaim inter alia; as follows:

6 The Defendant says that at all material times he was the registered proprietor of the premises comprised in Volume 1194 Folio 685 of the Register book of Titles and known as 7 Bowie Road, Charlton District, Ewarton in the Parish of St. Catherine and the uncle of the Plaintiff.

7 In about the year 1991 the Defendant fell in arrears with his mortgage with the Jamaica National Building Society and asked the Plaintiff for her assistance in having the loan discharged.

8 The defendant asked the plaintiff to take over servicing of the loan to the Jamaica National Building Society and /or alternatively to repay same which at that time amounted to the sum of $89, 000.00.

9 The Defendant at no time intended to sell nor transfer the said premises to the plaintiff during his lifetime but merely obtained a loan from her to prevent the premises being auctioned.

10 The Plaintiff, sometime in the year 1992, fraudulently, unlawfully and without the Defendant's knowledge and/or consent procured and obtained a transfer of the premises to herself.

11 The Defendant has not and has never received any money from the Plaintiff for any purported transfer of the premises.

12 Further and/or in the alternative, the plaintiff exercised undue influence on the Defendant due to his age and illness to attempt to obtain a transfer of the said property to herself.

The Plaintiff in her Reply and Defence to Counterclaim denied the allegations of the Defendant and contends that the Defendant willingly transferred the premises. The Plaintiff has also denied fraud and asserts that the Defendant initiated the Plaintiff's acquisition of the said property.

Plaintiff's Case

The Plaintiff is 67 years of age and a divorcee; she has lived in England for the past 40 years. She worked as a domestic supervisor in a hospital, but is now retired. The defendant has known her uncle since her early childhood, when she lived with him and his mother, her maternal grandmother. Both, the defendant and the plaintiff migrated to England, he in 1955, and she in 1960. The plaintiff testified that whilst in England, the relationship between herself and her uncle started rather tentatively. However, her evidence was "she had gotten on well with his wife, who was a mother and an aunt I did not have." The Defendant and his wife returned to Jamaica in 1986, and his wife died some two years later, on the 1st January 1988."

The plaintiff was unable to attend the funeral and sent £50 for her uncle. This he denied. She said, "After this I sent him money and he would confirm receiving it." The plaintiff, came to Jamaica in September 1988, bringing at his request, some intimate female garments for 'a friend that has brought him back to life'. The plaintiff did not like the uncles' friend so she never gave him the articles she had brought. She returned to England in October 1988, and there was no communication between herself and the Defendant until May 1990, when he wrote to her borrowing $89,000, because, "he was in financial problems." The Plaintiff in her evidence in chief, testified that she did not reply. The Defendant wrote again, in a letter dated 15th June 1990; (Exhibit 2) states, inter alia;

> I just write you to let you no (sic) that if you are interested in the place I have out here it is all up to you to take it off me. I owe the bank some money and true (sic) my pension is not coming the right way the interest rise. So if you want it before they put it Auction Sale, please write to Mr. Wesley Scott, Senior Supervisor, Jamaica National Building Society, etc.
> .... mortgage account no.86965,....
>
> So you can get your title ready from them. I have nothing to do with it, so if you want somebody else to have it all before, you can....

She had also received a telegram from a sister, alerting her that they were going to take away the defendant's house.

Still reluctant to respond, she testified she spoke to a friend and was encouraged to see her solicitor, Janet Standbury. The plaintiff made direct contact with Mr. Scott at Jamaica National Building Society (JNBS), who wrote to her. She instructed her solicitor to contact Mr. Scott.

She applied to National Westminister Bank for a loan of £8,000.00. The bank approved £6,000.00. She withdrew £2,000.00 from another account and handed the proceeds to her lawyer. She advised her sister in Jamaica, to secure a lawyer for her uncle. Subsequently, Mr. Bartholomew, an Attorney-at-Law, contacted her solicitors, on behalf of the defendant.

The Plaintiff next visited the island in December 1990 and stayed with a sister in Tivoli Gardens. On a visit to the defendant, he appeared unwell and the Plaintiff, along with her sister took him to the doctor. The defendant remained with them for a week in Tivoli Gardens. On his way home the Defendant indicated he wanted to stop at his attorney Mr. Bartholomew to make a Will. The Plaintiff's sister signed this Will as well... (Exhibit 4)

The plaintiff returned to England on 30th January 1991. Summoned to her lawyer's office, she signed the transfer for the premises for 7 Bowie Road. Her next visit to Jamaica was in February of 1994. She stayed with the Defendant and found him aggressive and moody. It was uncomfortable for her to remain there. She alleged that on this visit, she was given poison to drink. She remained in the island for nine months, returning to the United Kingdom, in October 1994. Of her visit, the plaintiff said, the defendant appeared not to want her around. He told her that she had bought the land and not the house. Her nephew, Patrick Shannon, is presently living at 7 Bowie Road with his wife and two children. She complains that she was barred from picking coconuts on the premises. She said she was petrified of the occupants and had to get protection from them.

In cross-examination, she states that after giving the money to her lawyer, she came to Jamaica and remained here for six months. She denied that it was in April 1991 that her uncle signed the Will. She agrees that the mortgage was discharged in 1991. She admits in contradiction to her evidence in chief that she had responded to the first letter of the defendant,

requesting money. Her reply was in a letter dated 9th September 1990, in which she told the defendant that he should tell his lawyer "that you cannot afford to pay your mortgage. So you are turning over to your niece who is in England. Tell your lawyer that you need him to draw up two papers to say so, then you sign it in front of him with your witness and he can either send it off to my lawyer or you posted (sic) it to me." (See exhibit 7). In that same letter she had earlier cautioned him that "I am asking you to read carefully and make sure you understand what it means is very serious. This is not a joking matter for me."

She said in cross-examination, " I had to advise him because he was more for the girls, he was wasting his money. I would not let him have my money just like that; he needed something to prove...." She denied going to Linstead and meeting Mr. Green there, and having seen the defendant being handed the Certificate of Title. She denied that she saw where Mr. Green placed the title.

The plaintiff said the defendant regarded her as his daughter. She testified that she had not advised him about the name of any specific lawyer. She said she had understood the words "to take off me" in the defendants letter dated 15thJune, 1990, to mean the same as sell. She denied that she had gone to Mr. Bartholomew's office with two gentlemen, one of whom was wearing a hat, purporting to be Mr. Green.

The plaintiff's case was supported by Mr. Wesley Scott of JNBS, Linstead. He testified that, "The defendant had two mortgages with me around June 1990. He had dealt personally with Mr. Green", he says, "The accounts were in serious arrears in respect of both mortgages, serious that it was about to be processed for sale by Public Auction." In his letter to the plaintiff's solicitors, Mr. Scott stated, "The mortgages are not transferable. Mr. Green would have to transfer ownership of or share it jointly with your client by adding her name to the title. Then,

she would have to make an application to us for a mortgage. However, we have invited Mr. Green to come in and discuss the matter with us. So, as soon as this is done, we will inform you of his decision".

Mr. Scott testified, "as a result of the letter, I met with Mr. Green and informed him we were contacted by solicitors who were acting on behalf of Ms. Gwendolyn Green (the plaintiff), whom I understand was related to him." He said that he explained to the defendant that a mortgage was not transferable to third parties at Jamaica National Building Society (JNBS). He said he explained to the defendant that if a transfer is to take place, be it jointly or solely, he would need to see a lawyer. Mr. Scott said the defendant advised him that he would be seeing "his lawyer to look about" the transfer because he was going to transfer it". (Emphasis mine) Mr. Scott says he appeared to understand what was happening. Scott said based on that meeting he wrote the plaintiffs solicitors to the effect that "Mr. Green visited our office. He advised us that he will be instructing his attorney to start proceedings to transfer ownership to your client solely." (Exhibit 10). After the mortgage was discharged, the title was sent to Mr. Green's lawyer. Mr. Scott denied that he handed Mrs. Boothe the Certificate of Title in Mr. Green's presence or at any time at all.

Mrs. Bartholomew, office manager, of H.G. Bartholomew & Co., Attorneys-at-Law testified that she understood from the defendant, that he desired the property to be transferred to Mrs. Boothe. He was in financial difficulties and did not want to lose the property to a stranger. She did the research to effect the transfer and said that the valuation mentioned in the firm's letter of 17th December 1990 was for a submission to be made to the Stamp Commissioner for calculation of duties; she also received information from JNBS. She requested the death

certificate and funeral expenses for the defendant's wife in order to have her name removed from the Certificate of Title.

She further testified that Mrs. Boothe visited her offices, early in 1991, and Mr. Green spoke with the witness and said he needed a Will to be drawn up, because he was very sick and, should anything happen to him, he would like what he had to go to Mrs. Boothe. The Will was drawn up and signed by the defendant and attested by a member of the firm's staff. She identified the defendant as the person who signed the Will; she particularly remembered Mr. Green because he bore a "strong resemblance" to her father. She denied that it was one occasion that Mr. Green came to make a Will and explains that the second will could be accounted for by the defendant claiming that the Will could not be found. She said she did not think that the transfer was to be based on true market value, because of the mortgage situation.

The defendant's case

Mr. Green states that he is 92 years of age. However, his evidence is that he was born on 24 December 1920. He said the property in question was bought in 1976 and that he came from England in 1995. Those dates were clearly incorrect and, unfortunately, characterized the evidence of the Defendant. It was clear as his evidence progressed that he was experiencing a difficulty in recalling dates and certain events. He therefore contradicted himself on several occasions. He testified that he had taken "two draws" from the bank when he was building the house. This was from JNBS in Linstead. He said he paid "them back totally" and borrowed money from his niece Gwen. He said he had written to Gwen to lend him the money because the interest was "going up fast". He testified that she sent the money and cleared the debt. He said he went to Mr. Scott, who told him that everything was paid off. He was not given anything by

Mr. Scott, and he could not say whether Gwen had gotten anything from Mr. Scott. This bit of evidence was in conflict with suggestions put to the plaintiff. He, however, stated that the land paper was removed from his house after it was ransacked. He said he had to tell the plaintiff that he would transfer the property to her because he did not have anywhere to go and he did not want them to sell the property. He said he told her also that if she paid off the debt, she could come and live with him until she died. He denies that he signed any document to put her name on the title. He further claims that he never knew any lawyer in Spanish town. When he went there, Gwendolyn took him there to make documents about selling the place. He was not selling the place. Shown the Will dated 15th April 1991, he said, "I signed this Will. I know this Will is mine" (Exhibit 18). He testified that the Plaintiff would "tell one woman that I have another woman over there. It was not lies, but she should not do it." The defendant testified that, "I loved plenty women." The plaintiff was of the view that his financial woes were as a result of the defendants love for these women. He denied that the plaintiff had been barred from picking coconuts off the property. He said if he had wanted to stop her, she would not be here today as he would have drawn his long machete at her. Contrary to what he had said earlier in chief, he testified that he had seen Mr. Scott hand Gwen a brown envelope and she later told him that it contained "the land paper". He claimed that she gave him the Title and he put it in a drawer, and someone removed it. He would never sell the place for $89,000.00. He was never advised of the consequences of putting Gwen's name on the Title.

In cross-examination, challenged as to whether he had acted in accordance with the plaintiff's suggestion to "go to a lawyer and take Patrick and Sylvia with you", he replied that he did not go to a lawyer. "There was nothing for me to go and see a lawyer about." Challenged that he had gone to Mr. Bartholomew's office on receipt of the plaintiff's letter, advising him to

do so he denied it. Shown Exhibit 19, an affidavit prepared by his present attorney, he denied that the signature was his. He also denied, paying Mr. Bartholomew $1,000.00. Asked how he would have dealt with the arrears accumulated on his mortgage account, he said he would have gone back to the bank (i.e. Jamaica National Building Society) for another loan to clear the arrears. Shown his further affidavit, he denies having signed same, and denied the assertion contained in paragraph 3 therein. He said that the plaintiff plotted with Mr. Scott and Mrs. Bartholomew to take away "my home". He said he had intended to repay the plaintiff, $10.00 per month, to liquidate the $89,000, she had expended to discharge the mortgage.

The issue of undue influence

The Defendant contends that the plaintiff exercised undue influence over the Defendant due to his age and illness.

The defendant, it was who wrote requesting the plaintiff to lend him $89,000.00, as he was experiencing financial difficulties. That letter was written in April 1990. When the plaintiff had last seen him in 1988, there was no evidence of ill health. He had written requesting 'some sexy panties' from Marks and Spencers and two 'lovely skirts' for a nice friend who had brought him 'back to life'. When she visited in Dec 1990, she testified "he was very sick" and she sought medical attention for him. He was diagnosed as having diabetes. The Plaintiff took him to her sister, living in Tivoli Gardens. He was tended by the plaintiff, for a week until he appeared well, and said he wanted to go home. Importantly, the sister and herself had taken him to the doctor, and it was both of them who took him home. It was on the trip home that the Will was made. Mrs. Bartholomew said that Mr. Green spoke to her. She said of Mr. Green that in all the conferences with him, he appeared to understand what was happening.

The plaintiff remained in Jamaica until January 30th 1991, and her uncontradicted evidence was, "When I left him he was in good shape." The defendant's evidence in relation to the visit to Mr. Bartholomew was that he did not go there, not that he was incapacitated; his evidence is that the only Will he signed was on the 15th April 1991. On the occasion he visited the office with the plaintiff he had signed a document, of which he testified, "I never know what the document was about." The thrust of the defendant's case is that, this constitutes the plot between Mrs. Bartholmew and the plaintiff. The reason for his signature, he claimed was not ill health, but rather a conspiracy to fraudulently and unlawfully procure his signature to the transfer of the property to the plaintiff. Mr. Scott testified that, "The total amount was closed" (was repaid on the 8th March 1991, the signing of the transfer would have been subsequent to that date). The plaintiff had returned to England on the 30th January 1991.

In her written submission, Counsel for the defendant, refers to Cheshire and Fifoot and Furmston, Law of Contracy, 11th Edition pages 296 to 306. It is noted at page 298 of that work.

"It (equity) developed a doctrine of undue influence. This doctrine is accurately stated by Ash burner:

> "In a court of equity, if A obtains any benefit from B, whether under a contract or as a gift, by exerting an influence over B which, in the opinion of the Court, prevents B from exercising an independent judgement in the matter in question, B can set aside the contract or recover the gift. Moreover, in certain cases the relation between A and B may be such that A has peculiar opportunities of exercising influence over B. If under such circumstances A enters into a contract with B, or receives a gift from B, a court imposes upon A the burden, if he wishes to maintain the contract or gift, of proving that he in fact exerted no influence for the purpose of obtaining it"

In Murray v Deubery (1996) 52 WIR 47, Sir Vincent Floissac CJ. sitting in the Court of Appeal of the Eastern Caribbean States, explained the doctrine of undue influence, in this way;

> " The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgement with full appreciation of the nature and effect of the transaction, the transaction is voidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of recession."

There are two broad categories of transactions, which fall under this doctrine. The category under which a particular transaction falls will determine on whom the onus lies in proving or disproving the presence of undue influence.

In The Law of Contract (supra) at page 302;

> "Contracts which may be rescinded for undue influence fall into two categories; firstly, those where there is no special relationship between the parties; secondly, those where a special relationship exists."

In the first category undue influence must be proved as a fact, in the second it is presumed to exist. Where there is a special relationship as is claimed by the defendant in this case, the Law of Contract (Supra) states at page 304:

> "The onus is on the party in whom confidence is reposed to show that the party to whom he owed the duty in fact acted voluntarily, in the sense that he was free to make an independent and informed estimate of the expediency of the contract or other transaction."

Counsel for the defendant submits that the plaintiff and the defendant could be said to have a parent child relationship. The defendant's case was squarely put in the second categorization of cases in which the doctrine of undue influence may come into effect. If the argument succeeds and the court accepts that such a relationship exists, the onus would be on the

plaintiff to prove that the act of transferring the property was spontaneous and voluntary, and the defendant was free to make an informed estimate of the expediency of the transfer.

Counsel for the defendant's argument was raised in this way: The defendant had no children of his own and the plaintiff was the closest relation he had to a daughter and he placed heavy reliance on her. Despite having other nieces and nephews, the defendant only communicated with and knew the Plaintiff and depended on her to assist him in his affairs.

On the other hand, the Plaintiff's Counsel submitted that this was not a case where a special relationship of confidence existed. That the evidence of the Plaintiff shows that short of fulfilling certain occasional financial needs of the Defendant, there was no special relationship of trust and confidence between the parties. Indeed argues the plaintiff's Counsel, it was the plaintiff and the defendant's wife who at first, forged civil relations. It is contended that it is the plaintiff's evidence that he never regarded her as his daughter, but only as his niece. It was submitted that, even in his own testimony, he has not set about to show any such special relationship.

The first issue for determination is therefore, is there evidence adduced before me to demonstrate such a special relationship between the parties; that it must be presumed that the plaintiff was endowed with exceptional authority over her uncle or imposed upon her the duty to give disinterested advice.

The Defendant has given evidence that he was supportive of the plaintiff when she first came to England, that he had gotten a job for her at the factory where he worked. The plaintiff has denied this and asserts it was another uncle who had assisted. In any event, getting a job for the plaintiff would not to my mind demonstrate that he reposed such confidence and trust as to give rise to a presumption of undue influence.

On his return to Jamaica, the first bit of evidence in relation to any communication between the parties was his letter of request for a loan. The plaintiff's visit of December 1990 highlighted the illness of the defendant and the attendance of the parties at the office of Mr. Bartholomew, attorney-at-law, and the opening of an account in the joint names of the parties. The plaintiff's sister, at whose home the defendant stayed during the period of his illness, was also present during the transaction at the lawyer's office. Page 303 of the Law of Contract states;

> " In this second class of case, the equitable view is that undue influence must be presumed for the fact that confidence is reposed if one party either endows him with exceptional authority over the other or imposes upon him the duty to give disinterested advice.
>
> The possibility that he may put his own interest uppermost is so obvious that he comes under a duty to prove he has not abused his position."

I have no evidence before me to support Defense Counsel's submission that the defendant reposed such confidence in the plaintiff. Or that the plaintiff was the closest relative he had to a daughter. To my mind, the evidence clearly points in the other direction. The plaintiff did say he regarded her as a daughter. The plaintiff did however testify that her Uncle Charles had some eleven children. She had five siblings. She also had an aunt who had children. The fact that his nephew Patrick is presently ensconced at 7 Bowie Road suggests to my mind, that he was not a stranger to his uncle. The plaintiff's unchallenged evidence is that it is not true that of the eighteen nephews/nieces, the defendant regarded her as the closest to him. In fact, if that were so, he would have been quite distant from his family members, his correspondence with the plaintiff being so sporadic and infrequent. The evidence does not similarly support the submission that the plaintiff only communicated with and knew the plaintiff. The defendant appears to have enjoyed the companionship of several visiting girlfriends; he had been active in

the church. He had communicated with at least one other of his relatives his financial plight, because the plaintiff had been written to by an aunt after receiving the defendant's loan request and had received a telegram from an aunt in Jamaica, informing her that the defendant's house was up for sale.

The monies she said she sent were unsolicited gifts from her and cannot establish any reliance by the defendant upon the plaintiff. The defendant's request of his niece to 'take it off me' in reference to his home in the circumstances may indicate trust on his part, and that on its transfer to her, she would not eject him. If it does indicate confidence and trust, it is an isolated case.

In Murray v Deubery, the learned Chief Justice said of a single demonstration of confidence made by the complainant: -

> " In my judgement, an isolated demonstration by a complainant of trust and confidence in a dominant party is insufficient to engender a class 2(b) relationship (i.e. a special relationships that presumes undue influence) between the complainant and the dominant party. There must be evidence that the complainant generally reposed trust and confidence in the dominant party. (Emphasis mine)
>
> The evidence required is evidence before or at the time of the execution of the transaction. The complainant had habitually, frequently or repeatedly expressed or indicated his trust and confidence in the dominant party."

There is no evidence, which could support a contention that the complainant had indicated, either by word or conduct at any time before the transaction, his trust or confidence in the plaintiff. The acts of placing the plaintiff's name on the Will does not by itself indicate confidence and trust. In my judgement, there is no evidence that the plaintiff enjoyed generally the confidence and trust of the defendant, such as would give rise to a presumption of undue influence.

Even if such a relationship had been established, the presumption raised was rebutted by the plaintiff adducing evidence that the plaintiff had the advice of Mr. Scott of Jamaica National Building Society, and access to his attorney, Bartholomew and Company. He had his girlfriends, nieces and nephews and his siblings. The plaintiff had discharged any duty placed on her by such a relationship. She had instructed him to 'talk with' his lawyer and to take his nephew, Patrick and his sister along. Both Mr. Scott and Mrs. Bartholomew were of the view that he understood all that was happening. Scott said, "I explained to him that if a transfer is to take place, be it jointly or solely, he would need to see a lawyer. The defendant advised me he would be seeing his lawyer to look about the transfer, because he was going to transfer it." Mrs. Bartholomew testified that Mr. Green desired the property to be transferred to Mrs. Boothe. He was in financial difficulties and did not want to lose the property to a stranger. The transaction had been initiated by the defendant. The defendant was aged, and was ill for a period, but neither of those factors tainted the voluntary and spontaneous nature of the transaction. The plaintiff has adduced evidence that the defendant exercised his own independent will and judgment fully understanding the nature of the transaction.

In Beckles v Springer (1992) 43WIR51. Sir Denys Williams C.J. said at page 57.

> "In these circumstances the court will not presume undue influence, but even if the circumstances had been such as to raise the presumption and require evidence in rebuttal; the evidence as to Henry's physical and mental condition, her access to advice from third parties and that......would seem to me to rule out any suggestion of victimization of Henry by the defendant."

In Brocklehurst Estate (1978) 1Ch14, Lawton L.J., after stating that the donee on whom the evidential burden rests has to justify the court in holding that the gift was the result of a free exercise of the donors will, said: -

> "The best way of proving this will probably be by calling a solicitor to say that he was fully instructed about the facts and circumstances of the proposed gift and that he advised the donor about the consequences of what he was doing. This is not, however, the only way of proving that the gift was the spontaneous act of the donor. In the Inche Noriah case (1929) A.C. 127, the Privy Council said so. See the opinion of Lord Hailsham at pg.135 Mr. Francis submitted, however, that Lord Hailsham observations should be read as meaning that although the independent advice need not be given by a lawyer, as a matter of law, there must be evidence of some independent advice. There may be cases in which the proven ascendancy of the donee over the donor was of such a degree that without independent advice, the donor was incapable of exercising an independent will."

Ms. Cummings further submitted that this was an unconscionable bargain and ought not to be allowed to stand. She argued the property was grossly undervalued, and had been transferred at a consideration of $89,000 which constituted approximately one-tenth of the value of the property.

In Re Fry, Fry v Lane (1888) 40 CHD 312. Kay J, enuciated the guidelines on which a court will disturb a transaction on the basis that it constitutes an unscionable bargain. He said (at page 322).

> "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable under-value the vendor having no independent advice, a court of equity will set aside the transaction ... The circumstances of poverty and ignorance of the vendor and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving in Lords Selboards words that the purchasee was 'fair, just and reasonable'."

In my judgment, there is abundant evidence that the defendant received independent advice. In any event the plaintiff has demonstrated that the transaction was devoid of undue influence, and was the exercise of the voluntary and spontaneous will of the defendant.

In Alcard v Skinner, 1887 36 CHD. 145. Lord Lindley, in outlining the principle underlying the Courts jurisdiction in setting aside a transaction brought about by undue influence explains, at page 182.

> "The principle must be examined. What then is the principle? Is it right and expedient to save persons from the consequences of their own folly? or is it right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity has never set aside gifts on the ground of the folly, imprudence or the want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. Hugueninv Basely, 14 Ves, Jun. 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to a charitable institution or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked and misled in any way by others imparting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

In my judgement, there was no actual undue influence or presumed undue influence.

The Issue of Fraud

The defendant has particularized several allegations of fraud. The defendant's testimony was unconvincing, contrived and most of his evidence in this area was contradictory and confusing. He alleges that the Certificate of Title was removed from a drawer in his home by the plaintiff. His testimony is however, contradictory as to how the certificate came to be in his drawer. Early in his testimony he had said that when himself and the plaintiff attended the office of Mr. Scott, he did not see Mr. Scott "hand anything to anybody". However, later he stated that Mr. Scott handed Gwen a brown envelope, which she told him 'contain the land paper'. He testified that this brown envelope, was handed to him, he locked it away, but returned from

church one day to find his home ransacked and the land paper missing. Mr. Scott said that he had the title and it was sent to Mr. Green's attorney by the attorneys acting on behalf Jamaica National Building Society (JNBS). He denied handing the title to Mrs. Boothe. Mrs. Boothe has denied receiving the title from Mr. Scott.

The defendant alleged that the plaintiff conspired with others to deprive the defendant of the property. The conspiracy, according to the defendant, was effected in having a person brought to Mr. Bartholomew's Law office pretending to be Mr. Green ostensible, to sign the transfer. It was suggested to the plaintiff in cross-examination, that she had returned to Mr. Bartholomew's office with a gentleman who was wearing a hat and who pretended to be the defendant. The plaintiff denied this. It was similarly suggested to Mrs. Bartholomew that a man in a hat had come there to sign as the defendant, this was also denied. In respect to the signing of the transfer, the defendant testified he had been given a document, which his niece claimed was a will, but must have been the transfer – "I now realize that it was the transfer document transferring my property to Mrs. Boothe." So despite the suggestion that the transfer had been signed by the man in the hat, who had impersonated, the defendant. The defendant himself, said he signed the transfer thinking it was a Will.

The contradictions did not stop there. He later said, "She didn't fool me with the Will. She never put a transfer before me instead of the Will." I accept the evidence of the plaintiff when she denied that no such misrepresentations were made to the defendant, which caused him to sign the transfer, thinking it was a Will. I find, as a matter of fact, that the plaintiff did not commit any of the alleged particulars of fraud as pleaded by the defendant.

Is the plaintiff entitled to recover possession of 7 Bowie Road

Ms. Susan Richardson, Counsel for the plaintiff, poses the following question: "Has the plaintiff been deprived of the right to possess and occupy the property, thus giving validity to the action for recovery of possession?" She argues that Mr. Green, by his nephew, has caused her client to vacate the premises and further, the defendant himself has stated that he has permitted his nephew with wife and child to occupy the house with him. There is no available accommodation for the plaintiff at the house. Moreover, the defendant's behaviour towards the plaintiff is acrimonious, and he has openly indicated that he is capable of violence towards the plaintiff. The Plaintiff alleges that the defendant is either a tenant-at-will or a bare licensee, and that the relationship of landlord and tenant does not exist between the parties.

The defendant's case is that the plaintiff did not own the premises and is therefore not entitled to give the defendant notice.. The defendant further contends that, in any event, ownership of property without more does not entitle one to possession of property. In relation to a tenant, including a tenant-at-will, there must be some reason given by the landlord or owner to require possession of the property before any court will require a tenant or tenant-at-will to relinquish possession.

The defendant, at the time of the contract, was a man of advanced years. The relationship up to the transfer of the property was a harmonious relationship. The plaintiff had shown a willingness to be of assistance to the defendant. It is against that background that the agreement for the transfer of the property took place. There was the understanding that the defendant would be allowed to reside on the property for the remainder of his life. He had said in evidence in chief "I had to tell her that I would transfer the property to her because I did not have anywhere to go. I did not want them to sell it." The reason the property was transferred for the consideration money of $89,000.00 an undervalue was to ensure that the defendant would have

a place to live for the remainder of his life. The plaintiff was aware that the transfer was being effected so that the defendant would have somewhere to live for the remainder of his life when she agreed to accept the transfer. She by that act (her conduct) promised to provide accommodations at the home for the defendant for the remainder of his life. The defendant was not a tenant-at-will or at sufferance, or a bare licensee, but was a licensee by estoppel. The learned authors of Hanbury & Martin - Modern Equity (Fourteenth Edition) at page 879; states:

Promissory Estoppel

> "Where by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties and the representee alters his position in reliance on it, the representer will be unable to act inconsistently with the representation if by so doing, the representee would be prejudiced."

In Tanner v Tanner [1975] 1WLR where the defendant the mother of the plaintiff's children left her rent-controlled flat and moved in with the plaintiffs into his house, when some three years later the plaintiff ordered her out of the house. She refused, claiming she could remain in the house until the children left school. The court held, that the inference to be drawn from all the circumstances was that the defendant had a contract licence to have accommodation in the house for herself and the children so long as the children were of school age and reasonably required accommodation, and that, accordingly, the order for possession ought not to be made.

The County Court had made an order for possession, and the defendant had been rehoused by a local authority. The defendant remedy was in the form of compensation, for the loss of the licence.

In Inwards v Baker [1965] 2 Q.B. 29.

Where there was an expenditure on the land encouraged by the landlord. On the expectation that the licensee will be entitled to stay for as long as he desired. Lord Denning M.R. said at page 37.

> "So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: "You are to go. It is my land and my house." Nor could he at any time thereafter so long as the son wanted it as his home."
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> At Danckwerts L.J. at page 38 letter
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> "In my view the case comes plainly within the proposition stated in the cases. It is not necessary, I think, to imply a promise. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

It is however realized that the harmonious relations that existed between the parties are no more. The Court is reluctant to have the parties, reside together. In Modern Equity, at page 893. The approach of the Court in these circumstances, is spelled out.

> "finally, the court will not make an order, which would be unworkable in view of family discord. In such a case, a clean break may be the best solution involving an award of compensation rather than proprietary interest. Thus the equity may be satisfied in a different way from that which the parties intended when on good terms."

The basis for the assessment of the award of compensation to satisfy the defendant's equity is the determination of the real loss to the defendant. In Baker v Baker and Another (Court of Appeal) Times Law Report 23 February, 1993 at page 95 for Lord Dillion.

> "In some cases of equitable estoppel, the course taken by the court to satisfy the equity had been to order the defendant to repay the plaintiff's expenditure. That was the course the Judge followed in the present case.
>
> However, the gift in the present case is directed to achieving two aims: The provision of family home as well as rent-free accommodation for the life for the plaintiff.
>
> In his Lordship's Judgment, in the present case the correct appreciation was that which the plaintiff had lost was not the £33,950 but merely the right to rent-free accommodation for the rest of his life." (emphasis mine).

In my judgment, the equity will be satisfied, if the plaintiff pays compensation in lieu of the provision of living accommodations for the remainder of the defendant's life. The sum will be based on an a valuation of 7 Bowie Road, for rental purposes for a period of one year (the multiplicand). The multiplier, to be applied, will be four years.

The valuator to be agreed by both parties within 14 days of the Order, failing which, the Registrar of the Court, will appoint, a valuator. The payments by the plaintiff will be with effect from within 30 days of the defendant's and the other occupants vacating the premises.

An order for recovery of possession is hereby granted to the plaintiff within three months of this order.

Costs to the plaintiff to be agreed or taxed.