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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1987/D.221

BETWEEN	ROSE DUNSCOMBE	PLAINTIFF
A N D	YORK PAGE SEATON	DEFENDANT

Mr. Barrington Frankson instructed by B.E. Frankson & Company for Plaintiff.

Mr. Andrew Rattray and Miss Carol Sewell instructed by Rattray, Patterson & Rattray for Defendant.

Heard: January 31, February 1, 3, 7, 8, 10;
April 5, 6, 17, 20; May 3, 4, &
July 31, 1995.

HARRIS, J. (AG.)

In this action, the plaintiff's claim against the defendant is for the following relief:-

1. (a) A declaration that she is the fee simple owner of premises No. 11 Kingsway in the parish of Saint Andrew registered at Volume 1109 Folio 384 free of all encumbrances.
- (b) Alternatively, the cancellation of the aforesaid duplicate certificate of title and the issue to the plaintiff of a new certificate of title free of all encumbrances.
2. An injunction restraining the defendant whether by himself, his servant and or Agents, or otherwise, from dealing with, or entering upon the plaintiff's premises.
3. Damages.

The following documents comprised an agreed bundle:-

- (a) Copy Probate in the Estate of Emile Josephs with copy Will annexed, granted to the Executors Louis and Robert Josephs on the 30th October, 1990 - Exhibit '1'.
- (b) Cancelled Copy duplicate Certificate of Title registered at Volume 161 Folio 12 showing Rose Dunscombe as registered proprietor by virtue of transfer 197397 dated 25th and registered 27th August 1964 - Exhibit '2'.

- (c) Copy transfer dated 31st December, 1981 from Emile Josephs to York Page Seaton in respect of premises No. 13 Kingsway, St. Andrew - Exhibit '3'.
- (d) Copy transfer dated 31st December, 1981 from Rose Dunscombe to York Page Seaton in respect of premises No.11 Kingsway, St. Andrew - Exhibit '4'.
- (e) Copy duplicate certificate of title registered at Volume 1109 Folio 384 recording Rose Dunscombe as original proprietor and York Page Seaton as current proprietor by virtue of transfer No.399186 registered on 18th February, 1982 - Exhibit '5'.
- (f) Copy duplicate certificate of title registered at Volume 518 Folio 43 on which a transfer of proprietorship registered on 18th February, 1982 is recorded to York Page Seaton, the previous owner being Emile Elroy Elias Josephs - Exhibit '6'.

The following documents were also tendered into evidence as exhibits:-

- (g) Letter from York Page Seaton to Bully Josephs dated 20th November 1980 - Exhibit '7'.
- (h) Copy Writ of Summons in Suit C.L. 1986/J409 Louis and Robert Josephs v. York Page Seaton - Exhibit '8'.
- (i) Affidavit of York Page Seaton sworn on the 25th June, 1985 - Exhibit '9'.
- (j) Copy letter from Gilroy English to York Page Seaton dated 18th March 1982 - Exhibit '10'.
- (k) Copy valuation report re 11 and 13 Kingsway done by Allison Pitter and Company dated 18th March, 1981 - Exhibit '11'.
- (l) Copy letter from Gilroy English to Messrs Clough, Long and Company dated the 13th February, 1986 - Exhibit '12'.
- (m) Copy letter from Emile Josephs to Manager National Commercial Bank Trust Company dated 8th December, 1980 - Exhibit '13'.

(n) Copy affidavit of Gilroy English sworn 23rd April 1936 - Exhibit '14'.

The plaintiff, a lady advanced in years, being over 80 years, at the hearing of this matter, was at times incoherent and unable to recall most events surrounding this action.

She testified that she had a brother called Emile 'Bully' Josephs who had died. The relationship between her brother and herself had been close. A mutual trust existed between them. She was dependent on him and he looked after her business.

She further stated that her brother and herself owned property at Kingsway. She never resided on those premises as she had lived in Morant Bay but visited the premises frequently. She knew nothing about any transactions touching the property she owned. Her brother Emile did everything in respect of the property, as, he was fully in charge of its management and affairs.

It was also her testimony that she was unable to recall whether the property was in her name only but gave evidence that it was the custom of her family to place property in her name.

She also stated that she was not sure if the property had been sold. She received no proceeds of sale from the property. If her brother had sold the property and had been in receipt of any money for it, he would have informed her and would have delivered the money to her.

There was no recollection on her part of having executed any documents in relation to the property, neither did she remember using the property as a security for any loans.

She did not know whether the land was to be developed. She had never heard of the defendant. She could not recall having brought the current action nor was she aware of the contents of the action.

The main witness for the plaintiff was her nephew Louis Josephs, son of Emile Josephs. His evidence was that premises No.11 Kingsway was owned by his aunt, the plaintiff, who lived in Morant Bay. He said he resided on those premises since age 3 with his father Emile, his mother and two brothers.

The relationship existing between his father and aunt was very close. His aunt allowed his father and family to occupy 11 Kingsway rent free. His father attended to all the expenses of the property.

His father, who was a contractor, owned premises No. 13 Kingsway which adjoined No. 11. Initially, his father's property was rented but between 1978 or 1979 his father allowed his workmen to occupy it rent free up to the time of his death in 1985.

He also stated that his father and the defendant had been friends for about 20 years. His father treated the defendant as an 'adopted son'. The defendant visited his home regularly. His father assisted the defendant from time to time with projects and by way of advice.

It was also his evidence that in or about August 1980 the defendant attended their residence at 11 Kingsway and in his presence, a discussion took place between his father and the defendant, about a joint venture. His father spoke to the defendant about paying off an outstanding mortgage on No. 13 Kingsway and intimated that if he could liquidate the debt, he would speak to his sister (the plaintiff) who owned 11 Kingsway, to enter a joint venture to construct town-houses and apartments. His father's share of the joint venture with the consent of the plaintiff would be 11 and 13 Kingsway.

During the course of the discussion, his father showed defendant approved plans for a development of 11 and 13 Kingsway to be called "Cromwell Court". The defendant agreed to the proposal and expressed a desire to create a larger development than that put forward by his father. The defendant then took possession of the plans, which he returned.

He also stated that further communication took place between his father and the defendant in respect of the joint venture in December 1984 at the defendant's residence. There, the defendant explained to his father that the larger type of development which he desired to construct was not permitted by the Town Planning Department and would only be allowed if a sewerage main was put in

place.

His father died in March 1985 leaving a Will which he had made while in hospital, about a year before his death. He was named co-executor on the Will with his brother.

About a week after his father was buried his mother and himself attended on the defendant at his office at Molynes Road. He made inquiry of him concerning the joint venture agreement. The defendant's response was that his father must have been a mad man, as there was never any joint venture agreement, his father had sold him the properties 11 and 13 Kingsway and they should vacate the property of which they were in occupation.

He then showed the defendant a letter which was written by the defendant to his father, as well as the Will and inquired of the defendant the meaning of the letter and the reference of his father to a joint venture in his Will. The defendant then produced the titles to the properties.

After he received this information from the defendant, he visited his aunt to ascertain whether the defendant was in fact the registered proprietor. His aunt said it was impossible as she had not sold her property and had not received any money for it.

The defendant subsequently placed security guards on the premises. He again told his mother Mrs. Josephs and himself that he owned the property and they should leave. His mother and himself were given notice to vacate 11 Kingsway. His mother left but he remained until 1987 when he was ordered by The Resident Magistrates' Court for St. Andrew to vacate the premises. He did not appeal the order.

Prior to his father's demise, he had granted permission to the defendant to store excess lumber on 13 Kingsway. The defendant had premises, 13 Kingsway rented after his father died.

During his father's lifetime, although the defendant regularly visited 11 Kingsway, he never at any time exercised any rights of ownership. He never attempted to take possession of the properties then.

He also stated that up to the time of his father's death, the father had owned several other properties. These properties included 96 acres at Cavaliers, 77 acres at Halls Delight and 33 acres at Bog Walk.

He asserted that his father executed no document with the defendant in respect of the joint venture and that he had no knowledge of the existence of a mortgage on No. 11 Kingsway.

Mrs. Helen Josephs widow of Emile Josephs also testified on behalf of the plaintiff. She stated that she lived with her husband Emile and their children at 11 Kingsway. The plaintiff was owner of 11 Kingsway and her husband was registered proprietor of 13 Kingsway. In 1981, 11 Kingsway was well maintained but premises 13 Kingsway required repairs.

The plaintiff and her brother Emile enjoyed a close relationship. She lived in Morant Bay but visited with the family at 11 Kingsway frequently while her husband was alive. She was very active between 1980 and 1987 and even drove her own car then. She is now far over 80 years old and "her mind comes and goes".

Her husband "looked after the property generally" for the plaintiff. He attended to the expenses of the property and assisted with payment of mortgage.

She met the defendant through her husband. He was her husband's friend of about 20 years. Her husband rendered assistance and gave him advice whenever these were required by the defendant. He was a frequent visitor to their home.

It was her testimony also that her husband owned several other properties which included lands at New River, Halls Delight and Bog Walk. Her name was not entered on any of the titles to any of her husband's properties. She was not aware of any mortgages on any of his properties.

She stated that she had not been aware that premises 11 and 13 Kingsway had been sold to the defendant but it came to her attention after her husband's death, when she was so advised by the defendant on the attendance of herself and her son Louis at the defendant's office, shortly thereafter. At that time, she had in her possession

a letter written by the defendant to her husband, which her husband had given to her for safe keeping.

She stated that when the defendant informed her that he was owner, she was shocked, as she had thought the property had belonged to her husband. She had not been aware of any transactions between the defendant and her husband and was surprised to have made the discovery.

The defendant never indicated that he was owner while her husband was alive but a week after his death he posted security guards on the premises. This eroded her privacy and she found it impossible to remain there. Defendant gave her Notice to quit the property. She requested that she be given some time. She left in August 1985 to reside in the United States of America but left her possession behind in the house.

Mervyn Downs a valuer, gave expert evidence as to the current value of 11 Kingsway which he placed at \$16,300.00. He was unable to state the value of the property in 1982 when it was transferred to the defendant.

The defendant's evidence is that he is an Electrical Contractor. Premises 11 and 13 Kingsway were purchased jointly by him for \$300,000.00 on the basis of a valuation received from Allison Pitter & Company.

In purchasing the property, he negotiated with Emile Josephs who had been his friend about 20 years. The carriage of sale for the property was conducted by Mr. Gilroy English Attorney-at-Law, acting on his behalf. He never executed an agreement for sale. His purchase of the premises was by way of cash. The sum of \$300,000.00 was paid to Mr. English. He made a deposit of \$100,000.00 on his execution of the transfer and there was an oral agreement that the balance purchase money be paid within 4 weeks, which sum he paid before the expiration of 4 weeks.

He stated that at all material times he was under the impression that Emile was the owner of 11 Kingsway. He only became aware that the property was not owned by him in October 1981 when Emile presented two transfers in respect of 11 and 13 Kingsway to Mr. English at Mr. English's office and Mr. English gave him the

transfers to sign, whereupon he observed that the registered proprietor of No. 11 Kingsway was Rose Dunscombe. He spoke to Emile about it. He knew Mrs. Dunscombe the plaintiff was Emile's sister but could not recall having met her up to the time of Emile's death. He stated that Emile told him that the property was owned by him but was placed in his sister's name and he should not be apprehensive about it, he would have her sign the document. He was satisfied with the information received from him and based on that information, he appended his signature to the document. After signing the documents, Mr. English witnessed his signature and then handed them to Emile. Emile left with the transfers, that day.

He also testified that he permitted Emile to continue residing at 11 Kingsway after the sale. He did not request him to pay rental as he was his friend and in addition he had intended to move up to New River.

He had building material and construction equipment stored on both premises. After Emile's death he placed security guards on the properties to protect those items he had there.

Subsequent to Emile's death he spoke to his widow informing her that he required the use of the property 11 Kingsway. She requested that he allow her to remain for a few months, as she had expected to migrate to live with her son abroad. He acceded to her request. She did not leave. He gave her notice to quit. She left but did not remove her possessions from the house.

Her son Louis took up residence in the house after she left. He took legal proceedings against him in the Resident Magistrates' Court for St. Andrew and Judgment was awarded in his favour. Louis then moved out.

He further stated that at no time did he hold discussion with Emile in the presence of Louis about a joint venture. In October, 1980 he did converse with Emile about a joint venture but Louis was not present. Following this discussion, in November 1980, at Emile's request, he wrote a letter to him.

After writing the letter, he conducted certain investigations into the possibility of carrying out a development at 11 and 13 Kingsway. These investigations revealed that it would not be feasible to proceed with the development, as there was no central sewerage main in the area and it was not economically viable to do so. He told Emile it was not possible.

He did not sign any documents with Emile nor anyone relating to a joint venture. He stated initially that he did not instruct Mr. English to liquidate the mortgages on the premises as there was no joint venture agreement but later stated that he instructed him to liquidate the mortgages but he did not do so. He made no representations to the plaintiff, nor did he cause anyone to make any representations to her about any joint venture agreement.

In December 1984 Louis and Emile paid him a visit at his home. The object of the visit was to have a drink in celebration of the festive season. On that occasion, he loaned Louis money at Louis' request. Emile and himself had no discussion concerning joint venture project then.

He did not meet with Louis and Mrs. Josephs at his office after Emile's death. He advised Mrs. Josephs that the property was his, at 11 Kingsway. In evidence in-chief he said he met with Robert at his office at Molynes Road and showed him the titles with his name endorsed thereon. However, in cross-examination he said Mrs. Josephs was present when he met with Robert.

He had never heard of a scheme to be designed 'Cromwell Court', nor had he seen any approved plans or documents in relation to such a scheme.

He also denied that he was an electrical contractor between 1980 and 1982 and that he was a real estate developer. He had done electrical work for the Petrojam Building but another company, Tycon Engineering of which he was a partner, did contract for the building. He was neither managing director, nor principal shareholder of that company.

Gilroy English, an attorney-at-law gave evidence on the defendant's behalf. He stated that he had met Emile Josephs in 1965 or 1966 and over the years he had known him, he had done legal work for him. He had known the defendant for 30 years.

He stated that in August 1980 Emile Josephs attended on him at his office and requested that he secure mortgages for him on the security of his premises 11 and 13 Kingsway. He took preliminary steps and prepared mortgage documents towards end of 1980, or, early 1981 but he was unable to obtain the required mortgage loans. Those mortgage deeds were prepared in Mr. Joseph's name as Mr. Josephs had informed him that he was also the owner of the property 11 Kingsway, which he had occupied. He had not, prior to preparation of the document obtained the respective certificates of titles.

Sometime between August 1980 to October 1981 on the strength of a letter of authority from Emile, he received copies of the relevant titles from the mortgagee and discovered that No.11 Kingsway was registered in Rose Dunscombe's name. He did not convey this information to the defendant.

On a subsequent occasion, Mr. Josephs advised him that he would have to sell the properties as a result of pressure from the mortgagees and that a purchaser was found. He then attended on him one morning, accompanied by the defendant. The purchase price of \$150,000.00 for each property had been agreed when they arrived. The purchase was by way of cash transaction, which was one which did not require a mortgage. It was also agreed that a deposit of \$100,000.00 be paid and that balance purchase money be paid within 4 weeks. There was an oral agreement for vacant possession. It was orally agreed that he should have the carriage of sale.

He prepared instruments of transfer for 11 and 13 Kingsway. An agreement of sale was not prepared by him. He explained that at that time where a sale was not subject to mortgage or any reservations, it was usual to engross a transfer and dispense with preparation of an agreement for sale. It was his practice not to prepare an agreement for sale in those circumstances.

Both transfers were duly executed by the defendant and witnessed by him. The transfers were given to Emile to be executed by his sister and himself in the presence of an attorney-at-law, or justice of the peace. When the transfers were handed to the defendant to be signed by him, he asked who was Rose Dunscombe, he told defendant that Emile had informed that he had placed title in sister's name and it would be in order for him to sign.

The transfers were returned to him a few days before the 24th October 1981. He telephoned the defendant who came to his office and paid him a banker's cheque for \$100,000.00. Emile was present when defendant paid the money. Emile expressed a desire to obtain \$50,000.00. The defendant subsequently attended and paid him the balance purchase money of \$200,000.00 from which various duties, costs and mortgage payments were met. He gave the balance of \$15,000.00 and a statement of account to Emile who had told him he was responsible for plaintiff's affairs.

He said he never received instructions from the defendant to liquidate the mortgages and he never held funds for the defendant.

He stated he had met plaintiff on an occasion after the transfer had been executed. He met her at Emile's home and in the presence of Emile, he asked her if he should send her the proceeds of sale. Her response was that Bully (Emile) would handle the matter, as he did all her business. He also inquired of her if she had signed the transfer, she replied that she had done so in the presence of a relative of hers, who was a justice of the peace.

It was also his evidence that he had done other legal work for the defendant prior to and after the transactions relative to 11 and 13 Kingsway. He denied having knowledge of any agreement between the defendant and Emile relating to a joint venture.

He admitted he had sworn to an affidavit on the 23rd July, 1986 in respect of a suit before this court entitled C.L. 1986/J405 in which he outlined the circumstances under which the defendant purchased 11 and 13 Kingsway.

Owen Pitter a Chartered Valuation surveyor testified that in February 1981 the defendant requested him to do a valuation survey of premises 11 and 13 Kingsway as the basis of securing mortgage financing. In March, 1981 he visited the premises carried out an inspection of both properties on which he placed a value of \$325,000.00 to \$300,000.00 for them both. At that time, there was no central sewerage facility available to 11 and 13 Kingsway.

He prepared a report which he remitted to defendant.

The Registration of Titles Act S.68 provides:-

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

However S.161 of the Act, so far as it relates to these proceedings states:-

"161. No action of ejectment or other action, suit or proceedings, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say -

a - c

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

e - f

and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as

the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding."

In order to obtain the relief sought, the plaintiff is under an obligation to bring herself within the ambit of the foregoing provision of the Act by proving that the defendant is not the bona-fide registered proprietor of premises 11 Kingsway, Saint Andrew as he had by fraudulent means secured the transfer of the property to himself. Fraud in this context must be actual fraud, not merely constructive or equitable fraud.

In Assets Company v. Mere Rochi (1905) AC 210 Lord Lindsley said:-

"..... by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transaction having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

Actual fraud incorporates acts of dishonesty or moral turpitude on the part of the registered proprietor. Absention from inquiry, when suspicion has been aroused may also constitute fraud. It would appear that gross negligence in the absence of male fides would not amount to fraud.

I will now consider whether it has been established that the defendant procured the registration of himself as proprietor of 11 Kingsway by way of fraud. The plaintiff averred that the

defendant caused or permitted her to execute a transfer on the representation that her premises would be used for a joint venture project between the defendant and the plaintiff's brother Emile Josephs to construct town houses and apartments.

The plaintiff did not know the defendant. The defendant did not recall having ever met the plaintiff. It follows therefore that the defendant could not have made any representations to the plaintiff, fraudulent, or, otherwise, to have caused her to execute a transfer of her premises.

Is there evidence that the defendant made any representations to the brother of the plaintiff, Emile Josephs, to have permitted her to have transferred her property to him? Emile was ostensibly her agent. Her evidence and that of her witnesses make this disclosure. Louis Josephs son of Emile Josephs stated that he was present at 11 Kingsway sometime in August 1980 when he overheard a discussion between the defendant and his father. This discussion centred around the establishment of a joint venture project. Emile spoke to the defendant about his liquidating a mortgage on 13 Kingsway owned by Emile. He showed the defendant approved plans for a development and told him that with the plaintiff's consent they should enter into a joint venture to erect town houses and apartments on 11 and 13 Kingsway. The father's input would be the land. The defendant agreed to the proposal and even indicated that he would be prepared to construct a development larger than that contemplated by his father.

It was confirmed by the defendant that he had a discussion, in October 1980, with Emile Josephs in respect of a joint venture project. This was followed by a letter dated 20th November 1980 written by him to Emile at Emile's request. Paragraphs 1 and 2 of the letter states:-

"This is to confirm our verbal agreement whereby we will enter into a joint venture to do housing development on 11 and 13 Kingsway."

I have also instructed my lawyer Mr. Gilroy English, of 33 Duke Street, Kingston to liquidate the mortgages now existing."

The defendant stated that Louis Josephs was not present when the discussion took place between Emile and himself. He further stated that it was his intention to enter into a joint venture agreement with Emile in respect of 11 and 13 Kingsway but this plan was thwarted by the fact that he had carried out investigations which revealed that it would not have been economically viable to have done so, and that there was no central sewerage system in the area and the Town Planning Department would not have granted approval for the development.

Exhibit '11' which is captioned as a valuation report, was prepared in March 1981 at the defendant's request and subsequent to the letter written by the defendant to Emile. The report is in essence an assessment and analysis of the re-development potential of the area with particular references to 11 and 13 Kingsway. Further review of the document reveals an appraisal of the excellent re-development possibilities of these properties, notwithstanding the absence of the facility of a central sewerage system. There is no evidence to establish that an application for approval to subdivide the land to accommodate housing development had been refused by the relevant authorities on the ground that a central sewerage system was not in place. The valuation of the properties was restricted to land only. It is evident that the report was as a consequence of the defendant's letter.

It is my opinion that paragraph one of the letter ought to be construed as an acceptance by the defendant of an offer to him by Emile to enter into a joint venture agreement. Unfortunately, details concerning all the terms and conditions of the agreement or, details as to what transpired between Emile and the defendant subsequent to the agreement had not been disclosed by the plaintiff save and except the contents of paragraph 2 of the defendant's letter and Louis' statement that his father's input would have been the land and the joint venture would be subject to the plaintiff's consent.

It must be borne in mind that in November 1980 when the letter was written, the fact that the plaintiff was the registered proprietor of 11 Kingsway, had not yet come to the attention of

the defendant. At the material time, Emile had held himself out as the proprietor of the premises. Consequently, the defendant at that time, in dealing with Emile would have thought he was dealing with the owner. There is no evidence that the plaintiff's consent had been obtained by Emile. She stated she was not aware of a joint venture agreement between her brother and the defendant. Her recollection of events would have greatly diminished since that time. Further, she is well advanced in age and this coupled with her state of mind, would have affected her power to recall most things. In any event, in November, 1980 the defendant dealt with Emile believing he was the registered proprietor of 11 Kingsway. No act of impropriety could be ascribed to the defendant, there being no evidence that any representations had been made by him to Emile, in his capacity as agent for the plaintiff, to have induced a transfer of 11 Kingsway to him.

Louis also stated that the joint venture issue was again discussed by his father and the defendant at the defendant's home in December, 1984. The defendant denied any such discussion had taken place then. He said Louis and his father paid him a social visit during the Yuletide season in December 1984. At that time, Louis requested a loan from him. He acceded to the request. I accept defendant's evidence that this was so.

It was also the plaintiff's assertion that the defendant took possession of her duplicate certificate of title and had his name entered thereon by a trick and, or deception. No evidence had been advanced by the plaintiff to show that the defendant had been in possession of her document of title, at any time before the registration of the transfer of the property to him. The relevant certificates of title was originally in the custody of mortgagees. It was subsequently transmitted by the mortgagees directly to Mr. Gilroy English, the attorney-at-law acting for Emile Josephs, he having written to the mortgagee with instruction that the title be sent to his attorney-at-law.

Negotiations in respect of the sale and transfer of the property were conducted by Emile. The transfers were prepared by Mr. English. Emile had initially approached Mr. English with a view to his obtaining mortgage on 11 and 13 Kingsway as the then mortgagees were pressuring him for repayment of mortgage loans. Mr. English did preliminary work for the purpose of obtaining mortgages but failed to negotiate same. Emile subsequently informed Mr. English of his proposition to sell and told him he had a purchaser. Emile instructed him to prepare transfer for both properties. Mr. English complied.

Emile subsequently attended Mr. English's office, accompanied by the defendant. The defendant executed transfers and Mr. English witnessed his signature. The transfers were delivered to Emile for the plaintiff's and Emile's signatures to be appended to the respective instruments.

The transfer for No.11 Kingsway which was tendered into evidence as Exhibit 4 was executed by the plaintiff in the presence of a justice of the peace. There was no challenge to her signature and no dispute that she had signed the document. The transfer shows she executed same on the 12th October, 1981. Mrs. Josephs said the plaintiff was very active between 1980 and 1987. She even drove a car. It is therefore reasonable to infer that the time she executed the document she was fully in control of her mental faculties. After execution of the document, it was returned by Emile to Mr. English. Clearly, it was not at any time in the possession of the defendant, save and except for a brief period, when it was handed to him to be executed, in Mr. English's office. There is no evidence that the plaintiff was induced by fraudulent means by defendant to execute the transfer, nor, that she executed same by trick, or, deception on the part of the defendant.

The plaintiff additionally averred that the defendant failed to inform her of the obligation she assumed in signing the transfer. The plaintiff did not know the defendant. The defendant had no recollection of ever having met her. All transactions with defendant

touching 11 Kingsway were done by Emile. However, even if he had met her, he would have been under no moral or legal obligation to have advised her of any liability which she may have assumed in executing the transfer.

It was also the plaintiff's claim that the defendant, with knowledge that she had not entered into a contract of sale of her property obtained a transfer thereof. Before considering the merits of this aspect of the plaintiff's claim, I will first make reference to a submission made by Mr. Frankson that a contract of sale, in accordance with the provisions of the Statute of Frauds had not been prepared and executed by the parties and failing to do so imputed fraud on the part of the defendant. In order to place reliance on the Statute of Frauds (section 4), it would be incumbent on the plaintiff to have specifically pleaded the statute. Assuming however, that this had been done, it might not have availed the plaintiff, as the authorities clearly establish that non-compliance with the statute does not in itself portray, or, is evidence of fraud.

It was the defendant's evidence that in October 1981 there were negotiations between Emile and himself for the sale to him of 11 and 13 Kingsway for the sum of \$300,000.00. The sale price of each property was agreed at \$150,000.00. This was confirmed by Mr. English. Mr. English also stated that Emile had advised him that he had been obliged to sell the properties as a result of pressure from mortgagees and that he had found a purchaser. The sale price was based on a valuation done by Allison Pitter and Company. No evidence had been adduced to show that Emile who was at the relevant time, the plaintiff's agent, did not agree to sell the properties for the sum of \$300,000.00.

The defendant did not deny that a contract of sale had not been prepared and executed. He declared that there was an oral contract between Emile and himself. This was supported by

Mr. English, who acted for the defendant and Emile. However, Mr. English's explanation for the absence of a written contract of sale is unhelpful. He said that at that time there was no legal requirement for the preparation of an agreement for sale relating to sale of property and it was his custom, when dealing with transactions which did not require a mortgage, not to prepare an agreement for sale. He, however, acknowledged that it was usual to prepare an agreement of sale.

In my opinion, an agreement for sale ought to have been prepared by Mr. English. The practice prevailing in transactions touching the sale of land is for the preparation of a contract. Further, Mr. English was in an invidious position, acting for both vendor and purchaser and was therefore under a duty to engross one. He was aware that 11 Kingsway was not registered in the name of Emile and should have ensured that the plaintiff had signed a contract of sale. The defendant had been on previous occasions involved in sale and purchase of land and would have known a contract would be necessary and should have insisted on having one prepared. The omission of Mr. English in preparing a contract and failure of the defendant to have been insistent on a contract being made available for his signature, must be regarded, irregular but certainly not fraudulent.

Despite the absence of a written agreement of sale executed by the parties, there is an instrument of Transfer duly executed by the plaintiff transferring the property to the defendant. The terms of this transfer satisfies the requirements of the Registration of Titles Act S.88 which provides as follows:-

"The proprietor of land or of a lease mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto: and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to

transfer or dispose of under any power, with all rights, power and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant."

There is no provision in this section, or, for that matter in any other section of the Act, making it obligatory for a written contract of sale, signed by the parties to be in existence in order to effect a transfer of property. In the case under consideration, the transfer, in compliance with section 88 of the Act has set out all the relevant terms. A proper transfer was duly executed by the parties and registered. There being no evidence that the signature appearing on the instrument of transfer was not the plaintiff's the absence of a written agreement for sale, by itself, does not point to fraud on the part of the defendant.

It is interesting to note that where fraud has not been established, a registered proprietor of land retains an indefeasible title, even in circumstances under which he acquires title by virtue of a void instrument.

In Boyd v. Mayor of Wellington (1924) NZLR 1174 it was held that assuming a proclamation was void, its registration under the land transfer Act had bestowed on a corporation, in the absence of fraud, an indefeasible title to certain land. In that case the plaintiff had sought a declaration that a proclamation which vested in the defendant land owned by the plaintiff, was void for want of compliance with certain mandatory statutory requirements. The plaintiff also claimed that the proclamation was fraudulent and wrongfully obtained and that he was entitled to have the entry of the registration of the defendant removed from the Land Transfer Register.

This principle of the indefeasibility of title, except in a case where the person dealing with the registered proprietor is guilty of actual fraud, was also enunciated in the case of Wainuha

Sawmilling Company v. Waione Timber Company 1926 AC 101 p.106 where

it was expressed thus:-

"The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud, on the part of the person dealing with the registered proprietor, such person taken upon the registration of the title under which he takes for the registered proprietor an indefeasible title against all the world."

Additionally, the Transfer Tax Act S.10(1) does not impose liability on any party to a transfer of land, to reduce to writing, a contract for the sale of such land.

S.10(1) of the Act is expressed as follows:-

"10(1) Where a contract of transfer, being a contract to transfer any property, whether or not in existence or ascertained at the time of the contract, is made, the contract shall be deemed to be the transfer of the property (for the consideration provided for by the contract, without prejudice to any requirement under this Act that consideration for such a transfer be otherwise assessed) for the purpose of this Act."

This provision makes reference to contract of transfer.

It deems the contract of transfer an actual transfer of the property, whether, or not, a transfer document is in existence at the time of the contract. It does not make a written contract of sale a condition precedent to an instrument of transfer. It is therefore obvious that a contract of transfer is the only documentary instrument required to fulfill the obligations of the Act. There is an instrument of transfer duly executed by the parties. There is no contest that the transfer had not been executed by the plaintiff. This being so, nothing beguiling can be laid at the door of the defendant.

I must hasten to point out however, that although the transfer is in conformity with the requirements of the Registration of Titles Act S.88 and the Transfer Tax Act S.10(1), the relevant duties were not fully paid. S.10(1) of the Transfer Tax Act directs that transfer tax must be borne by transferor but payment thereof must be made by the transferee, who is entitled to recover the

by way of deduction from the consideration for the transfer, or, by process of the court.

The defendant, as transferee, was under an obligation to pay the duty. At that time, transfer of property attracted duty at the rate of 7.5 percent on every dollar of the consideration, exceeding \$10,000.00. The tax payable would have amounted to \$10,500.00 and not \$7,300.00 as paid. Was there an intention on the part of the defendant to be fraudulent?

Payment of stamp duty and transfer tax is supervised by the Commissioner of Stamps & Estate duties. It is the Commissioner who assesses and directs the sum payable on submission of requisition by the transferee. It must be observed that the transfer, tendered in evidence, bears an endorsement by the Commissioner that duty had been paid. A penalty was even imposed. A certificate had been issued by him to the effect that the relevant duties had been paid. The Commissioner fell in error by an incorrect assessment of the tax. It would be unreasonable to infer fraudulent intent on the part of the defendant, concerning the incorrect payment of the duty. The Commissioner is charged with the responsibility of collecting duty and ought to have secured the precise amount due, before issuing his certificate.

The plaintiff further claimed that the property had not been sold and she received no purchase money. The evidence of the defendant disclosed that Emile, agreed to sell premises 11 and 13 Kingsway to him for \$300,000.00. Both the defendant and his attorney-at-law stated that it was agreed that the sale price would be \$150,000.00 for each property. The sum of \$300,000.00 was based on a valuation by Allison Pitter and Company. The report showed that both properties were valued as one at \$300,000.00 to \$325,000.00 and only the value of the land had been taken into account, for the purpose of the appraisal. Mrs. Josephs stated that No. 11 Kingsway was well maintained at the time. The report showed that 11 Kingsway was in a fairly good state of repair, while, 13 Kingsway required repairs. It is obvious that the sale was in relation to the land only. However no evidence had been adduced by the plaintiff to establish that Emile, who was in fact

her agent, had not agreed to sell to the defendant both properties for the sum of \$150,000.00 each.

The defendant stated that he paid a deposit of \$100,000.00 by way of cash, on the purchase price, on the date of his execution of the transfers. His attorney-at-law said that the defendant paid the deposit by cheque on the date when the transfers were returned to him by Emile. The balance purchase money was paid about 4 weeks later.

The question here, is whether the purchase money had been paid. Mr. English reported that the purchase money was paid to him by the defendant. A deposit of \$100,000.00 was paid on his receipt of the transfers for 11 and 13 Kingsway duly executed by the plaintiff, the defendant and Emile. He gave the entire proceeds of deposit to Emile, as he had urgent need for \$50,000.00 to pay on an aircraft for his son. It seems quite inappropriate for the attorney-at-law, as stakeholder to have given funds which he ought to have held in escrow, to the vendor. However, when the balance of \$200,000.00 was paid, he disbursed from this, funds to meet legal costs and payment of outstanding mortgages on both properties.

The copy duplicate certificate of title registered at Volume 1109 Folio 384 in respect of 11 Kingsway, shows that an outstanding mortgage debt of \$42,000.00 with interest, to National Commercial Mortgage & Trust Company registered on the 1st March, 1978 had been discharged on 1st February, 1982. The instrument of transfer dated 31st December, 1981 from Rose Dunscombe to York Page Seaton reflects payment of stamp duty of \$3,981.25, Transfer tax of \$7,300.00 and a penalty of \$1.75. The duty relating to transfer tax is inaccurate, in spite of which, the Commissioner of Stamps and Estates duties granted a certificate. This erroneous grant of the certificate conveys implication that the correct duty had been paid.

During the course of the transaction, Mr. English while on a visit to Emile's home was introduced to the plaintiff. He enquired of her whether she had executed the transfer, she replied in the affirmative and told him that she had done so in the presence of a

justice of the peace who was a relative of hers. He further requested her to inform him how he should dispose of the proceeds of sale. Her response was that her brother Emile would take care of the matter, as he conducted all her business transactions.

In accordance with her instructions, the sum of \$15,000.00 representing the net balance proceeds of sale for both properties and a statement of account were remitted by him to Emile.

It is therefore reasonable to infer, from all the circumstances, that the funds which had been utilised to discharge the liabilities relating to the respective duties and the mortgages originated from proceeds of sale of the properties. This being so, I am constrained to find that the property had been sold and the purchase price agreed between Emile and the defendant had been paid by the defendant. Further, no evidence has been advanced to demonstrate any collusion between Emile and the defendant to deprive the plaintiff of her property. No evidence had been adduced from which it could be deduced that Emile was at any time acting as the defendant's agent. It follows therefore, that it must be inferred that the sale was a proper one and not one contaminated by fraud.

It was also an averment of the plaintiff that the defendant obtained the transfer not knowing, or, caring whether she intended to part with possession of her property. She also alleged that he obtained the fee simple estate in her land without caring, or, ascertaining whether the transaction was bona fides.

The defendant stated that he first became aware of the plaintiff being registered as proprietor of 11 Kingsway on that occasion when he was handed the transfer to affix his signature thereto. However, in an affidavit sworn by him in suit Common law J409 of 1986, brought against the defendant by Robert and Louis Josephs for specific performance of a contract in respect of 13 Kingsway, he stated that "prior to my purchasing 13 Kingsway Mr. Josephs represented himself as agent for 11 Kingsway". This statement unmistakably illustrates that he knew Emile was not the owner of 11 Kingsway, prior to his purchasing same.

On perusal of the valuation report, it is manifest that the plaintiff is the registered proprietor of 11 Kingsway, as this information is boldly recorded therein. Bearing in mind that the defendant declared that negotiations to purchase the property commenced in October, 1981 and the valuation report was dated March 1981, he would have been seized of the fact that Emile was not the proprietor of 11 Kingsway at least 6 months before the transaction, yet he refrained from making investigation into ownership of the property during that time.

The defendant was less than frank with the court when he reiterated that he had not been cognisant of the fact that the plaintiff was owner of 11 Kingsway until he was about to sign the transfer. His knowledge that Emile was not owner of the property should have persuaded him into investigation of the ownership before entering into a contract of sale. Despite this, there is evidence that he did make inquiry of Emile before executing the transfer and was satisfied with the answer given, before he executed the document. On the presentation of the transfer he observed that Rose Dunscombe was transferor. He asked "who is Rose Dunscombe?" Emile's response was that the property belonged to him but was in his sister's name, he should not worry he would have her sign it. He believed Emile who had been a long standing friend of his and who had always treated the property as his own. He said he had no reason to doubt Emile's word, or, integrity as he trusted him.

The relationship which existed between the defendant and Emile was close. The defendant had reposed great confidence in him. Emile had behaved in a manner consistent with ownership of the property. He told Mr. English the property belonged to him but was placed in his sister's name. This he also told the defendant immediately before his signing of the transfer. The defendant could have honestly believed that the information given to him by Emile was true. Further, his attorney-at-law instructed him to sign, having first indicated to him that Emile had inform him that the property was his, notwithstanding his sister being registered as

proprietor. He could have been convinced that this was so. In these circumstances, fraud or dishonesty cannot be inferred from the defendant's conduct.

I must now direct my attention to certain provisions contained in the Will made by Emile on the 25th March, 1984. This Will made reference to a joint venture agreement and a transfer touching 11 and 13 Kingsway. The relevant portion of the Will was expressed in the following terms:

"There is a joint venture existing in writing between Y.P. Seaton and myself re 11 and 13 Kingsway, my wife that letter written by Seaton to me. If my titles are used although transfer to Seaton other than the development of 11 and 13 Kingsway, the joint venture exist there also.

In my opinion this provision in the Will tends to show that there was a joint venture agreement between the defendant and Emile in respect of 11 and 13 Kingsway. It also denotes that the properties should not be used other than in accordance with that agreement, although transferred to the defendant.

The transfer duly executed by the plaintiff and defendant exposed a sale of 11 Kingsway to the defendant. However, the valuation report upon which the sale was based, was essentially an evaluation and appraisal of the re-development potential of premises 11 and 13 Kingsway. The improvements on both sites were discounted for the purpose of the appraisal. It is evident that the land only was sold with re-development of the premises in contemplation.

The inescapable inference therefore, would be, that the sale was a condition of the joint venture agreement and the plaintiff's execution of the transfer could only be interpreted as her ratification of the agreement. This being so, there is nothing to demonstrate that the defendant is culpable, or, acted fraudulently, or, dishonestly in being registered as owner of 11 Kingsway.

Failure of the defendant to acknowledge fully, ownership of 11 Kingsway during Emile's lifetime is demonstrable of extraordinarily unusual conduct on his part but cannot be considered imputation of

fraud. He paid taxes on the premises after purchasing same and while Emile was alive. He permitted Emile and his family to remain on the premises rent free until Emile's death in 1985, although Mr. English had written to him informing him that he had indicated to Emile that, he the defendant would have been entitled to vacant possession of the property as of the 31st March, 1982 and he, (Emile) should make arrangements with the defendant for payment for his use and occupation of the premises until he (Emile) had vacated same.

One week after Emile's burial the defendant took possession of the property and placed guards there to protect his material and equipment which he had stored on both properties. There is nothing unseemly about his action. His requisition to the widow to deliver up possession of 11 Kingsway shortly after her husband's death is an act which could be regarded insensitive but not improper, or dishonest. He had stated however, that the privileges enjoyed by his friend Emile would not have been extended to his widow.

It has been established that there was a sale of 11 Kingsway. This sale was subject to a joint venture agreement. Negotiations in relation to the sale and joint venture agreement were conducted on the plaintiff's behalf by her brother Emile who was the agent. She ratified the sale by execution of a transfer, whereupon she divested her fee simple interest in the property in favour of the defendant. It must therefore be concluded that the circumstances under which the defendant secured the registration of his name on certificate of title do not amount to fraud within the meaning of S.161(d) of the Registration of Titles Act. The defendant's title therefore remains unassailable.

Judgment for defendant.