

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)**

SUPREME COURT CIVIL APPEAL NO 113/2017

**BETWEEN MAUREEN BEVERLY SIMPSON 1ST APPELLANT
(Executor of Estate of Winnifred
Simpson, Deceased)**

**BETWEEN DOREEN RICHARDS 2ND APPELLANT
(Executor of Estate of Winnifred
Simpson, Deceased)**

AND RONALD SIMPSON 1ST RESPONDENT

AND PATSY SIMPSON 2ND RESPONDENT

**Seyon Hanson, Mrs Crislyn Beecher-Bravo and Shamar Hanson instructed by
Beecher-Bravo Hanson & Associates for the appellants**

**Miss Jeromha Crossbourne, Miss Renee Freemantle and Miss Sarah Bailey
instructed by Scott, Bhoorasingh & Bonnick for the respondents**

28, 29 January 2020 and 21 June 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and there is nothing I could usefully add.

FOSTER-PUSEY JA

Background

[2] Dudley and Winnifred Simpson were married on 1 January 1955. They had three children. The eldest is Ronald Simpson, the 1st respondent in this appeal. They also had two girls, Gloria and Maureen Simpson. Maureen Simpson is the 1st appellant in this appeal. Both Maureen and Doreen Richards, the 2nd appellant, are the executrices of Winnifred's last will and testament. Ronald married Patsy Simpson, the 2nd respondent in this appeal. For ease of reference, with no disrespect meant, I will, from time to time, refer to the parents and the children by their first names.

[3] Dudley and Winnifred acquired property together during their marriage, and often discussed with their children, how they intended to share the property among them. They built their family home on a piece of land, the first parcel of land, which was located at Canoe Valley, New Roads in the parish of Clarendon. No issue about that property arises in this appeal. However, it is an important part of the background facts.

[4] In the 1970s, they bought an unregistered parcel of land ('the second parcel of land'), comprising of approximately 11 acres. It was also located at Canoe Valley, New Roads, in the parish of Clarendon. They constructed two houses and a commercial building on it. In 1992, they obtained title for it in both their names as joint tenants. It is registered at Volume 1255 Folio 97 of the Register Book of Titles. In 1993 and 1998, they sold parts of the property, and in 2002, they transferred a piece of it to themselves as joint tenants, and acquired title registered at Volume 1351 Folio 987 for that third parcel of land.

[5] Ronald and Patsy, the respondents, got married on 22 December 2002.

[6] Dudley died on 23 June 2003, while on a visit to Canada.

[7] On 6 December 2005, the third parcel of land was transferred by way of gift from Winnifred and Dudley to the respondents as joint tenants.

[8] Winnifred signed an instrument of transfer dated 12 October 2007, gifting the second parcel of land to the respondents. She signed another transfer document in respect of the same property, on 3 April 2008. The transfer by way of gift to the respondents as joint tenants, was registered on 30 November 2011.

[9] On 23 November 2009, Winnifred died leaving a will naming the appellants as her executrices. The appellants obtained probate of the will on 16 January 2013. In June 2013, when they obtained copies of the certificates of title for the second and third parcels of land, they became aware that those parcels of land had been transferred to the respondents before 2013.

[10] The appellants filed a claim against the respondents, which was amended in April 2014. They claimed that the respondents acquired the third parcel of land by fraud. They also claimed that the respondents exercised undue influence over Winnifred and Dudley in relation to the third parcel of land, and Winnifred solely, in relation to the second parcel of land. Additionally, the appellants asserted that, when Winnifred transferred the second parcel of land to the respondents, she did not have the requisite mental capacity to do so. The appellants also averred that the transfers were intrinsically inequitable and unconscionable, and were contrary to Winnifred's testamentary dispositions in her last will and testament executed on 8 March 2004.

[11] The respondents responded to the claim in their defence filed on 29 May 2014. They denied exercising undue influence over Winnifred and Dudley, and pleaded that when Winnifred and Dudley made the gifts, they were still capable of living independently and making decisions, fully understanding the implications of their actions. The respondents denied the particulars of fraud in the claim and rejected the assertion that the transfers of the parcels of land were fraudulently obtained. In addition, the respondents denied that the transfers were inequitable and unconscionable. In fact, they stated that Winnifred and Dudley transferred the properties to them out of love and affection.

[12] Tie J (Ag) (as she then was) ('the judge') heard the claim over the period 5-9 June, 17 and 31 July 2017, and handed down judgment on 2 November 2017. The judge found that the appellants had failed to prove that the respondents had acquired the third parcel of land by fraud. She found that the appellants had not proved that the respondents, Winnifred and Dudley, shared a relationship of trust and confidence or of ascendancy or dependency. The judge also ruled that, even if such a relationship had been proved, the appellants had not established that the influence generated by the relationship had been abused, as the transactions in question were readily explicable by the relationship among the respondents, Winnifred and Dudley. In addition, the judge found that the appellants had not proved that Winnifred lacked the requisite mental capacity when she transferred the second parcel of land, and the transfers of both the second and third parcels of land were neither inequitable nor unconscionable. She therefore dismissed the claim.

[13] By way of a notice of appeal filed on 6 December 2017, the appellants challenged the judge's findings. In this appeal, we have had to consider, broadly speaking, as the grounds will show, whether the judge erred in her findings of fact and mixed findings of law and fact concerning:

- (i) Whether there was a relationship of trust and confidence or ascendancy and dependency among Dudley, Winnifred and the respondents;
- (ii) The appellants' failure to prove that the respondents acquired the third parcel of land by fraud;
- (iii) Winnifred's mental capacity when she signed the documents for transfer of the second parcel of land; and
- (iv) Inequity or unconscionability of the transfer of both properties.

[14] On 28 and 29 January 2020, we heard the appeal, reserved our decision, and with apologies for the delay, now deliver our judgment in this matter.

[15] In light of the issues which arise for determination in this appeal, including the judge's assessment of the credibility of the witnesses, it is important to carefully examine the evidence led at the trial.

Evidence led in the court below

Maureen and Gloria's evidence

[16] Maureen and Gloria testified that the entire family lived in Canada at one time, but eventually both parents returned to Jamaica, as did Ronald.

[17] The sisters remained in Canada, and Ronald, being the only child in Jamaica, became someone on whom their parents heavily relied. At first, Ronald lived in the family home with their parents, but he eventually went to live in the house which had been built for him on the second parcel of land in close proximity to the family home. Winnifred and Dudley had given Maureen the other house on the second parcel of land.

[18] In or about December 2002, Ronald married Patsy. Although they had always had a close family unit, Ronald did not invite his parents to his wedding. After marrying Patsy, Ronald went to live with her on property belonging to her family. Ronald nevertheless continued to visit Winnifred and Dudley who continued to rely on him heavily.

[19] During a visit to Canada in 2003, Dudley died. Ronald did not contribute to his father's funeral expenses, stating that he did not have any money. When Gloria and Maureen came home for their father's funeral, they realized that someone had removed all the documents from a safe located in the family home, including the certificates of title for the lands owned by their parents. Only Ronald had access to the safe, Winnifred having given him the key.

[20] Ronald and Patsy then moved to live on the second parcel of land. After Ronald and Patsy moved into Ronald's house, due to their close proximity, Winnifred became very dependent on them.

[21] Maureen visited Jamaica in February 2004 and stated that, at that time, she realized that Winnifred was not well. She found the family home in a very messy condition, and observed that her mother was urinating on herself. She sought medical treatment for, and, along with Gloria, employed a caregiver to look after her mother on a full-time basis. During that visit, she took her mother to see a Justice of the Peace, Mr Arthur Phidd, who assisted her mother to prepare a will.

[22] Gloria and Maureen sent money to the caregiver to assist with their mother's living expenses, but Ronald, although living "a few meters away", did not provide any financial assistance to their mother. Maureen stated that, during her yearly visits to Jamaica, she noticed that neither Patsy nor Ronald contributed anything to their mother, "not even food". Ronald did not want to take their mother to the doctor and confiscated their mother's medication. Ronald and Patsy began removing appliances and utensils from the family home, and placed them in their own home. Instead of helping his mother, Ronald was helping himself, as he, for example, removed a washing machine which had been left in the family home.

[23] In addition, Ronald made the lives of the caregivers difficult. In fact, on one occasion Ronald had gone to the family home, "grabbed the caregiver" and had put her out of the house "for no good reason". This chasing away and sabotage of caregivers occurred on more than one occasion, and Maureen and Gloria had to frequently hire new caregivers. Two caregivers, Audrey Coleman and Kayanna Boothe, stayed the longest. However, shortly before Winnifred's death, these caregivers were driven away by Ronald's constant harassment. Once they left, Winnifred was left entirely at the mercy of Ronald and Patsy.

[24] When Maureen visited Jamaica in 2005, she found that her mother's condition had further deteriorated, and this deterioration now included her mental condition. She noticed that her mother kept repeating herself and referred to past events as if they were current. In light of her observations, in July 2005, she asked the caregiver to take her mother to see Dr Victor Lindo, who prepared a medical letter.

[25] Gloria also noticed changes in their mother after their father passed away. Her mother became very disoriented and would give away anything that Gloria sent for her. In 2005 when Gloria visited her mother she noticed that her mother was constantly talking to herself, was not eating on time, was urinating on herself and the house was very messy.

[26] Maureen stated that, in or about 2007, she rented 'her' commercial building to get additional income to assist Winnifred with her expenses. Ronald brought a claim against the tenant for trespass, and insisted that the building belonged to him. Maureen hired a lawyer to represent herself in the proceedings.

[27] Later that same year, Gloria and Maureen came to Jamaica to attend a family meeting which Ronald also attended. They also had their attorneys-at-law present. Maureen stated that at that meeting, Ronald's attorney-at-law, Mr George Clue, "made a declaration in the hearing of all of us in relation to the second property". Winnifred was not present at the meeting.

[28] Maureen stated that, by 2008 (a contradiction with the time expressed above), when she returned to Jamaica for the meeting, Winnifred's mental condition had deteriorated so badly that she did not recognize her, Maureen, or her sister, Gloria. Their mother was wearing adult diapers and kept calling her, Maureen, 'Ruby'. In addition, she used foul language, which she was not known to do before. Maureen believed that her mother was mentally incapacitated. Gloria also stated that by 2008, their mother's mental condition had completely deteriorated and her mother would wander away from her home and not be able to return home without the help of

members of the community. From her observations, if her mother was asked to sign any document she would willingly do so because, by that time, she was no longer able to discern what she was signing.

[29] After Dudley died, because he had been receiving a pension in Canada, Winnifred became entitled to a widower's pension. At first, the pension cheque was sent to Jamaica by mail. Ronald would collect the cheque and have Winnifred endorse it. After Ronald encashed the cheque, he kept all of its proceeds for himself. As a result, Winnifred was not benefitting from the pension. In order to better protect her income, Maureen visited Canada Services, informed them of their mother's health condition, and requested that the cheques be sent to her, Maureen, instead. Canada Services requested a certificate of incapability. Audrey Coleman, their mother's caregiver took the certificate to, and it was completed by, Dr Sheldon Brown, a medical doctor.

[30] Winnifred died in 2009. Maureen and the 2nd respondent were the executrices of her estate. Probate was granted of her will on 16 January 2013. In the will dated 8 March 2004, Winnifred made the following devises: Gloria was to receive household #1 (the family home) at New Roads, New Longville, along with 3.34 acres of land, Maureen was to receive the middle home and the club fox-fire (both on the second parcel of land) along with 3.34 acres of land, Ronald was to receive the 3rd home (on the second parcel of land). After Ronald's death, the 3rd home was to be given to Michael Ronald Simpson along with 3.34 acres of land.

[31] After the probate was granted, the executrices attempted to distribute Winnifred's estate. It was at that time that they became aware that, in 2008, Ronald had transferred the second and third parcels of land into the names of himself and his wife Patsy".

[32] Maureen testified that Ronald was aware of the contents of their mother's will, as it had been read aloud in her, Gloria and Ronald's presence during a mediation session held in 2010, at the May Pen Probation Office in the parish of Clarendon. At that time,

Ronald did not indicate that he had taken steps to have the second and third parcels of land transferred to himself and his wife.

[33] Dudley, their father, had given Maureen a house on the second parcel of land, and she had been occupying it for several years, long before their mother died. No one having challenged her right to this house, Maureen had not been aware that "Ronald and Patsy had transferred ownership of the second parcel into their names".

[34] Gloria supported much of Maureen's testimony. Gloria stated that their parents kept their children aware of their plans. As a family, they had always discussed and decided on important matters together. Their father made it clear that a club constructed on the second parcel of land, and called 'Fox Fire', Maureen's nickname, was to go to Maureen, whom their father always regarded as very business-like. Their parents made it clear that they had bought the second parcel of land with the intention that each of their children would benefit. Their father did not, at any time, speak of an intention to transfer the third parcel of land to Ronald and Patsy. Furthermore, to her knowledge, their father did not like Patsy, and so would not have included her on a transfer of land.

[35] Ronald's marriage to Patsy caused his relationship with the family to change "in a negative manner". He only told their father that he was getting married on the day of the wedding. After the marriage, Ronald displayed deep hostility and aggression towards the family. This worsened after their father's death, and it appeared as if Patsy wanted to take over everything related to the family. Patsy told Gloria that it was her (Patsy's) time now, and she and Ronald moved into the house on the second parcel of land along with their animals.

[36] Gloria and her sister Maureen, realized that they were not being granted ready access to the second parcel of land, although Maureen had her house and the club on it. They called the police and took court action to gain access to and use of the second

property. At one point, Ronald and Patsy set their dogs on Gloria when she tried to pick a breadfruit for their mother from the second parcel of land.

Kayanna Boothe's evidence

[37] Kayanna Boothe, one of Winnifred's caregivers, also gave evidence at the trial. She testified that she knew Winnifred to be a proud and intelligent woman.

[38] In 2006, at Gloria's request, she began to take care of Winnifred. At that time, Audrey Coleman was the primary caregiver, while she assisted on weekends when Ms Coleman was off. By 2008 both she and Ms Coleman lived at the house with Winnifred.

[39] Ms Boothe noticed that Winnifred spoke a lot about Ronald, but this was not about anything current, instead it was about past memories of Ronald such as the fact that he was born in England and had attended Munroe College.

[40] Ms Boothe noticed that although Ronald lived in close proximity to his mother, he did not take any food for her when he visited. Ronald was, instead, a troublemaker, always interfering with Ms Coleman and herself. At one time Winnifred was very ill, and although he had a motor vehicle, Ronald showed no interest in taking her to see a doctor, but instead told his mother to make her way by taxi. He also removed his mother's bed from the house, and replaced it with a smaller one from which she kept falling.

[41] Importantly, Ms Boothe observed that whatever Ronald told Winnifred to do, she obeyed 'without question'.

[42] Ms Boothe noticed the deterioration of Winnifred's mental condition. In 2006 when she began caring for Winnifred, she could not go to the bathroom by herself, and started urinating on the floor. As a result, she was put in adult diapers. Winnifred began to talk constantly about past events, but could hardly recall recent events. She also threw the items from her closet on the floor, complained of hunger when she had just eaten, claimed to own and hid things belonging to other people.

[43] It was only Maureen and Gloria who maintained Winnifred, including paying Ms Boothe's salary and sending money for the purchase of items Winnifred needed. Ms Boothe did not know of Ronald contributing anything towards his mother's care.

[44] Ms Boothe accompanied Winnifred to see Dr Sheldon Brown because she was unable to keep her food down. She did not know whether Winnifred had visited Dr Brown in relation to her deteriorating mental condition.

[45] By the time Winnifred died in 2009, both Ms Coleman and Ms Boothe had left Winnifred's home, as they could no longer deal with Ronald 'cursing' them and telling them to leave the house. To the best of her knowledge, after they left, Ronald and Patsy took care of Winnifred.

Lennox Henry's evidence

[46] Lennox Henry also gave evidence. He was a cousin to Ronald, Gloria and Maureen, and knew the family very well. He had heard Dudley telling his children that the family house belonged to Gloria, the house near to it belonged to Maureen and the 12-apartment house was for Ronald. He also knew that the family had a club called 'Fox Fire', which was Maureen's nickname.

[47] Mr Henry also noticed that after Ronald married Patsy, he changed in a negative way, and was not as close to the Simpson family as he had previously been. When Dudley died, Ronald and Patsy owned 60 to 70 goats, but refused to contribute even one to the repast held in his honour.

[48] In or around 2006, Mr Henry noticed that Winnifred began to deteriorate mentally, wandering away from home, unable to return by herself, not bathing, talking gibberish and failing to recognize people whom she knew before. He knew both Audrey Coleman and Kayann Boothe who were Winnifred's caregivers.

[49] Mr Henry noticed that Winnifred and her son Ronald were very close. He observed that Ronald had great influence over his mother, even though he did not pay

any of her maintenance, and did not visit her often. He knew that Ronald removed items from Winnifred's home, including her washing machine and bed. He expressed the view that by 2007/2008 Winnifred Simpson was "gone, gone in that she didn't know her foot from a broomstick. She would not have been able to read any legal documents much less understand the legal implication of any document that she was signing as she could not remember anything, she did not recognize persons familiar to her and could no longer hold a sensible conversation".

Dr Sheldon Brown's evidence

[50] Dr Sheldon Brown testified at the trial. He had prepared a certificate of incapacity for Winnifred. Dr Brown testified that he had not examined Winnifred, or performed any medical test on her, to diagnose a mental condition such as senile dementia, before he prepared the certificate. Instead, he had prepared it at the request of, and based on information provided by, Maureen. He was trying to assist Maureen to facilitate the release of Winnifred's pension funds. He honestly believed that Winnifred had been previously diagnosed as senile by another doctor. When he had examined Winnifred in March and June 2006, he found that her memory was not as sharp as persons her age, but he had not mentioned this in any medical report.

The evidence from the National Land Agency, Land Titles Division 'Office of Titles'

[51] The judge summarized this evidence and I rely on her very useful outline.

[52] Ms Shalise Porteous from the Office of Titles outlined the procedure involved at the Office of Titles when property was being transferred. The transfer instrument must be signed by both the individual transferring his or her interest as well as the transferee, and all signatures must be witnessed in compliance with section 152 of the Registration of Titles Act ('the Act'). The certificate of title is submitted along with payment of the registration fee and transfer tax certificate, and the transfer instrument must be stamped at the Stamp Office indicating payment of the requisite stamp duties.

[53] The Office of Titles had a manual system of processing transfers which was replaced by an electronic system, called the Aumentum, sometime between 2003 and 2004. Transfers recorded manually were never placed on the Aumentum. The Aumentum required staff to input relevant information in respect of transactions after the payment of relevant fees. Once a transaction is deemed registrable by a legal officer, an electronic signature as well as a physical signature would be placed on the certificate of title and on the instrument of transfer itself.

[54] Turning to the transfer of the third property, Ms Porteous testified that the actual transfer documents had not been located. The Aumentum, however, indicated that Dudley and Winnifred Simpson transferred property to Ronald Simpson and Patsy Simpson as joint tenants. This transaction was registered on 6 December 2005, with the records indicating that the transfer instrument was lodged by Dudley Simpson.

[55] Ms Porteous testified that, at that time, a person lodging a transfer was not required to show identification. Sometime between 2010 to 2012, however, when persons who were not attorneys-at-law were lodging transfers, they were required to present identification. This was as a result of significant levels of fraud which had been taking place at the Office of Titles.

[56] That was the evidence for the appellants.

[57] The respondents' evidence was in stark contrast with that of the appellants.

Ronald and Patsy Simpson's evidence

[58] Ronald shared his understanding of his parents' intentions for the properties. In his understanding, the family home was for Gloria, the second parcel of land was his except for portions which had been surveyed, and a house which had been built for Maureen.

[59] Winnifred and Dudley constructed a commercial building on the second parcel of land, and operated a club known as Canoe Valley Entertainment Centre for two or three

years. Ronald stated that, prior to his return from Canada, he sent money to Dudley for the addition of a bathroom and kitchen to the house intended for him and for the installation of a metal gate and electrical rewiring for the commercial building.

[60] Shortly before he became married, he, Patsy and Dudley walked around the second parcel of land and Dudley pointed out its boundaries.

[61] Sometime in 2002, Dudley spoke to Ronald and Patsy about the third parcel of land. As a result of what Dudley said, Ronald believed that his father intended to give him and his wife the property as a wedding present. Dudley took Patsy and Ronald to Kingston, and introduced them to a gentleman named Mr Rodgers, who he said took care of his land business. Ronald and Patsy were presented with documents to sign so that the land could be transferred to them. Mr Rodgers told them that they had to pay 'transfer money', however they did not have the funds to do so at the time, and decided to 'hold off' until they could come up with the money. Sometime in 2005, Ronald returned to Kingston and paid the money. He then received a call concerning the title and went to collect it.

[62] Ronald denied attending the Office of Titles pretending to be Dudley, having anyone do so on his behalf, or lodging an instrument of transfer. He denied exercising undue influence over his father Dudley, who he described as business minded and independent in the handling of his affairs.

[63] Ronald also denied exercising undue influence over Winnifred. He stated that when he lived nearby, he visited her on a daily basis. Despite her age, Winnifred remained fairly independent and continued to perform her daily activities. However, he assisted her by taking her to the doctor, grocery shopping and paying her utility bills. From 2005, however, Maureen arranged for the grocery shopping as well as the bill payments.

[64] Up to 2008, the year before she died, Winnifred continued to rear chickens, feeding them and cleaning the chicken house on her own. Ronald did not at any time

get the impression that his mother, up to the time of her death, had difficulty recognising persons.

[65] Ronald observed that Winnifred did not get along with the first helper that was hired, and he asked the helper to leave after he heard her speaking harshly to Winnifred. He had nothing to do with the departure of the second helper. It was Maureen who fired the third helper in or about 2009, and, thereafter, he hired a helper who remained until Winnifred died.

[66] After Dudley died, he applied for death benefits for Winnifred to help to maintain her. Winnifred was receiving the payments until 2005, when Gloria, and then Maureen, took it over.

[67] In or about 2004, Patsy contacted Digicel about erecting a tower on the second parcel of land, and they entered a lease agreement. Although the property had already been given to him, his name was not on the title, and Digicel required the title holder to sign the contract. He received payment for the lease in 2004, however in 2006, he received a letter from Digicel enclosing a cheque made payable to Maureen and Gloria. He then discovered that Maureen had sent to Digicel, a power of attorney dated 4 July 2005 and signed by Winnifred. At Winnifred's request, he took her to Mr Winston Young, attorney-at-law, for advice about the situation. Mr Young prepared a power of attorney dated 27 March 2006 which Winnifred signed. This was submitted to Digicel. Digicel conducted a survey of the property in May 2006, visited the property, and spoke with Winnifred. Thereafter Digicel decided to make the lease payments to him.

[68] In or about 2007, locks on the commercial building were removed, and two men entered the building, claiming to have signed a lease agreement with Maureen. Ronald consulted with a lawyer and brought an action against them for trespass and an injunction. Winnifred attended court to support him in the action. It was while the proceedings were ongoing, that Winnifred signed a transfer so that the second parcel of land could be formally given to him. The transfer was first signed in 2007 and was

lodged at the Stamp Office for assessment. Ronald and Patsy objected to the assessment, and wrote to the Stamp Commissioner in January 2008. They later received assistance from the Land Administration and Management Programme regarding the matter, and a fresh transfer document was required. Winnifred signed a fresh instrument of transfer in 2008.

[69] Patsy corroborated Ronald's evidence, including that Winnifred was mentally sound up to her death.

Keith Jones' evidence

[70] Keith Jones, a relative of the Simpson family, testified for the respondents. He visited Winnifred once per month. During his visits with her, she appeared generally well, and her only health complaint was that her joints were swollen from arthritis. Sometime in 2007, he witnessed Winnifred, Ronald and Patsy signing a document dated 12 October 2007, and entitled "The Registration of Titles Act Transfer". He also witnessed all three persons signing another Transfer document dated 3 April 2008. On both occasions when he met with Winnifred, he asked her to read through the documents, and asked her if they reflected her wish. Winnifred appeared to have had full knowledge and understanding of the documents she was signing, was in her right mind and was fully competent to execute them.

The appeal

Grounds of appeal

[71] The grounds of appeal are:

- "a) The Learned Trial Judge erred in law in failing to find that Winnifred Simpson and/or Dudley Simpson generally reposed trust and confidence in [the respondents];
- b) That the Learned Judge erred in law in failing to find that a relationship of ascendancy and dependency

existed between Winnifred Simpson and/or Dudley Simpson and [the 1st and/or 2nd respondents].

- c) The Learned Judge erred in law in failing to find that the relationship of trust and confidence and/or alternatively the relationship of ascendancy and dependency was abused by [the respondents] in respect of Winnifred and/or Dudley Simpson;
- d) The Judge erred in law in failing to find that the transfers of the second and/or third parcels of land to [the respondents] were of such size and nature as to call for an explanation as being not readily explicable by the relationship of the parties;
- e) The Learned trial judge erred in law in failing to find that [the respondents] unfairly exploited Winnifred Simpson and/or Dudley Simpson to obtain some unfair advantage in circumstances where equity ought to intervene to set aside the said transaction;
- f) The Learned Judge erred in law in finding that no relationship capable of giving rise to undue influence existed between Winnifred Simpson and/or Dudley Simpson and [the 1st and/or 2nd respondents];
- g) The Learned Judge erred in law in failing to find that Winnifred Simpson lacked the requisite mental capacity to transfer the second parcel of land to [the respondents];
- h) The Learned Judge erred in law in failing to find that the transfer of the second parcel of land by Winnifred Simpson to [the respondents] was inequitable and/or unconscionable;
- i) The Learned judge failed to take account, or failed to take sufficient account of the admissions by [the respondents] that:
 - i. [The 1st respondent] exercised influence over Winnifred Simpson in getting her to instruct the postmistress to send her mail, including mail concerning her pension cheque to him;

- ii. [The respondents] exercised influence over Winnifred Simpson in getting her to enter into and sign a lease with Digicel and authorize payments of money thereunder to [the 1st respondent];
 - iii. [The 1st respondent] exercised influence over Winnifred Simpson in taking her to Mr. Winston Young, Attorney-at-Law for the purpose of preparing a Power of Attorney in circumstances where both [respondents] were present;
 - iv. [The 1st respondent] exercised influence over Winnifred Simpson in getting Winnifred Simpson to attend court on his behalf in relation to the second parcel of land;
 - v. [The respondents] never allowed Winnifred Simpson to obtain any independent legal advice, or any legal advice before effecting the transfer of the second parcel of land to [the respondents];
 - vi. Winnifred Simpson gave possession of the titles to all the properties owned by her to [the 1st respondent], including the title to their family home which all parties agreed in evidence was for Gloria Simpson;
- j) The Learned Judge erred in law in rejecting the medical evidence of the Medical Doctor, Dr. Sheldon Brown and the evidence of eyewitnesses of the medical and mental state and condition of Winnifred Simpson;
- k) The Learned Judge erred in law in failing to take into account and/or appreciate that the effect of the transfer of the second parcel of land to [the respondents] was that [the 1st appellant] was effectively disinherited insofar as the house which she was given was on the second parcel of land;

- l) The learned Judge failed to take account, or failed to take sufficient account of the following facts that were not in dispute:
- i. The transfer of the second parcel of land to [the respondents] was against the disposition as contained in the Last Will and Testament of Winnifred Simpson;
 - ii. The transfer of the second parcel of land was initiated by [the respondents] on the recommendation/suggestion of [the 1st respondent's] Attorney-at-Law Mr. George Clue and was not an independent act or decision of Winnifred Simpson;
 - iii. The explanation of the transfer by Keith Jones to Winnifred Simpson was that the transfer was from mother to son and no mention was made of [the 2nd respondent];
- m) The learned Judge erred in law in failing to find based on all the circumstances and on the evidence presented by [the appellants] that the transfer of the third parcel of land was fraudulent."

[72] In light of these grounds of appeal, the appellants seek the following orders:

- "a. An order setting aside the trial Judge's Order.
- b. An order granting judgment in favour of the Appellants.
- c. An order that the Respondents pay to the Appellants, the costs of this appeal and in the court below, to be taxed if not agreed.
- d. Such further and/or other relief as this Honourable Court deems just."

Issues

[73] In oral submissions, the appellants indicated that they were pursuing the issue of fraud solely in respect of the third parcel of land. However, they also argued that the transfer could be vitiated arising from undue influence, or on the basis that the transfer was unconscionable and inequitable.

[74] Insofar as the transfer of the second parcel of land was concerned however, they argued that the transaction should have been vitiated due to undue influence and/or the fact that it was unconscionable and inequitable.

[75] In determining the outcome of this appeal, the following are critical issues that this court must decide:

Fraud (the third parcel of land):

- i. whether the judge erred in finding that the appellants failed to prove that the respondents fraudulently transferred the third parcel of land into their joint names. (Ground m)

Undue influence (the second and third parcels of land):

- ii. whether the judge erred in finding that the appellants had failed to prove that there was a relationship of trust and confidence or ascendancy and dependency between Winnifred Simpson and/or Mr Dudley Simpson and the respondents. (Grounds a, b, f and i)
- iii. whether the judge erred in failing to find that the transfers called for an explanation, and erred in finding that the evidential burden had not shifted to the respondents to prove that the transfers of land

were freely and independently made by Dudley and Winnifred Simpson. (Grounds c, d, k and l)

Inequitable and/or unconscionable transactions (the second and third parcels of land):

- iv. whether the judge erred in finding that Winnifred had the mental capacity to make the transfer of the second parcel of land. (Grounds g and j)
- v. whether the judge erred in finding that the appellants had not proved that the transfers of the parcels of land were inequitable and/or unconscionable warranting the intervention of the court of equity. (Grounds e and h)

The law

Findings of fact and credibility

[76] Before examining the submissions and the law relating to the particular issues, it is useful to outline general principles about which there is no dispute and which assume a high level of importance in the case at bar. On a review of the appellants' grounds of appeal, the majority of the issues which are raised are not errors of law, but, instead, relate to the findings of fact which the judge made, or are mixed questions of fact and law. There are occasions when the appellant disagrees with the findings of fact which the judge made, and there are occasions when the appellant believes that certain facts ought to have convinced the judge that particular elements required in proof of either fraud, undue influence or unconscionable transactions, had been satisfied.

[77] Brooks JA (as he was then) in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, in a very comprehensive manner, outlined the law in relation to how this

court ought to treat with a judge's findings of fact and rulings on the credibility of witnesses. He said at the following paragraphs:

"The law relating to findings of fact

[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:

'... It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord **Macmillan in Thomas v Thomas** [[1947] AC 484] at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.** Occasions meriting appellate

intervention would include when a trial judge failed to analyse properly the entirety of the evidence: **Choo KokBeng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.' (Emphasis supplied)

....

[10] In the latter case, K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

'The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.'"
(Emphasis as in the original)

[78] In **Carlton Williams v Veda Miller** [2016] JMCA Civ 58, Edwards JA (Ag) (as she then was) cited the case of **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410, which provides a detailed examination of this principle of law. At paragraph [102], she recited the dictum of Patterson JA (Ag), which states:

"Where there is an appeal from the trial judge's verdict based on his assessment of the credibility of witnesses that he has seen and heard, an appellate court **'in order to reverse must not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'** (per Lord Kingsdown in *Bland v Ross*, the Julia

(1980) 14 Moo P.C.C. 210 at p. 235) Lord Wright, in his opinion in *Powell v Streatham Manor Nursing Home* (supra) at page 67, quoted Lord Sumner's views as to 'the proper questions which the Appellate Court should propound to itself in considering the conclusions of fact of the trial judge.

- i. Does it appear from the President's judgement [sic] that he made full judicial use of the opportunity given him by hearing the viva voce evidence?
- ii. Was there any evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?
- iii. Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression' or any specific misunderstanding or disregard of a material fact or any "extreme or overwhelming pressure" that has had the same effect?" (Emphasis supplied)

See also **Attorney General and Another v Paul Facey** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 25/2006, judgment delivered 31 July 2007 and **Cecillia Mitchell Davy v Riley Adolphus Davy** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 19/2004, judgment delivered 30 March 2007.

[79] The case law has reiterated that appellate courts should be cautious in interfering with the findings of a trial judge who has had the privileged position of observing the witnesses and using that privileged perspective to inform a conclusion on credibility (see **V (A Child), Re** [2015] EWCA Civ 274, per McFarlane LJ at paragraph 15).

[80] In **Ronald Chang and Another v Frances Rookwood et al** [2013] JMCA Civ 40, Dukharan JA at paragraph [26] cited the dictum of Lord MacMillan in **Watt (or Thomas) v Thomas** [1947] AC 484, 490, where he said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial.

[81] Further Viscount Simon in **Watt (or Thomas) v Thomas**, said at page 486:

“... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, **but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.** This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.” (Emphasis supplied)

[82] In considering the grounds of appeal, the above established principles regarding the approach taken by the appellate court when reviewing findings of fact, will therefore be applied.

[83] Counsel for the appellants in his submissions on the grounds of appeal, categorised them in two main areas; namely, fraud, then undue influence and

inequitable and/or unconscionable transactions. In considering this appeal, I will take a similar approach.

Issue (i) - Fraud

Whether the judge erred in finding that the appellants failed to prove that the respondents fraudulently transferred the third parcel of land into their joint names

Submissions

Appellants' submissions

[84] Mr Hanson, counsel appearing on behalf of the appellants, argued that the judge erred in law in failing to find in all the circumstances, and on the evidence presented, that the transfer of the third parcel of land was fraudulent. Counsel contended that there was no evidence that both Dudley and Winnifred signed the instrument of transfer in accordance with section 152 of the Act, therefore, the transfer was invalid. Counsel noted that Ms Sharlise Porteous, Senior Deputy Registrar of Titles and Manager Legal Applications Branch at the National Land Agency, testified that the transfer documents could not be located, and it could have been a case where it was misplaced due to movement between various departments.

[85] Counsel submitted that neither parent lodged the instrument of transfer, but someone purporting to be Dudley did so. He highlighted that Ms Porteous deponed that the Office of Titles' electronic system, revealed that the transfer was lodged on 6 December 2005 by Dudley; two years after his death. Counsel highlighted that, as pointed out by Ms Porteous, no identification was needed at that time to lodge an instrument of transfer, and identification was only required if an issue arose with the documents, for example with the signature or seal of a Justice of the Peace. This resulted in high incidences of fraud during that period of time.

[86] Counsel referred to paragraphs [71]-[92] of the judgment, where the judge considered the issue of fraud. He argued that, having examined these paragraphs, it was evident that the judge was very accommodating of the explanations given by the

respondents. For example, at paragraph [76] of the judgment, the judge stated that on Ronald's account, he did not see Winnifred Simpson sign the transfer, and that Mr Rodgers instructed "us" to sign, but there was no indication whether "us" included Dudley Simpson. On Patsy's account, she outlined that she did not see Dudley Simpson sign the transfer, but both herself and the 1st respondent did. However, the judge nevertheless found that there was no evidence that the parents did not sign the transfer.

[87] Counsel submitted that at paragraph [85] of the judgment, the judge offered an explanation for the inconsistency in relation to when the transfer was executed and submitted to the Office of Titles. The 1st respondent in cross-examination stated that the transfer was submitted in 2002, but he collected the document physically in 2005. The evidence was that Dudley Simpson lodged the transfer in 2005, but the judge, according to counsel, found that this was due to the protracted and disjointed process and participation of Mr Rodgers.

[88] Counsel argued that, in effect, the judge "breathed life into the mythical and elusive Mr Rodgers" as the 1st respondent was unable to provide, in detail, particulars of this Mr Rodgers. Counsel also highlighted that at paragraph [90] of her judgment, the judge accepted and explained away inconsistencies as "inability to recall".

[89] In light of the foregoing, counsel argued that the appellants met the requirements in establishing fraud. He relied on the case of **Asset Company Limited v Mere Roihi et al** [1905] AC 176, where the court stated that fraud should be actual, not constructive, and must be brought home to the person whose registered title is impeached or to his agents.

Respondents' submissions

[90] Counsel for the respondents argued that the court was being invited to make baseless assumptions. For instance, the court was urged to assume that Winnifred or Dudley did not know of the transfers and did not sign them, although there was no

evidence to prove that. The court was also being urged to assume that if the titles were collected in a manner that did not accord with the usual procedure at the Office of Titles, and the submitted documents cannot be found there, fraud had been committed.

[91] Counsel examined the relevant law in relation to fraud, and highlighted that fraud must be pleaded and particularized (see **Davy v Garrett** (1877) 7 Ch D 473) and must be proven, not inferred or presumed (see **Chin v Watson's (Off-Course Betting) Ltd** (1974) 12 JLR 1431 and **Wallingford v Mutual Society** (1880) 5 App Cas 685). Counsel then examined sections 68 and 70 of the Act which speak to the indefeasibility of a registered title, save and except in the case of fraud. In looking at what amounted to fraud, counsel also referred to the case of **Assets Company Limited v Mere Roihi**, which stated that the fraud must be actual fraud, and it must be brought home to the person whose registered title is impeached or to his agents.

[92] Counsel submitted that the burden of proof was on the appellants to show that the respondents acted fraudulently, and in order to discharge that burden the court must consider the strength of the evidence (see **Hornal v Neuberger Products** [1957] 1 QB 247 at pages 264 and 266). In addition, the evidence to prove fraud must be clear, cogent, indisputable and conclusive (see **Sunshine Dorothy Thomas v Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus Brown, deceased) et al** [2015] JMCA Civ 22, paragraphs [104]-[111] and **McCormick v Grogan** (1869) LR 4 HL).

[93] Counsel indicated that these applicable principles were correctly outlined by the judge in her judgment at paragraphs [49]-[57]. Further, the judge heard several witnesses on this issue and found in favour of the respondents. She submitted that the appellants failed to meet the requisite thresholds in proving fraud, and there was nothing in the appellants' assertions which pointed to any acts of dishonesty.

The judge's treatment of the issue of fraud

[94] At paragraphs [49]-[57] the judge looked extensively at the law as regards fraud. She examined sections 68, 70 and 161(d) of the Act and then referred to and relied on the leading case of **Assets Co Ltd v Mere Roihi** in which Lord Lindley delivered the judgment. She highlighted page 210 of that judgment. Thereafter, at paragraph [53], the judge succinctly summarized the relevant principles in the following manner:

“From the above, the following principles can be extracted: -

- (i) Fraud involves an element of dishonesty.
- (ii) The fraud must be actual as opposed to constructive or equitable.
- (iii) In order to invalidate a registered title, the fraud in issue must be brought home to the registered owner or to his agent.
- (iv) Abstaining from enquiries which may have revealed a fraud in circumstances where suspicions have been aroused may constitute a fraud on the part of the registered owner.
- (v) Presentation for registration of a forged or fraudulently or improperly obtained document does not amount to fraud if the person so presenting honestly believed that the document was genuine.”

[95] Importantly, the judge at paragraphs [54]-[57] also highlighted that firstly, fraud must be specifically pleaded and sufficiently particularized (she relied on **Davy v Garrett** (1877) 7 Ch D 473 at 489 and **Wallingford v Mutual Society** at 697) and secondly, fraud must be proved on the clearest, most cogent and indisputable evidence on a balance of the probabilities (she relied on **Linel Bent (Administrator of the estate of Ellen Bent, deceased) et al v Eleanor Evans** (unreported), Supreme Court, Jamaica, Suit No CL 1993/B115, judgment delivered 27 February 2009). The

judge noted at paragraph [57], that in dealing with this issue, the evidence had to be examined in light of the pleaded particulars of fraud. She then outlined the particulars of fraud at paragraph [58] as contained in the amended particulars of claim.

[96] At paragraphs [71]-[92], the judge in a detailed manner, analysed the issue of fraud as alleged and particularized, and made certain findings. These findings will be examined later in this judgment.

Analysis

[97] From the outset it is necessary to look at the particulars which were pleaded in the case at bar. In the amended particulars of claim filed on 29 April 2014, the appellants pleaded the following particulars of fraud:

- a) Acquiescing in engrossing or causing to be engrossed signatures on an Instrument of Transfer purporting to be that of the deceased and/or the said Dudley Simpson when it was well known to [the respondents] that the signatures were not those of the deceased and/or the said Dudley Simpson;
- b) Fraudulently using an Instrument of Transfer purportedly executed by the said Dudley Simpson after he was deceased to transfer the third parcel of land into their names;
- c) Purporting to be, or having someone purporting to be, the said Dudley Simpson attend at the Office of the Registrar of Titles and lodge the Instrument of Transfer and supporting documents and thereby procure the transfer of the said third parcel of land into the joint names of [the respondents];
- d) Presenting or causing to be presented for registration a fraudulent document;
- e) Fraudulently obtaining the transfer of the said third parcel land out of the names of the parents and into the names of [the respondents];

- f) Falsely representing that the parents had agreed to make a gift of their interest in the said third parcel of land to [the respondents].”

[98] In considering the issue of fraud, the legislative framework relating to registered titles is relevant. A registered title is regarded as sacrosanct except in certain circumstances. The Act provides:

- “68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall be, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.
- 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, **the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud**, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument

evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

...

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

...

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

[99] The Act, therefore, provides that a registered title can be set aside on proof that it was acquired by fraud. The relevant principles as regards fraud are well settled. In a judgment of this court, **Sunshine Dorothy Thomas v Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus Brown, deceased) et al** , Panton P underscored at the following paragraphs:

"[43] Attorneys-at-law dealing with civil litigation have traditionally been admonished **to treat the issue of alleging fraud very cautiously and carefully**. Lord Selborne LC in **John Wallingford v Mutual Society and the Official Liquidator** (1880) 5 App Cas 685 at page 697 stated the general rule. He said:

'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an

avertment of fraud of which any Court ought to take notice.'

[44] In **Associated Leisure Ltd and others v Associated Newspapers Ltd** [1970] 2 All ER 754 at pages 757-8, Lord Denning MR **cautioned that fraud should not be pleaded unless there was "clear and sufficient evidence to support it"**. Similarly in **Donovan Crawford and Others v Financial Institutions Services Ltd** [2005] UKPC 40, the Privy Council emphasised the standard in respect of the issue of fraud in civil litigation. It said, at paragraph 13 of its judgment:

'It is well settled that actual fraud must be precisely alleged and strictly proved.'" (Emphasis supplied)

See also **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1.

[100] At paragraphs [71]-[92] of the judgment, the judge extensively analysed the issue of fraud. There is no complaint about the legal principles which the judge outlined concerning fraud. The judge, however, found that there was no clear and cogent evidence to support the appellants' allegations that the respondents fraudulently transferred the third parcel of land into their joint names. The judge indicated that the appellants had the burden of proof to prove fraud, and they failed to do so. The appellants did not present evidence that Winnifred Simpson or Dudley Simpson did not sign the instrument of transfer. Since the instrument of transfer could not be located, by no fault of the respondents, the authenticity of the signatures, or an allegation that the signatures were not properly witnessed, could not be explored. Furthermore, the fact that the respondents did not see Winnifred or Dudley sign the instrument of transfer, could not in and of itself, lead to the conclusion that they had not signed it.

[101] The judge took into account the deficiencies and the weaknesses in the Office of Titles at the time, such as the fact that, at the relevant time, individuals conducting transactions there did not have to present their identification. She also took into

account the inconsistencies in relation to the date when the transfer was lodged, and inferred that the variance was due to the involvement of Mr Rodgers. The judge accepted the evidence of Ms Porteous that a transfer would not be registered unless the legal and procedural requirements were met. Additionally, the judge found that the failure of the parents to utilize the services of an attorney-at-law for the particular transaction, as they did in the past, did not provide evidence of fraud. Therefore, the judge concluded at paragraph [91] of her judgment:

“On the totality of the evidence, it has not been established by [the appellants] that there was any fraudulent activity as regards either the execution of the instrument of transfer or the lodging of same by anyone and in particular by [the respondents]. **The mere suspicion of fraud cannot amount to proof of same.**” (Emphasis supplied)

[102] Several authorities have emphasized that allegations of fraud are serious, therefore, allegations should not be made lightly and certainly not without evidence to support it. Suspicious events, by themselves, do not prove fraud. For example, the fact that Dudley died in 2003, but the transfer of the third parcel of land by both Dudley and Winnifred to the respondents was registered in 2005, did appear suspicious. However, the judge identified, from the evidence, a basis on which this occurred.

[103] Guided by the unequivocal principles in respect of proving fraud, it is clear that the conclusion to which the judge arrived was the only one open to her. The evidence presented to the court did not support the particulars of fraud pleaded by the appellants. As such, there is no basis on which it would be proper to interfere with the findings of the judge. It cannot be successfully argued that the judge was plainly wrong.

Issues (ii), (iii), (iv) and (v) - Undue influence and inequitable and/or unconscionable transactions

Whether the judge erred in finding that the appellants had failed to prove that there was a relationship of trust and confidence or ascendancy and dependency between

Winnifred Simpson and/or Mr Dudley Simpson and the respondents (Grounds a, b, f and i)

Whether the judge erred in failing to find that the transfers of land called for an explanation, and erred in finding that the evidential burden had not shifted to the respondents to prove that the transfers were freely and independently made by Dudley and Winnifred Simpson (Grounds c, d, k and l)

Whether the judge erred in finding that Winnifred had the mental capacity to make the transfer of the second parcel of land (Grounds g and j)

Whether the judge erred in finding that the appellants had not proved that the transfers of the parcels of land were inequitable and/or unconscionable warranting the intervention of the court of equity (Grounds e and h)

Submissions

Appellants' submissions

[104] Counsel highlighted that there are two categories of undue influence; actual and presumed. He relied on **Kenneth Charles Hart et al v Susan Anne Burbridge et al and Arthur Kenneth Gerald Samways et al v Susan Anne Burbridge et al** [2013] EWHC 1628 Ch, in which Sir William Blackburne noted at paragraph 37, that it is in the case of actual undue influence that one is required to prove affirmatively that the transaction in question was caused by the alleged influence. In the case of presumed undue influence, on a balance of probabilities, there must be proof of reposed trust and confidence, ascendancy or control, and that the transaction was of such a size or nature which calls for an explanation. Having proved this, the burden of proof shifts, requiring proof on a balance of probabilities that the transaction was the result of the independent will of the transferor.

[105] Counsel submitted that there are certain categories of relationship which however give rise to a presumption of influence, they include parent and child; solicitor and client; doctor and patient; and trustee and beneficiary (he relied on **Leslie Augustus Watts (By Lloyd Barnett, his next friend and Guardian Ad Litem) v Lelieth Watts et al** [2013] JMCC Comm 15, (paragraph [95]), **Lloyd Haughton and Another (Executors of estate of Alexander Haughton, Deceased) v Yvonne**

Haughton and Yvonne Haughton (By her duly appointed Attorney Dennis Forsythe) v Lloyd Haughton and Another (Executors of estate of Alexander Haughton, Deceased) and Cynthia Rainford, (unreported), Supreme Court, Jamaica, Claim Nos E476/2001 and 2003HCV1445, judgment delivered 17 November 2004), (paragraph 11) and **Robert Murray v Reuben Deubery and Another**, (unreported) Antigua and Barbuda, Court of Appeal, Civil Appeal No 16 of 1993, judgment delivered 15 January 1996, per Sir Vincent Floissac, CJ). In light of those principles, counsel contended that the judge erred in her approach at paragraphs [117]-[185] of the judgment, as she treated the whole case as if it was actual undue influence; requiring affirmative proof of undue influence. In so doing, counsel argued that the judge failed to acknowledge the distinction between the two types of undue influence.

[106] Counsel pointed out that at paragraph 12 of **Lloyd Haughton and Another (Executors of estate of Alexander Haughton, Deceased) v Yvonne Haughton and Yvonne Haughton (By her duly appointed Attorney Dennis Forsythe) v Lloyd Haughton and Another (Executors of estate of Alexander Haughton, Deceased) and Cynthia Rainford**, Sykes J (Ag) (as he was then) outlined objective facts the courts are to look at in determining whether undue influence had occurred. These include the victim's age, nature of character, general state of health, business experience, financial circumstances at the time of transaction, the nature and duration of the relationship with parties, whether the transaction causes manifest disadvantage or makes commercial sense, whether there was independent legal advice or the absence of such and whether there was an appreciation of the full impact of the transaction and likely consequences. Counsel also relied on **Kenneth Charles Hart et al v Susan Anne Burbridge et al and Arthur Kenneth Gerald Samways et al v Susan Anne Burbridge et al** in support of the submission.

[107] Counsel argued that the evidence presented to the court supported the fact that there was presumed undue influence. The relationship in the instant case was that of

parent and child, and there was evidence to prove that the transfers of the parcels of land did not result from the exercise of the independent free will of Winnifred and/or Dudley, and were affected by dependency or ascendency of the 1st and/or 2nd respondent. He further argued that the judge failed to properly appreciate or had ignored the following evidence that was indicative of a relationship of trust and confidence and ascendency and dependency:

- a. influence of Winnifred Simpson by the 1st respondent to lease a part of her property, where the 1st respondent negotiated and agreed to the terms and initially benefited from the lease payments;
- b. the 1st respondent took Winnifred Simpson to attorney-at-law, Winston Young in 2006 to execute a power of attorney invalidating the previous one giving the 1st appellant and Gloria Simpson power of attorney concerning her affairs;
- c. the 1st respondent secured the attendance of Winnifred Simpson to court (as he was not the registered owner) when he initiated legal proceedings for recovery of possession of the commercial building;
- d. the 1st respondent, acting on the advice of his attorney-at-law, George Clue, procured the transfer of the second parcel of land without allowing Winnifred Simpson to obtain independent legal advice; and
- e. the 1st respondent used to collect the pension cheques payable to Winnifred Simpson before the intervention of the 1st appellant and/or Gloria Simpson.

Counsel also argued that, although a Justice of the Peace was present during the execution of the transfers and purported to provide independent legal advice, there was no evidence that Winnifred Simpson appreciated the impact of what she was doing. He submitted that the law is clear that the degree of understanding required in these transactions is a high one (see **In re Beaney, Deed** [1978] 1 WLR 770). Counsel also submitted that the Justice of Peace did not give proper legal advice as all that he explained was what the transaction was about and his explanation was inaccurate. Counsel referred to and relied on the case of **Royal Bank of Scotland v Etridge (No 2)** [2001] UKHL 44, which he stated deals with the content of the legal advice to be given.

[108] Additionally, counsel contended that the judge erroneously equated the advice of the Justice of Peace to that of an attorney-at-law. He referred to paragraph 46 of **Howell Evans et al v David Lloyd et al** [2013] EWHC 1725 (Ch), where the court highlighted that to prove that a gift resulted from the free exercise of an independent will, the most obvious way is after the nature and effect of the transaction had been fully explained by some independent and qualified person. Counsel submitted that in the instant case, the advice was not by provided an independent person, but instead by a childhood friend of the 1st respondent. Counsel further submitted that the transaction was tainted from the beginning to the end as the same person who explained the transactions, witnessed the signatures twice, and this was only discovered during cross-examination.

[109] In light of the evidence presented before the court, despite the inconsistencies in the appellants' case which the judge identified, counsel argued that there was sufficient evidence that there was an established relationship of reposed trust and confidence or ascendancy and dependency, this relationship was abused, and hence called for an explanation of these transfers. He also submitted that the transfers of the parcels of land were not in accordance with the intentions of the parents, in particular, Winnifred Simpson, by virtue of her last will and testament executed on 8 March 2004.

[110] Counsel submitted that it was alarming that, on the totality of the evidence, the judge found that the evidential burden did not shift to the respondents, therefore, requiring them to demonstrate that the transactions were as a result of the exercise of free will by Winnifred Simpson.

[111] On the issue as to whether the transfer of the second parcel of land was an unconscionable or inequitable transaction, counsel submitted that the judge erred when she found that the appellants had failed to prove that Winnifred lacked the requisite mental capacity when she signed the transfer documents.

Respondents' submissions

[112] Counsel submitted that, contrary to counsel for the appellants' contentions, the judge did not deal with the case as if it involved actual undue influence. Counsel referred to page 167 of the record of appeal (notes of evidence) where counsel for the appellants had indicated at trial that they were arguing presumed undue influence. The judge at paragraph [103] of her judgment had also acknowledged that the case concerned the issue of establishing presumed undue influence.

[113] While the appellants had argued on appeal that the case at bar was a relationship case, in which there was no need to prove the nature of the relationship, and influence is assumed, counsel stated that the appellants had not made such arguments before the judge. Counsel did not agree that the case at bar was a relationship case in which the law assumes that one party acquires a form of ascendancy or dominance over the other. She noted that these relationships include, solicitor and client, doctor and patient and parent and child. Counsel submitted that in the last category, the parent is the one who is assumed to exercise dominance over the child. However, in the instant case, counsel for the appellants was erroneously arguing that the influence would be assumed to go from the child to the parent.

[114] Relying on **Royal Bank of Scotland v Etridge (No 2)**, counsel submitted that the appellants had a burden to establish two matters; firstly, that the relationship was

one of trust and confidence and secondly, that the transactions were of such a nature and extent as to call for an explanation. In relation to the first limb, counsel pointed out that every day persons have influence over each other. Therefore, it could not be suggested that everyday transactions, without more, disable a person from freely exercising his or her will. She referred to and relied on **Kenneth Charles Hart et al v Susan Anne Burbridge et al and Arthur Kenneth Gerald Samways et al v Susan Anne Burbridge et al** (see paragraph [49]).

[115] Counsel contended that the evidence at trial were polar opposites on the question as to whether the respondents shared a relationship with parents, arising out of which, the will of the parents was suppressed. Counsel noted that the appellants argued that the 1st respondent had an acrimonious relationship with the family including the parents, rarely visited his mother and did not assist her financially or otherwise. On the other hand, the respondents' evidence was that they had a very close relationship with Dudley and Winnifred. The judge, after considering the nature of the relationships, concluded at paragraphs [128] and [164] that there was no illustration of dependency and she was correct in her approach.

[116] Counsel referred to **Howell Evans and Others v David Lloyd and Another**, in which the court noted that although the relationship between the parties is a close one and is one of mutual love and trust, that does not necessitate a finding that the relationship is one resulting in suppression of will. Counsel contended that in the case at bar, there was no evidence before the court to justify such a finding. The father was described as an independent minded individual and the mother had her own chicken rearing business. The allegation concerning the mother's mental incapacity was rejected by the judge after she assessed the evidence. Counsel urged that this court should be reluctant to disturb this finding (see **Industrial Chemical Co (Jamaica) Ltd v Ellis**).

[117] In respect of the second limb; a transaction causing for an explanation, counsel argued that it is absurd to presume that an everyday gift by a parent to a child was brought about by undue influence. She submitted that this does not prove that

something is amiss in order to reverse the burden of proof which calls for an explanation (see paragraph 24 of **Royal Bank of Scotland v Etridge (No 2)**).

[118] Counsel reiterated that, having looked at the evidence, the judge found at paragraphs [166] and [173] of the judgment that the gifts were explicable, and, further, that the appellants failed to demonstrate that the gifts were unconscionable or inequitable within the meaning of equitable fraud (see **Hart v O'Connor** [1985] UKPC 1). There was no evidence that the respondents had acted in a morally culpable or reprehensible way, and the judge was correct to reject the evidence on which the appellants sought to rely to show that Winnifred lacked the requisite mental capacity when she signed the transfer documents.

[119] In light of this, counsel also submitted that the judge was correct in finding that the appellants had not discharged the burden of proof and that the evidential burden had not shifted to the respondents to explain the transactions. As such, there was no requirement to establish that legal advice had been obtained. Nevertheless, counsel contended that the judge, at paragraphs [176]-[184] of her judgment, adequately addressed the issue when she found that Winnifred Simpson obtained independent legal advice from the Justice of the Peace who explained the transaction to her by reading the document and enquiring whether she understood what she was doing.

The judge's treatment of the issues of undue influence and inequitable and/or unconscionable transactions

[120] The judge stated that the fact that a parental relationship existed, and that the parents were senior citizens, did not necessarily equate to the existence of a relationship in which Ronald was capable of exercising influence over them.

[121] The judge decided to examine the relationship between Ronald and the parents when they were both alive, as distinct from the relationship between mother and son after the father died. She noted that Maureen contended that Ronald exerted undue influence over his parents, who relied heavily on him because he was the only child in

Jamaica, and had lived with them for a while on his return to Jamaica. However, from the evidence led by the appellants, the relationship between Ronald, his parents, and the entire family, deteriorated after he married Patsy. In fact, he did not invite the parents to the wedding and only told them the day before that he was getting married. In light of this evidence, the judge stated that, even before the transfers of the parcels of land had occurred, on the appellants' case, Ronald had an unhealthy relationship with his parents. Nevertheless, Maureen said Ronald continued visiting his parents and they continued to rely on him.

[122] The judge stated that Maureen did not testify to the manner in which the parents relied on Ronald. Gloria testified of a terrible relationship between Ronald and the family after the wedding, with him being hostile and aggressive. Lennox Henry stated that Ronald did not speak to his father and would not really speak to his mother. The judge observed that while the appellants claimed that the parents relied heavily on Ronald, their evidence "cast a contrary picture", and they did not lead tangible examples of how the parents relied on Ronald.

[123] The judge looked at the personalities of the parents. She noted that, on the appellants' case, Dudley was an independent man who was the head of the household and took care of his own affairs. There was nothing in the evidence to suggest that he was incapable of making reasoned decisions or was dependent on anyone. Maureen had testified that she did not need to help her father financially, as he took care of himself and collected his own pension.

[124] In considering Winnifred's personality, the judge stated that, on the appellants' case, she was a devoted wife who supported her husband and was also a sensible, proud and intelligent woman with good business sense before she became ill.

[125] The judge concluded that the fact that Ronald was the only child living in Jamaica, and that the parents were old (in their seventies) when they made the transfers, as well as the fact that Ronald lived close to them, was not sufficient to

support a conclusion that they relied heavily on him. Instead, the judge found that there was a “dearth of evidence” to support the notion that Dudley was reliant on Ronald and it was a similar situation in relation to Winnifred, during her husband’s lifetime.

[126] Consequently, the judge did not find the appellants’ witnesses to be credible as regards the “bald claim” that the parents relied heavily on Ronald. She concluded that the appellants had not proved that either Dudley or Winnifred relied on the respondents at the time of the transfer of the third parcel of land. Consequently, the appellants had failed to prove that a relationship capable of giving rise to the necessary influence existed—that is a relationship of trust and confidence or of ascendancy and dependency.

[127] The judge then examined the relationship that existed between mother and son after Dudley’s death, in light of the appellants’ contention that Winnifred was very dependent on the respondents as they lived close by.

[128] Again, the judge noted the appellants’ evidence of a poor relationship between Ronald and his family after he became married. She highlighted that one of the appellants’ witnesses, Lennox Henry, said that Ronald would not really speak to his mother after his marriage, and no evidence was led of a reconciliation of the relationship. In fact, the evidence was that Ronald hardly visited his mother, and that the respondents had no interest in Winnifred’s physical and mental health, which began deteriorating after her husband died. According to the appellants’ case, the respondents did not provide financial or other help, but instead tried to deprive her of her things and frustrate the caregivers Maureen and Gloria employed.

[129] The appellants stated that Winnifred became aggressive towards the respondents. While Gloria initially said that Winnifred had become generally aggressive and would fight her (Gloria) when she tried to bathe her, she reneged from this position and said that their mother was aggressive towards the respondents.

[130] The judge looked at the overall picture and concluded at paragraphs [134]-[138]:

“[134] I am of the view that the overall picture painted by the evidence does not lend to a conclusion of dependency of mother on [the 1st respondent] or a relationship of trust. The bare declaration that Mrs Winnifred Simpson became very dependent on [the respondents] after the death of her husband is inconsistent with the general tenor of the evidence as regards the character of the relationship that existed. The thrust of the evidence when considered in total was that of an unhealthy relationship wherein [the 1st respondent] alienated himself from the family and essentially ignored his mother who was ailing and needed assistance. It is difficult to fathom the manner in which she relied on him given that [the appellants’] case is that all her needs were provided for by the sisters to include helpers who lived at her home. It is also difficult to appreciate the grounds upon which it is alleged that [the 1st respondent] kept his mother isolated and under his direct authority and control. It is also challenging to comprehend the opportunity [the 1st respondent] would have had to exert this undue influence over her given his lack of contact with her and also the presence of live in helpers that the sisters employed.

[135] I am of the view that the statements by the witnesses as regards dependency by Winnifred on [the 1st respondent] were made without giving a basis on which the court can adopt them as accurate. The pronouncement of Kayanna Booth [sic] for instance that Mrs Winnifred Simpson obeyed everything [the 1st respondent] told her without question was unsubstantiated by any such instance of this happening and was found to be not credible or convincing. Similarly, the declaration by Lennox Henry that [the 1st respondent] and his mother were very close and that he ‘had great influence over her’ was explained under cross

examination to mean that [the 1st respondent] had great love for her.

[136] I find no basis upon which I can accept the position that Mrs Winnifred was reliant on [the 1st respondent] or that he was able to exert influence over her. It is also inconsistent with the general picture that was painted of a terribly strained relationship wherein she was aggressive towards [the respondents] and they were uncaring towards her.

[137] I also can find no evidence to support the particulars pleaded as it relates to the parents, either together or individually, sharing a relationship of mutual trust with [the 2nd respondent] their daughter in law given the evidence that they disliked her.

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

[131] The question of Winnifred’s mental health, and whether she was able to make reasoned decisions, was then considered by the judge, who observed that the parties presented “diametrically opposed evidence”. The judge referred to the appellants’ evidence that Winnifred’s physical and mental health declined after her husband died and that she was incontinent, had challenges recognising persons, became forgetful, would wander away from home, and spoke gibberish. She also noted the appellants’ contention that Winnifred was not mentally capable when she signed the transfer for the second parcel of land.

[132] The judge stated that, from the evidence, Dr Brown, on whom the appellants relied, had not examined Winnifred when he prepared certificates of incapacity on 31 July 2006 and 10 October 2009. He had, instead, relied on information Maureen had given him, and prepared these certificates to facilitate release of pension funds to Maureen. He had never examined Winnifred to make a diagnosis of a mental condition

such as senile dementia and had not treated her for it. This was in contrast with his certificate that stated that “this patient was recently assessed as having further deterioration of memory and intellectual skills. She was deemed incapable of making responsible personal financial decisions”.

[133] Not surprisingly, the judge concluded that the appellants could not rely on the evidence in the certificate of incapacity to support their case, as the doctor had not examined Winnifred, but had instead relied on Maureen’s evidence that another doctor had diagnosed Winnifred as senile.

[134] The judge noted that the doctor had treated Winnifred for a urinary tract infection in 2007, and in 2008 for hypertension and osteoarthritis, and found it curious that the doctor had not noticed any obvious signs of mental deterioration, in contrast with the appellants’ other witnesses who spoke of Winnifred talking “gibberish” and not knowing her foot from a broomstick, when this would have been obvious to the doctor. The judge referred to Maureen’s evidence that by 2008 Winnifred’s mental condition had totally deteriorated and found it unbelievable that the doctor would not have observed this. She also observed that the physical ailments for which the doctor treated Winnifred did not appear as debilitating as the appellants’ witnesses claimed.

[135] The judge also found it telling that there was no dispute that Winnifred attended the proceedings which Ronald had initiated in the Parish Court, and that she spoke to the judge. Maureen’s evidence was that she had retained counsel in the matter, and the judge opined that if Winnifred had been mentally incompetent, she would not have been able to speak to the judge.

[136] The judge assessed the credibility and reliability of the appellants’ witnesses and found inconsistencies in the appellants’ case. At paragraphs [151]-[154], she wrote:

“[151] I was of the view that each of [the appellants’] witnesses who testified as to the nature of the relationship between the parents and [the respondents] had an interest to serve. There was

clearly no love lost between these witnesses and [the respondents]. Admittedly, the relationship between the sisters and [the respondents] had deteriorated and was virtually non-existent. They also conceded to disliking [the 2nd respondent]. Gloria accepted that there was an incident in which she herself bit [the 1st respondent] as a result of him assaulting her which matter was reported to the police. Kayanna's evidence must also be viewed in the context that she views herself as being like a daughter to Gloria, which may suggest where her loyalty rests. Similarly the relationship between Lennox Henry and [the respondents] was also poor and he had in fact been successfully sued by [the 2nd respondent] for slander for which he was ordered to pay damages.

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

[153] [The 1st appellant] for instance in her witness statement indicated that she first noticed the mental deterioration in her mother in 2005. Under cross examination however she indicated that it was actually in February 2004. Gloria stated that she noticed the problem in 2005 and that was when she and her sister hired a caregiver. Kayanna in her witness statement indicated that she noticed that Winnifred Simpson's mental condition had started to deteriorate in 2006, some months after she started caring for her. In her evidence she indicated that she noticed that something was wrong when she started wandering away which was in early 2005. Lennox Henry in his witness statement indicated that she started to deteriorate mentally in 2006 when she started wandering away from home which began some two years after the death of her husband.

[154] I find the evidence as presented by [the appellants] that Winnifred Simpson was mentally unfit to make reasoned decisions to be unreliable.

In fact if the court were to accept the evidence that she was mentally compromised from 2004 as [the 1st appellant] stated, this would call into question her competence in executing the very will that [the appellants] seek to have enforced.”

[137] In contrast, the respondents, the judge observed, had presented evidence that Winnifred was mentally and physically well, save for arthritis and high blood pressure from which she suffered. The Justice of the Peace, Keith Jones, who witnessed Winnifred’s signature on the transfer testified that he visited and had conversations with Winnifred from time to time and did not notice any deficiency in her mental health. When he witnessed Winnifred signing the transfers, he read the document to her, told her that she was transferring the property to her son, enquired whether this was what she wanted to do and she “responded in the affirmative.”

[138] Importantly, after reviewing the evidence of the Justice of the Peace, the judge found at paragraphs [156]-[158]:

“[156] I am of the view that a more balanced and accurate view of Winnifred Simpson’s mental condition is that provided by Justice of the Peace Keith Jones, even though he is a friend of [the 1st respondent]. I found him to be forthright in his evidence.

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

appreciated that she was divesting herself of the property, and by extension her estate.

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

[139] The judge found that the appellants’ description of the relationship between Ronald and his parents, Dudley and Winnifred, and later with his mother, Winnifred, was not credible and was exaggerated. The judge rejected the appellants’ evidence concerning the acrimony between Ronald and his parents, and later his mother.

[140] The judge expressly stated that she had arrived at her conclusion after analysing “the evidence as a whole.”

[141] Insofar as Ronald was concerned, the judge accepted his testimony that on his return to Jamaica, he lived in the house that his parents intended to give him, although the property was still owned by his parents. The judge accepted Ronald’s evidence that he wanted to keep his wedding small, and that was why only his best man and his wife’s maid of honour were invited. Importantly, the judge found that Ronald’s failure to invite his family to his wedding did not destroy his relationship with his family.

[142] Although Maureen and Gloria testified that Ronald only visited his mother infrequently, the judge found that since they lived in Canada, they were not able to speak fully to that issue. Where the evidence of Kayanna Boothe and Lennox Henry that Ronald scarcely visited his mother was concerned, the judge found it questionable, and noted inconsistencies in their estimates of the frequency of visits. While Ms Boothe said that Ronald would visit once or twice per month or none at all, Mr Henry said Ronald

would visit once a month or once a year. The judge found that the wide range given did not have a ring of truth and gave the court the impression that the evidence was being misrepresented as regards the relationship that existed.

[143] Turning to Ronald's evidence of his relationship with his mother, the judge found his description of a loving relationship in which they would talk about friends and relatives, and he would assist her by taking her to the doctor, grocery shopping and paying her utility bills, as "believable" and not indicative of dependency. The judge noted that, in any event, this assistance largely stopped in 2005, when Maureen took charge of these matters. This was some years before Winnifred transferred the second parcel of land to Ronald.

[144] The judge found that the evidence led did not satisfactorily support the appellants' claim that Ronald's relationship with Winnifred was unhealthy and acrimonious.

[145] Turning to the gifts which were made, the judge found at paragraph [166] that "the size and the nature of same are explicable by the relationship between the parties and by the circumstances regarding the transfers of the properties". She explained how she came to this finding by highlighting that:

- i. the parties agreed that the parents had always expressed their intention to give their various properties to the children, and the appellants had not shown that the parents changed their minds due to Ronald's "alleged" change in behaviour;
- ii. the fact that the parents always intended to give their children the properties did not allow for inferences of unfairness when the transfers were not made for monetary value; and

- iii. according to the evidence the parents had spoken about how they intended to deal with the first and second parcels of land and Gloria was to receive the family home.

[146] The judge referred to Maureen's claim that she was to receive the commercial building and one of the houses on the second parcel of land, with Ronald receiving the other house on it. On the other hand, Ronald insisted that he was the one to get the commercial building with Maureen and himself each receiving a house on that property.

[147] The judge stated at paragraph [168] that:

"On the evidence the parents had expressed their intention as regards the first and second properties. The first being the family home was for Gloria. [The 1st appellant] contends that it was the intention of the parents that she should receive the commercial building and one of the houses on the property, whilst [the 1st respondent] would receive the other house. On the other hand, [the 1st respondent] insists that the reverse is true; that he was to get the commercial building and one of the houses and [the 1st appellant] would receive the other house. On the face of it therefore, the fact of one child receiving the commercial building and a house is not in and of itself unreasonable. The gift as it relates to the second property was certainly within the scope of what the parents had indicated as their general intention."

[148] The judge accepted that the respondents had developed the second parcel of land by fencing it, had utilized it to rear their animals and had improved the commercial building. She found that this was a reasonable basis for Winnifred to transfer the second parcel of land to them and concluded that since all of the children benefitted from the properties, the gifts were not 'mystifying'.

[149] In light of the fact that the parents had always intended to transfer the properties to their children and the parents had not been utilising the properties, the

judge found that the transfers were not unfair and did not place the parents in a disadvantageous position.

[150] The judge accepted the explanation which Ronald had given for Winnifred signing transfer documents for the second parcel of land in both 2007 and 2008.

[151] Ronald and Patsy had testified that the parents had given them the third property as a wedding gift, and the judge found that this was not surprising or inexplicable. At paragraph [176] the judge concluded:

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

[152] Nevertheless, the judge went on to examine other issues which the appellants claimed cast a shadow over the legitimacy of the gifts. The appellants had argued that the contents of Winnifred’s last will and testament indicated her true intentions, and showed that the transfer of the second parcel of land was not legitimate. The judge found that a will does not dispose of property, and the fact that Winnifred executed her will in 2004 did not suggest that the subsequent transfer was not her true desire.

[153] The judge also found that the fact that the sisters did not know of the transfers which the parents made to the respondents was inconsequential, as there were other transfers of parts of the second parcel of land of which they were unaware.

[154] The judge did not find anything suspicious about the fact that Winnifred signed the second transfer at Ronald’s house or that Winnifred signed the transfer after Ronald had brought proceedings in court after Maureen had changed the locks on the commercial building and rented it. She found that there was nothing on the evidence to indicate that Winnifred did not attend of her own will or was influenced to attend court on Ronald’s behalf.

[155] The appellants had also highlighted that, when they had a meeting in which Winnifred's will was read, Ronald did not mention the property that had been transferred to him. The judge noted that on the appellants' evidence, Maureen and Gloria had excluded Ronald from various decisions relating to their mother-including the hiring of helpers, diverting her widowers' cheque to Maureen and diverting the lease payments from Digicel to themselves as a result of a power of attorney they received from Winnifred. Ronald testified that Maureen and Gloria had known of the transfer. The judge stated that even if they had not known, and Ronald had not mentioned it at the meeting, that would not be satisfactory evidence that he was "culpable for something as regards the transfer, particularly given the relationship that existed between his sisters and himself".

[156] On the issue as to whether Winnifred had sought independent legal advice, the judge reiterated that the circumstances were not as such to require the respondents to justify the transfer. She noted that even if they had to do so, the obtaining of legal advice by the donor is but one way in which the respondents could establish that the transfers were made free of undue influence. The judge accepted that the Justice of the Peace had explained the transaction to Winnifred by reading the document to her and enquiring whether she understood it.

[157] The judge therefore reiterated at paragraph [185]:

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

[158] The judge at paragraphs [104]-106] considered whether the transfer of the second parcel of land by Winnifred was inequitable or unconscionable. She wrote:

"[104] A transaction may be regarded as unconscionable where the terms are so unjust or overwhelmingly one sided in favour of a party

who has superior bargaining power over the other. It is often viewed as one that no person who is mentally competent would enter into and no fair and honest person would accept.

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

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

set aside where the donee has knowledge of the incapacity.'

[106] From this it can be distilled that [the appellants] must prove that the [sic] Winnifred Simpson lacked the requisite mentally incapacity and hence did not understand the implications of the gift and that [the respondents] were aware of her challenge."

[159] She then concluded:

"[186] ...

3. [The appellants] have not proven on a balance of the probabilities that Winnifred Simpson lacked the requisite mental capacity.
4. [The appellants] have not proven on a balance of the probabilities that the transfers were inequitable or unconscionable."

[160] At paragraph [186], she summarized her findings as follows:

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

1. [The appellants] have not proven on a balance of the probabilities fraud against [the respondents];
2. [The appellants] have not proven on a balance of the probabilities the exertion of undue influence by [the respondents] as regards either transfer as they have failed to establish that a relationship capable of giving rise to the necessary influence existed, that is a relationship of trust and confidence or of ascendancy and dependency. Even if they had so proved, they failed to further establish that the influence generated by the relationship was abused, in that the transaction is of such a size or nature as to call for an explanation as being

not readily explicable by the relationship of the parties. [The respondents] were therefore not required to demonstrate that the transaction was the result of the free exercise by the transferor of an independent will, but nonetheless presented evidence that a Justice of the Peace had established that she understood her actions and that she acted independently.

3. [The appellants] have not proven on a balance of the probabilities that Winnifred Simpson lacked the requisite mental capacity.
4. [The appellants] have not proven on a balance of the probabilities that the transfers were inequitable or unconscionable.”

Analysis

[161] The judge’s findings must be examined not only in light of the evidence that was led, but also against the backdrop of the appellants’ pleadings. In the amended particulars of claim, filed on 29 April 2014, the appellants outlined the following particulars of undue influence:

- “(a) [The 1st respondent] was the son of the deceased and the said Dudley Simpson and [the 2nd respondent] their daughter in law and in the circumstance [the 1st and/or 2nd respondents] were therefore in a relationship of mutual trust and confidence with them jointly and/or severally;
- (b) The deceased and or the said Dudley Simpson were elderly persons and were vulnerable to undue influence based on the fact that [the 1st respondent] was the eldest of their children, the only one of their children living in Jamaica at the material time and someone who lived in close proximity;
- (c) [The 1st respondent] kept the deceased isolated and under his direct authority and control including taking steps to prevent her from having a Care Giver;

- (d) Any transfer of the second and/or third parcels of land to [the respondents] was not for monetary value but was by way of gift;
- (e) Such transactions would be manifestly unfair to the deceased and/or the said Dudley Simpson and/or the Estate of Winnifred Simpson;
- (f) The deceased and or the said Dudley Simpson received no independent legal advice prior to embarking upon any of the said transactions ...”

[162] By way of comment, these particulars are in stark contrast with the numerous points outlined in the grounds of appeal.

[163] The evidence led and the findings of the judge must also be examined against the backdrop of the established legal principles on actual and presumed undue influence. **Royal Bank of Scotland plc v Etridge (No 2)**, a decision of the House of Lords, is regarded as the leading case on undue influence. The case consisted of eight conjoined appeals raising issues relating to undue influence and constructive notice in the context of loans secured on matrimonial property. Their Lordships helpfully outlined the general principles involved in undue influence matters. I have found the judgment of Lord Nicholls to be particularly helpful, and will outline in the following paragraphs, principles which he highlighted.

[164] Equity has identified various forms of unacceptable conduct. These include overt acts of improper pressure or coercion. Unacceptable conduct may also arise out of a relationship between two persons where one has acquired over another, a measure of influence, or ascendancy, of which the ascendant person takes unfair advantage. As Lord Nicholls explained at paragraph [11]:

“... Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.”

[165] Disadvantage is not a necessary ingredient of the cause of action.

[166] Lord Nicholls then examined the question of the burden of proof and presumptions. At paragraphs [13] and [14], he stated:

“[13] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

[14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”

[167] There are, however, certain types of relationship in which the law presumes that one party had influence over the other. In these relationships it is not normally expected that the influenced party will make substantial gifts to the one who is presumed to have influence. These include parent and child, guardian and ward, trustee and beneficiary, solicitor and client and medical adviser and patient. In such cases, the complainant does not need to prove that one party reposed trust and

confidence in the other and need only prove the existence of the type of relationship (see paragraph 18).

[168] What if the donor received independent advice before he entered into the impugned transaction? This will be taken into account by the court when weighing all of the evidence. However, receipt of outside advice does not necessarily show that the donor was 'free from the exercise of undue influence' (see paragraph 20).

[169] There are two prerequisites to the evidential shift in the burden of proof from the complainant/donor to the other party. Firstly, the donor must have reposed trust and confidence in the other party/donee, or the other party/donee acquired ascendancy over the complainant/donor. Secondly, the transaction is not readily explicable by the relationship of the parties. If the gift is so large that it cannot be reasonably accounted for on the ground of the relationship, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift (see paragraph 22).

[170] In speaking further on the need for the second prerequisite, Lord Nicholls stated at paragraph 24:

"... The second prerequisite ... is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable

person, the more cogent must be the explanation before the presumption will be regarded as rebutted.”

Having outlined the above important and relevant principles highlighted in **Royal Bank of Scotland plc v Etridge (No 2)**, I move on to refer to other legal and case authorities.

[171] The issue has arisen in this case as to whether it is presumed that a child exercises influence over the parent, or whether the presumption of influence relates to that of a parent over a child. The editors of Halsbury’s Laws of England address this question at Volume 47 (2014), paragraph 26. They write:

“The presumption of **undue influence** arises in the relationship of parent and child, especially where the child has only recently come of age and is still under parental control. **The child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts.** If, however, the exercise of parental influence is disproved by any means which show that the gift was in fact the spontaneous act of the donor, acting in circumstances which enabled him to exercise an independent judgment, and which justify the court’s holding that the gift was the result of a free exercise of his will, then the gift stands on the same footing as any other gift. It is desirable, although not essential, that a child should have independent, and if possible professional, advice before making a gift. The rule applies where a person who is or has been in loco parentis takes a benefit from the child.”
(Emphasis supplied)

[172] The writers highlight that there is no reverse presumption that a parent may be unduly influenced by an adult child.

[173] At paragraph 22 of the commentary, the question of the rebuttal of the presumption is addressed. It states:

“The presumption of undue influence is a rebuttable evidential presumption which shifts the burden of proof to the alleged wrongdoer. The presumption cannot be rebutted merely by evidence that the complainant understood what

he or she was doing and intended to do it, but only by showing that he or she was either free from the influence of the alleged wrongdoer or had been placed by the receipt of independent advice in an equivalent position. The problem is not lack of understanding but lack of independence. Where the presumption arises a voluntary gift will be set aside unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him or her to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will. Any sign of reluctance on the donor's part may indicate that improper pressure was being brought to bear."

[174] Bearing in mind the above principles, it is clear that the case at bar was not a relationship case in which it is presumed that the donees, Ronald and Patsy, enjoyed a relationship of trust and confidence or ascendancy and dependency with Dudley and Winnifred. There is no presumption that Ronald, the son of Dudley and Winnifred, exercised undue influence over his parents. On the contrary, this is a case in which the appellants were required to prove firstly, that a relationship of trust and confidence, or ascendancy and dependency existed between the respondents and Dudley and Winnifred, and, secondly, the transfers of the parcels of land to the respondents were of such a nature that they called for an explanation. If those two points were established on the evidence, then the burden would have shifted to the respondents to show that Dudley and Winnifred exercised their independent will when they transferred the parcels of land to them. One way in which the respondents could prove this, was if Dudley and Winnifred had received independent legal advice before they made the transfers of the parcels of land.

Unconscionable bargain, exploitation, lack of the requisite mental capacity

[175] **Hart v O'Connor**, a case on which the appellants relied, is useful. The case was on appeal from the Court of Appeal of New Zealand to the Privy Council, with the judgment delivered by Lord Brightman. In **Hart v O'Connor** their Lordships had to determine whether to accept a proposition enunciated in **Archer v Cutler** [1980] 1

NZLR 386 that a contract with a person ostensibly sane, but actually of unsound mind, can be set aside if it is unfair to the person in the sense of contractual imbalance. Their Lordships did not accept that proposition, and I will not examine it any further as it is not relevant to the case at bar.

[176] There was never any doubt expressed in **Hart v O'Connor**, however, that if a person knows that an individual is mentally unsound, and nevertheless enters into a contract with the individual, it will be open to the court to set the transaction aside.

[177] In **Hart v O'Connor**, their Lordships went on to consider whether in the circumstances, the relevant contract could be set aside as an unconscionable bargain. At pages 22-23 of the judgment, Lord Brightman wrote:

“Their Lordships turn finally to issue (C), whether the respondent trustees are entitled to have the contract set aside as an “unconscionable bargain”. This issue must also be answered in the negative, because Mr. Hart was guilty of no unconscionable conduct. Indeed, as is conceded, he acted with complete innocence throughout. He was unaware of Jack’s unsoundness of mind. Jack was ostensibly advised by his own solicitor. Mr. Hart had no means of knowing or cause to suspect that Jack was not in receipt of and acting in accordance with the most full and careful advice. The terms of the bargain were the terms proposed by Jack’s solicitor, not terms imposed by Mr. Hart or his solicitor. **There was no equitable fraud, no victimisation, no taking advantage, no over-reaching or other description of unconscionable doings which might have justified the intervention of equity to restrain an action by Mr. Hart at law.**” (Emphasis supplied)

[178] It will be necessary to consider whether, in light of the evidence before her, the judge erred when she did not find that Winnifred lacked the requisite mental capacity when she transferred the second parcel of land to the respondents. In addition, it must be considered whether the judge erred when she did not find that some unfair advantage was taken, or victimisation of Winnifred and Dudley occurred, leading them to transfer the third parcel of land to the respondents.

[179] Having established the guiding legal principles, I will now consider whether the judge erred in her consideration of the issues and the findings of fact which she made.

[180] From the outset, it is noted that the appellants have not argued that the judge's findings of fact were not supported by the evidence. In fact, they would be hard pressed to credibly make such an argument as it is clear that, since there were diametrically opposed accounts on certain points, it was open to the judge to accept one of the accounts as the more credible of the two. As mentioned earlier, it is also noticeable that the bases on which the appellants argue that the judge ought to have found that a relationship of trust and confidence or of ascendancy and dependency existed are far more expansive in the grounds of appeal than they were in the particulars of undue influence outlined in the amended particulars of claim. This is important, as it must be taken into account when reviewing the judge's findings of fact. It is clear that the judge took great care to address the various facts on which the appellant had relied in its pleadings as proof that a relationship of trust and confidence or of ascendancy and dependency existed. The appellant has now, in its notice and grounds of appeal, relied on facts, which, although they were before the court below, were not pleaded or urged as bases on which the court should have found that the requisite relationship existed. This is unfortunate, as it is unfair to criticize the judge's decision on her failure to find that these matters proved undue influence, when this was not urged before her. I nevertheless felt that it was appropriate to examine the various new points of emphasis, since they formed a part of the evidence that had been led before the court, and so the respondent would not have been prejudiced.

[181] There is an important difference between the transfer of the second and third parcels of land, and the discussion concerning undue influence. While the third parcel of land was transferred by both Winnifred and Dudley, the second parcel of land was transferred by Winnifred, solely, her husband Dudley having predeceased her in 2003.

[182] The allegation that the third property was transferred to the respondents due to undue influence, clearly faced a significant hurdle, as the evidence led in the hearing

was that Dudley was an independent man, who at no time had to rely on assistance from his children to arrive at any of his decisions. While general statements were made that both parents came to rely on Ronald and Patsy, nothing specific was ever highlighted in the evidence concerning Dudley. It was never suggested that he suffered any mental deterioration. In addition, the evidence on the appellants' case that Winnifred deteriorated mentally, and required assistance, was focused on the period after Dudley had died. The appellants have not demonstrated any error by the judge when she concluded that they had not shown that Dudley Simpson reposed trust and confidence in the respondents. There was no evidence on which the judge could have properly found that Dudley reposed trust and confidence in Ronald and Patsy.

[183] In all the circumstances, the appellants faced a significant hurdle, which they ultimately did not overcome, to prove that Winnifred and Dudley were impacted by undue influence when they transferred the third parcel of land to Ronald and Patsy.

[184] There is more to be considered in respect of the second parcel of land, however, which was transferred to Ronald and Patsy by Winnifred. In the notice and grounds of appeal, the appellants have relied on a number of matters which they believe ought to have led the judge to find that Winnifred reposed trust and confidence in the respondents, or there was a relationship of ascendancy and dependency among them. However, the matters on which they relied did not prove the nature of the relationship needed for their claim to succeed. For example, the fact that Winnifred gave instructions to the post office to send her mail, including her pension cheque to Ronald, did not in and of itself point to a relationship of trust and confidence or ascendancy and dependency. In any event, Maureen took steps to arrange for the pension cheques to be sent to her instead. This is one of the many points on which the appellants relied on appeal, which was not highlighted in the particulars of undue influence (see pages 197-198 of the record of appeal).

[185] Insofar as Winnifred's signing of the lease with Digicel was concerned, the evidence given by Ronald was clearly accepted by the judge, that while his wife Patsy

had initiated discussions with Digicel, Digicel required the registered owner to sign the lease. Although the lease payments were originally sent to Ronald, Maureen again intervened, so that at one time the lease payments were made in her and Gloria's name, after she presented a power of attorney dated 4 July 2005 to Digicel. Ronald thereafter also accompanied Winnifred to Mr Winston Young, an attorney-at-law, where he prepared and she signed a power of attorney dated 27 March 2006. Afterwards, Digicel resumed making lease payments to Ronald. It is not clear why the fact that Winnifred was taken to Mr Winston Young for the purpose of preparing a power of attorney, and both respondents were present, can be seen as providing support for a conclusion that undue influence took place. This is so in light of the fact that Maureen had also arranged for her mother to sign a power of attorney appointing herself and Gloria as her "attorney".

[186] The appellants have also sought to rely on the fact that Winnifred attended court in support of Ronald when he brought an action for trespass against the tenants Maureen had placed in the commercial building. Again, this was not proof of a reliant relationship.

[187] While the appellants have also argued that Winnifred transferred the second parcel of land on the recommendation of Ronald's attorney-at-law and not as an independent act, these matters had also not been pleaded in the particulars of undue influence. However, there was again, nothing on the evidence to prove that Winnifred did so unwillingly and because of undue influence. It is, in fact, consistent with Winnifred's attendance in court in support of Ronald.

[188] While the appellants alleged that Ronald had taken from the family home, the certificates of title for the properties owned by Winnifred, the judge did not make a finding in respect of this allegation, leaving it undetermined. However, even if this had occurred, bearing in the mind the acrimonious relationship between the siblings, it would not have been surprising for him to do so, and this would not mean that he and

Patsy had a relationship of trust and confidence or ascendancy and dependency with Winnifred for the purpose of establishing undue influence.

[189] The appellants have argued that the judge failed to take into account or to sufficiently take into account the fact that the transfer of the second parcel of land to the respondents was “against the disposition as contained in the Last Will and Testament of Winnifred Simpson”. The judge clearly considered this issue, and correctly concluded that the dispositions, which were in Winnifred’s will, did not prevent her from transferring the property. It is well known that a will takes effect only after the death of the testator. So even if a property is bequeathed in a will, there is nothing to prevent the testator from transferring the property during her lifetime.

[190] Counsel for the appellants, in oral submissions, also advanced an interesting argument. He acknowledged that the appellants’ case suffered from inconsistencies and contradictions. He submitted, however, that a relationship of trust and confidence or ascendancy and dependency could be shown on the respondents’ case. The judge did not find that, on the respondents’ case, the relationship among Winnifred and the respondents reflected trust and confidence or ascendancy and dependency. This was clearly open to her and so counsel’s argument is unsustainable.

[191] It was, therefore, clearly open to the judge to find that there was no proof of the existence of a relationship of trust and confidence and/or ascendancy and dependency between Winnifred on the one hand and Ronald and Patsy on the other. In fact, generally speaking, there was little evidence concerning specific acts by Patsy or any proof that Patsy exercised any influence over Dudley or Winnifred.

[192] In light of the evidence before her, it was also open to the judge to find that the transfers of the second and third parcels of land to the respondents were not of such a size and nature as to call for an explanation, due to their being not readily explicable by the relationship of the parties. The judge believed Ronald that his parents gave him and Patsy the third parcel of land as a wedding gift. The judge accepted the evidence of all

the siblings that Dudley and Winnifred had always intended to share the properties among the children. In the end, this is what occurred, although there is an issue concerning the house to which Maureen is entitled, to which I will return.

[193] Since it was open to the judge to find (a) that the appellants did not prove that Winnifred and Dudley shared a relationship of trust or confidence or ascendancy and dependency with the respondents and (b) the transactions were readily explicable and so did not call for an explanation, there was no need for the respondents to be called upon to prove that the transactions were as a result of Winnifred and Dudley's free will. It was therefore unnecessary for me to examine the question as to whether Winnifred received independent legal advice.

[194] Separate and apart from the allegations of undue influence, the appellants also asserted that the respondents unfairly exploited Winnifred and Dudley to obtain "some unfair advantage in circumstances where equity ought to intervene to set aside the...transaction" (see Ground e). They also alleged that the judge erred in:

- (a) failing to find that Winnifred lacked the requisite mental capacity to transfer the second parcel of land to the respondents; and
- (b) law in failing to find that the transfer of the second parcel of land by Winnifred to the respondents was inequitable or unconscionable.

[195] When one places these assertions against the backdrop of the evidence, and the findings to which the judge arrived, it is clear that the appellants would have found it very difficult to succeed in their claim. It was open to the judge to find that the appellants had not satisfied her that Winnifred lacked the requisite mental capacity to transfer the second parcel of land to the respondents. In light of the fact that Dr Sheldon Brown admitted that he had not physically examined Winnifred before preparing the certificate of incapacity, and had never reflected any concerns in respect

of Winnifred's mental capacity in any document, it was open to the judge to reject his evidence. While there were eyewitnesses testifying of the alleged medical and mental state and condition of Winnifred, the judge found that their evidence was contradictory. She did not find them to be credible and reliable. Bearing in mind the fact that the judge at first instance has had the advantage of seeing and hearing the witnesses with a view to assessing their reliability and credibility, I have not seen any error reflecting that the judge was plainly wrong in her conclusions.

[196] In any event, the appellants' contention that the transfer of the third parcel of land was inequitable or unconscionable also faced a challenge. The question would be unconscionable to whom? Generally, when this question is raised, one would usually look to see or find a transaction that appears unfair to the giver or the person disposing of the property. There is nothing to suggest that Winnifred and Dudley, in gifting the third property to Ronald and Patsy, were entering into a transaction which harmed them in any way. They still had the family home; it is not as if by gifting the third parcel of land, they left themselves homeless. It is of course understandable that Maureen and Gloria could feel disappointed as they had hoped to inherit more land from their parents, however, that is not the test of unconscionability in the law.

[197] The argument concerning unconscionability is also a non-starter so to speak, because it was clear that both Winnifred and Dudley had always intended that their children would share the various properties.

[198] On the facts which the judge found, and in light of all the evidence, it was difficult for the appellants to succeed in proving their allegations that the respondents unfairly exploited Winnifred or Dudley to obtain an unfair advantage in circumstances where equity ought to intervene to set aside the transaction. There was no such evidence. It was, therefore, open to the judge to conclude that the transfer of the second parcel of land by Winnifred to the respondents, was not inequitable or unconscionable.

[199] Upon a review of the judge's reasons for her decision, it is clear that she made use of the benefit of having seen and heard the witnesses. She assessed their credibility and reliability, identified inconsistencies in the evidence and gave reasons why she believed whom she believed. There was evidence to support the judge's findings of fact and, in the face of the evidence as a whole, it was clearly permissible for her to have made the findings of fact to which she arrived. Furthermore, the appellants have not identified any material mistake in the judges' evaluation of the evidence that would undermine her conclusions.

[200] There is an outstanding issue that must, however, be addressed although it was not mentioned in the judgment. It is included in the grounds of appeal, but it was not clear whether it was raised in the court below. It is correct that, as the appellants have argued, the transfer of the second parcel of land to the respondents had the practical effect of "disinheriting" Maureen from the house which she had been given. Throughout the proceedings, there was never any dispute that Maureen is entitled to a house that was built for her on the second parcel of land. The transfer of the second parcel of land arose in the context of the disagreement over the ownership of the commercial building. However, in the course of the proceedings, there was no evidence that the section of land on which the house was built had been subdivided with a view to an individual title being issued to Maureen. There is no evidence that Winnifred intended to take or give away the house belonging to Maureen or that the respondents claim to own it. This is an issue which, in my view, can be easily resolved between the parties. In all the circumstances Ronald and Patsy are duty bound to allow Maureen to continue to access the house which had been built for her and about which no dispute arose in the claim.

[201] It is for all the above reasons that, in my view, this appeal should be dismissed, and I propose the following orders:

- (1) The appeal is dismissed.

- (2) The decision of Tie J (Ag) (as she was then) made on 2 November 2017 is affirmed.
- (3) Costs to the respondents to be agreed or taxed.

SIMMONS JA (AG)

[202] I too have read in draft the judgment of sister Foster-Pusey JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

- (1) The appeal is dismissed.
- (2) The decision of Tie J (Ag) made on 2 November 2017 is affirmed.
- (3) Costs of the appeal to the respondents to be agreed or taxed.