

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2020/0019**

Between

Vilmoth Jones

Claimant

-and-

**Janice Perkins
Ricaldo Caines**

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Mrs. Angela Cozier of counsel for the claimant

Ms. Dollrita Camilla Cato of counsel for the defendants

2021: September, 28th
October 4th (submissions)
December, 10th

JUDGMENT

[1] **Moise, J:** On 24th February, 2020, Mr. Vilmoth Jones filed a Fixed Date Claim seeking a total of 16 orders and declarations against the defendants, who are his daughter and former attorney at law respectively. Despite the significant number of declarations being sought, it is somewhat difficult to summarize the exact cause of action pleaded in this case from a mere perusal of the claim form. The claim was stated to have been filed in accordance with Rule 8.1(5)(b) of the CPR. However, the evidence led at trial does not seem to raise any issue of Mr. Jones' actual possession of the land in question. Therefore, it is now unclear to me as to whether this claim should have even been commenced as a Fixed Date Claim at all.

[2] In essence, it would seem that Mr. Jones wishes for the court to invalidate a conveyance of a parcel of land which was transferred to the 1st defendant on 9th February, 2012. He claims that this

conveyance was executed by fraud on the part of the 1st defendant with the dishonest assistance of the 2nd defendant. From the pleadings it can also be gleaned that Mr. Jones relies on professional negligence or breach of fiduciary duty on the part of the 2nd defendant. However, in closing submissions, and for the first time, counsel for Mr. Jones raised the issue of undue influence with no prior notice to the other side. In these circumstances, Mr. Jones would also wish for an order that the property be re-conveyed to him and that damages be award to him together with interest and costs. However, after having reviewed the evidence and the submissions of counsel, I am of the view that the claim is not sustainable on the basis of the findings of fact which I have made and I have decided therefore, that the claim should be dismissed with costs to the defendants. These are the reasons for my decision.

The Facts

Mr. Jones' evidence

[3] Mr. Jones was a joint owner of a parcel of land situated at Cotton Ground in Nevis. He owned this property jointly with his wife, Mrs. Gwendolyn Jones, who is now deceased. As I understand it, there is a dwelling house on the property which was the matrimonial home shared between the couple. In his affidavit in support of his Fixed Date Claim, Mr. Jones states that he owned this property from 1975 and that it was only in 2016, when he went to pay property taxes to the Inland Revenue Department, did he discover that he was no longer the owner. It was then that he was informed that the property had been transferred to Ms. Janice Perkins, who is the 1st defendant in the matter. The property was also subsequently transferred from Ms. Perkins to her son Lenroy Lescott in March, 2012.

[4] Mr. Jones states that he recalled that sometime in 2012, Ms. Perkins approached him and asked that he put her name on the property. He said that he informed her that the property was to be left for all of his 6 children after his passing. He also states that since she would have been one of the beneficiaries, he would add her name to the property together with that of himself and his wife. That was the transaction he claims to have agreed to. According to his evidence, Ms. Perkins informed

him that she would consult with Mr. Ricaldo Caines, an attorney at law, in order to carry out the transaction.

- [5] Mr. Jones states that sometime in 2012 he went to Mr. Caines' office to pay the money to his secretary. He met Mr. Caines and informed him that he wished only for his daughter's name to be added to the property. He states that he never gave permission for the entire property to be transferred to Ms. Perkins. After discovering that this was what was in fact done, he contacted Ms. Perkins and accused her of deceiving him. He also tried to communicate with Mr. Caines at his office, but alleges that Mr. Caines refused to speak to him. This is, in substance, the evidence initially filed by Mr. Jones. In that initial affidavit, he makes no mention of his wife's role in this transaction, although she was alive at the time and was a joint owner of the property with him. He makes no issue of the actual signing of the deed and although the original of the document was not presented into evidence by either party, the documents presented suggested that Mr. Jones did sign the deed of conveyance together with his wife.
- [6] In a further affidavit filed in this case, Mr. Jones asserts that after his initial conversation with Ms. Perkins, she informed him that the transaction was done and that he and his wife should go to Mr. Caines' office to sign some papers and pay him some money. He states that it was he who paid the money even though the invoice was issued to Ms. Perkins. He claims that he now knows that Ms. Perkins was deceiving himself and his wife. He claims that he did not know that Ms. Perkins had given Mr. Caines different instructions and that he never gave any permission to convey the entire property to Ms. Perkins.
- [7] That was the nature of Mr. Jones' pleadings and the evidence led in chief in support of his claim. Before addressing his cross examination in detail, I wish to address an issue which arose during the course of Mr. Jones' evidence and the concerns which the court continues to express regarding compliance with its case management orders and the general manner in which this case had been litigated in the first place.
- [8] This court has been persistent in encouraging counsel in particular, to comply with its orders in relation to the preparation and filing of trial bundles. The bundles are a critical aspect of the trial process and the pre-trial directions to agree on and compile the bundles are orders which must be complied with. The court's proceedings, being conducted via zoom, makes it all the more important

for counsel for all parties to jointly agree on the bundle and file it within the time prescribed by the court's order. This will assist in ensuring that even the witnesses are adequately briefed and prepared for trial. Any peculiarities which the witness may have ought also to be addressed so that any assistance which is required is arranged beforehand in order to ensure that the witnesses can follow the bundles and give their evidence in a manner which is incorruptible and fair to all involved.

[9] In this case, two of the bundles were filed two working days prior to the trial and one was filed on the day before. This was despite the court's express admonition to counsel at the pre-trial review. Counsel for the defendants informed the court that she in fact contacted counsel for the claimant and offered to help in preparing the bundles. This offer was not accepted and the bundles were simply filed in non-compliance with the court's orders. Counsel for the claimant sought to represent that there were administrative challenges in her office which affected her in complying with the court's order. I do not accept these as being excusable; especially in light of the fact that counsel for the defendants had offered to assist. It appears that counsel never discussed and agreed to the bundles, which were then filed at the eleventh hour.

[10] The effect of this was that Mr. Jones was completely unable to follow the bundle and to give evidence in line with what had been filed therein. He was unable to identify even the very documents that he tendered before the court. He was completely unable to navigate the bundles in any way. I appreciate that Mr. Jones is elderly. However, this is precisely why the preparation of the bundles on time and in keeping with the court's order is important. Adequate arrangements could have been made to assist Mr. Jones, with the safety and sanction of the court. This was not done. When the court took a break to enquire of counsel on the best way forward at this stage, someone entered the room and appeared to me to be giving directions to Mr. Jones in relation to his evidence. When the court enquired into this, it was stated that Mr. Jones was only being asked to speak up. That however, did not appear to me to be what was taking place.

[11] In those circumstances the court wishes to reiterate that counsel has a duty to adequately assist the court in managing this trial process and compliance with the Pre-trial review orders is critical in fulfilling this purpose. Any peculiarities which the witness may have, such as vision problems or an inability to read must be brought to the court's attention. It may very well be that the events which transpired can compromise the integrity of the trial process and should never occur in the future.

[12] Having said this, I note that in cross examination Mr. Jones denied that he had ever even signed the document conveying the property to Ms. Perkins. He states that he was unaware as to whether his wife had signed. This was notwithstanding the fact that he expressly stated in his affidavit that he was brought to Mr. Caines' office to sign the document. It did not appear to me that Mr. Jones had ever put the actual signing of the document into issue in his own pleadings. Even in closing his counsel had argued that he was in fact unduly influenced into signing the document. It was one thing to say that he was not aware of what he was signing, but another to deny that he had signed it altogether. Taken at its highest, the case for Mr. Jones was that he did envisage some transaction between Ms. Perkins on the one hand and himself and his wife on the other. He stated that he did agree to sign over at least some of the ownership of the property to her. It is not that there was no transaction to take place. It was just that he did not wish to entirely relinquish his own interest. I can see no reason to believe that Mr. Jones did not sign the document and it is my finding that he in fact did and was fully aware of the fact that he did sign the conveyance.

[13] When it came to the invoice which was paid to Mr. Caines for the work done, Mr. Jones said he knew nothing of it. He accepted that he paid some money to Mr. Caines but that was on behalf of his wife for some work Mr. Caines had done for her. He specifically stated that *"that \$5,312.35 I don't know about that."* It is difficult to appreciate the circumstances under which Mr. Jones can claim to know nothing about the invoice which he himself had put in issue in the case. He is claiming that very sum in damages as having been paid by him for the conveyance. Yet, he claimed in cross examination to know nothing of it. This lends to the lack of credibility in Mr. Jones' case. I find as a matter of fact that he is fully aware of the invoice and the basis upon which the monies were paid to Mr. Caines and I do not find the allegations which he is making against his daughter to be true.

[14] In closing submissions, counsel for Mr. Jones also wished for the court to find that Mr. Jones was visually impaired and that he had lost sight in one eye. Indeed, the Claim Form made some mention of Mr. Jones being visually impaired. He certainly appeared not to be able to follow the bundle and read any of the documents in there during the course of his cross examination. However, the difficulty with counsel's submissions is that the court is called upon to consider a transaction which Mr. Jones had undertaken in 2012. That was 9 years prior to the trial. One would

have thought that if Mr. Jones was inviting the court to find that visual impairment was a basis on which he did not know what he was signing in 2012, then some form of evidence would have been presented to prove this. He has presented no medical evidence to that effect and nowhere in his affidavit evidence did he claim to have been impaired in his ability to execute a deed of conveyance in 2012.

[15] In fact Mr. Jones presented two affidavits to this court signed by him with no indication that he was unable to read them over and sign them himself. His own lawyer presented him with the bundle in examination in chief for him to identify his signature on the affidavits which he had signed. He apparently did so. But yet in cross examination he showed some measure of difficulty. However, apart from a brief mention of visual impairment in the claim form, nothing else was said of it and nothing in any of his sworn statements spoke to that issue. There is just not sufficient evidence for the court to find that Mr. Jones was visually impaired in 2012 so as to inhibit him from participating in the transaction which is now under review.

Ms. Perkins' Reply

[16] In reply to the allegations against her, Ms. Perkins denies ever approaching her father about transferring the property to her. She states that she never gave any instructions to Mr. Caines to prepare any conveyance in her favour. She states that her mother had always informed her that she wanted the property to go to her grandson, Lenroy Lescott, but that she did not initiate any process leading up to the conveyance. In essence her initial response to the claim was that she simply did not do any of what her father has accused her of doing. He signed the documents willingly and was fully aware of what he was doing.

[17] In cross examination, Ms. Perkins remained adamant that she did not give any instructions to Mr. Caines and that the entire transaction was initiated by her parents. She states that after obtaining a conveyance in her favour, she simply signed the property over to her son as this was what her parents desired. She never had a conversation with Mr. Jones about putting her name on the property as he had relayed in his own affidavit. Although she recalls having used Mr. Caines' services for a legal issue some years prior to the transaction, she states that it was her father who brought her to Mr. Caines for that purpose. She was adamant that Mr. Caines was not acting as her lawyer in this particular transaction and that she had given him no instructions in that regard.

[18] As it relates to the receipt for the payment of the legal fees, Ms. Perkins states that, although it was issued in her name, she had never seen it before. The receipt was not presented to her previously and she was not the one who had paid Mr. Caines. Mr. Jones in fact claims that the funds should be returned to him as damages for payment to Mr. Caines. His evidence is that it was he who paid those funds. I find that Ms. Perkins is being truthful when she says that she was not presented with this invoice, although it was issued in her name. Overall I accepted her evidence as being truthful as it relates to her involvement in this matter. I find on balance that she did not initiate the discussion regarding the transfer of the property and was not the one who instructed Mr. Caines in the preparation of the deed of conveyance.

Mr. Caines' Reply

[19] The issues surrounding the conveyance of the property were addressed by Mr. Caines in his own affidavit in response; and I would state from the onset that I have accepted his evidence as being the truth of what transpired in this case. Mr. Caines states that in fact Ms. Perkins was never a client of his and he never took instructions from her regarding the conveyance of this property. He was adamant that he had in fact acted as solicitor for Mr. Jones and his wife for a number of years and it was they who approached him about transferring the property to Ms. Perkin's son, Lenroy Lescott. According to Mr. Caines, the entire conversation took place between Mr. Jones, his wife Gwendolyn and himself. Ms. Perkins was not involved in any of those conversations.

[20] As Mr. Caines relays it, from prior to 2008 he had conducted a number of legal transactions for the Joneses. This involved the subdivision and transfer of property from Mr. Jones to some of his other children. Mr. Caines also assisted them in resolving issues relating to their social security benefits from the US and other transactions. These are not generally in dispute. Mr. Caines also relayed some rather personal information about the Jones family which he knew because of the professional, yet cordial, relationship he had with Mrs. Jones especially. He asserted that there was a somewhat strained relationship between Mrs. Jones and some of her children as well as Mr. Jones' own children; some of whom appeared as witnesses in this case. This was perhaps one of the reasons she did not wish for them to inherit her property. It is not necessary for the court to reconcile the truth of these assertions. However, I do find on balance that Mr. Caines had

maintained a professional relationship with Mr. and Mrs. Jones and had conducted a number of transactions for them in his capacity as an attorney at law over the years.

[21] Mr. Caines states that his only interaction with Ms. Perkins prior to the execution of the conveyance now under review was an occasion when she was actually brought to his office by Mr. Jones to address a legal matter on which she needed advice and representation. Other than that, she was not his client and, as it relates to this particular conveyance, he took no instructions from her. I find that evidence to be honest and truthful and I accept that, as it relates to this particular transaction, Mr. Caines took his instructions from Mr. Jones and his wife and not from Ms. Perkins. Despite the fact that the invoice was issued in Ms. Perkins' name, I do find that it was paid, at least partially, by Mr. Jones as his own contribution towards the costs of the transaction which was done based on the instructions of himself and his wife.

[22] It was Mr. Caines' evidence that towards the end of 2011 and the early part of 2012, Mr. Jones and his wife visited his office to discuss a number of ideas relating to their property in Cotton Ground. They discussed the possibility of executing a will in which the property would be left to their grandson. They also discussed the possibility of leaving the property to all of the children born between them. They also considered leaving the property for one, two or three of their children. Mr. Caines indicated that he advised the Joneses on the effect of each of these possibilities. He states that Mrs. Jones would also often contact him via telephone in order to discuss these issues.

[23] It appears that during the course of those discussions there may have at times been some disagreement between the Joneses about the manner in which to go about accomplishing this. Mr. Caines states that Mrs. Jones was somewhat concerned that her desire to will the property to her grandson would not be fulfilled if the transaction was done via last will and testament. She wanted for the property to be conveyed during her lifetime. Mr. Caines states that the parties discussed these issues in his office and he advised them on the effects of what they were considering. Though Mr. Jones did at one point express the desire that the property be willed to all of his 6 children, they eventually settled on a conveyance to the grandson Lenroy Lescott after months of discussion.

[24] Having settled on the transfer of the property to their grandson, Mr. Caines states that he advised them on the most efficient way to conduct this transaction. He informed them that a direct transfer

of the property to Mr. Lescott would require a higher payment of stamp duties to the government. However, a transfer to a child of the property owner only attracts a \$100 fee. Mr. Caines advised them therefore, that the property can be transferred to Ms. Perkins for onward conveyance to Mr. Lescott. That was the basis upon which a transfer to Ms. Perkins was discussed. That way the amount of duties paid would be reduced. As Mr. Caines puts it, the parties agreed to this transaction. I find as a matter of fact, that Mr. Jones was fully aware of the transaction and was not deceived into it. As it relates to the effect this has on the issue of stamp duties to the government, I express no opinion on it.

[25] Mr. Caines also states that he advised the Joneses to keep Ms. Perkins' name on the title to the property in order to safeguard their own occupation of the property. There is no evidence presented to suggest that the Joneses had ever been disturbed in their occupation of the premises since the conveyance of the property. That was not an issue which was canvassed in any way. The issues relate more so to the conveyance of the property as opposed to Mr. Jones' actual possession of it.

[26] There was also some evidence of Mr. Caines being involved in radiating a loan facility which the Joneses had paid off from another bank. It is somewhat unclear to me, but I take counsel's submissions to suggest that after the mortgage was removed from the Joneses' title to the property Mr. Caines retained the vesting deed in his possession. However, Mr. Caines went on to deny that he was ever dishonest in his dealings with Mr. and Mrs. Jones. He states that as it relates to the legal fees, they were split between Mr. Jones and his wife. His wife made the payment by issuing a cheque and Mr. Jones came into the office to make his own payment over time.

[27] In cross examination Mr. Caines remained adamant that he never took any instructions from Ms. Perkins and was in fact acting on behalf of Mr. and Mrs. Jones. He states that he never signed a retainer or engagement letter with them for any of the work he had done for them. He stated that as they would request his services he would provide it over the years. In relation to this transaction he did not sign an engagement letter with them.

[28] As I have stated, I do not find Mr. Caines to be an unreliable or untruthful witness. It would always be wise for an attorney at law to document his dealing with his clients. This would save him from criticism in the future. However, the failure to sign an engagement letter is not evidence of deceit, as counsel for the claimant has submitted. I accept that Mr. Caines had conducted similar

transactions for Mr. Jones before and was not accused of being fraudulent in his dealings with Mr. Jones. I find that the general nature of the relationship with the Joneses to be as Mr. Caines had described it.

[29] Mr. Caines was also pressed on the services he provided to Ms. Perkins. He stated in response that some years prior, Ms. Perkins came to his office with her parents because she had to sign some documents regarding a facility with the Nevis Credit Union. Mr. Caines was the lawyer for the credit union at the time. The loan facility was signed by Ms. Perkins. That was the general extent of his dealings with Ms. Perkins at the time. I do not find this transaction to stand as proof that Mr. Caines was acting as attorney for Ms. Perkins in the transaction which is now under review by this court.

[30] As it relates to the invoice for the work done in relation to this case, Mr. Caines stated in cross examination that he had enquired of Mr. Jones and his wife as to whom the invoice was to be issued. He states that they had instructed him to issue the invoice to Ms. Perkins and her son and that if it was not paid they would pay it. In the end he stated that Mr. and Mrs. Jones jointly paid the invoice and I find this evidence to be truthful. Overall I find Mr. Caines to have been a credible witness and I generally accept his evidence as a more reliable explanation of the events which transpired as it relates to this case.

Additional Witnesses

[31] I make just one brief comment as it relates to the evidence led in this case. Mr. Jones led evidence from a number of his children in this matter. I do not think it necessary to comment on their testimonies in detail, as none of them could shed any light on the details of the transaction which took place in this case. In essence, at most the evidence was led to show that Mr. Jones had promised his other children that they too would inherit this property. However that does not lead me to any other conclusion than that which I have already highlighted. It was clear to me that Mr. Jones had in fact transferred property to a number of his children individually. Mr. Caines was the attorney for a number of, if not all, of those transactions.

[32] From the cross examination it was also evident that the family may have had their ups and downs and emotional conflict over the years. That is normal in any family situation and I do not find these

to have any significant bearing on the decision which I have to make; except to say that it is most unfortunate that this type of animosity, which was obvious at the trial, continues to this day. When it comes to this particular case nothing really turns on the evidence presented by these witnesses and it would suffice to say that I have given due consideration to everything that they had to say.

The Issues

[33] From the submissions of counsel I am of the view that there are three general issues to be considered in this case. These are:

- (a) Whether the 1st defendant was guilty of Fraud in that she deceived her father in order to obtain full title to his property;
- (b) If the first issue is found in Mr. Jones' favour, the court should then consider whether Mr. Caines is guilty of knowing assistance in the commission of the fraud; and
- (c) The court should also consider whether there was a breach of fiduciary duty on the part of Mr. Caines.

Fraud/Knowing Assistance

[34] Counsel for Mr. Jones filed submissions on 4th October, 2021. Although the claim was founded on fraud and deceit, counsel's submissions, relating to Ms. Perkins especially, centered primarily on the issue of undue influence. Counsel refers to a number of passages from *Halsbury's Laws of England*¹ highlighting the general principles relating to this equitable doctrine. However, I wish to express some concern about the submission now being raised by counsel. No doubt there is a component of fraud in undue influence cases. However, when one examines the nature of the pleadings against Ms. Perkins especially, this did not initially appear to me to be a case of undue influence at all. In addition to that, counsel did very little in her own submissions to elaborate on the

¹ Volume 17, para 1297 onward,

issue of undue influence as it relates to the facts of this case; making it somewhat difficult to place the submissions into context.

[35] In my view, something must be said about the manner in which cases of this nature are pleaded before the court. The rules require that a Claim Form must include a short description of the nature of the claim and any specific remedies which the claimant seeks. The pleadings must also be sufficient to allow the other party to adequately respond to the nature of the case being pleaded against him or her. In light of this I refer to the case of **George W. Bennet Bryson's & Co. Ltd. v George Purcell**² where Blemnan JA stated that “...*the function of pleadings is to “give fair notice of the case which has to be met and “to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.” It is [the] duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings.*”

[36] What often obtains however, is that a plethora of declarations are outlined in the claim form, when in reality they are only findings of fact which the court is entitled to make. This is done with very little attempt to place these allegations into any kind of legal context. As a result, it is quite often difficult to properly determine what the actual cause of action is in the first place so as to assist even in the proper management of the case. In this case, the court also ordered that pre-trial skeleton submissions be filed. Counsel did not comply with this order. The court was therefore left to navigate this trial somewhat blindly and the issue of undue influence emerges only in post-trial submissions which the other side has not had an opportunity to respond to. In light of that I wish to refer to the dicta of Michel JA in the case of **Della Vallery Nolan et al v. Diane Jude et al**³ where he expressed the following:

It is of course desirable that all issues likely to be addressed by a party to proceedings before the court, particularly the High Court or Court of Appeal, should be foreshadowed to the other party or parties to the proceedings. It is also of great importance for the tribunal adjudicating on the issues in dispute between the parties to be alerted as to the issues likely to be canvassed before it by the parties. A party who

² [2018] ECSCJ

³ SLUHCVP2017/0025

fails to alert the court or the other party or parties should in appropriate cases be denied altogether the opportunity to advance any issue which they did not first bring to the attention of the court and the other party or parties. At the very least, if the defaulting party is permitted to pursue the issue, they should be penalized in costs for that failure.

[37] I refer to this case as I do believe that there is a distinction between a case of outright fraud and deceit and one of undue influence. In as much as there may be an overlap, the mere fact that the case involved Mr. Jones' daughter does not make it a case of undue influence. It would have therefore been important for counsel to have indicated from the onset that the case was grounded on undue influence and not wait until post trial submissions to outline this issue.

[38] In a very recent case emanating from our court of appeal, Ramdhani JA (ag) also had this to say:

“In the usual case, if an issue is not raised on the pleadings, then a court must consider the prejudice that either of the parties would suffer by any attempt to consider it even with the benefit of arguments. If it is at all possible that even slight prejudice could be caused to one or the other of the parties by the new issues raised, the court should cease consideration of the issue and instead consider whether an amendment should be allowed to do justice to the case. The kind of prejudice which is contemplated here is where the issue cannot be fully ventilated on the proper evidence which is before the court, or is not at all grounded or properly grounded in pleadings, and one of the parties is likely to suffer for these shortcomings. In such circumstances, the general rule must apply and the case must be decided on the pleadings before the court”⁴

[39] In ***Della Vallery Nolan et al v. Diane Jude et al***, Michel JA also noted that if an issue is being raised after the fact, the court would have had to give the other side an opportunity to make representations before a decision can be made. In the circumstances of this case, the post-trial submissions of the defendants did not address undue influence at all. That is perhaps because not

⁴ Joseph Fenton v Audrey Frederick MNIHCVAP2020/0013 at paragraph 24

even the court was alerted to the fact that the claimant was relying on the doctrine of undue influence beforehand and the submissions were filed and exchanged rather than replied to. What counsel for the defendants pointed out in the submissions was that this was a case based on the tort of deceit and in light of that counsel referred the court to the case of ***The Castries Constituency Council v Lambert Nelson***⁵ where Webster JA noted that “[t]he law relating to the treatment of allegations of fraud by the courts is settled. An allegation of fraud must be specifically pleaded and particularized. The mere averment of fraud in general terms is not sufficient; there must be allegations of definite facts or specific conduct.”

[40] Counsel’s argument was that Mr. Jones’ case was based on a general allegation of fraud with no particulars. I find some force in that argument. There is nothing in Mr. Jones’ pleadings or his evidence which adequately addresses the actual signing of this deed. Was he unable to read? Was the deed read over to him? What role did his wife play in this process? It is not that one cannot glean his overall allegation that his instructions were not followed, but as to why this stands out as an outright case of fraud, raises a serious doubt to my mind. The substance of his allegation is that he agreed willingly to one transaction, whereas the deed executed another. Mr. Jones claims to have remained clear and adamant about what his instructions were, rather than being improperly influenced by anyone to relent in executing a conveyance to Mr. Perkins. Even if Mr. Jones’ evidence were to be accepted as being true, I doubt that this would prove undue influence. When it comes to fraud in general I simply am unable to find adequate particularization of fraud in the actual execution of the deed.

[41] In any event, even if I were to have considered the issue of undue influence I am not satisfied that the test had been adequately established here. I refer firstly to the case of ***Paull v. Paull***⁶ which recently found favour with our own court of appeal⁷. In that case the learned Master Bowles noted the following:

“Certain relationships, usually of an overtly fiduciary nature, automatically and without more, are treated as relationships of trust and confidence. While the

⁵ SLUCVAP2014/0016

⁶ [2018] EWHC 2520 (Ch)

⁷ see Della Vallery Nolan et al v. Diane Jude et al

relationship of a parent to his, or her, child, is one such relationship, the converse relationship, that is to say the relationship of child to parent, such as in this case, does not automatically raise any presumption that the relationship is one of trust and confidence. That must be established in the evidence.”

[42] The learned Master goes on to say that ***“before any presumption of undue influence arises, there must first be established the requisite relationship, whether of trust and confidence or of vulnerability and domination, or control.”*** Essentially, there is no presumption in law that Ms. Perkins stood in a position of trust and confidence or domination or control towards her father. The law does not assume that to be the case merely because she is Mr. Jones’ daughter. The nature of the relationship as one of trust and confidence has to be established by evidence. This takes me back to the concern of raising such an issue after trial. Certainly the defendants ought to have been made aware of this, as proof or rebuttal of the existence of this type of relationship would have been an issue to be addressed during the pleadings and oral evidence of the witnesses. However, I can find nothing in Mr. Jones’ evidence which proves that Ms. Perkins was ever placed in that position towards him. He simply does not address the nature of their relationship other than the fact that she was his daughter. He claims to have been deceived in terms of what the outcome of the transaction was, but not that he was unduly influenced into the transaction on account of any relationship, the nature of which is required under the law relating to undue influence.

[43] However, even if I were to be wrong on that issue, I simply do not accept Mr. Jones’ evidence as being truthful. When it comes to Ms. Perkins’ role in this case, I find as a matter of fact that she did not initiate this transaction and was not involved in the discussions between Mr. Jones, his wife and Mr. Caines. She states that this was entirely her parents’ idea which they discussed with their own attorney and I accept this to be true. On the basis of that finding alone I am not of the view that Ms. Perkins had committed any fraud against Mr. Jones, neither did she unduly influence him into entering into this transaction.

[44] In relation to Mr. Caines it would suffice to state that having found no fraud on the part of Ms. Perkins, he would certainly not be liable for knowing assistance. One cannot assist in a fraud which does not exist. However, for the sake of completeness I will address the submissions of counsel for the claimant as it relates to Mr. Caines.

[45] Counsel for Mr. Jones refers to the case of **Barnes v. Addy**⁸ where Lord Selbourne stated as follows:

'Strangers are not to be made constructive trustee merely because they act as the agents of trustees in transactions ... unless those agents received and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles are disregarded, I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity may take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.'

[46] Counsel also refers to the case of **Royal Brunei Airlines Sdn Bhd v. Tan**⁹ where Lord Nicholls stated that ***'[u]nless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know and then proceed regardless.'*** In light of that counsel again makes reference to Lord Nicholls where he goes on to state that ***"a trust is a relationship which exists when one person holds property on behalf of another."***

[47] In light of these authorities, counsel goes on to argue that it is not in dispute that Mr. Caines held Mr. Jones' vesting deed and asks what evidence is there that he received instructions to transfer the property to the 1st defendant? I have to state that for my part, I am somewhat unable to appreciate the link between the authorities referred to and the submissions of counsel. I can find nothing in the evidence to suggest that Mr. Caines held any property on trust for Mr. Jones. Neither did he in fact transfer any property to Ms. Perkins. There is a difference between a relationship of trust and confidence, such as attorney and client and one of owning property on trust for someone else. What Mr. Caines did was to draft and oversee the execution of a deed between Mr. Jones, his

⁸ (1874) 9 Ch App 214

⁹ [1995] 2 AC 378

wife and Ms. Perkins. It is also unclear to me as to why Mr. Caines' possession of the vesting deed would amount to a trust, sufficient to place this case within the context of the authorities referred to. Counsel did not elaborate on this point and I see very little reliance which can be placed on it.

[48] The issue here may very well be a question of whether Mr. Caines was somehow involved in knowingly assisting in the execution of a fraud against Mr. Jones. In light of that the case of **Royal Brunei Airlines Sdn Bhd v. Tan** also made it clear that a dishonest state of mind must exist in order to hold someone liable for knowing assistance. I can find nothing in the evidence to state that Mr. Caines acted in a manner which was dishonest towards Mr. Jones; neither did he knowingly assist in any fraud or undue influence perpetuated towards him. In the circumstances I would dismiss this case insofar as it is grounded on the allegations of fraud and knowing assistance. Neither is there any evidence of Undue Influence.

Breach of Fiduciary Duty

[49] As it relates to the allegation of breach of fiduciary duty on the part of Mr. Caines, counsel for Mr. Jones' sole legal submission was to refer the court to the case of **Leonora Walwyn v. Eustace Archibald**¹⁰. In that case Pereira CJ noted that a solicitor stands in a fiduciary relationship with his client. That can hardly be a novel or controversial principle to state. However, other than that, neither counsel has placed any guidance before the court in relation to this issue as it relates to the peculiar circumstances of this case. At paragraph 63 of her closing submissions, counsel for Mr. Jones outlines 15 propositions which she states proves that Mr. Caines embarked on a path of deceit and dishonest assistance. I have found that Mr. Caines did not act in a manner so as to deceive Mr. Jones. However, after assessing the propositions put forward by counsel I am of the view that the following issues ought to be considered:

- (a) Whether there was a conflict of interest between Mr. Jones and Ms. Perkins when the property was conveyed;
- (b) Whether Mr. Jones ought to have been encouraged to seek independent legal advice; and

¹⁰ SKBHCV2010/0012

(c) Whether Mr. Caines failed to ascertain whether Mr. Jones knew what he was signing.

Was there a Conflict of Interest?

[50] There can be no controversy in saying that Mr. Caines owed a fiduciary duty to Mr. Jones. He accepted that he acted at all times on Mr. Jones' instructions and that of his wife. In addressing the direct submissions made by counsel I repeat some of the findings of fact which I have already made. I do not accept that Mr. Caines had received his instructions from Ms. Perkins. I accept that he received all of his instructions from Mr. Jones and his wife. They came to his office to discuss a number of possibilities and he advised them on each possible transaction. As such, I do not accept that there was a conflict of interest which arose between Mr. Caines' duty towards Ms. Perkins and Mr. Jones. Ms. Perkins was not his client and did not initiate, neither was she a part of the discussions giving rise to this transaction. I can also find no relationship which exists between Ms. Perkins and Mr. Caines which raises any level of concern here.

Should Mr. Jones have been encouraged to seek independent legal advice?

[51] The question of whether a party to a transaction should be advised to seek separate and independent legal advice is one which has occupied the court's time on numerous occasions. It normally arises in transactions with the bank, where one party seeks to argue that he or she was unduly influenced by another to enter into a transaction. In such cases, the courts have examined the circumstances under which a party to the transaction should be encouraged to seek independent legal advice before entering into it. However, the need for independent advice and the nature of that advice will always depend on the peculiar circumstances of the case. Even then, it doesn't necessarily take away from a person's competence to form opinions of his own on the nature of the transaction which they are about to undertake. In the case of **Coomber v. Coomber**¹¹ Moulson LJ noted the following:

'All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should

¹¹ [1911] 1 Ch 723, 730

put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.'

[52] The issue seems to hinge on the question of whether the solicitor is tainted in any way with the relationship or the particular interests which may conflict in the transaction under review. In ***Royal Bank v. Etridge***¹² Lord Nicholls noted that “[a]s a matter of general understanding, independent advice would suggest that the solicitor should not be acting in the same transaction for the person who, if there is any undue influence, is the source of that influence.” However, given the broad number of circumstances under which this issue may arise, it is also true that “***in every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her.***” The rule is therefore not hard and fast and must be something which the solicitor ought to consider if the situation so arises.

[53] In the circumstances of the present case however, I have found that Mr. Caines had taken no instructions from Ms. Perkins; neither was he acting as her solicitor. His only prior relationship with Ms. Perkins was initiated by Mr. Jones himself. I accept Mr. Caines’ evidence where he states that Mr. Jones and his wife came to his office and discussed a number of options and that he had advised them on the effects of those options. That had nothing to do with Ms. Perkins, in the sense that she did not initiate this or give any instructions in relation to it. As such, I do not find that Mr. Caines had acted for Mr. Jones whilst also acting for Ms. Perkins in circumstances where she was the source of any undue influence. There was no personal or professional relationship between Mr. Caines and Ms. Perkins which was sufficient to raise any red flags in his mind. Therefore, there was no need for Mr. Caines to send his own clients for separate advice in relation to a transaction on which they directly sought his advice and on which he took instructions from no one else. It was his duty to advise them and I find that this is what he in fact did.

¹² [2001] UKHL 44

Did Mr. Caines fail to ascertain whether Mr. Jones knew what he was signing?

[54] This really hinges on a question of fact which takes us more into the realm of professional negligence than fraud. Counsel for Mr. Jones argues that Mr. Caines ought to have known “*that the Claimant, an elderly and unlearned man, would not have known what he was signing and could reasonably have thought that he was simply adding the 1st Defendant’s name to the property, as was the case.*” The first observation that I would make is that no evidence was presented to the court to suggest that Mr. Jones was an unlearned man. For my part I am uncertain as to precisely what this means. He signed numerous affidavits in this very case and ascertained that he signed them and knew what they entailed. Nothing was presented to the court to suggest that Mr. Jones was unlearned or incapable of understanding what he signed back in 2012. Whilst the Claim Form states that he is visually impaired, he presented no evidence of this, or what his status was in 2012.

[55] On the other hand, Mr. Caines states that when Mr. Jones and his wife came to his office they discussed a number of options of what they were considering with their property. None of these entailed simply putting Ms. Perkins’ name on the property. Ms. Perkins denied that she ever even approached her father about that issue and Mr. Caines confirms that this was not what was communicated to him. Both parties accepted that Mr. Caines had in fact executed conveyances for Mr. Jones to some of his other children. This was therefore not a transaction the nature of which had been peculiar to Mr. Jones. The only issue which would have created a distinction here is that this was the place where Mr. Jones resided. However, Mr. Caines stated that they did discuss the issue of the Joneses’ occupation of the premises until their death. Overall I accept his evidence when he states that he did explain the nature of the transaction to Mr. Jones and I can find no evidence to lead me to the conclusion that he did not ascertain whether Mr. Jones was aware of what he was doing.

Conclusion

[56] In conclusion, I find that there has been no fraud committed against Mr. Jones and, by extension, Mr. Caines did not knowingly assist in the commission of any fraud. There was also no undue influence exerted on Mr. Jones and the documents which were executed are not to be impugned on

account of this allegation. I have also found that Mr. Caines did not breach his fiduciary duty towards Mr. Jones.

[57] In the circumstances the case is dismissed with costs in favour of the defendants to be prescribed in accordance with Rule 65.5 of the CPR2000. For the benefit of any doubt, Mr. Jones filed this action claiming the sum of \$350,000.00 and a further \$5,312.35 in damages. The defendants are each awarded prescribed costs on these amounts.

**Ermin Moise
High Court Judge**

By the Court

Registrar