

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2014/0063

**IN THE MATTER OF THE REGISTRATION OF DOCUMENTS ACT OF THE REVISED LAWS OF ST.
VINCENT AND THE GRENADINES**

AND

IN THE MATTER OF ESTATE OF ABEL LEWIS DECEASED

AND

IN THE MATTER OF AN APPLICATION FOR CANCELLATION OF DEED OF GIFT NO 2284 OF 2013

BETWEEN

JONATHAN DASILVA

of Arnos Vale but currently residing in United Kingdom
(by his lawful attorney on record **YVONNE LEWIS**)

CLAIMANT

AND

BRANNIE JOHN

of Colonaire

DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mr. Roderick Jones for the claimant.

Mr. Joseph Delves for the defendant.

2019: Jun. 4

2020: May 14

Sept. 29

Oct. 1

Dec. 1

2021: Feb. 24

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Leonardo DiCaprio is credited with saying: 'A man's legacy is determined by how the story ends.' In the same vein, the outcome of this case will to a great extent frame the impact of Abel Lewis' legacy. When he passed away on 5th March 2014, Abel Lewis deceased also known as Cairo was residing at a residential property at Brighton ('the subject property') in Saint Vincent and the Grenadines. I will refer to him throughout this judgement as Cairo. On 25th June 2012 he made his last Will and Testament appointing his brother Jonathan DaSilva as executor and sole beneficiary of his estate. That day, he also appointed Jonathan Da Silva as his lawful attorney and thereby gave him administrative control over his assets and property.

[2] Just over 3 months later¹ he executed a transfer of that property to his cousin Brannie John by Deed of Gift No. 2284 of 2013. Jonathan DaSilva is convinced that the transfer was done under suspicious circumstances. He claimed that Cairo was ill and suffering from dementia at the time of that gift and did not have the mental capacity to validly effect the transfer. He alleged that Brannie John exerted undue influence over Cairo and took advantage of him to cause him to give him the land. He sought² an order to cancel the Deed of Gift; an injunction to restrain Brannie John from dealing with the subject property; an order that Cairo died testate; damages and costs.

[3] Mr. Brannie John denied the allegations of undue influence and maintained that Cairo was of sound mind and memory when he executed the transfer. He insisted that Cairo's was an independent and considered decision. He contended that Cairo gave him the property because he was upset about Jonathan Da Silva's treatment of him. The court finds that Jonathan DaSilva has not made out his case against Brannie John. It is accordingly dismissed.

ISSUES

[4] The issues are:

- 1) Whether Brannie John secured the execution of Deed of Gift No. 2284 of 2013 from Cairo to him:

¹ On October 4th, 2012.

² By Fixed Date Claim Form filed on 25th March 2014.

- a) while Cairo was suffering from dementia or other mental incapacity;
- b) through undue influence; or
- c) under suspicious circumstances?

2) To what remedies is Jonathan Da Silva entitled?

LAW AND ANALYSIS

Issue 1 – Did Brannie John secure the execution of Deed of Gift No. 2284 of 2013 from Cairo to him while Cairo was suffering from mental incapacity, through undue influence or under suspicious circumstances?

- [5] Cairo never married and had no children. Jonathan Da Silva and Tabitha Ollivierre were two of his siblings. In his Will, he directed that if Jonathan Da Silva predeceased him, then his entire estate would go to his sister Tabitha. Mr. Da Silva testified that Cairo also executed a power of attorney on the same day, appointing him as his lawful attorney. Brannie John was one of the two attesting witnesses to the Will. He admitted signing as a witness but said that he was not aware at the time that it was a Will. He indicated that he was told that it was a Power of Attorney. He stated that he was not in the room when Cairo signed the Will. He was adamant that he did not know that Cairo had left his property to Mr. Da Silva by Will and that between July 25th, 2012 and 5th October 2012 knew nothing about a Will.
- [6] Ms. Maxine Rodney was another attesting witness. She testified on Mr. John's behalf. She claimed that she and Cairo were friends. Ms. Rodney claimed that she began visiting Cairo at his home in 2010 and continued doing so until 2014. She also recalled visiting him at the hospital. She explained that at times she used to assist him in having a shower.
- [7] She stated that she and Cairo used to attend church services at the Pentecostal Church at Sion Hill for gatherings and such events. She could not remember the date that she last saw him there but indicated that it was at harvest time. Brannie John and Jonathan Da Silva testified that Cairo was an adherent of the Rastafarian religion having previously been a staunch Seventh Day Adventist. Mr. Da Silva argued that it is unlikely that Cairo attended any such services as alleged by Ms. Rodney. Ms. Rodney said that she did not know that Cairo was at any time a practicing Seventh

Day Adventist or Rastafarian. It is conceivable that Cairo attended services before he converted to the Rastafarian religion. Nothing turns on this topic except as it relates to credibility.

- [8] Ms. Rodney said that she was present when Cairo 'signed the document to Mr. Da Silva'. She recounted that she was sitting on the porch when a lawyer came to the house. She recalled that Mr. Da Silva told her that he wanted a witness. She stated that the lawyer told her it was a power of attorney and asked her to sign, which she did. She said that she did not read it. On being cross-examined she stated that the power of attorney was signed on March 20th while the Will was signed on 25th June 2012. At first, she said that she signed the Will as a witness. She later claimed that she did not know that she signed a Will and in fact signed only one document – the Power of Attorney. It is difficult to reconcile these two accounts.
- [9] Cairo took ill about one month after he made the Will. He was admitted to the Milton Cato Memorial Hospital on July 31st, 2012. He was re-admitted to the hospital on two further occasions that year – 29th August and 13th September. There is common ground between the parties as to those hospital stays. However, factual disputes exist between them regarding Cairo's mental state when he allegedly executed the referenced Deed of Gift and regarding the nature of his relationship with Mr. Da Silva and Mr. John.
- [10] Mr. Da Silva pleaded that Cairo was diagnosed during those three hospital admissions with having senile dementia and being a regular senile dementia case. He proffered no medical evidence to support such diagnosis. Under cross-examination, he admitted that Cairo was never declared mentally incompetent of making decisions as to his health and well-being. He testified that he got in touch with Mr. John after Cairo was hospitalized in May 2012. He said that he knew that Mr. John had assisted Cairo with cleaning his yard and doing odd jobs previously and he therefore contacted him and asked that he accompany him to the hospital.
- [11] Mr. Da Silva claimed that Cairo had previously accused Brannie John of stealing and had prohibited him from returning to his home. He stated that Mr. John stole several things from Cairo's house. He was of the view that Cairo had not changed his mind about Mr. John with respect to these accusations. Notwithstanding, he said that he nonetheless had Mr. John accompany him to

the hospital because he knew he would need help to care for Cairo. He explained that he was supposed to return to England in September 2012 and wanted to ensure that Cairo would be looked after. He said that he communicated this to Mr. John who agreed to stay with Cairo until he could return to the State.

[12] Mr. John denied stealing from Cairo. He also had a different account of how he ended up taking care of Cairo. He testified that he and Cairo were cousins and had developed a close friendship which spanned many years from when they were both in their 20s. Mr. Da Silva did not fully acknowledge the familial relationship between the two men. In answer to a question under cross-examination, he replied that Mr. John was 'supposedly related' to him and Cairo.

[13] Mr. John explained that he first made Cairo's acquaintance during the 80s when Cairo was living in the United Kingdom. He said that Cairo used to travel to Saint Vincent from time to time to visit his mother Dorcas Da Silva who lived in Georgetown. He explained that his (John's) maternal grandfather and Dorcas were siblings. He recounted that he used to take provisions for his aunt Dorcas and would encounter Cairo at her home on those occasions when Cairo was visiting Saint Vincent. It was during those visits that they got to know each other and became friends.

[14] He asserted that around 1998 Cairo invited him to travel to the UK and paid for the ticket. He accepted the invitation and spent 3 months at Cairo's home in Highwycombe. He testified that Cairo retired from his factory job in England in or about 2001 and returned to Saint Vincent, having bought the subject property earlier that year. He explained that their friendship continued and they visited each other regularly. He recalled staying at Cairo's house overnight and sometimes cooking there. He stated that Cairo came to his farm in Mount Young Mountain on many occasions, the last time being in 2013.

[15] Mr. John provided further details of the close friendship between them. He testified that around 2010 he discovered that Cairo had developed a 'sore foot' and consequently he went to Cairo's house to 'nurse the foot' which eventually healed. He was insistent that Cairo's medical issue which resulted in his hospitalizations in 2012 was 'high sugar' and 'low sugar'. He stated that he took

notes of the dates when he was hospitalized. He added that after he was released, he tested Cairo's 'sugar levels' and recorded the results.

- [16] He explained that Cairo was hospitalized from August 29th through August 31st, 2013, 10th through 11th September 2013, 12th through 14th September 2013 and February 27th, 2014 through 3rd March 2014. He noted that he was not hospitalized at all for the 17-month period between September 2012 and February 2014. He said that he was present at the hospital when Cairo was released in July, August and September 2012. He explained that he was with Cairo constantly after he took ill.
- [17] He included in his testimony, details of Cairo's blood sugar test results that he said he measured and recorded. They spanned 36 days between 20th August 2012 and 19th December 2012. He was not challenged about the blood sugar test results. They are accordingly accepted at face value, as evidence that those tests were conducted and notes of the readings made by Mr. John. They are not probative as to either a low or high blood sugar medical condition in respect of Cairo. Mr. John added that Cairo's physician Dr. Michael Goodluck visited Cairo at home once monthly.
- [18] Mr. John asserted that Mr. Da Silva did not invite him to accompany him to the hospital to visit Cairo. He testified that Mr. Da Silva visited Saint Vincent in or about May 2012 and met Cairo at his home very ill, whereupon he was taken to the hospital. He explained that while Cairo was hospitalized in May 2012 both he and Mr. Da Silva visited him at the hospital. He said that they also went to Cairo's home often and would encounter each other there. He averred that during that time, he (John) washed for Cairo.
- [19] He testified that it was during this time that Mr. Da Silva asked him about Cairo's business and banking affairs whereupon he told him that Cairo held bank accounts in his sole name. He recalled that he and Mr. Da Silva went to two local banks and enquired about Cairo's accounts but were met with confidential restrictions. He explained that arising from this, the power of attorney was executed in Mr. Da Silva's favour. He said that Mr. Da Silva brought the Power of Attorney to him and asked him to tell Cairo to sign it. He testified further that Mr. Da Silva told him that it was a paper to go to the bank 'to see Cairo's business since the banks were not disclosing Cairo's affairs.'

He said that 'they' did not discuss it with Cairo before it was prepared and brought to him on his bed.

[20] Mr. John recounted that a man came to the house and told him that his name was Mr. Daniel and he was lawyer. He stated that the lawyer and Mr. Da Silva went into Cairo's bedroom. He stated that Mr. Da Silva called him onto the bedroom and asked him to sign as a witness because the lawyer needed two witnesses. He said that he signed it. He recalled that Ms. Rodney was on the porch and after he signed Mr. Da Silva called her in and asked her to sign which she did. He stated that he was present when she signed but he did not sign in her presence and he was not present when Cairo signed. He said that he had no idea what a Will or Power of Attorney was supposed to be.

[21] Mr. DaSilva said that he wanted to ensure that Cairo's affairs were in order should anything happen and so armed with the power of attorney he withdrew funds from Cairo's bank account and applied the funds in the payment of bills, taxes and other debts including medical expenses associated with his hospitalization. He said that he arranged for the gate to Cairo's property to be built to prevent him from wandering out of the yard as he was accustomed to do. Ms. Rodney testified that she did not know that a gate had to be installed to prevent Cairo from walking away from his residence. Her recollection was that a gate was always there.

[22] Mr. John testified that the Power of Attorney was registered on July 4th, 2012. He recalled that 4 days later (on Carnival Sunday) Mr. Da Silva and his two sons took Cairo to the outside of his house and bathed him in the yard while declaring that he is nasty and did not want to bathe. He remarked that Cairo's house contains 2 bathrooms, insinuating that this outside 'bath' was unnecessary. Mr. John testified that Cairo was so incensed that he put out Mr. Da Silva and his two sons and ran them off. He said that Mr. Da Silva spoke to him two days later - on Carnival Tuesday and said, 'if anything they will have to put him in a home'. Ms. Rodney said that she was present when Mr. Da Silva sprayed Cairo with a hose. She stated that Cairo was complaining and Mr. Da Silva told him to shut up.

[23] Mr. Da Silva admitted that he planned to put Cairo in an Old People's home because he formed the opinion that that would be best for him. He stated that he did not discuss this with Cairo but

informed Mr. John of this intention. He was unaware that Cairo had discovered that he intended to do so. He was adamant that he and not Cairo was the one who insisted that Mr. John stay with Cairo at his house. Mr. John disagreed with this account.

[24] He testified that he spoke with Cairo the day following the bath outside and Cairo asked him to come immediately. He said that on his way he met Cairo on the road coming to meet him. It was there in the presence of witnesses that he claimed Cairo asked him to come to look after him or he 'go dead'. He explained that from that moment he moved into Cairo's house and took care of him and the house without payment. He stated that he did not ask for and was not given a salary.

[25] Mr. Da Silva acknowledged that he did not pay Mr. John. He asserted that this is because Mr. John had access to Cairo's account. Mr. John admitted that he had access to Cairo's account at First Caribbean International Bank. He testified that Cairo removed Mr. Da Silva's name from the account and added his. He explained that he started withdrawing money from the account when Cairo added his name to it and after he had been given the subject property by Deed of Gift. He averred that he accounted to Cairo whenever he withdrew monies from the account. I accept this testimony. It is credible. Mr. Da Silva's acknowledgement that Mr. John had access to the bank account also reveals that Mr. Da Silva was aware that before his death Cairo had made changes to his banking arrangements.

[26] Mr. John asserted that a number of things turned Cairo's mind from Mr. Da Silva as a result of which he revoked the Power of Attorney on December 11th, 2012. He recounted that Mr. Da Silva withdrew \$8,500.00 from one of Cairo's bank accounts on July 13th, 2012 leaving a balance of \$93.92; and in November 2012 withdrew £6700.00 from another account in England. He said that Mr. Da Silva gave none of that money to Cairo. He testified that Cairo was upset about the treatment he received from Mr. Da Silva, including the fact that he made those withdrawals and was especially upset that they bathed him on the outside of his house.

[27] Mr. Da Silva admitted withdrawing \$8500.00 from Cairo's bank account. He also admitted that he withdrew all of the money from Cairo's bank account at one of the banks. However, he claimed that he spent those monies to cover Cairo's expenses. He acknowledged that he held no discussions

with Cairo about that. Mr. John pointed out that prior to appointing Mr. Da Silva as his lawful attorney on record, that Cairo conducted all of his banking and other business.

[28] Mr. Da Silva averred that on October 4th, 2012, exactly one month after Cairo's last hospital visit and after he was diagnosed with senile dementia, a Deed of Gift was prepared without his (Da Silva's) knowledge, by which the subject property was transferred to Mr. John. He contended that Brannie John was aware of the dementia diagnosis as he was the caretaker hired to look after Cairo. He asserted that as an attesting witness to the Will, Mr. John would have known that Cairo intended that one of his siblings would inherit his estate. He contended that the gift to Mr. John was made under suspicious circumstances and does not reflect Cairo's wishes.

[29] Mr. Da Silva reasoned that it is suspicious that all of Cairo's actions after his illness, hospitalizations and senile dementia diagnosis were for Brannie John's sole benefit and went contrary to everything he had previously done. He averred that this is especially glaring in view of the fact that Mr. John was simply Cairo's caretaker, hired for the express purpose of caring for him. He stated that Cairo had gotten to a point where he could no longer care for himself. He maintained that Mr. John dishonestly used his position and opportunity as caretaker to coerce and unduly influence Cairo to transfer the property to him. He accused Mr. John of doing so with full knowledge that Cairo was of unsound mind and in a weakened physical state following his hospitalization.

[30] Mr. Da Silva testified that he returned to Saint Vincent in December 2012 accompanied by one of their brothers. He claimed however, that Cairo apparently could not remember the brother and thought he was a stranger. He said that he attributed this lack of recognition to Cairo's dementia. He said that he stayed at Cairo's house for four days and then left as planned. He stated that he spent one week in the State on that occasion.

[31] Mr. John recalled that Mr. Da Silva returned to the State in December 2012 accompanied by his brother 'Melo'. He recounted that Cairo refused to let them stay at his house and instead put them out. Mr. Da Silva denied that Cairo asked him to leave the house. He explained that he left because his brother and Mr. John were taking care of Cairo. He added that two nurses went to the

house about 2 or 3 times each week to bathe Cairo and administer his medicine and they stayed with Cairo for about an hour each time. He said that they were sent by the hospital and he paid them \$75.00 each. In another part of his testimony, Mr. Da Silva stated that he hired a nurse to visit Cairo twice weekly. His accounts as to the arrangements for the nursing services are not consistent.

[32] Mr. Da Silva stated that after at the end of his visit to Saint Vincent in December 2012, he returned to England with the impression that the status quo with respect to the power of attorney and the Will were the same. He said that he expected Mr. John to contact him if any issues arose with Cairo. He explained that he saw Mr. John on several occasions before departing Saint Vincent and at no point did he indicate to him that Cairo had transferred the subject property to him.

[33] He recalled seeing Mr. John on several occasions before he returned to England. He testified that at no time did Mr. John reveal that Cairo had transferred the subject property to him. He remarked that Cairo did not tell him or his other siblings about the gift, but he considered that this was understandable having regard to Cairo's medical and physical condition.

[34] He concluded that Mr. John used his position of trust and confidence as Cairo's caretaker 'to take advantage of his diminished mental state and infirmed state and to unduly influence' him to transfer the land to him. Mr. Da Silva averred that it was only after Cairo died that he and his siblings realized that the subject land had been gifted to Brannie John. Mr. John disputed this account and maintained that he had notified two of Mr. Da Silva's siblings of the gift to him.

[35] During cross-examination he stated that Cairo was not 'physically and mentally okay' up to May 25th, 2012. He acknowledged that at that time Cairo lived alone and took care of himself. He then accepted that Cairo was capable of making his own decisions at that time and also on June 25th, 2012 when he made his Will and executed the Power of Attorney. Those positions are not reconcilable.

[36] Mr. John testified that the Deed of Gift was prepared by attorney at law Mr. Joseph Delves who visited Cairo and gave him independent legal advice, including explaining to him the nature and

legal consequences of the Deed of Gift. He said however that he was not present or in the same building when the Deed of Gift was signed. He indicated that it was registered on 31st July 2013. He testified that while it was prepared on October 4th, 2012, it took that long to be registered because that was when he paid the 10% deposit.

[37] Mr. John claimed that Cairo told him that he should get the house because he was the one taking care of him. He testified that at all material times Cairo was fully aware, alert and cognizant of his business affairs and the nature and import of the various documents he signed. He argued that it is contrary to common sense and ordinary mental health principles to assert that Cairo was sufficiently capable of making a good Will on June 25th, 2012 but that he was completely incapable four months later when he signed the deed of gift transferring the property to him. In the absence of expert medical opinion, this court cannot conclude that an individual can suffer dementia which would erode his mental ability to comprehend the nature and consequences of a Deed, within a period of 4 months. There is no evidence that Cairo was affected in that way.

[38] Mr. John denied that he abused the friendship between him and Cairo by taking advantage of Cairo or that he unduly influenced him to transfer the property to him. He insisted that Cairo was at all material times able to make decisions for himself concerning his finances and business affairs including disposal of the subject property. He was adamant that Cairo was not coerced. He recounted that Cairo had told several persons of his desire and intention to give him the property and of his decision to disinherit Mr. Da Silva because of his ill-treatment at his hands. He testified that he lived in the house with Cairo until he passed away on March 5th, 2014.

[39] He was emphatic that Mr. Da Silva was the one who was saying that Cairo is going senile. He said that he was present when Mr. Da Silva made that statement to a doctor at the hospital on the second occasion when Cairo was taken there. He said that he quarreled with Mr. Da Silva and asked him not to make such statements if he did not live with Cairo, and further that Cairo lived alone and took care of himself up to May or June 2012 and that a senile man would not have put them (the brothers) out. He explained that he lived with Cairo as close friends right up to his death and they care for and looked out for each other. He stated that Cairo told him many times 'God

bless you'. I accept Mr. John's account that he and Cairo had a close friendship up to his death and reject the assertion that Mr. John stole things from Cairo's house.

[40] Mr. Selwyn Dabreo was another of Mr. John's witnesses. He described himself as one of Cairo's friends. He knew that Cairo bought a ticket for Mr. John to visit him in England. Mr. Dabreo also travelled to England at that time and stayed with Cairo. Mr. Dabreo stated that he would visit Cairo at his home when he returned to Saint Vincent. He said that at times he met Mr. John there. He recalled that they went on cooks with other persons from time to time.

[41] He testified that he heard Cairo say repeatedly after he took ill in 2012, that Mr. John was the one looking after him and he would get what he has. He recounted that Cairo told him that he is the owner of the place and 'they' put him outside to bathe. He said that Cairo was totally upset about this. He testified that he visited Cairo in the hospital, and they chatted for a long time and carried on a normal conversation. He denied that Cairo ever accused Mr. John of stealing his money. His testimony had the ring of truth to it and I believe him.

[42] On the matter of Cairo's burial Mr. John explained that he bore the full cost of the funeral in the amount of approximately \$8,000.00. He remarked that none of Cairo's siblings attended the funeral. Mr. Da Silva admitted that he did not attend the funeral although he was in the State. He accepted that he did not pay the funeral expenses and was unaware that Mr. John paid them.

[43] Having listened to and observed the parties and witnesses as they testified in this case, I formed the opinion that Mr. John and Mr. Dabreo were truthful. Ms. Rodney appeared to be either confused or evasive at times. Mr. Da Silva's several inconsistencies in his account undermined his credibility and ultimately his case. I prefer Mr. John's and Mr. Dabreo's testimony over Mr. Da Silva's. I turn now to assess the evidence in light of the applicable law in respect of the allegations of lack of mental capacity, undue influence and suspicious transaction, in turn.

Mental Capacity

[44] It seems that Mr. Da Silva relies on copies of medical reports attached to his Fixed Date Claim Form to anchor his assertions that Cairo was suffering from dementia when he executed the impugned Deed of Gift. In this regard, he submitted:

‘At the time of the purported transfer Abel Lewis was advanced in age and had obvious physical and mental challenges as evidenced by the hospital release forms. The Claimant has furnished the Court with the hospital release forms...’

Neither party adduced medical evidence as to Cairo’s mental capacity. There is therefore no factual basis on which this court can find that he suffered from dementia at any time.

[45] Any such determination would have a critical bearing on the rest Mr. Da Silva’s case. He cited the case of **Re Beaney deceased** for the proposition that the test to be applied in determining a person’s mental capacity to execute a deed is:

‘whether the person concerned is capable of understanding what he does by executing the deed in question when its general import has been fully explained to him.

... The degree or extent of understanding ... in the case of a contract ... a deed made inter vivos ... varies with the circumstances of the transaction.’³

[46] Mr. Da Silva contended that **Re Beaney** is authority which makes clear that in cases where a deed is being executed, the person making it must be capable of understanding what he is doing in executing the deed, after it has been explained to him and must have a high degree of understanding. Mr. Da Silva referred to the diagnoses recorded on the referenced discharge notes but tendered no medical evidence by the author or custodian of those records as mandated by the law⁴. To be admissible into evidence, such records must be *Gazetted*, printed by the Government printer, authenticated by the Secretary to the Governor General or certified by the head or custodian of the relevant government department. In the absence of such verifiable documentation, this court is unable to place any weight on the photocopies of records attached to the Fixed Date Claim Form.

[47] Mr. Da Silva relies on his testimony and his personal observations of Cairo as the factual basis on which this court should find that Cairo was suffering from dementia and was otherwise mentally deficient and incapable of forming the requisite informed and deliberate intention to execute the Deed of Gift transferring his property to Mr. John. He argued that in **Re Beaney** the position of the

³ [1978] 1 WLR 770, per Nourse J.

⁴ Evidence Act, Cap. 220 of the Laws of Saint Vincent and the Grenadines, section 34(1)(d).

court was that where the donor is disposing of his only asset of value, he must have a high degree of understanding of the document of transfer. He submitted that Brannie John has not furnished the Court with any evidence that anyone explained to Cairo the document that he was signing and the consequences of signing the document of transfer of title bearing the Registration Number 2284/2013, particularly in light of his cognitive challenges at the time when he purportedly signed the document.

[48] He submitted further that in the case of **Jacqueline Charlesv Jean Mc Neilly**⁵the court ruled that the donee had a duty to prove that the transfer was a result of the free exercise of the independent will of the Donor. He argued that Mr. John has not furnished the court with any evidence that Cairo, given his failing physical and mental health, received any independent legal advice prior to signing the deed of gift transferring title to him. He argued that Brannie John in evidence stated that he did not know where the Deed was signed and if any legal advice was given to Cairo prior to signing.

[49] Mr. John countered that Mr. Da Silva seems to be of the erroneous view that the burden is on him (John) to prove actual undue influence. He submitted that the burden rests on Mr. Da Silva to establish that Cairo was subjected to actual undue influence at Mr. John's hands and further that Cairo did so under suspicious circumstances and lacked the required mental capacity. He is correct.

[50] It is a matter of record that no medical records were admitted into evidence at the trial. The learned authors of **Halsbury's Laws of England** declare that the law presumes capacity until the contrary is proven.⁶ It is a basic procedural requirement that evidence must be led in order to establish a particular fact. It bears repeating that Mr. Da Silva led no medical evidence of Cairo's alleged mental deficits. He relied entirely on his own observations. He is not a medical doctor and he led no evidence that he has any training in medicine or an associated discipline. His allegations that Cairo was suffering from dementia do not establish this, without more.

[51] Mr. Da Silva has failed to remove the presumption of sanity in connection with Cairo. Furthermore, there is abundant evidence by Mr. John and Mr. Dabreofrom which this court can find that Cairo

⁵ GDAHCV2010/0299.

⁶Vol. 11 (2020), para. 736; Vol. 75 (2013) at para. 598.

was fully mentally competent to understand the nature, legal import and consequences of the impugned deed when he signed it. I accept that he also received independent legal advice to guide him. I therefore make no finding that Mr. Abel Lewis (Cairo) was suffering from dementia or other mental deficiency when he executed Deed of Gift No. 2284 of 2013 or at any time.

Undue Influence

[52] Mr. John submitted that Mr. Da Silva has not pleaded presumed undue influence but rather actual undue influence. He contended that presumed undue influence differs from actual undue influence in that the former involves some legally recognized relationship by virtue of which one party owes a special duty to the other, as in the case of lawyer/client, parent/child and doctor patient. He contended that in those kinds of relationships one side is presumed in law to place trust and confidence in the other. He submitted that Mr. Da Silva did not plead that he (John) was in a position of trust with Cairo; that Mr. John abused that trust or even that he and Cairo were close friends.

[53] He argued that instead Mr. Da Silva pleaded that there was no special relationship of trust, friendship or any kind of relationship between Cairo and Mr. John, but rather that Mr. John was a paid worker 'cleaning the yard and other odd jobs' whom Cairo would not have trusted because he had stolen from him. He submitted that there is no presumption in law that confidence flowing from a special relationship has been abused. Citing the case of **Robert Murray v Reuben Denberg**, he submitted that according to Floissac CJ:

'The evidence required is evidence that before or at the time of the execution of the transaction the complainant had habitually, frequently, or repeatedly expressed or indicated his trust and confidence in the dominant party.'⁷

[54] An examination of the pleadings is necessary. Mr. Da Silva pleaded:

'7. About one month after the testator's last hospital visit where he was diagnosed with senile dementia, a Deed of Gift was prepared unknown to the Claimant on the 4th October

⁷ [1996] ECSCJ No. 3

2012 which transferred a parcel of land with buildings and erections thereon at Brighton owned by the testator to the Defendant and which said parcel of land is more particularly described in the Schedule ...

9. The Claimant further avers that the Defendant used the position of trust and confidence he held as the testator's caretaker to take advantage of the testator's infirmed state and to unduly influence the testator to transfer the said parcel of land to him.

Particulars of Undue Influence

- a) The Defendant was hired as a caretaker to look after the testator as the testator had gotten to a point where he was unable to fully take care of himself.
- b) The Defendant was a witness to the last will and testament of the testator that was executed by the testator on the 25th June 2012, so he was aware at all material times that the testator wished for his siblings to benefit from his estate.
- c) The Defendant was also aware of when the testator was hospitalized and diagnosed with senile dementia.
- d) The Defendant dishonestly used the position he held as caretaker and the opportunity after the testator's hospitalisation and diagnosis to coerce and unduly influence the testator knowing that he was not of sound mind and in a weakened physical state, so that the testator transferred the said parcel of land to him.'
(Underlining added)

[55] In light of my earlier finding regarding the assertions of lack of mental capacity, all references to senile dementia in the pleadings will be disregarded for purposes of evaluating the allegations of undue influence. I hasten to add that while Mr. Da Silva alleged that Mr. John coerced Cairo into signing the Deed of Gift (paragraph 9(d)), no evidence of coercion was produced. I find that Mr. John did not force Cairo to sign the deed.

[56] The term 'undue influence' describes types of conduct which the court frowns on as being contrary to good conscience, and which the court will sanction. The court does so by vitiating any gift made by

a donor over whom such influence has been exerted.⁸ 'Undue influence' is sometimes referred to as constructive fraud. It is an equitable doctrine which may manifest as actual or presumed undue influence. In the case of actual undue influence, the claimant must plead and prove that the defendant positively exercised undue influence over the donor which caused him to make the impugned gift.⁸ **Halsbury's Laws of England**⁸ gives examples of instances where the court has granted relief against such conduct: for example, where an employee obtained complete control over his employer who was of weak understanding⁹ and where an older man acquired a strong influence over a weaker one¹⁰.

[57] Proof of presumed undue influence necessitates the existence of a special relationship between the donor and the defendant by virtue of which the donor reposed trust and confidence in the defendant, which leads to the donor making a gift in circumstances which is not readily comprehensible.¹¹ Certain classes of relationships have been accepted as raising such an irrebuttable presumption of trust and confidence. As submitted by Mr. John, they include relationships between parent and child. They extend to those between trustee and beneficiary. They have also been held to arise between individuals where one has reposed such confidence and trust in another in respect of the management of the donor's financial affairs or otherwise, where the defendant has acquired influence over the donor in respect of some general aspect of his affairs. In those circumstances, the claimant would need to go further to allege and prove the impugned gift was one which called for an explanation. If this is established, the burden of proof passes to the defendant to show that he did not abuse the power conferred on him by the special relationship.¹¹

Presumed Undue Influence and Suspicious Circumstances

[58] Mr. Da Silva appears to be relying at the same time on actual and presumed undue influence. By asserting that the relationship of caretaker and infirmed charge arose in the circumstances at bar, he seems to be requiring the court to make a finding that a presumption of undue influence arises. This is not one of the established types of relationships recognized by the law. In those

⁸Halsbury's Laws of England 22 (2019), para. 94.

⁹*Meneces v Middleton* [1971] Ch 95.

¹⁰*Smith v Kay* (1859) 7 HL Cas 750.

¹¹Halsbury's Laws of England 22 (2019), para. 96.

circumstances as outlined above, Mr. Da Silva would need to go further to plead and establish that the circumstances of the gift required an explanation. He could also have alleged and proved that Mr. John had acquired influence over the management of Cairo's financial or other personal affairs. He made no such assertions either in his pleadings or in his testimony. In fact, he vehemently refuted that Mr. John had such influence over Cairo.

[59] The evidence led by Mr. Da Silva and Mr. John does not establish that Mr. John managed Cairo's

affairs. Instead, while Mr. Da Silva maintained that he (Da Silva) managed Cairo's financial affairs at the relevant time, Mr. John was equally insistent that Cairo was fully in charge of his own personal affairs. Mr. Da Silva pleaded that the gift was effected in suspicious circumstances. In this regard, he recited the fact of the existence of the Will and its contents, referred to the diagnosis of dementia and the subsequent transfer of the land to Mr. John.

[60] In the absence of a finding that Cairo was suffering from dementia or otherwise mentally incapable of making the Deed, those circumstances point to a change of heart on his part. There is nothing suspicious about someone changing their mind regarding to whom they wished to give their assets. In the premises, Mr. Da Silva has failed to make out a case of presumed undue influence against Mr. John, on a preponderance of the evidence. Accordingly, the burden does not shift to Mr. John to rebut such presumption. His reliance on presumed undue influence is not sustainable.

Actual Undue Influence

[61] Although Mr. Da Silva did not plead actual undue influence as an alternative to presumed undue influence, I will consider it for the sake of completeness. The learned authors of **Atkin's Court Forms** aver that in order to establish actual undue influence, the claimant must prove not only that the defendant exerted undue influence over the donor, but he must go further and establish that the defendant had the capacity to so influence the donor; and that the exercise was undue and that such exertion of influence was the reason why the gift was made.¹² It is now established

¹² Lexis Nexis Edition, Vol. 21(1), para. 23.

in law that an unequal bargaining position would not suffice. Rather, 'there must be something in the nature of the conduct which is unfair and improper before equity will intervene.'¹³

[62] The main pillar of Mr. Da Silva's claim of actual undue influence is related to the alleged diagnosis of senile dementia and vague allegations of use of undue influence. I have already dealt with the issue of dementia. As there is no finding of dementia, that averment does not afford a factual or legal basis on which to anchor a claim of actual undue influence. Mr. Da Silva provided no evidence of any coercion by Mr. John in relation to Cairo.

[63] In his Reply to Defence, Mr. Da Silva asserted that Cairo did not receive independent legal advice before executing the Deed of Gift. He pleaded that the Deed of Gift was prepared by Mr. John's legal practitioner Mr. Joseph Delves and that Cairo did not have the benefit of independent legal advice. He provided no testimony of this. Mr. Da Silva was there responding to Mr. John's defence in which he pleaded that Cairo obtained independent legal advice from his (Cairo's) legal practitioner Mr. Joseph Delves. Mr. John testified to like effect. His account is unchallenged and is therefore accepted.

[64] I am satisfied that Cairo consulted his own lawyer Mr. Delves and was advised of the nature and effect of the Deed of Gift before he signed it of his free will and independently of Mr. John. Mr. Da Silva's claims that Cairo did not benefit from independent legal counsel is not supported by the evidence. I find that Mr. Da Silva has failed to establish that Cairo's gift to Mr. John was actuated by actual undue influence. His claim is therefore dismissed.

Issue 2 – To what remedies is Jonathan Da Silva entitled?

[65] Mr. Da Silva has not established his claim against Mr. John. He is not entitled to any remedies.

Costs

[66] In civil proceedings in the Supreme Court the winner is usually awarded costs, unless there are reasons for departing from that general rule.¹⁴ No such reasons exist in this case. As the defeated

¹³Allcard v Skinner (1887) 36 Ch D 145 at 181, CA.

¹⁴CPR 64.6.

party, Jonathan Da Silva shall pay prescribed costs to Brannie John pursuant to CPR 65.5(2)(b) in the amount of \$7,500.00.

Conclusion

[67] If Leonardo DiCaprio's musings about a man's legacy are evaluated against the opposing contentions in this case, Jonathan Da Silva and Brannie John will view Cairo's 'legacy' through entirely different lenses. The facts and applicable law demonstrate that after he made his Will Cairo had a change of heart regarding the disposition of his house. It was manifested in the gift to Brannie John.

ORDER

[68] It is ordered: -

1. Jonathan DaSilva's claim is dismissed.

2. Jonathan DaSilva shall pay to Brannie John costs of \$7,500.00 pursuant to CPR 65.5(2)(b).

[69] I am grateful to counsel for their submissions. The slight delay in delivering this judgment is regretted. It was attributable entirely to technological issues which resulted in the loss of significant portions of the court's notes due to a computer viral attack. The parties' patience is appreciated.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar