



IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 197 of 2019

IN THE MATTER OF SECTIONS 11, 23 AND 27 OF THE REGISTERED LAND LAW (2018 REVISION)

AND IN THE MATTER OF REGISTRATION SECTION WEST BAY SOUTH BLOCK 5B, PARCEL 180

AND IN THE MATTER OF REGISTRATION SECTION LOWER VALLEY BLOCK 38B, PARCEL 57

BETWEEN

ANDYLANE BUSH-MARSH

Plaintiff

AND

DON EDWARD MARSH

Defendant

OPEN COURT

Appearances: Mr. Delroy Murray of Murray & Westerborg for the Plaintiff
Mr. Steve McField, Attorney-at-Law for the Defendant

Before: Hon. Mme Justice Margaret Ramsay-Hale

Heard: 11 November 2020

Draft judgment circulated: 27 April 2021

Judgment Delivered: 4 May 2021

HEADNOTE

Voluntary transfer of land - application to set aside on ground of duress or undue influence - presumption of undue influence arises if transferor places trust and confidence in recipient and enters into transaction which requires explanation - presumption rebutted if recipient shows transaction made with free will on ground of relationship and transferor fully understood implications

Civil procedure - Mode of commencing proceedings - GCR O.5, r 2(b) - originating summons inappropriate where substantial dispute of fact likely - GCR O. 5, r4 - proceedings required to be commenced by Writ - claim of duress must be properly particularised so defendant knows the case he has to meet

JUDGMENT



Introduction

1. The Plaintiff, Mrs. Andyland Bush-Marsh (“Mrs. Marsh”), and the Defendant, her son Don Marsh (“Don”), are the joint proprietors of two parcels of land, one a residential property in West Bay, appearing in the Land Register as Block 5B Parcel 180 (the “West Bay property”) and the other, Lower Valley Block 38B Parcel 57 (the “Lower Valley property”).
2. The properties were both originally held by Mrs. Marsh as sole proprietor but, in July 2017, she transferred the properties into the joint names of Don and herself in consideration of her natural love and affection.
3. By Statement of Claim filed on 8 October 2020, Mrs. Marsh seeks to unwind those transactions on the grounds of duress and undue influence and have the properties transferred back to her as sole proprietor.

Procedural Background

4. The proceedings were begun by way of Originating Summons dated 25 November 2019 in which Mrs. Marsh sought an order that the Registrar of Lands be directed to remove Don as joint proprietor of the West Bay South Block 5B Parcel 180 on the basis that the Registration was obtained by duress.
5. Other relief was sought including injunctive relief to permanently restrain Don from interfering with Mrs. Marsh’s use and enjoyment of the property known as Lower Valley property where they both lived.
6. Certain interim relief was granted by McMillan J at an ex parte hearing on 13 January 2020. At the first *inter partes* hearing on 3 March 2020, the interim injunction was continued by consent and Directions agreed for the hearing of the summons.
7. On further review of the papers, it became clear that the mode of commencing proceedings which had been adopted was inappropriate because the claim of duress is actionable as a tort and was required by GCR O5 r, 1(2) to be commenced by Writ. The principle was stated by Lord Scarman in the decision of the House of Lords in *Universe Tankships v International Transport Workers Federation, The Universe Sentinel* [1983]1 AC 366, at 400,

“It is, I think, already established by law that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damages or loss: Barton v. Armstrong [1976] A.C. 104 and Pao On v. Lau Yiu Long [1980] A.C. 614.”



8. In any event, it is inappropriate to proceed by way of originating summons procedure where there was likely to be a substantial dispute of fact: see O.5, r.4 (2)(b).
9. The Court ordered that the matter continue as if begun by Writ pursuant to O.2, r.1 (2) and gave directions, *inter alia*, for Particulars of Claim to be filed and served.
10. On 8 October 2020, a Statement of Claim was filed which pleaded, consistent with the claim made in the Originating Summons, that the transfer of a joint interest in the West Bay property to Don had been obtained by duress. The Statement of Claim, however, also included a new claim which is that the transfer had been obtained by undue influence.
11. For the first time as well, it was claimed that the transfer of the Lower Valley property was obtained by duress and /or undue influence.
12. No point was taken by Counsel for the Defence and the pleadings were closed on 28 October 2020 and the matter tried on 11 November 2020.

The Claim

13. The particulars of duress are set out as follows:

“(i) On diverse (sic) days since the return of the Defendant to the islands on or about the 10th day of July 2017 the Defendant used physical force, threats, intimidation, verbal invective, bullying against the Plaintiff designed and calculated to produce fear of bodily harm thereby overcoming her will (sic) and resistance and leading to her executing the said Transfers on or about the 10th day of July 2017, when she was in a state of fear for herself and completely mentally exhausted by the acts of the Defendant complained of herein.”

14. The alternative case of undue influence is pleaded as follows:

“7. The Plaintiff was induced [to execute the transfer] under the undue influence of the Defendant and pursuant to the faith, trust and confidence she reposed in the Defendant but without any separate or independent advice and without due consideration of the reasons for or effect of what she was doing.”

Particulars

- (a) *The Defendant caused the Plaintiff to be isolated from her other children and grandchildren and made her completely reliant on him.*
- (b) *The Defendant effectively took charge of the Plaintiff's daily life and affairs.*

(c) *The Defendant used his influence over the Plaintiff to cause her to transfer the said properties in the joint name of the Plaintiff and himself*

...

(d) *The said Transfers of propertied tothe Defendant ...were contrary to the wishes and plans of the Plaintiff and were made because of the undue influence the Defendant had acquired over her."*

The Defence

15. As so often happens, both the material facts and the evidence in support of them are pleaded in the Defence. In many instances, the pleaded averments are in the form of a first person narrative.
16. In his Defence, Don denies inducing or otherwise causing Mrs. Marsh to transfer the Properties from her sole name and into their joint names by duress. More particularly he denies using physical force, threats, intimidation, verbal invectives or bullying to put Mrs. Marsh in fear of bodily harm as alleged.
17. At paragraph 3, he takes issue with the generality of the allegations of duress as set out in the Statement of Claim on the ground that they are not particularised and are for that reason frivolous and vexatious thus rendering the allegations an abuse of the process of the Court.
18. Don also denies he ever acted in a controlling or abusive manner towards Mrs. Marsh or threatened her life or demanded she put the properties in his name and states that he never physically, mentally nor emotionally abused his mother as alleged.
19. He also denies isolating her from her other children, making her reliant on him and taking charge of her daily life and denies that he had or used any influence over Mrs. Marsh to procure the addition of his name to the Title to Lower Valley or West Bay properties as alleged.
20. His alternative case is set out at paragraphs 11 to 19 and may be summarised as follows:
21. When he returned home in 2016, he found his mother in poor health and sharing her home in Lower Valley with his younger brother. He avers that the house was without running water and electricity and his mother would spend much of the day at her church as she did not want to be home by herself. Meals on Wheels delivered meals to the home but these were often eaten by his brother. Mrs. Marsh was unable to get around on her own and was "*at the mercy of church members*" for transportation.
22. He restored the electricity and running water to the premises and shouldered the responsibility of taking his mother where she needed to go. If Mrs. Marsh were dependent on him to go about the course of her daily business, then this was solely because her other children and grandchildren refused and/or were unwilling to help. When Don took her to her monthly doctor



visits, the doctor would interview Mrs. Marsh alone and she never once indicated to the doctor that she was abused or felt threatened in the home that they shared.

23. With respect to the property in Lower Valley, Don's case is that he and his mother had jointly purchased the land and it was always understood and agreed that the land would be registered in her name only for the purposes of the government building a house on the land, after which the property would be transferred into their joint names or left to him in her Will. He denies that he demanded that his mother put his name on the properties and avers that he only spoke to her once about the Lower Valley property to ask her when she would add his name to the Title, as he was also in ill-health and wanted things settled should anything happen to either of them.
24. With respect to the West Bay property, his case is that Mrs. Marsh voluntarily transferred the property into their joint names to protect her interest in the land as she had received information that his sister, Kathleen, was trying to sell the land. As a result, Mrs. Marsh insisted that his name go on the Title. She had requested that the property be transferred to him as sole proprietor but at the Office of the Registrar of Titles, suggested that both names could go on the Title, "*with or without shares*" and that Mrs. Marsh had decided that "*it should be listed without shares*" i.e. as joint proprietors.
25. Don avers that he did not know of any life insurances policies his mother may have had and denied that he coerced her to designate him as a beneficiary. It was his belief that his name is '*listed*' on a home insurance policy because it was necessary to do so when he became a joint owner of the property.
26. The Reply traversed the Defence. More particularly, Mrs. Marsh stated that Don had to shoulder the responsibility of taking her wherever she needed to go, as he alleged, only because he would not allow her children and grandchildren to visit her at home, "*thereby inducing in her a syndrome of dependency.*" ¹Somewhat contradictorily, she also denied that he ever took her to the doctor and avers that she took the bus by herself to those appointments.
27. She denied that she had mental health issues at the time of the transfer of the properties - which was not alleged - but averred that since the proceedings were filed, she had been diagnosed as having symptoms of Alzheimer's and that her short term memory is not what it used to be.

The Issues

28. There is no dispute that the properties were transferred into the joint names of Mrs. Marsh and her son, Don, in October 2017 as alleged. The question for resolution is whether Mrs. Marsh executed the Transfers under duress. Alternatively, the Court is asked to determine whether

¹ Reply at para 8

Mrs. Marsh was unduly influenced by Don who had taken up residence with her on his return from the United States.

29. There is a factual dispute as to whether Mrs. Marsh had any life insurance policies as alleged and whether Don procured the naming of himself as the beneficiary of those policies either by undue influence or duress.

The Law

Duress

30. In *the Universe Sentinel*, on which Mr. Murray relied, Lord Scarman noted said that there were two elements in the wrong of duress. One was pressure amounting to compulsion of the will of the victim and the second was the illegitimacy of the pressure. His Lordship stated further;

“Compulsion is variously described in the authorities as coercion or the vitiating of consent. The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) with later developments when the law came also to recognise as duress first the threat to property and now the threat to a man’s business or trade. The development is well traced in Goff and Jones, The Law of Restitution, 2nd ed. (1978), chapter 9.

“The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred: see Maskell v. Horner [1915] 3 K.B. 106. But none of these evidential matters goes to the essence of duress. The victim’s silence will not assist the bully, if the lack of any practicable choice but to submit is proved.”

31. Simply put, to establish the plea of duress, a plaintiff must prove on a balance of probability that the defendant used or threatened her with violence such that she had no practical choice open to her but to submit to his demand to have the property transferred.

Undue Influence

32. The jurisdiction to set aside a transfer of property obtained by the abuse of influence was developed by equity to supplement the common law of duress. In *Royal Bank of Scotland v Etridge*², Lord Nichol’s of Birkenhead said:

² [2001] UKHL 44

“Undue influence is one of the grounds of relief developed by the Courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused...The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in scope, restricted to more blatant forms of physical coercion such as personal violence. ..Here, as elsewhere in the law, equity supplemented and extended the reach of the law to other unacceptable forms of persuasion”³

33. The overarching principle set out in *Etridge* is that, if the donor intended to enter into a transaction, but the intention was produced by means which lead to the conclusion that the intention thus procured ought not fairly to be treated as the expression of the donor's free will, the law will not permit the transaction to stand.
34. Lord Nicholls reiterated that the starting point for any analysis was the two forms of unacceptable conduct. The first was overt acts of improper pressure or coercion. The second arose out of a relationship between two parties where one acquired an influence or ascendancy over the other, and then unfair advantage was taken by the stronger party without any specific acts of coercion.”⁴
35. His Lordship stated that that the law recognised the need to protect these “relationship” cases, even when there was no evidence of overt acts of persuasive conduct. He also observed that the relationships which may develop a dominating influence of one over another are “*infinitely various.*” The question to be asked is “*whether one party has reposed sufficient trust and confidence in the other.*”⁵
36. With respect to the burden of burden of proof, Lord Nicholls said this:

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

³ Ibid para 7

⁴ Para 8

⁵ Para 10

37. Despite the allegations made in the statement of claim, Mrs. Marsh does not seek to rely on the overt acts of improper pressure or coercion which were pleaded to establish that the transfers were obtained by undue influence. Rather, she seeks to prove undue influence by relying on certain evidential presumptions arising from the nature of her relationship with Don which she describes in the pleadings as one of “*faith, trust and confidence.*”
38. These presumptions are described by Lord Nicholls in *Etridge* as a forensic tool to establish undue influence in the “*relationship*” cases:

“Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”⁶

39. Thus, if a complainant establishes that she placed trust and confidence in the defendant or that the defendant had acquired ascendancy over her and that the transaction is one which calls for an explanation, then she will have discharged her evidential burden of raising the inference that the transaction was tainted by improper influence. If the defendant fails to rebut the inference, then the claim of undue influence arising from those facts will be proved.
40. The case of *Johnson v Buttress*⁷ on which Mr. Murray relies, decided by the apex court within the court hierarchy in Australia, provides a very vivid example of undue influence inferred from a relationship of trust and confidence. The facts are that Ms. Johnson (the appellant) had for many years looked after Mr. Buttress, now deceased. Buttress was illiterate, unsophisticated in business affairs and reliant upon Johnson. Buttress transferred ownership of a piece of land to Johnson without receiving independent legal advice. After Buttress' death, the transfer was challenged by his son.
41. Latham CJ noted that that Buttress was unable to read or write, even his own name, and was “*dependent for his living upon the rent which he received from the cottage*” that was the subject of the transfer and was dependent upon others in relation to “*almost any*

⁶ Paragraph 14

⁷ (1936) 56 CLR 113 High Court of Australia



*business matter.*⁸ The learned Chief Justice also referred to evidence of other witnesses which suggested that the *“deceased was highly excitable, very stupid and mentally unstable.”*⁹

42. Justice Dixon referred to Buttress as *‘a man peculiarly dependent on others ... quite unable to do anything but the roughest work ... excitable and would give rein to his emotions, whether of anger, grief, or dejection’*¹⁰ He was *“easily moved to gesticulation and shouting ... had a tendency to loud and disconnected talk. Many ... found him trying and he seems to have been regarded as an oddity. He was called by a nickname, ‘Rocker’...”*¹¹
43. As the cottage was Mr. Buttress’s sole source of income, the learned Chief Justice remarked that *“the absolute transfer to the defendant of the property which was his sole source of income was highly improvident,”*¹² the more so in the circumstances where Johnson retained the rents of the property transferred.
44. The Court found that a relationship of trust and confidence obtained between Johnson and Buttress of such a character that he relied upon her for advice on any matter of business. In those circumstances, in order to maintain the transaction, it was necessary for Johnson to show affirmatively that Buttress knew what he was doing when he made the transfer, in the sense that he understood its effect and significance in relation to himself, and further to show that the transfer was the result of his own will which she had failed to do.

The Plaintiff’s Evidence

45. In her affidavit sworn on 21 November 2019, which stood as her evidence-in-chief, Mrs. Marsh described her son as a person possessed of a mean and violent temperament from which she had suffered. She recalled on one occasion when they lived together at Smith Road, George Town, Don had violently kicked her down some steps, causing her to suffer severe tissue damage and injury to ligaments in her leg. At that time, she was working at a nurse at the Hospital and had to work on crutches for 6 months.
46. Many years after that incident, following the passage of Hurricane Ivan, Don left Cayman and migrated to the United States.
47. She states that on his return to Cayman, he came to her home in Lower Valley and immediately began to *“abuse”* his sister, Kathleen, and demand that Kathleen leave the property. She tried to intervene but he turned on her in a manner so *“vicious”* that the Pastor who had accompanied him to the residence had to shield her from his conduct.

⁸ At page 120

⁹ At page 122

¹⁰ At page 127

¹¹ At pages 127-128

¹² At page 121

48. She nonetheless let him stay with her at her home because he had nowhere else to go. Don continued to harass her other children and her grandchildren and barred them from coming to the home to visit her. When she objected, he would verbally assault her. Eventually, because of his conduct, her children and grandchildren stopped visiting.
49. Don started to badger her to add his name to her properties. She initially disagreed as it was her intention to leave the properties to her grandchildren with the stipulation that the properties always remain in the family. Don, however, demanded she put his name on the properties “so he could handle [her] other children.” Whenever she would say that those children had taken care of her while he was away, he would say they hadn’t done “such a good job”.
50. Don gradually took over the running of her home and she grew dependent on him “for support in getting around.” He continued to demand that she place his name on the properties to protect them from her other children and eventually began to threaten her with violence if she didn’t do so. He also threatened to stop taking care of her.
51. Eventually, as she explains,
- “...as a result of his demands, I was pressured into transferring the properties into both our names. This was not really an act of my free will but came about as a result of the intimidating tactics employed by [him] and the fact that I was by then totally dependent on him for transport and for getting things done.”*
52. In October 2017, Don began to “further pressure” her to grant him a Power of Attorney to conduct her financial affairs. She does not say what form this pressure took but says that, in any event, she resisted his demands because she felt she was “fairly competent” to do so on her own. Ultimately, he threatened to have her committed if she didn’t do what he asked and, as a result, she appointed him her attorney by a Power of Attorney made on 19 October 2017 and executed a Will leaving her properties to Don and his children.
53. Mrs. Marsh asserted that after she executed the Power of Attorney, Don became controlling and abusive to the point where she became “a virtual prisoner in her home.” As a result, she attended at her attorneys’ offices by herself on 26 April 2018. She told them “what had and was still occurring to her” at Don’s hands and that she wished to revoke the Will made on 19 October 2017. On the same day, she made a new Will.
54. In December 2018, she invited her granddaughter Brittany Helvester to stay at the home and look after her. This was said to be in response to Don’s controlling and abusive behaviour which made her feel like a prisoner in her own home and that her life would be at risk if she continued to stay in the home without another family member present.

55. She stated that when Brittany moved in, Don became extremely aggressive and violent towards her as a result and “on occasions” he physically assaulted her. No details of these assaults are given.
56. Eventually, she had enough and, on 22 March 2019, she instructed her attorneys to write a letter to Don to demand, *inter alia*, that he desist from making threats against her, to cease harassing Brittany and making demands that she pay more towards the electricity bill and cease preventing her other children and grandchildren from visiting the home.
57. Mrs. Marsh says the letter caused a brief lull in Don’s aggressive behaviour but he soon resumed his aggressive and “intimidatory attitudes” which caused her granddaughter to move out. Shortly after, Don’s girlfriend, later his wife, moved in. Thereafter, she became the ‘sole source’ of his anger - I think she meant “target” - was physically pushed around and threatened with a knife and at times would go hungry because she did not like the food he and his wife prepared.
58. On 9 August 2019, Mrs. Marsh again attended on her attorneys who wrote a further letter to Don in which they stated, *inter alia*,

“Our client instructs us that you are prohibiting and preventing her daughter... and her son... from (a) visiting the property and (b) staying with her at the property at nights.

“As you are aware our client transferred this property to your joint names for Love and Affection on the basis that you would look after her in her advanced years and the poor state of her health. We are instructed that instead of doing so, that you have physically assaulted (sic), taken money away from her and emotionally abused her...

“We now write to advise that should you prevent her children and grandchildren from visiting her at her home and enjoying the amenities, we will have no alternative but to apply to the Court to remove your name as Joint Proprietor and thereafter oust you from the property.

“We hope this does not have to happen but that depends on your conduct towards our client, her children and grandchildren.”

59. Despite this letter, Don’s aggressive and unlawful conduct towards her did not cease. She, therefore, returned to her attorneys’ offices on 14 October 2019 and revoked the Power of Attorney appointing Don and one Greg McLaughlin and executed a new Power of Attorney appointing her daughter Kathleen and grandson Paul. On the same occasion, she obtained another letter from her Attorneys addressed to Don advising him that his mother had,

“...revoked the Power of Attorney granted to you and Greg McLaughlin and has appointed new Attorneys in replacement of both of you.”



60. Although the witnesses' affidavits were ordered to stand as their evidence-in-chief, Mr. Murray elicited further evidence from Mrs. Marsh, examining her on some of the matters set out in the Defence.
61. He asked her to comment on Don's denial in his Defence that he had ever treated her with any physical force, threats, intimidation, verbal abuse or bullying to which Mrs. Marsh responded, *"He never treated me that way...He roughed me up."*
62. She denied that Don had paid any monies towards the purchase of the property in Lower Valley as he alleged and stated that there was no agreement between them that she would put his name on the Title.
63. She also denied insisting that Don be added to the Title of the West Bay property because Kathleen had tried to sell it. She also denied she had ever thought she transferred the West Bay property to his sister by mistake thus giving her the right to sell, as Don alleged.
64. Responding to other allegations made by Don in his Defence, Mrs. Marsh denied that she was living in poor conditions when he came home from the States or that she was in a state of malnutrition and receiving meals from Meals on Wheels. She said she had running water and kept everything beautiful. Her only difficulty was that she wasn't able to get around well because she had been in an accident but that her daughter Kathleen took her wherever she needed to go as Kathleen owned a car. She denied that Don assisted her, saying that Don had no car.
65. Mr. Murray asked Mrs. Marsh to comment on Don's assertion that it was she who insisted had said he must have his name on the West Bay property. She responded,
"Yes. How it was...because he was carried down and I just gave it to him."
66. She was not asked what she meant by *"carried down,"* but the meaning I take from the words used is that Don had been brought low by his circumstances. The evidence was at odds with her case.
67. Asked about Don's assertion that he had never abused, controlled or threatened her, she replied,
"My son, let me tell you what he would do. He come like he going to fight. He jump up, he make a pile ah noise. And it wasn't that I was exactly afraid because I was on crutches and I was really tortured that he would try to lick me down."
68. It is part of Don's case that his mother has recently developed dementia and suffers short-term memory loss. In his Defence, he alleged that Mrs. Marsh had insisted that his wife sleep with her



because “*dead people were out to get*” her. Asked to comment on that assertion, Mrs. Marsh replied,

*“That wasn’t true. That is not true...I went there to sleep with the wife, yes, but the wife and him was upstairs. Okay? I’m downstairs in a lounge chair. ..She came down and slept with me. That was it. And we did it good. **We lived loving.**”*

69. That last was at odds with the rest of her evidence.
70. Nothing of consequence was elicited during Mrs. Marsh’s cross-examination.

The Defendant’s Evidence

71. In his *viva voce* testimony, Don denied ever physically assaulting or threatening his mother or being abusive in any fashion. He described his relationship with his mother, before he went to the States, as ‘*awesome.*’
72. Referred to the period when he and his mother lived that Smith Road, Don denied assaulting his mother but accepted that they and his mother were not getting on at the time. Nonetheless, they continued to live together, staying at different places after the Smith Road property was sold, including North Sound Courts, Randyke Gardens and at Ms. Webb’s apartment in Crewe Road. He refuted the suggestion that when they lived at Crewe Road, he and his wife charged his mother “*tens of thousands of dollars*” for light and water and phone and said he and his wife took care of his mother, that they “*didn’t need for nothing*” and that his mother “*paid for nothing, not even food*”
73. When he left the Islands after Hurricane Ivan, he said his mother begged him repeatedly to come home. After he separated from his wife, she called him and said, “*Come home, I need you,*”
74. In 2013, she told him she was “*in stress*” with the other children and he “*must come home*”. In 2013, however, Don, who had become homeless after the separation and had been living in a tent by the river and doing odd jobs to survive, was imprisoned for dealing in drugs.
75. He accepted that he had had an argument with his sister Kathleen at the Lower Valley property the day he arrived back home from the United States. He explained that he had gone to Foster’s to get food and on his return to the premises he found his sister, Kathleen there with her son, trying to take his mother’s “*last \$100*” which made him angry. He denied that the incident upset his mother.
76. He said that, once home, he took over the responsibility of taking his mother to her doctor’s appointments. He did not accept his mother’s evidence that it was his sister, and not he, who



took her to her appointments when he returned home from the United States. He insisted that since his return to the Islands, he had been the only person who did so and that he continued to arrange transportation for Mrs. Marsh even after he lost his vehicle. Asked if he was calling his mother a liar, Don said his mother wasn't a liar but she had problems with her memory and that it states in her medical records that she has dementia.

77. With respect to the Lower Valley property, he said he gave his mother money towards the purchase, *"passed over the money for her for whatever she needed."* He insisted that the property was *"for him"* and that his sister got the majority of the money from the sale of the Smith Road property and that *"the rest of them got what they were supposed to get."* He explained that his name did not go on the Title because the Government would not have built the house on the land for his mother if an able-bodied man's name was on the Title.
78. He denied the suggestion that he had demanded that his mother transfer the property to him with threats and bullying. He was taken to his pleaded case by Mr. Murray but the averment made there was not that he made any demand, but that he had asked his mother once about adding his name to the Title and only because they were both in ill-health and things settled should anything happen to either of them. It emerged from his evidence his health was indeed bad as he had had a heart attack in 2007/2008 and weighed some 500lbs when he returned to Cayman.
79. It was his evidence that he *"had nothing to do with"* the West Bay property and that it was Mrs. Marsh who made the decision to add his name to the Title to protect the property from Kathleen as she had been told that Kathleen was trying to sell the land. He maintained no claim by way of contribution to the property and offered to transfer his interest back to Mrs. Marsh.
80. The only other witness of fact was Ms Maxine Bodden who gave evidence on behalf of Don. It was her evidence that she had met Mrs. Marsh, to whom she referred as Miss Andyland or Miss Ann, about 5 years and knew her well.
81. From her the Court learned that Don's ex-wife, Kim and Ms Bodden's sister, Patrice Donalds, had worked together trying to get *"the paperwork necessary to get Don moved from prison in the United States to Cayman as per Miss. Ann's request."*
82. Ms Bodden's evidence is that when her sister moved out of Bodden Town, she left Miss Ann in her hands. Her sister gave her an envelope with some money in it and told her to buy groceries for Miss Ann and take them for her. According to Ms. Bodden, *"That's where it start"* According to Don, that was money which he and his ex-wife Kim sent from the United States to Patrice for Mrs. Marsh's care.
83. Ms Bodden said that that she would pick up Miss Ann in the mornings and take her to Church at least three times a week, Mondays, Wednesdays and Fridays. She would buy her whatever she

needed and show her the receipts. In the course of her evidence it transpired that the money Ms. Bodden spent on Miss Ann was sent by Kim, Don's former wife. She said she would have conversations with Miss Ann in which she listened more than she asked questions. She said that Miss Ann basically said that the property in Lower Valley belonged to her and Don and there was no way her daughter is going to get it and added,

"You need to understand why she brought Don home. The reason she brought Don back from the US is because she was going through a rough time. Her children were treating her bad. And this is why she went through all the trouble to get Don from prison. Miss Ann talks freely. Her children were treating her bad. She named her daughter, Princess [Kathleen] and her son, Henry who were living with her. I never saw anything. I can only go by what Miss Ann said. Miss Ann was very bitter against her daughter because she believed her daughter was trying to put her in the old people's home."

84. She said that Miss Ann had told her before Don came home in January 2016 that the property belonged to her and Don. Ms Bodden also said in her evidence that when the transfer was being done, both Miss Ann and Don made her aware of it.
85. In cross-examination she refuted the suggestion that she wasn't speaking the truth. She said that she loved Miss Ann dearly and would *'never tell a lie on her.'* She explained that, after months of taking Miss Ann to church, she finally decided to go into the church with her and said she was *"really happy for that as I am the woman I am in Christ because of that."*
86. She rejected the suggestion that had never bought groceries and said she was disappointed that Miss Ann had instructed her lawyer that her evidence was untrue. She countered the suggestion that Miss Ann was not in the habit of discussing family relations with strangers, and would not have discussed them with her, by saying that *"a whole church-load of people"* would back her up. She said further that she wouldn't be in Court putting herself in jeopardy for a lie that had no bearing on her life.

Findings of Fact

The Lower Valley Property

87. There is an inconsistency between Mrs. Bush-Marsh's pleaded allegations of being browbeaten by her son's violence, threats of violence and abuse into transferring her properties into their joint names against her will, intended to support the claim of duress, and the evidence she gave which demonstrated that she was clearly capable of, and continued to make, independent decisions inconsistent with Don's alleged demands and despite his abuse, including,
 - (i) making a new Will in April 2018;

- (ii) installing Brittany in the home which she and Don shared in December 2018, despite his objection to her children and grandchildren visiting;
 - (iii) instructing lawyers to warn him to desist from abusive behaviour in March 2019;
 - (iv) threatening him, through her lawyers in August 2019 to remove his name as Joint Proprietor, on the ground that she had given him an interest in the properties on the basis that he would look after her in her advanced years;
 - (v) revoking the Power of Attorney granted to him and another person and appointing her daughter Kathleen Helvestor and her son, Paul, as her new Attorneys in October 2019;
 - (vi) having her daughter come to stay in the home with them despite Don's objections to her daughter's presence and
 - (vii) calling the police to have him warned, when he demanded that Kathleen leave the premises.
88. He who asserts must prove. It is impossible to accept, in the light of this evidence, that Mrs. Marsh was threatened or intimidated by Don and cowed into transferring the properties to him, as she alleged.
89. There is merit in the complaint that the particulars of duress are insufficiently particularised in the Statement of Claim. The allegations are broad and absent of those particulars that would allow the Court to understand the violence visited on her, what constituted the threats of violence, what words said that amounted to verbal invectives and the conduct which was said to be bullying.
90. The content of the threats Don is said to have made remained opaque, as Mrs. Marsh did not set out the nature of the threats in her affidavit, making only the broad assertion that Don continued to demand that she place his name on the properties to protect them from her other children *"and eventually began to threaten her with violence if she didn't do so."*
91. Her *viva voce* evidence took the matter no further. She said that Don would jump up and down make noise and behave as if he were going to hit her.¹³ When he did this, however, she wasn't afraid. She just felt tortured - which I construe to mean feeling hurt - that he would try and hit her.
92. Having noted Mrs. Marsh's demeanour as she gave her evidence I accept that although his conduct pained her, she wasn't afraid of Don. I caution myself not to attach too much weight to my impression, but she gave not the least bit appearance of being capable of being intimidated.

¹³ Supra para 64



She was unfazed and unfiltered when she gave her evidence. My impression of Mrs. Marsh as someone who spoke her mind freely is supported by Ms Bodden's description of Mrs. Marsh.

93. That is not to say I disbelieve her evidence entirely: I am quite prepared to believe that Don could lose his temper, say things which were ugly and express himself forcefully. He freely admits he does not like or have time for his siblings or their children, did not want them at the Lower Valley property and that he quarreled with his sister, Kathleen, the very day he returned to Cayman.
94. What I do not accept is that Mrs. Marsh was threatened by Don if she didn't add his name to the Title to the properties or was so intimidated by him, whether by physical force or bullying, that her will was overborne and she felt she had no practical choice but to execute the transfers transferring the properties in their joint names.
95. Mr. Murray, in his closing submissions, relied on the fact that Mrs. Marsh made the Will appointing Don as her beneficiary when Don was present with her in her attorneys' office, and then revoked it when she came back to the attorneys' office on her own, as demonstrating that she had been acting under duress when Don was present. But the evidence cuts both ways and what it says to me is that she was able to get around by herself, attend on her attorneys without Don and give instructions contrary to what Don ostensibly wanted and was allegedly prepared by force or the threat of force, bullying and intimidation to achieve.
96. Mrs. Marsh's case is further undermined by the letters of 22 March 2019 and 9 August 2019, written on her behalf by her attorneys in they which state that their instructions are, that on his return from overseas, she added Don's name to the property in Lower Valley on the basis that he would look after her and be "*a loving brother, uncle and grand uncle to the other members of the immediate family.*" Those instructions are at odds with the allegation that she transferred the property to him as a result of violence, threats of violence and abuse. The letters suggest rather that, having transferred the land to him for love and affection, as recorded in the Transfer, Mrs. Marsh was disappointed that Don had not played the role within the family that she desired him to play.
97. Also inconsistent with the plea of duress were Mrs. Marsh's instructions to her attorneys as they appear in the letter of 22 March 2019, that Don's behaviour - "*making threats*" and "*actions that amounting to an assault*" - became an issue **after** she had added Don to the Title of the Lower Valley property:
- "our client...on your return from overseas, added your name as a joint proprietor...**shortly after** the transfer to you of the said property, your attitude and behaviour towards her has steadily declined..."* [my emphasis]
98. The letter of 9 August 2019 confirms these instructions, stating *inter alia* that the Lower Valley property,



“was transferred on the basis that you would look after her in her advanced years, but instead you have physically assaulted [her], taken her money away from her and emotionally abused her.” [my emphasis]

99. There is no assertion in either letter that she instructed her attorneys that she had executed the Transfer in respect of the Lower Valley property as a result of threats and intimidation.
100. That Mrs. Marsh did not do so in April 2018, when she attended on her attorneys to revoke the Will naming Don as her beneficiary, or in October 2019, when she revoked the Power of Attorney, or in November 2019, when she filed the Originating Summons, belies her claim that she transferred the Lower Valley property under duress. The fact that the claim in respect of the Lower Valley property was not made until some 11 months after she filed her Originating Summons seeking to set aside the transfer of the West Bay property also calls the sincerity of the claim into question.
101. The evidence of Ms Bodden puts it beyond doubt that Mrs. Marsh’s decision to transfer the Lower Valley property into their joint names was voluntary. Far from allowing Don to stay at Lower Valley because he had nowhere to go, as Mrs. Marsh said in her evidence, we learned from Ms Bodden that Mrs. Marsh actively worked with to get Don out of prison sooner so he could come home to Cayman and live with her at the Lower Valley property, a property which she told Ms Bodden belonged to them both and which she was going to transfer into their joint names when he returned. Her evidence is consistent with Don’s evidence that it was always understood and agreed between himself and his mother that they would own the Lower Valley property jointly, but that his name would not be out on the Title until the house was built, for the reason Don gave in his evidence, and that Mrs. Marsh voluntarily added him to the title for the property in Lower Valley in July 2017, consistent with their agreement.
102. Don’s evidence, that he had no antecedent interest in the West Bay property and was willing to transfer his interest back to his mother, also supported his credibility as a witness and lent weight to his assertion that he had contributed to the acquisition of the Lower Valley property and that it was always intended to be jointly owned by him and his mother. The evidence establishes that the transfer of the Lower Valley property into their joint names by Mrs. Marsh was voluntary and I dismiss the claim of duress.
103. Mrs. Marsh’s evidence is incapable of supporting the alternative claim of undue influence with respect to the Lower Valley property and I dismiss that claim as well.

The West Bay Property

104. Don’s offer to transfer his interest in the West Bay property back to Mrs. Marsh brought the claim, to set aside the transfer to an end.



105. For completion, however, I move to consider whether the claim was made out on the evidence.
106. With respect to the claim that the transfer was procured by undue influence, I start by noting that the presumption of undue influence does not automatically arise upon a transfer of valuable property from an elderly parent to a child in circumstances where the parent is in good health and has possession of all his or her faculties. An *inter vivos* transfer of property from a parent to a child for Love and Affection is not, without more, a transaction that calls for an explanation.
107. A presumption of influence will arise if the relationship between the elderly parent and the child is characterised by dependency. Perhaps unsurprisingly, Mrs. Marsh asserts in her affidavit that Don isolated her from her family and induced in her “*a syndrome of dependency*” of which he then took unfair advantage, inducing her to make him a joint proprietor of property that she intended to leave to her grandchildren.
108. That assertion was however, contradicted by her *viva voce* testimony in which she stated that her daughter, Kathleen, took her wherever she needed to go, both before and after Don came back from the States, traversing her own case that she was dependent on Don to get around. It was also contradicted by her Reply, in which she averred that she took the bus to her doctor’s appointments,¹⁴ thus demonstrating her independence. It also emerged from the evidence she made her own way to her attorneys to give them instructions whenever she became disappointed that Don had not lived up to her expectations being a good brother, uncle and grand uncle.
109. Mrs. Marsh, on her own case, had no mental health issues at the time the transfers were executed which might have suggested that she was vulnerable and the transactions, for that reason, should be closely examined.
110. Further, to raise the inference of undue influence, what is required is “*proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs.*” There was no such evidence.
111. I accept Don’s evidence and find that it was Mrs. Marsh who proposed transferring the West Bay property into their joint names to protect it from his sister Kathleen and that she had proposed transferring all of her interest to him. I am also satisfied and find that it was he who suggested that she keep her name on the Title, thus ensuring that the transaction was not to her disadvantage. In addition, it was Mrs. Marsh who, presented with the options at the Registrar’s office, decided that she and Don should hold the property as joint proprietors rather than as tenants in common.

¹⁴ Reply at para 13

112. This case could not be further from the case of *Johnson v Buttress* on which Mr. Murray relies. None of the evidence is capable of raising the inference that the transfer of the West Bay property was procured by undue influence.
113. Before disposing of the matter, I would also observe that there was a paradox inherent in Mrs. Marsh's claim that she transferred the properties because her will was overborne by Don's violence, threats, intimidation and bullying while at the same time claiming that she transferred the properties because she reposed "*faith, trust and confidence*"¹⁵ in Don and, for that reason, had agreed a course of action proposed by him.
114. The point is made by Lord Scott in *Bank of Scotland v Bennett*, one of the cases decided in the heard in the conjoined appeal in *Etridge*, who said this at para 313 and 314 of the judgment:

"The deputy judge went on to consider, as an alternative to actual undue influence, Mrs. Bennett's case based on presumed undue influence. He held ([1997] 3 FCR 193 at 221–223) that both the guarantee and the legal charge were manifestly disadvantageous to Mrs. Bennett and that the relationship between her and her husband was one of sufficient trust and confidence to raise a presumption of undue influence in relation to both transactions. He held that the presumption had not been rebutted.

"On this aspect of the case, Chadwick LJ ([1999] 1 FCR 641 at 662) commented on the paradox that Mrs. Bennett was contending, on the one hand, that she had signed the two documents because her will to resist had been overborne by her husband but, on the other hand, that her trust and confidence in her husband was such that if he asked her to sign she would do so. The point is the same as that to which I have referred in Coleman's case (see [290], above)."

115. That Mrs. Marsh advanced an alternative case at odds with her primary case betrayed the insincerity of her claim that the transfers were not voluntary, as does the fact that the claim that the transfer was procured by undue influence was formulated 11 months after the Originating Summons was filed.

Life Insurance Policies

116. Finally, no life insurance policies were exhibited or any evidence led to support the allegation that Don had "*wrongfully procured and induced*" Mrs. Marsh to name him as a beneficiary. The claim for a declaration and an order to remove Don's name as a beneficiary is dismissed.

Conclusion

¹⁵ At para 7 of the Statement of Claim

117. Mrs. Marsh has failed to meet her burden of proving on a balance of probabilities that the transfer of the properties into the names of her son, Don, and herself as joint proprietors was procured either by duress or undue influence.
118. That said, as noted above, Don does not claim a proprietary interest in the West Bay property, which he says was transferred into their joint names to protect Mrs. Marsh's title and the property is to be transferred to Mrs. Marsh by consent.
119. I will hear Counsel on the form of Order and any orders consequential on the judgment of the Court as well as on costs.

DATED 4 MAY 2021

RAMSAY-HALE J