

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3 CAUSE NO. G0207 OF 2014
4 LEGAL AID NO. LACR117/2011

5
6 BETWEEN

7
8 JOHN GOULDBOURNE
9 AS ADMINISTRATOR OF THE ESTATE OF LEE ALEXANDER GOULDBOURNE

10
11 PLAINTIFF

12
13 AND

14
15
16 LEEROY NOEL GOULDBOURNE

17 DEFENDANT

18
19 Before: Hon. Mrs. Justice Marlene Carter (Actg.)

20
21 Appearances: Mr. David Lewis-Hall of Priestleys for the Plaintiff
22
23 Ms. Yvonne Mullen of Broadhurst LLC for the
24 Defendant

25
26 Dates of Hearing: 17th November 2020 - 20th November 2020

27
28 Date draft circulated: 8th March 2021

29
30 Date of delivery of judgment: 8th April 2021



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33
34 HEADNOTE

35
36 *Civil Jurisdiction - Breach of trust and undue influence -*
37 *Monies Had and Received - Presumption of advancement - Resulting trust*
38
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42 JUDGMENT
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1 **1. The parties:** The Plaintiff has filed this action in his capacity as Administrator of the Estate
2 of Lee Alexander Gouldbourne (hereinafter “the Deceased”). The Plaintiff was granted Letters
3 of Administration of the Deceased’s estate on the 11th October 2012. The Defendant is the
4 brother of the Plaintiff and a son and beneficiary of the Deceased’s estate. Pursuant to s.29
5 (1)(c) of the *Succession Act*, the Plaintiff, the Defendant, and their brother Paul are equal
6 beneficiaries of the Deceased’s estate.

7
8 **The Pleadings**

9
10 Statement of Claim:

11 **2.** The Plaintiff’s claim was based on the following as set out in the Statement of Claim:

12 “3. *From around January 2008 the Deceased was suffering from cognitive*
13 *decline and was suffering from short term memory loss. The Deceased*
14 *continued to suffer mental decline until the date of his death on the 4th*
15 *February 2011. By the date of his death, the Deceased was suffering from*
16 *Alzheimer’s disease and prostate cancer.*”

17
18 “4. *In the Deceased’s later years leading up to his death he relied on the*
19 *support of the Defendant to assist with his care and financial affairs and*
20 *he was placed in a role of trust and confidence by the Deceased.*”

21
22 **3.** There are three areas of claim arising as a result. The first is a claim for Monies Had and
23 Received in the amount of CI\$235,305.94. The Plaintiff claims that the Deceased held these
24 monies in an account TD 013-04240 at the Cayman National Bank in his sole name up to the
25 date of his death. It is further claimed that on the date of the Deceased’s death, after the time
26 of his passing, the entire amount held in that account was transferred to Account 011-00063,
27 an account held either legally or beneficially by the Defendant. The Plaintiff claims that:

28 “By transferring the said sum of CI\$235,305.94 out of the account of the
29 Deceased, after his passing the Defendant intermeddled in the Estate and has
30 had and received money to the use of the Plaintiff.”¹

31
32

1 ¹ See Paragraph 7 of the Statement of Claim



1 4. The Statement of Claim further alleges that the Defendant was in a position of trust and
2 confidence as the son of the Deceased. The Plaintiff claims that the Deceased was reliant on
3 the Defendant to assist with his personal and financial affairs and that the amendment of the
4 account mandate for account CK 011-01825 to the joint names of the Deceased and the
5 Defendant was made with a view to assisting the Deceased with the management of his personal
6 affairs given his health and advanced years.
7

8 5. The Statement of Claim sets out as follows at Paragraph 12:
9

10 *"On or around the 10th January 2005 the Defendant was added as a joint*
11 *signatory on account CK 011-01825 and between January 2005 and February*
12 *2011 the following sums were transferred from the account to account 011-*
13 *01826 which it is averred is an account held legally or beneficially in the name*
14 *of the Defendant.*

15
16 These sums amounted to C\$ 512, 450.72.

17
18 6. The Plaintiff claims that:
19

20 *"Given the relationship of the Deceased and the Defendant as father and son*
21 *and the nature of the transactions set out at paragraphs 12 it is presumed that*
22 *these transactions were procured by the undue influence of the Defendant. In*
23 *the alternative, it is averred that the Defendant holds all funds removed from*
24 *account CK 011-01825 between January 2005 and February 2011 on*
25 *resulting trust for the Plaintiff."*²
26

27 7. The Plaintiff therefore seeks an account of all dealings by the Defendant in the financial affairs
28 of the Deceased and an enquiry into those dealings.
29

30 8. The third area of claim relates to property at West Bay North West, Block 4E, Parcel 81. This
31 property was transferred from the Deceased to the Defendant on the 16th July 2008. The
32 Statement of Claim at paragraph 16 sets out:
33

² See paragraph 13 and 14 of the Statement of Claim



1 *“Given the relationship of the Deceased and the Defendant as father and son, the nature*
2 *of the transaction, being a transaction so large that it calls for an explanation and*
3 *occurring at a time when the Deceased was of failing mental health, it is presumed that*
4 *this transaction was procured by the undue influence of the Defendant over the Deceased.”*
5

- 6 9. The Plaintiff seeks a declaration that the transfer of land be set aside or in the alternative
7 payment by the Defendant to the Plaintiff of a sum by way of damages equivalent to the value
8 of the property as at July 2008. The Plaintiff also seeks costs and interest.

9
10
11 The Defence
12

- 13 10. The Defendant denied that the Deceased was suffering from cognitive decline, memory loss or
14 Alzheimer’s disease. Instead, the Defendant avers that the Deceased suffered from prostate
15 cancer for which he had received treatment and had fully recovered by the time of his death.

16 *“At all material times, leading to the date of his death the Deceased was of sound mind,*
17 *memory and understanding.”*
18

- 19 11. It was admitted that the Defendant provided support, care and assistance to the Deceased, and
20 assisted the Deceased with his financial affairs.

- 21
22 12. The Defendant averred that the Deceased added the Defendant as a signatory to his account at
23 Cayman National Bank TD 013-04240. It was further set out in the Defence:

24 *“It is averred that at the time the amendment of the account mandate the*
25 *Deceased informed the Defendant that he intended to and was making a gift*
26 *to him of the funds in the said account. The Deceased informed the Defendant*
27 *that he should withdraw the funds in the account if anything were to happen*
28 *to him.”*³
29
30

31 The Defendant asserts, that it was on this basis, that the transfer of the entire balance of the said
32 account on the 4th of February 2011, the date of the Deceased’s death, was made, *“consistent*
33 *with the Deceased’s wishes”*.
34

³ At Paragraphs 7.2 and 7.3 of the Defence, Tab 3 of Agreed Bundle.



1 13. The Defendant admitted that he was added as a joint account holder to the Deceased's CNB
2 Account no. CK 011-01825. The Defendant averred that this account was used by the Deceased
3 for the purposes of his health food store business and also for personal matters. At paragraph
4 8.4 of the Defence it was stated as follows:

5 *"It is averred that in conversations which took place between the Deceased and the*
6 *Defendant, after the said account mandate was amended, the Deceased made it clear that*
7 *he had added the Defendant to the account so that he could assist him with his daily*
8 *financial affairs, if required and that he had intended that should he pass away any funds*
9 *left in the account would belong solely to and for the benefit of the Defendant.*

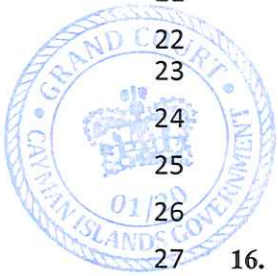
10
11 14. With regard to paragraphs 12-14 of the Statement of Claim and the sum of CI\$512, 450.72
12 referred to therein by the Plaintiff, the Defendant admitted that these sums were transferred
13 from the Deceased's account to an account held by the Defendant.
14

15 15. The Defendant averred that when the Deceased sold his interest in his property at North Church
16 Street in 2007, he told the Defendant that he did not wish for it to be held in Account CNB 011-
17 01825 and that it was to be placed in an account in the Defendant's name. The Defendant
18 therefore placed the sum in a CNB Securities account *"on the understanding that the account*
19 *was for the Deceased's benefit."* It was from this account, on the Deceased's instructions that
20 the Defendant states that he had drafts for CI\$100,000.00 issued to his brothers, the Plaintiff
21 and Paul Gouldbourne in January 2009. The Defendant averred that:

22 *"The Deceased instructed the Defendant that he was to have the balance of funds that*
23 *remained in the said Cayman National Securities account after the issue of these bank*
24 *drafts."*
25

26
27 16. The Defendant denied that these transactions were procured by the undue influence on the
28 Deceased, that any presumption of implied undue influence arose or that he held any funds
29 removed from that account on resulting trust.
30

31 17. The Defendant admitted that the Deceased transferred property at West Bay North West, Block
32 4E, Parcel 8 to the Defendant in July 2008 for natural love and affection. This the Defendant
33 averred was a gift from his father when the Deceased was of sound mind memory and
34 understanding.
35



1 18. The Defendant amended his Defence on the 9th August 2019 to indicate his intention to rely on
2 the doctrine of the presumption of advancement in respect of any funds/transactions in issue.
3 The Defendant also averred that the Plaintiff had been: *“guilty of prolonged, inordinate and*
4 *inexcusable delay in bringing and progressing the current action,”* with the result that he
5 *“caused or permitted the Defendant to believe that he did not intend to take such a step and the*
6 *Defendant acted to his prejudice and in particular that evidence is now no longer available.”*
7 The Defendant therefore claims that the Plaintiff is barred by laches from claiming he relief
8 that he seeks, or any relief claimed against the Defendant.

9 **The issues**

10
11 19. The issues for the Court’s determination:

- 12
13 (a.) Were the monies transferred from Account Number TD 013-04240 at Cayman National
14 Bank in the amount of C\$235,305.94 to Account number 011-00063 on the 4th of
15 February 2011 transferred after the time of passing of the Deceased?
16 (b.) If the monies were transferred after the passing of the Deceased, were these monies had
17 and received by the Defendant for the use of the Plaintiff?
18 (c.) Did the presumption of implied undue influence arise from the relationship between the
19 Defendant and the Deceased which called for an explanation of the transactions/transfers
20 from the Deceased to the Defendant between 2007-2011?
21 (d.) Alternatively, were the transactions/transfers and the value thereof held on resulting trust
22 for the Plaintiff?
23 (e.) Does the presumption of advancement apply in relation to the transactions/transfers at
24 issue?
25 (f.) Should the Plaintiff be barred by laches from the relief sought on the claim by reason of
26 delay?
27 (g.) Should the Court order an Account of the Plaintiff’s dealings with the property of the
28 Deceased between 2007-2011?

29
30 **The Evidence before the Court**

31
32 **John A. Gouldbourne**

33 20. The Plaintiff, John A. Gouldbourne, confirmed that the matters set out in his witness statement
34 were true and remained so to the best of his knowledge and belief. The Plaintiff’s witness
35 statement stood as his evidence in chief.
36

1 21. The Plaintiff's witness statement reveals that he shared a close relationship with his parents
2 while he lived in Grand Cayman. He moved to the United States of America in 1981 and had
3 his own business there. He returned to live in the Cayman Islands in 2004 when he realized
4 that his mother had become quite ill and that the Deceased, his father, was ageing as well. He
5 returned to look after his parents. He lived in a house that his father owned and helped him
6 during the day at his store. He stated that he recognized that his father was becoming "*less*
7 *sharp-minded*" and at times appeared to get very confused when dealing with customers.

8
9 22. The Plaintiff stated that the Defendant was unhappy with his connection with his father. After
10 the incident that led to his present incarceration, he related that the Deceased visited him once
11 shortly after his arrest. He stated that he continued to speak to his father every week and related
12 that the Deceased told him that the Defendant did not want him to visit the Plaintiff and took
13 away his car keys to prevent him from doing so. He was aware that his father got into a car
14 accident and his driving licence was revoked as a result of the accident.

15
16 23. The Plaintiff related that he would visit his father and mother during home visits from prison.
17 He stated that although the approved visit was to his mother, he would arrange with his father
18 for him to be present on those visits to his mother. He related that both his parents were keen
19 to see him.

20
21 24. The Plaintiff was aware that the Deceased was unable to drive and was suffering from
22 Alzheimer's disease and Prostate Cancer. He stated:

23
24 *"I do not believe that my father ever fully recovered from his prostate cancer and I don't*
25 *accept that he was of sound mind, memory and understanding in the latter years of his life."*
26

27 25. The Plaintiff related that on a home visit in August 2009 he went to see the Deceased at the
28 Defendant's home. He described:

29 *"...when I arrived the gates were padlocked with my father walking barefoot around the*
30 *house talking to himself. During the visit my father did not recognize me and couldn't hold*
31 *a conversation for nearly the entirety of the 2-hour visit."*
32

33 26. The Plaintiff referred to medical records that he obtained after the death of the Deceased in his
34 capacity as administrator of the Deceased's estate:



1 *"I believe these records confirm my belief that my father was suffering from Alzheimer's*
2 *Disease and Dementia from as far back as 2005 and was not in a position to manage his*
3 *own affairs or to be making any decisions with regard to gifting his assets to the*
4 *Defendant."*

5
6 27. On the issue of the transfer of funds from CNB account no. TD013-04240 in the amount of
7 \$235,305.94, made on the 4th February 2011, the date of the Deceased's death, the Plaintiff
8 insisted that the Deceased was in no state to authorize a transfer of the funds and, in any event,
9 the transfer was made after his death on that day.

10
11 28. With regard to the transfer from the Deceased to the Defendant of property at West Bay North
12 West, Block 4 E, Parcel 581, the Plaintiff related that this transfer in July 2008 was made at a
13 time when the Defendant was assisting the Deceased with his business affairs and also
14 providing him with accommodation at his home. He stated:

15 *"My father was ...suffering from ill health at the time and I believe he was mentally*
16 *compromised at the time of making the transfer."*

17
18
19 29. The Plaintiff stated, with regard to CNB Account no. CK011-01825, that it is his belief that the
20 Defendant was only added to this account by the Deceased in 2005 after he had suffered a very
21 serious coronary arrest and that this was done to facilitate the Defendant being able to assist the
22 Deceased with his affairs. He insisted that the Deceased had never mentioned to him that he
23 wished the Defendant to benefit by inheriting the funds in the account as the Defendant has
24 stated in his evidence.

25
26 30. The Plaintiff related:

27 *"Whilst I did not see much of my father in his later years, I continued to remain on good*
28 *terms with him and always understood him to regard his children as equals in his eyes. I*
29 *do not believe it was his intention to favour the Defendant above his other children."*
30

31
32 **Cross Examination**

33 31. The Plaintiff was asked about his knowledge of the health of his parents:
34



1 Q: Your mother had a heart attack the year before, Leroy took her to US
2 for treatment?

3 A: He brought her up to me.

4 Q: He had done the same with your father when your father had prostate cancer?

5 A: I had no personal knowledge of it. Because I was not living here, and I am in
6 the US and no one told me what was happening at the time. It was never
7 mentioned to me, that he was sick and come to the US for treatment, no.”
8

9 32. The Plaintiff was questioned about his level of knowledge of his father’s business. He stated
10 that when he moved to Cayman in Jan 2004, he was living and working with his father. He
11 stated that he knew how the business [his father’s business] worked and that while his father
12 went to work every day, he was there with him “most of time”. He stated that he understood
13 the processes at the business and how it worked.
14

15 33. When it was suggested to him that he knew little about the Deceased’s business he stated:

16 “I was basically working there as a helper, as a clerk would. Not ordering or accounts.
17 My father did those. I would help customers when they came in get things off shelf, put
18 things, maybe run cash register.”
19

20
21 34. The Plaintiff agreed that he was arrested for the crime for which he is presently serving a
22 sentence within 8 months of him returning to Cayman. He stated that his father visited him in
23 prison on only one occasion.
24

25 35. The Plaintiff was questioned about his statement that the Defendant kept his father from coming
26 to visit him and did not allow him to renew his driver’s licence. When confronted with the date
27 of the last issue of a licence to the Deceased he stated:
28

29 “The Last driver’s licence was issued to Lee after my arrest. And it expired on
30 14/12/2007. My understanding was they objected to him renewing it when it
31 expired. Not revoked but not allowed to have a new licence. For first 3 years
32 of my incarceration. I agree he had a licence. I agree that he only visited me
33 once notwithstanding that.”
34



1 36. The Plaintiff stated that he would have visits with his mother while she was alive from prison.
2 He stated that he would arrange for his father, the Deceased, to be present at those visits so that
3 he could in effect see both parents. Counsel for the Defendant suggested that there was not
4 support for this in the documents that the Plaintiff had produced relating to those visits. While
5 the Plaintiff agreed that only 3 visits were supported by the documentation between 2007 and
6 2009, he insisted that whenever he visited his mother his father was called to be there although
7 this was not reflected on the application because the prison rule was that the document should
8 reflect that each visit was to one person only.
9

10 37. The Plaintiff stated that he was aware of some of the living arrangements at the Defendant's
11 home when his father moved there in 2005 and that he also knew that his father was not
12 dependent on the Defendant financially. He acknowledged that his father was part of a close-
13 knit Adventist community and that "help or guidance" would have been available to him from
14 the Church, both resources and people. The Plaintiff also acknowledged that his father was an
15 intelligent man and a keen reader, smart and ran his own business until old age.
16

17 38. The Plaintiff described that after seeing his father in August 2009:⁴
18

19 *"I was upset to see him that way. There was nothing really I could do. I continued calling*
20 *him on telephone. Leroy would never speak to me. I did a lot of praying and asked church*
21 *people how he was doing if they saw him. Asked for divine assistance."*
22

23 39. The Plaintiff was questioned closely about his assertion that the Deceased was as ill as he
24 described. He was referred to the Emergency Physician's Notes from the 8th of August 2009
25 some ten days before the Defendant related that the visited his father and saw signs of him
26 being confused and not recognizing anyone:⁵
27

28 *Q: [Your] Father was in hospital but nothing [appears] in note of confusion,*
29 *unable to hold conversation or that he did not recognize anyone.*

30 *A: Your condition can change within minutes hours days.*

31 *Q: Can reduce so significantly from no mention in notes to what you describe...*

32 *A: [I described] Only what I observed, I don't know what happened before or*
33 *after, medical condition can change in any time.*

⁴ See paragraph 26 above

⁵ Page 13 of the Agreed Supplementary Trial Bundle 3 – Medical Records



1 40. The Plaintiff stated that any delay in issuing of the writ was not his fault as he had no control
2 over the attorney. He explained that it was sometimes difficult to make phone calls from prison
3 to follow up with his attorney. He stated that he did everything possible at that time with regard
4 to the issuing of the writ – that is, that he kept calling his attorney and even wrote to the Court
5 about trying to get this case concluded.
6

7 Re-Examination

8 41. In Re-examination the Plaintiff confirmed that he had not made up or invented the dates of
9 visits to his mother where the Deceased could have been present. He asserted that he saw his
10 father in the state that he described in August 2009. He insisted that he did not fabricate this
11 evidence.
12

13 **Mrs. Athine Gouldbourne-Duty**

14 42. The second witness for the Plaintiff was **Mrs. Athine Gouldbourne-Duty**. Her witness
15 statement stood as her evidence in chief. Mrs. Gouldbourne-Duty was previously married to
16 the Deceased 3rd son, Paul Gouldbourne and as such is the Deceased former daughter-in-law
17 and former sister-in-law to the Plaintiff and to the Defendant.
18

19 43. So far as relevant to the issues in this case her evidence was that after she separated from Paul
20 she remained in contact with the Deceased and his wife. She stated that she would see the
21 Deceased at church or at his store. Her evidence was that “*In the latter days when he moved in*
22 *with Leeroy, I would never visit him there.*” She related that this was due to the Defendant
23 being “*aggressive*” towards her and her children.
24

25 44. Mrs. Gouldbourne-Duty stated that she did not see the Deceased in the latter years of his life.
26 Her evidence was:

27
28 “*...I knew he wasn’t well and suspected he was becoming senile. He would make a scene*
29 *at the services and would get agitated and try to leave before the service was complete.*
30 *You could tell he was confused at the services and on one occasion around that time I found*
31 *him wandering along the Linford Pearson Highway alone. I stopped the car and spoke*
32 *with him, he didn’t know where he was or where he was going so I picked him up and took*
33 *him to Leeroy’s house.*”
34
35



1 Cross-Examination

2 45. Mrs. Gouldbourne-Duty stated that she considered the Deceased “*a fine gentleman*” whom she
3 had known in excess of 20 years. She agreed with Dr. Addleson’s assessment of the Deceased
4 character. She emphasized that he was a forthright man and had strong opinions about his
5 family.

6
7 46. Mrs. Gouldbourne-Duty related that after the Deceased moved to the Defendant’s home, she
8 would see him when he attended Church services. She stated that the Deceased started to get
9 a little bit confused in 2008-2009 although she agreed that at 90 plus, he was “*doing very well*
10 *for a man of his age.*” She stated:

11
12 “*I think he had a good quality of life around that time. Once Leroy took him home, he was*
13 *cared for with the helper and Ms. E [his companion]*”.

14
15 She went further to explain that:

16 “*Although he was appeared confused, I was not concerned for his heath or*
17 *caring. He was always neatly dress and cared for.*”
18

19 47. Mrs. Gouldbourne-Duty agreed that she did not know the Defendant well and that the only time
20 they spent together was when she lived with his brother Paul in Orlando and the Defendant has
21 brought his mother there for medical treatment in 2003.
22

23 **Michelle Taylor**

24 48. **Michelle Taylor** is a corporate Administrator at Priestleys, attorneys at law for the Plaintiff.
25 Her witness statement was admitted by consent at trial as her evidence in this matter. She
26 related that Priestleys contacted Cayman National Bank on the 12th September 2019 to inquire
27 as to the opening times for their branches on Grand Cayman. Exhibited with her statement was
28 a letter from the Bank’s Legal Counsel which confirmed that the Bank’s opening hours in 2011
29 at the Elgin Avenue Branch were as follows: “*Monday – Thursday 9:00 AM to 4:00 PM; Friday*
30 *9:00 AM – 4:00 PM.*”
31

32 49. Ms. Taylor also stated that on the 12th September 2019 Priestleys made contact with the
33 Department of Vehicle and Drivers’ Licensing to inquire as to when the Deceased last held a
34 licence to drive a motor vehicle in the Cayman Islands. Also exhibited to her witness statement
35 was an email from the Department which stated:



1
2 “The last drivers’ licence for Mr. Lee Alexander Gouldbourne was issued on 8th December
3 2004 and expired on 14th December 2007.”
4

5 50. That was the extent of the evidence in support of the Plaintiff’s claim.
6

7 **The evidence of the Defendant**

8 **Leeroy Noel Gouldbourne**

9 51. The Defendant’s witness statement stood as his evidence in chief. He related his early
10 relationship the Deceased and his leaving to live in the United States. He stated that he returned
11 to Grand Cayman in 1987 at the request of his parents and that he would assist his father in the
12 store by ordering products and also with the financial aspects of the business.
13

14 52. The Defendant described his father. He stated:

15
16 *“I think that an important point to note about my father was that, up until the day of his*
17 *death, he was very strong willed. He was extremely obstinate; it there was something he*
18 *didn’t want to do it wasn’t done. The idea that he was somehow under my influence or*
19 *persuasion is ridiculous. We had a good relationship, but he was definitely his own man.”*
20

21 53. The Defendant described that when his father told him that he had developed prostate cancer,
22 he took him to Dr. Addleson and when it was arranged for the Deceased to have treatment in
23 Miami, he accompanied him to Miami and paid for his surgery there. He related that the
24 Deceased returned to Cayman cancer free.
25

26 54. The Defendant stated that he suggested to his father that he leave his home in West Bay to live
27 with him and his family in George Town. In order to facilitate his father’s move, he added a
28 separate wing on to his home. He stated that the Deceased remained active in church and had
29 a wide circle of friends. He stated:

30
31 *“My father may have resided at my home, but his living situation was independent from me*
32 *as was the circle of friends he continued to enjoy.”*
33

34 55. The Defendant stated that John Gouldbourne had little relationship with the Deceased when
35 John returned to Grand Cayman after living abroad. He stated that his brothers, John and Paul

1 were far closer to his mother than his father. After John was imprisoned in 2004, the Defendant
2 stated that to his knowledge the Deceased only saw John on one occasion. He stated:

3 *“John, being incarcerated had absolutely no personal knowledge of my father’s status,*
4 *mental health or otherwise, as they had no contact.”*
5

6 56. The Defendant described his father as being immeasurably more capable than most people of
7 his age. He referred to the medical notes of the Deceased’s visit to the doctor on 29 January
8 2008, when it was noted that the Deceased: *“...was oriented in place, time and person. Has no*
9 *deterioration of habits. No wandering. No Hallucinations or Delusions. No depression. No*
10 *risky behaviour.”*⁶ The Defendant stated in relation to this visit that:

11 *“It is quite clear that any decline noted was considered normal for his age. No diagnosis*
12 *of dementia or Alzheimer’s was made by the mental health professional and no follow up*
13 *appointment was needed.”*⁷ As far as the Defendant was concerned *“any other references*
14 *to dementia [or] Alzheimer’s within the medical records are incorrect.”*⁸
15

16 57. The Defendant acknowledged that the medical records surrounding his father’s last admission
17 to hospital do mention Alzheimer’s Disease, however he offered that the Deceased was acutely
18 unwell at the time, had had a heart attack and was ventilated for the last few days of his life.
19 He offered that no reliable diagnosis of Alzheimer’s could have been made during that time.

20 58. The Defendant stated that the Deceased managed his store and his personal finances himself.
21 He stated that the Deceased often told him that he wanted everything to go to him and that
22 *“whatever I have is yours”*. He related that in 2005 accounts held in his father’s sole name were
23 transferred into joint names of himself and the Deceased. He stated:

24 *“This was done to allow us some flexibility, so I could help if necessary and to ensure that*
25 *the proceeds of these accounts went to me upon his death.”*
26

27 59. The Defendant stated that the Deceased owned property at George Town central 13EH 18. This
28 was the site of the Deceased’s shop. When, in 2006, the Deceased was approached to sell the
29 property, the Defendant told the Deceased that he did not want to have anything to do with the
30 sale. He stated that his only role in the eventual sale in 2007 was to take his father to the
31 attorney’s firm to sign the papers. The Deceased did the negotiation himself. After the sale,

⁶ Medical Record of visit 29 January 2008 – Core Bundle at page 152

⁷ Defendant’s Witness Statement dated 9 August 2019 at paragraph 37

⁸ Ibid. at paragraph 38



1 the proceeds in the amount of C\$ 658,000 were deposited into an account at Cayman National
2 Bank.

3
4 **60.** The Defendant's evidence from his witness statement was⁹:

5
6 *"52. After the North Church Street proceeds were deposited, I made two*
7 *transfers of funds into account number 011-01826, which was my account*
8 *and another to a brokerage account in order for the money to earn more*
9 *than it would simply as cash. My father knew of this transfer and had no*
10 *objection to the utilization of the funds in that manner. His firm view was*
11 *that he wanted me to have the money, and this was in the confidence that*
12 *I would take care of him.*

13
14 *53. There was another transfer of \$64,000 on the 5th November 2008. I have*
15 *no recollection of this transfer, but I note that it appears on the bank*
16 *statement exhibited at page 15.*

17
18 *54. A few important things about these transfers: -*

- 19 *a. My name was on the account and I had full authority to act;*
20 *b. My father, who had just negotiated a \$700,000 sale completely*
21 *understood what he was doing; and*
22 *c. My father willingly, freely and of his own choice gave the money*
23 *to me. I did not ask him for it, pressure or cajole him into giving*
24 *it to me."*

25
26 **61.** The Defendant confirmed that the Deceased directed him to transfer funds to his brothers John
27 and Paul in 2009 which he did in the sum of US\$100,000. He insisted that this was from the
28 sale of the property at George Town Central 13EH 18.

29
30 **62.** The Defendant's evidence is that the transfer of the property at West Bay North West, Block
31 4E, Parcel 581 was made to him by the Deceased freely and voluntarily in July 2008. He stated
32 that he did not ask for the property, it was transferred out of the Deceased love and affection
33 for him and was not due to *"any cognitive impairment and/or undue influence."*

⁹ Page 8 of the Defendant's Witness Statement

1 63. Finally, with regard to the transfer of monies from the Deceased account on the 4th of February
2 2011, the Defendant stated that he was a joint signatory to the account, the Deceased had added
3 him as a joint signatory *“with the express intention that I would have the benefit of same.”* He
4 stated that he left the funds in this account *“because I was afraid that I might die before him*
5 *and I wanted to make sure he had easy access to finds in that event.”* He stated that he
6 transferred the funds when he was told that his father was about to die.

7
8 64. The Defendant complained that there had been considerable and unexplained delay in the
9 Plaintiff progressing the matter. He related that this delay had caused him *“huge prejudice”*.
10 *“My own recollection of the detail around events has faded and it has been very difficult to*
11 *obtain objective medical evidence. Dr Addleson’s witness statement shows this.”*
12

13 **Cross Examination**

14 65. The Defendant was cross-examined by Counsel for the Plaintiff. The Defendant denied
15 knowledge that his father had had a heart attack in 2005. He maintained his view that his father
16 had no issue with dementia, Alzheimer’s or cognitive decline. When confronted with various
17 items in the medical notes on these matters the Defendant stated that he was aware that his
18 father had prostate cancer. His evidence was:

19 *“I had absolutely no concerns as far as my father was concerned. No issues no memory*
20 *problems at all except for man of his age. Not aware of others of old age but as far as I*
21 *am concerned my father was fine.”* He went on to state: *“Any references to Alzheimer’s*
22 *and dementia in the [medical] notes are just a fabrication. They are wrong about the heart*
23 *attack and wrong about Alzheimer’s, but I accept he had an issue with prostate. At age of*
24 *98 my father’s cancer had then ceased to be a problem. It was not an issue anymore.”*
25

26 66. When confronted with an aspect of his witness statement which noted
27 *“... it goes without saying that any ninety-seven year old is going to suffer from some*
28 *cognitive decline.”*¹⁰ the Defendant stated: *“My father did not suffer from any cognitive*
29 *decline to my limited medical ability. That line is totally false. I understand it is my witness*
30 *statement.”*
31
32

¹⁰ See the Defendant’s Witness Statement at paragraph 35.



1 67. The Defendant related that he kept his father secured at the house and was very emotive when
2 he was questioned about his father being seen wandering in the street. He denied that this ever
3 happened. He went on to state that: *"When he came to live with me, I was in charge, I was*
4 *running the show"*. He explained what his being in charge meant, that it was akin to how his
5 father saw a lawyer/client relationship,

6 *"He told me I am the lawyer he is the client. He is giving the orders and I am carrying them*
7 *out because he is the client."*
8

9 68. The Defendant agreed that the Deceased stopped going to church because of his ill health
10 specifically because he was suffering from frequent urination problems. He stated that the
11 Deceased stopped attending church in 2010-2011. He denied that it was earlier in 2008/2009.
12 He related that the Deceased stopped driving sometime in 2007 at the latest and that this was
13 as a result of the Deceased having caused an accident. The Defendant stated that he went to
14 traffic court and asked the Judge to take his father's licence after that incident.
15

16 69. In answer to Counsel for the Plaintiff, the Defendant stated that the Deceased had lost trust and
17 confidence in his brothers Paul and John before his death. He related that the Deceased did not
18 want any contact with the Plaintiff after he went to prison and denied that his father would see
19 the Plaintiff when the Plaintiff visited their mother as the Plaintiff had described to the Court.
20

21 70. The Defendant agreed that he provided support care and assistance to his father, that he assisted
22 with his well-being and care and also assisted him with his business and financial affairs. He
23 related that after his father came to live with him in 2005, he continued to assist him.
24

25 71. The Defendant was questioned closely about the relevant bank accounts. The Deceased's bank
26 records were agreed and admitted as part of the evidence at trial. These records for two
27 accounts date from 2006 – 2013 in respect of one account, the Investment account, and for
28 periods between December 2005 and January 2011 in respect of the other account – the
29 Chequing Account.
30

31 72. With respect to the first, the Investment account, a deposit of \$150,000 was made on the 3rd of
32 November 2006. The Defendant stated in evidence that he believed that those funds were from
33 the proceeds of sale of one of his father's properties in West Bay. He agreed in cross
34 examination that he was not a joint account holder for that account. He was a joint signatory



1 only. He also agreed that on the date of his father's death he removed all the monies from that
2 account.

3
4 73. The following account from the Defendant is relevant to this issue:

5
6 *"The 235,000 withdrawn on date of father's death was a gift from him or I*
7 *would put it another way: when he died I would have gotten that money...*
8 *In my defence in 2014, I said I was sure that that transfer took place prior to*
9 *my father passing away.*

10 *When I went to bank my father had not passed away.*

11 *My father was very much alive when I checked on him. I was advised he was*
12 *only alive because the equipment was keeping him alive.*

13 *.....*

14 *The bank account my understanding was, money was there and if he dies it is*
15 *for me and if I die it was for him. I don't remember if joint names or not. I*
16 *understood if I die it would be available for him to use and if He died it was*
17 *my money. I needed to go to the bank although money automatically mine*
18 *because it was mine in an informal way....*

19 *As far as I am concerned the money is mine. ...*

20 *It would need to be into my possession. Nobody else could touch that money.*

21 *That transfer was not made after my father died."*
22

23 74. The Defendant was also questioned about the Deceased's Chequing Account. He stated that
24 this account, for which he was a joint account holder added by the Deceased in 2005, that this
25 was to enable him to assist the Deceased with his daily financial affairs. The Defendant's
26 understanding was that *"During his [the Deceased] lifetime, he was the operating mind and I*
27 *dealt with it in accordance with his instructions. His intention that when he died, I would*
28 *inherit that money, but it was not my money during his lifetime. While alive it was his money*
29 *but when he died, I understood that I should receive the money."*

30
31 75. The Defendant went on to state with regard to the monies in that account: *"I treated them as*
32 *its all the same money and all going to come to me anyway. Legally in the bank it was my*
33 *father's account. To my Father's mind and mine and the family Paul, John and My mother and*
34 *everybody else knew that whatever my father had when he died was mine, was as clear as day*
35 *to anybody."*



1 76. When the Defendant was questioned about the movement of monies from the Deceased's
2 Chequing Account to his own he stated:

3
4 *"It would have been used as an operating account. I can't recall what it [the transfer] was*
5 *for. But it was used as operating account for the business, father's personal expenses, mine*
6 *and wife's personal expenses and the church if it needed a donation. It was operated as*
7 *an expense account. I would have had legal authority to move account but at same time I*
8 *would have said daddy I am going to do this or that and he would say alright. He would*
9 *not have to ask me. [to use monies from the account]"*

10

11 **Dr. R. John Addleson**

12 77. **Dr. R. John Addleson's** witness statement was admitted by consent and read into evidence in
13 support of the Defendant's case. Dr. Addleson is a licensed physician in the Cayman Islands
14 and has been in private practice in the Islands for over 30 years. He stated that he treated the
15 Deceased in the course of his professional practice. He stated that he was required by law to
16 maintain patient records for ten years and usually maintains such records for fifteen years. At
17 the time that he gave a witness statement in this matter in August 2019, Dr. Addleson stated
18 that since the Deceased had ceased to be a patient of his since approximately 2007 to 2008, he
19 did not have his records and so his evidence was only from his independent recollection without
20 reference to any records.

21

22 78. The other relevant information from his statement was as follows:

23

24 *"From independent recollection, without reference to any records, I recall the*
25 *following with regard to him. On a few occasions his son, Leeroy, brought him*
26 *to his appointments for minor medical issues related to coughs and colds. When*
27 *he was last in my office, he was accompanied by Lee Roy's wife, the Deceased's*
28 *daughter in law, and was quite forthright in his desire to speak to me rather*
29 *than have her speak for him. He became annoyed when she interrupted. He*
30 *tended to downplay any minor symptoms he had. At his last appointment, he*
31 *was asked to give a urine sample, which he did without assist, although it was*
32 *offered. He engaged in ordinary conversation with me seemed oriented in time*
33 *and space, and I noticed no disability at that time beyond what is customarily*
34 *expected by someone of advanced age. He answered all questions*
35 *appropriately."*



1 79. The Defendant did not call any other witnesses in support of his case.
2

3 **The Medical Evidence.**

4 Dr. Gary Starkman
5

6 80. The witness statement of **Dr. Gary Starkman** was admitted into evidence despite objection
7 from the Defendant. Dr. Starkman had been due to give evidence as an expert but did not
8 appear at trial. The Court admitted the statement, taking into consideration the fact that this
9 evidence had not been tested by cross-examination and the effect of this lack of the testing of
10 this evidence on the weight that could be attached to the Doctor's evidence. Dr. Starkman's
11 report deemed an 'expert report' was based upon an examination of the medical notes of the
12 Deceased only. Dr. Starkman never examined the Deceased. His opinion was confined to the
13 questions of whether the Deceased experienced any cognitive decline prior to his death and the
14 likely impact on the Deceased of any of such decline.

15
16 81. The relevant extracts from the report are as follows:

17
18 *"Executive Summary*

19 *In my opinion it is very likely that there is documented cognitive decline and*
20 *mental impairment of the Subject and that this would make him to be more*
21 *susceptible to outside and/or undue influences. This is evidenced from the*
22 *documented failure of keeping his medical appointments, not remembering his*
23 *means of getting around within the same day of his kept appointment and being*
24 *unsure about the number of his children due to confusion and memory loss. In*
25 *my opinion, not remembering his appointments could potentially make him*
26 *susceptible to suggestions of wrong appointment types and dates, not*
27 *remembering his means of getting around within the same day of his kept*
28 *appointment could potentially make him susceptible to suggestions of wrong*
29 *means getting around and being unsure about the number of his children could*
30 *potentially make him susceptible to suggestions of wrong decisions making*
31 *regarding his own children.*

32
33 *It is my opinion that the medical/health conditions suffered by the Deceased*
34 *would have had a significant impact on his ability to understand and make*
35 *decisions about financial matters."*
36

1 82. Dr. Starkman went on to state in his report that the matters that he noted in his summary, *“the*
2 *documented failure to keep his medical appointments, not remembering his means of getting*
3 *around within the same day of his kept appointment and being unsure about the number of his*
4 *children due to confusion and memory loss,”* were also indicators of likely adverse impact on
5 the Deceased ability to make rational decisions, to undertake everyday tasks, to act
6 independently and that these would also have made the Deceased more susceptible to outside
7 and/or undue influences.

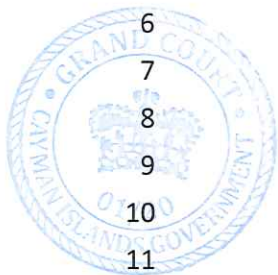
8
9 83. I find that I cannot and do not place much reliance on the conclusions of the Doctor, untested
10 as they were. In any event, the Court is not disadvantaged since there is other medical evidence
11 before the Court from Dr. Addleson, although this evidence could not be considered
12 comprehensive. However, the Court has had the benefit of the Deceased’s medical records
13 over a number of years which were admitted into evidence at trial by agreement of the parties.

14
15 84. The Plaintiff has submitted that there is no requirement for this Court to make a finding that
16 the Defendant was mentally impaired in order to determine whether the claim for implied undue
17 influence has been made out on a balance of probabilities. The Court agrees. However, the
18 medical records do assist the Court by providing details of the Deceased’s physical condition
19 and also of observations by the medical personnel of the Deceased’s mental state during his
20 visits to the hospital over the relevant period.

21
22 85. When the Deceased was admitted to hospital in January 2011, the Accident and Emergency
23 doctor noted that his diagnosis was of prostatic carcinoma. In June 2010, he had presented at
24 the hospital because of blood clots in his urine. In January 2010 he was admitted because of a
25 distended bladder and urinary retention and in August 2009 he had been taken to the hospital
26 because of chest pains and dizziness. General practice notes for the period show that the
27 physician in October 2010 described the Deceased as “well looking/pleasant/dementia”. This
28 was noted as well on the inpatient physician notes at the date of his death in February 2011. In
29 January 2008, the medical notes state that the Deceased was showing cognitive decline, which
30 was noted as being normal at the age of 95 years old.

31 86. There was nothing remarkable in the medical evidence given the Deceased’s age.
32
33
34
35





1 **COURT'S CONSIDERATIONS**

2 **87.** Before considering the specific issues in this case, the Court notes that the Defendant accepts
3 that the Deceased made the following transfers to him:

- 4
- 5 a. **The Defendant** received transfers to his CNB Account #011-01826 from the
6 Deceased's CNB Account #011-01825 in the sum of CI\$512,450.72 between April
7 2006 and May 2010;
- 8 b. **The Defendant** received a transfer of the property at Registration Section WBNW,
9 Block 4E, Parcel 581 in West Bay from the Deceased on the 16th of July 2008 for
10 'natural love and affection';
- 11 c. **The Defendant** removed CI\$235,305.94 from the Deceased's CNB Account TD 013-
12 04240 on the 4th February 2011 by transferring the sum to the Defendant's CNB
13 Account #011-00063.
- 14

15 **Were the monies transferred from Account number TD 013-04240 at Cayman National Bank in**
16 **the amount of CI\$235,305.94 to Account number 011-00063 on the 4th of February 2011**
17 **transferred after the time of passing of the Deceased?**
18

19 **88.** The evidence relating to this issue comes from the statements of Michelle Taylor and of the
20 Defendant himself. There is no dispute that the Deceased died on the 4th day of February 2011.
21 The evidence is that he died at 8:30 am. The Deceased's bank account was held at Cayman
22 National Bank. The evidence from Michelle Taylor is that the Cayman National Bank's
23 opening hours in 2011 at the Elgin Avenue Branch were as follows: "Monday – Thursday 9:00
24 AM to 4:00 PM; Friday 9:00 AM – 4:00 PM".

25

26 **89.** The Defendant removed the monies from the account after the bank opened on that day,
27 sometime after 9:00 am. At this time the Deceased was already pronounced dead. There is no
28 evidence to cause this Court to doubt the Deceased's time of death.

29

30 **If the monies were transferred after the passing of the Deceased, were these monies had and**
31 **received by the Defendant for the use of the Plaintiff?**
32

33 **90.** Although the Defendant was of the view as he expressed at paragraph 74 above that the monies
34 were for his benefit and that these were the wishes of his father, the law of succession is clear.
35 The Deceased died without a will. Any property of the Deceased that had not been disposed of
36 prior to his death falls to his estate.



1 91. Section 26 of the *Succession Act* states:

2
3 *"When a person dies intestate his estate, until administration is granted in*
4 *respect thereof, shall vest in a Judge of the Grand Court.*
5

6 92. Section 29 (1) [c] further states:

7
8 *"If the intestate leaves issue but no husband or wife, the residuary estate of the*
9 *intestate shall be held on the statutory trusts for the issue of the intestate;"*
10

11 93. The full amount of the monies transferred on the 4th February 2011 from the Deceased account
12 TD 013-04240 at Cayman National Bank to the Defendant's account 011-00063 in the amount
13 of CI\$235,305.94 are monies had and received for the Plaintiff as executor of the estate of the
14 Deceased.
15

16 **Did the presumption of implied undue influence arise from the relationship between the**
17 **Defendant and the Deceased which called for an explanation of the transactions/transfers from**
18 **the Deceased to the Defendant between 2007-2011?**
19

20 94. In order for the presumption of implied undue influence to arise it must be shown that the
21 Deceased had placed trust and confidence in the Defendant in relation to the management of
22 his financial affairs and that there was a transaction which called for an explanation. There are
23 a number of factors that the Court must consider in determining this issue. The nature of the
24 relationship between the Deceased and the Defendant. Was the relationship such that the
25 Defendant acquired influence over the Deceased because he was vulnerable or dependent,
26 bearing in mind that although such a relationship may be more easily seen in instances where
27 it is lawyer and client, doctor and patient or parent and child, a relationship which may allow
28 for the acquisition of such an influence is not limited to such special relationships. In order for
29 the presumption to apply there need not be any allegation of abuse of trust and confidence.¹¹
30

31 95. In the case of *Anne Marie Morley v Dr Joseph Elmaleh*¹², HHJ Wakesman Q.C. stated that
32 trust and confidence
33

34 *"...must be in relation to some general aspect of the donor's affairs, such as management*
35 *of finances...or other kind of relationship giving rise to influence."*

¹¹See *Watler (as personal representative of Estate of Thompson) v Solomon* [2014] 1 CILR 421

¹² [2009] EWHC 1196

1
2 In the instant case, the relationship is such that the child is the dominant party and the parent
3 the party over whom the influence is claimed to have been exerted.

4
5 96. The transactions which are questioned by the Plaintiff are (i) the transfer of land from the
6 Deceased to the Defendant on the 16th July 2008; (ii) the transfer of funds in the amount of
7 CI\$512,450.72 from *account CK 011-01825 to account 01101826 between January 2005 and*
8 *February 2011 and (iii) the transfer of monies in the amount of CI\$329,000 from that account*
9 *to a brokerage account in 2008.* This latter amount of CI\$329,000 while not particularized in
10 the Statement of Claim does fall within the relevant period of the Plaintiff's claim with regard
11 to transactions that may have been made due to presumed undue influence and therefore falls
12 to be examined. The Defendant admitted that these monies were transferred by him from the
13 Deceased's account to a brokerage account during this time.¹³

14
15 97. The Deceased was of advanced age at the time that the transactions/transfers took place. While
16 I do not place reliance on the conclusions of Dr. Starkman for the reasons stated above, evidence
17 of the age, mental and physical condition of the Deceased during the relevant period, though
18 not determinative, is relevant to the matter at issue. I take from the medical records that during
19 the relevant period the Deceased had the following complaints:¹⁴

20
21 Mental Health Notes, signed by Shah Hasmukh (23rd and 29th January 2008):

22 *"Impression: he shows cognitive decline",*

23 Inpatient Physician Notes, signed by Cawich Shamir (8th January 2010):

24 *"Patient is disoriented"*

25 Inpatient Physician Notes, signed by Adedayo Olayinka (25th January 2011):

26 *"Pleasant but confused"*

27 Inpatient Physician Notes, signed by Iheonunekwu Nelson (31st January, 2nd and 3rd
28 February 2011):

29 *"Diagnosis: Cardiopulmonary arrest, Anemia, Acute on chronic kidney*
30 *injury, Hypertension, CAD, Ca prostate, Alzheimer's disease"*

31
32 98. The other relevant medical information is as noted at paragraph 38 above.
33

¹³ See paragraphs 59-60 above

¹⁴ These were noted by Dr. Starkman and appear at pages 289-290 of the Agreed Core Bundle



1 99. The evidence before the Court supports the fact that the Defendant was in a unique position of
2 influence over the Deceased. The Defendant stated in evidence that he provided "*support care*
3 *and assistance*" to his father, that he assisted him with his well-being and care and also that he
4 assisted him with his "*business and financial affairs*."

5
6 100. The Deceased lived with him at his residence. Although he had separate accommodation within
7 the property, he remained dependent on the Defendant to drive him to places that he wished to
8 go and for assistance with his finances. The Defendant admits that the Deceased came to the
9 store in the later years only for something to do not because he was making a contribution to
10 the business as such. The Deceased relied on the Defendant for advice. When the Deceased
11 sought to sell a significant piece of property in George Town in 2007 it was from the Defendant
12 that he sought advice. While the Defendant stated in evidence that he was no part of the
13 negotiation for the purchase price of the property he did state in relation to that sale:

14
15 *"I said he should not take less than he wanted.*

16
17 *I had involvement in that my father asked my opinion. I drove him to Maples*
18 *& Calder. I told my father it looked ok to me. He signed the documents and*
19 *picked up the cheque. And my father asked me what he should do with money*
20 *and I said he should put money into investment account."*

21
22 101. The Defendant himself gives the reason for the Deceased making him a joint signatory to his
23 accounts. When he was questioned about his name being added to account, 011-01825, so that
24 it became a joint account he stated:

25 *"This was in 2005 so I could assist father with daily financial affairs. The idea was that*
26 *this would remain father's bank account, but it was easier to help him if I could sign*
27 *cheques and deal with the banking, the bankers."*

28
29 102. With regard to the monies transferred between accounts, the Deceased's CNB Account no. 011-
30 01825 to the Defendant's CNB Account no. 011-01826, I agree with the submissions of counsel
31 for the Plaintiff. The Defendant's evidence that these transfers were business transactions with
32 the majority of them being payments to US suppliers, some through the use of the Defendant's
33 credit card, with the Defendant being reimbursed by the Deceased is not supported by the
34 documentary evidence before the Court. The Defendant did not exhibit his personal bank
35 statements, for accounts 011-01826 and 011-00063 held with CNB, and provided only limited
36 credit card statements for that period. Credit card payments from the Defendant to suppliers in

1 the USA for the Deceased's benefit are not reflected with corresponding transfers from the
2 Deceased to the Defendant on the bank statements submitted into evidence.

3
4 **103.** The Defendant, in cross-examination, could not account for some of the larger transfers from
5 the Deceased's account. The Defendant's evidence of these transactions is that the payments,
6 apart from two which he readily identified, "*all of these payments are me being paid back for*
7 *buying goods for the business.*" He then admitted that they could have been for other expenses
8 including investments, because he was managing those for the Deceased and for himself.

9
10 **104.** However, I note that in cross examination, in relation to the said transfers, the Defendant stated:

11
12 *"Q: The transfers to you are not repaying you for business expenditure. A: They are*
13 *probably a gift to me 1/2 of them and 1/3 probably payment for business. I can't remember*
14 *what they are for."*

15
16 **105.** When it was put to the Defendant that there was no mention in his witness statement of the
17 transfers being for gifts or investments.

18 *"A: That is correct. The first time I said gifts or investments is today. I was operating on*
19 *the assumption that what my father told me: son what I have is yours."*

20
21 **106.** Taking all of the above evidence into account and marrying these with the aspects of the
22 relationship between the Deceased and the Defendant highlighted above, the evidence in this
23 case lends itself to the finding that there was a relationship of trust and confidence between the
24 Defendant and the Deceased. The evidence accepted by this Court supports its conclusion that
25 there was a relationship of trust and confidence between the Deceased and the Defendant.

26
27 **107.** The Court being satisfied that there was a relationship of trust and confidence between the
28 Deceased and the Defendant, it must determine whether the transactions that the Plaintiff has
29 highlighted in his claim call for an explanation. In *Allcard v Skinner*¹⁵ it was stated:

30
31 *"... if the gift is so large as not to be reasonably accounted for on the ground of friendship,*
32 *relationship, charity, or other ordinary motives on which ordinary men act, the burden is*
33 *upon the donee to support the gift".*
34

¹⁵ (1887) 36 ChD 145 at 185,



1 **108.** In *Royal Bank of Scotland v Etridge (No 2)*¹⁶ Lord Nichols of Birkenhead explained in his
2 speech that:

3
4 *"13. Whether a transaction was brought about by the exercise of undue*
5 *influence is a question of fact. Here, as elsewhere, the general principle is*
6 *that he who asserts a wrong has been committed must prove it. The burden*
7 *of proving an allegation of undue influence rests upon the person who*
8 *claims to have been wronged. This is the general rule. The evidence*
9 *required to discharge the burden of proof depends on the nature of the*
10 *alleged undue influence, the personality of the parties, their relationship,*
11 *the extent to which the transaction cannot readily be accounted for by the*
12 *ordinary motives of ordinary persons in that relationship, and all the*
13 *circumstances of the case.*

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

26
27 **109.** In *Smith v Cooper*¹⁷ Lloyd LJ noted in relation to the words "*in the absence of satisfactory*
28 *explanation*" at paragraph 14 of Lord Nicholls's speech above:

29
30 *"60. It is plain from his speech that he was using the phrase "a transaction*
31 *which calls for explanation" as shorthand for the formula in Allcard v*
32 *Skinner."*

33
34 **110.** This Court is satisfied that the transactions/transfers to which the claim for implied undue
35 influence relate are so large as not to be reasonably accounted for on the grounds of the
36 relationship between the Deceased and the Defendant as to call for an explanation from the
37 Defendant. The presumption of implied undue influence arises in this case in relation to these
38 transactions.

39
40 **111.** In closing arguments before this Court, Counsel for the Defendant conceded that the
41 presumption had arisen and that these were transactions which called for an explanation.

¹⁶ [2002] 2 AC 773,

¹⁷ [2010] EWCA Civ 722

1 **How can the presumption be rebutted?**

2 **112.** *Halsbury's Laws of England*¹⁸ states the following with regard to rebutting the presumption of
3 undue influence:
4

5 *"The presumption of undue influence is a rebuttable evidential presumption*
6 *which shifts the burden of proof to the alleged wrongdoer*
7 *The presumption cannot be rebutted merely by evidence that the complainant*
8 *understood what he or she was doing and intended to do it, but only by showing*
9 *that he or she was either free from the influence of the alleged wrongdoer or*
10 *had been placed by the receipt of independent advice in an equivalent position.*

11
12 *The problem is not lack of understanding but lack of independence. Where the*
13 *presumption arises a voluntary gift will be set aside unless it is proved that in*
14 *fact the gift was the spontaneous act of the doner acting under circumstances*
15 *which enabled him or her to exercise an independent will and which justify the*
16 *court in holding that the gift was the result of a free exercise of the donor's*
17 *will."*
18

19 **113.** In *Hackett v CPS & Hackett*¹⁹, the issue before the Court was an application relating the
20 ownership of a house brought by the 2nd Defendant's mother who claimed that the transfer of
21 the house from her to the 2nd Defendant for no consideration should be set aside on the grounds
22 of presumed undue influence of the 2nd Defendant and/or *non est factum* on the basis that when
23 the claimant signed the transfer of the house, she did not know what the document was. The
24 2nd Defendant supported the claimant's application but the Revenue and Customs Prosecutors
25 Office, [now the Crown Prosecution Service ("CPS")] contested it on the basis first, that the
26 house was purchased with the proceeds of the 2nd Defendant's criminal activities and second,
27 that the claims of presumed undue influence and/or *non est factum* cannot succeed.
28

29 **114.** In its consideration of the question: "Can the CPS (as the party seeking to counter the inference
30 of undue influence) discharge the evidential burden and provide a satisfactory explanation for
31 the transfer so that the presumption in favour of undue influence can be rebutted?", the Court
32 referred to the case of *Smith v Cooper*²⁰ in which Lloyd LJ explained in relation to the
33 presumption of undue influence: -
34

35 *"61. If that is shown, ...the presumption of undue influence applies, that is to*
36 *say, the court will presume that the transaction was procured by undue*
37 *influence exercised by one party over the other, in other words by the*
38 *abuse by the one of the position of influence that he has over the other. In*

¹⁸ Halsbury's Laws of England - Equitable Jurisdiction (Volume 47 (2014)) at 22

¹⁹ [2011] EWHC 1170 (Admin)

²⁰ [2010] EWCA Civ 722,

1 such a case it is then up to the one party to prove that the transaction was
2 not procured by an abuse of his position of influence but was rather the
3 free exercise of the will of the other party as a result of full, free and
4 informed thought.

5 ...
6 He would normally discharge that burden - as, for instance, now at least
7 occurs in husband and wife cases - by showing that the Defendant entered
8 into the matter with his will fully unconstrained, usually with the benefit
9 of independent legal advice"
10

- 11 **115. *Smith v Cooper*** is also authority for the proposition that it is not sufficient for there to be a
12 reasonable explanation for the transaction or that it was not manifestly to [the donor's]
13 disadvantage.²¹ Rather what must be considered is whether it had been proved the Defendant
14 "...had discharged the burden of proving that [the donor] entered into the transaction of
15 [his] own free will, independently of, and not in any way as a result of, the influence that
16 [the Defendant] was in a position to exercise over[him]"²².

17
18 **Has the Defendant presented evidence to rebut the presumption of implied undue influence?**
19

- 20 **116.** It is important to note that the Defendant in this case is not been accused of 'wrongdoing' in
21 the ordinary sense of that word. Counsel for the Plaintiff reiterated this in his arguments before
22 the Court. In *Hackett v CPS & Hackett*, Silbur J. noted as follows:
23

24 "...it is not determinative of the issue that the person presumed to exert undue
25 influence did not act wrongfully as it is not an ingredient of undue influence
26 that the wrongdoer cheated the victim because, as was explained by Mummery
27 LJ in *Niersmans v Pesticcio* [2004] EWCA Civ 372:-

28
29 "20...Although undue influence is sometimes described as an 'equitable
30 wrong' or even as a species of equitable fraud, the basis of the court's
31 intervention is not the commission of a dishonest or wrongful act by the
32 Defendant, but that, as a matter of public policy, the presumed
33 influence arising from the relationship of trust and confidence should
34 not operate to the disadvantage of the victim, if the transaction is not
35 satisfactorily explained by ordinary motives: *Allcard v.*
36 *Skinner* (1887) 36 Ch D 145 at 171. The court scrutinises the
37 circumstances in which the transaction, under which benefits were
38 conferred on the recipient, took place and the nature of the continuing
39 relationship between the parties, rather than any specific act or
40 conduct on the part of the recipient. The court may set a transaction
41 aside, even though the actions and conduct of the person who benefits
42 from it could not be criticised as wrongful."

²¹ [2010] EWCA Civ 722, paragraphs 65-66

²² Ibid. paragraph 66



1 117. The evidence of the Defendant was to the effect that he never pressured the Deceased to make
2 the transactions. With respect to the transfer of the proceeds of land to his account, the
3 Defendant's evidence was that he only drove the Deceased to the offices where the transfer of
4 land transaction was executed and that he did not advise or pressure him one way or the next
5 except to say that he should get the price for the land as he felt was appropriate. However as
6 expressed in *Credit Lyonnais Bank Nederland NV v Burch*²³ such action may not be sufficient
7 to rebut the presumption.

8
9 118. In that case the issue was whether the bank should move against the Defendant where it had
10 been shown that the Defendant had been put forward [and accepted by the Bank] as guarantee
11 to secure an increased overdraft for company in which she had no interest. The Court was
12 satisfied that the Defendant was not informed of the amount of the overdraft or of the amount
13 of the company's indebtedness.

14
15 119. The Court found that even though the Bank's solicitors had advised the Defendant to take
16 independent legal advice that this was not sufficient it was ordered that the transaction be set
17 aside. The Court's reasoning on this point was as follows:

18
19 *"In the circumstances the bank was required to ensure that she obtained*
20 *independent legal advice. The bank was aware the relationship between P*
21 *[the guarantee] and the Defendant was that of employer and employee and*
22 *should have been aware that it was capable of developing into a relationship*
23 *of trust and confidence with the attendant risk of abuse. The fact that the*
24 *Defendant chose not to seek independent legal advice should have alerted the*
25 *bank to the possibility that the def was acting under the undue influence of P."*
26

27 120. It can therefore be extrapolated from the dictum in that case that, in order to rebut the
28 presumption, the Defendant has to satisfy this Court not only that he had advised the Deceased
29 to have legal advice or even facilitated the Deceased receiving such advice. The Defendant has
30 to demonstrate that he confirmed that the Deceased did in fact obtain legal advice. This
31 requirement obtains with respect to each of the impugned transactions. There is no evidence
32 before the Court that the Defendant ensured that the Deceased had independent legal advice in
33 respect of the impugned transactions. The Defendant stated that in 2007 when the Deceased
34 sold the property which resulted in the Defendant receiving a benefit by the transfer of monies
35 in the amount of C\$329,000 from the Deceased's account to a brokerage account in the

²³ [1997] 1 All ER 144

1 Defendant's name, that he *"did not take him to get independent legal advice, that he did not*
2 *take him to see an attorney to get such advice."*
3

4 **121.** Similarly, there is no evidence that the Deceased had the benefit of any such advice at the time
5 that the property at West Bay was transferred from the Deceased to the Defendant on the 16th
6 July 2008.

7
8 **122.** During the period *January 2005 and February 2011* when the Deceased was between 92-98
9 years of age and in failing health, there is no evidence of his being provided with the full, free
10 and independent advice necessary to counter the claim of implied undue influence with regard
11 the transfers of funds amounting to CI\$512,450.72 between *account CK 011-01825 to account*
12 *011-01826*.

13
14 **123.** The Defendant in cross-examination was questioned about matters relating directly to this issue
15 and he stated:
16

17 *"My father did not make a will. I did not take him to an attorney or say you should*
18 *make a will.*

19 *Q: You did not take your father to get independent advice, from a banker or*
20 *financial advisor*

21 *A: Since 2005 when he moved to live with me, I have never taken my father*
22 *since I returned to the Cayman Islands in 1987, never taken him to a legal*
23 *practitioner in the Cayman Islands except for one time I drove him to Maples*
24 *and Calder. He was not taken to a financial advisor or anything like that.*
25 *The only contact my father had financially with anyone was if he spoke to*
26 *Tony Logan who he considered a good friend at CNB, to speak to him about*
27 *his accounts. I don't know of him contacting anyone about anything else*
28 *otherwise.*

29 *When he said he was giving me proceeds of sale [of the property] I did not*
30 *think to take him to speak or to see anyone else."*
31

32 **124.** Counsel for the Defendant's submission to the Court that the Deceased had friends around him,
33 that he could have received legal advice when he wanted as evidenced by the fact that he was
34 an active member and elder in his church, that he had a companion up to 2010, and that he that
35 he had helpers to take care of him, respectfully does not meet the evidentiary burden necessary

1 to rebut the presumption of implied undue influence. There is no evidence before the Court
2 that a third party had discussions with the Deceased about his intention to make gifts of the
3 transfers to the Defendant or even that anyone else was informed of these decisions and
4 transactions. In addition, there is no written evidence from the Deceased with respect to his
5 intentions concerning these transactions before the Court.

6
7 **125.** Evidence that the Deceased was not wholly financially dependent on the Defendant does not
8 take the Defendant's position further on this critical issue nor does the fact that the Defendant
9 asserted that as between himself and the Deceased: *"he told me I am the lawyer he is the client.
10 He is giving the orders and I am carrying them out because he is the client."* As the authorities
11 that have been considered above highlight, evidence that the Deceased knew what he was doing
12 and intended to do it does not rebut the presumption.

13
14 **126.** The Plaintiff is not required to prove that the Deceased was mentally impaired for the
15 presumption of implied undue influence to apply. Conversely, the Defendant does not have to
16 prove that the Deceased was not mentally impaired in order to rebut the presumption. In any
17 event, the medical evidence presented does not assist the Defendant, simply because the
18 question of implied undue influence is not a question of capacity. It is clear from the authorities
19 that evidence of rebuttal does not arise from a consideration of whether the Deceased knew
20 what he was doing at the time of the transactions. The evidence of impairment can only go the
21 likelihood of a relationship of trust and confidence. The *evidence of rebuttal of the*
22 *presumption* is more concerned with what a Court could expect someone to do to ensure that
23 the Deceased's decision with regard to a transaction is not made under the implied undue
24 influence exerted over him.²⁴

25
26 **127.** The presumption of implied undue influence has not been rebutted by the Defendant in this
27 case with regard to any of the relevant transactions or transfers. I am satisfied that the Deceased
28 did not have the full, frank and informed thought necessary when these were made. The
29 Defendant has not satisfied this Court that the Deceased *"entered into the transaction of [his]*
30 *own free will, independently of, and not in any way as a result of, the influence that [the*
31 *Defendant] was in a position to exercise over[him]"*.

32

²⁴ In *Wright v Carter* [[1903] 1 Ch 27, the Court found that the presumption of undue influence may apply even in the circumstance where there is no evidence of direct persuasion to make a gift. The defendant solicitor in that case could not rebut the presumption by showing that his influence did not operate with regard to the gift.

1 **Alternatively, were the transactions/transfers and the value thereof held on resulting trust for the**
2 **Plaintiff.**

3
4 **128.** The Plaintiff raised this cause of action in the alternative to that for implied undue influence
5 with regard to the monies transferred from the chequing account of the Deceased 011-01825 to
6 that of the Defendant, 011-01826 between the period April 2006 – May 2010. As stated above,
7 Counsel for the Defendant conceded that the transactions/transfers that the Plaintiff has raised
8 in the instant claim do raise the presumption of implied undue influence. This coupled with
9 the Court's own findings are sufficient to determine the claim.

10
11 **129.** In written submission to this Court, Counsel for the Defendant stated that the presumption of a
12 resulting trust:

13
14 *"...can be rebutted by direct evidence that A did indeed intend to make a gift to B and that*
15 *he should take it as the beneficial owner. ...Even where this is absent a court will strive to*
16 *determine the parties' real intentions at the time of the transactions. This may require*
17 *drawing an inference from the parties' words and conduct. In short, therefore, resulting*
18 *trusts should be viewed as default rules when there is insufficient evidence to determine the*
19 *settlers' intentions"*²⁵

20
21 **130.** In the instant case, if this Court is incorrect in its finding that the presumption of implied undue
22 influence does arise with regard to the transactions for which a resulting trust has been claimed
23 in the alternative, I find that the evidence that has been presented to this Court with regard to
24 these transactions as set out above,²⁶ is insufficient for this Court to find they were repayments
25 from the Deceased to the Defendant for monies spent by the Defendant on goods for the
26 Deceased's business. The Defendant has not provided compelling explanations for these
27 transactions. It is difficult to determine the Deceased's intentions with regard to these
28 transactions. Therefore, I find that these monies, the result of the transfers, are monies that
29 were held on trust by the Defendant for the Deceased during his lifetime and are now being
30 held on trust by the Defendant for the benefit of the Deceased's estate.

31
32 **131.** The monies held in the brokerage account in the amount of C\$329,000 are similarly monies
33 held on resulting trust for the benefit of the Plaintiff there being no direct evidence that the

²⁵ See page 5 at paragraph 24 of the Defendant's Skeleton Argument

²⁶ See particularly paragraphs 102-105 above

1 Deceased intended to make a gift to the Defendant of those monies and that he should take it
2 as the beneficial owner.

3
4 **Does the presumption of advancement apply in relation to the transactions/transfers at issue?**

5
6 **132.** The Defendant has submitted that the presumption of advancement applies on the facts as
7 presented on this claim. It has been advanced as being able to displace the presumption of a
8 resulting trust if such is found to be applicable.

9
10 **133.** In *Antoni v Antoni*²⁷ the presumption of advancement was described as follows:

11
12 *"This presumption, a construct of equity, applies when a parent places assets*
13 *in the name of a child and assumes that the parent intends to make a gift to the*
14 *child. It is a rebuttable evidentiary presumption. In the absence of adequate*
15 *rebuttal evidence, the presumption bars the application of the converse*
16 *presumption, namely, the presumption of a resulting trust. If a person places*
17 *assets of his or hers in the name of a stranger, the presumption is that the*
18 *stranger holds the assets on a resulting trust for the transferor. This, too, is a*
19 *rebuttable evidentiary presumption."*
20

21 **134.** The Plaintiff has argued that the Court may find that the transfer of the property from the
22 Deceased to the Defendant was not a transfer of all legal and beneficial interest, but only of a
23 legal interest and that it should be presumed that the beneficial interest was to remain for the
24 benefit of the Plaintiff. For the reasons set out above at paragraph 130, this Court has found
25 that a presumption of a resulting trust can be made out the facts of this case with regard to the
26 transactions between the chequing accounts of the Deceased and the Defendant. The Defendant
27 cannot have it both ways, that these transactions were repayments for his expenditure on items
28 for the business and also, when that explanation is unsupported by the evidence, to claim that
29 these transactions were gifts from his father. The presumption of advancement does not arise
30 with regard to these transactions or to the \$329,000 held in a brokerage account opened by the
31 Defendant in 2007.

32
33 **Should the Plaintiff be barred by laches from the relief sought on the claim by reason of delay?**

34
35 **135.** The Defendant asserts that the delay in bringing this claim to trial has resulted in prejudice to
36 his case. The submission of Counsel for the Defendant is that nothing substantial was done to
37 pursue the matter until 4 years ago, although the Deceased has been dead for almost ten years.

²⁷ [2007] UKPC 10

1 Counsel referred to Dr. Addleson's evidence and his lack of medical records for the Deceased.
2 Counsel also referred to the Defendant's evidence that he had lost certain relevant financial
3 records such as bank records and invoices for goods and services relating to his use of monies
4 from the bank account 011-01826 from which he assisted the Deceased in his business. She
5 also submitted that the delay has resulted in the Defendant being unable to recall times, places
6 and dates.
7

8 **136.** Counsel for the Plaintiff in response noted that the suggestion of delay and resulting prejudice
9 had never been raised before the amendment of the Defence in August 2019. He pointed to the
10 fact that although the matter had not progressed as quickly as it could have done the Defendant,
11 represented throughout by Counsel, made no application to have the claim struck out due to
12 delay. Counsel for the Plaintiff asked the Court to consider whether there was evidence that
13 the matters raised by the Defendant would go to the heart of the issues now before the Court in
14 any event. Counsel submitted that there was nothing that the Defendant now suggests that he
15 would have known in 2014 that would have assisted him in this case in terms of the presumption
16 of undue influence and therefore no issue of prejudice arises.

17
18 **137.** Counsel for the Plaintiff drew to the Court's attention the substance of Dr. Addleson's with
19 regard to this issue. Dr. Addleson's evidence was that he was required to keep patient records
20 for 10 years and usually kept them for up to 15 years. However, at the time he gave his witness
21 statement in 2019, although the Deceased had ceased to be a patient of his in 2007-2008, well
22 within his own 15-year limit for keeping patient records, he did not have those records. No
23 explanation was offered for why he had not done so in this case, why he had not kept the
24 Deceased's records for the longer period. Counsel for the Plaintiff argued that given the lack
25 of explanation for the Deceased records being unavailable that the Court could not find the
26 Plaintiff bore responsibility for this lack.

27
28 **138.** With respect to bank account records, Counsel for the Plaintiff pointed to the fact that the
29 Defendant had not provided any of his credit card or bank records for the Court's scrutiny and
30 there was no explanation for same, emphasizing that the Defendant could have provided records
31 for the 7 years previous to 2014 but had chosen not to do so. Counsel for the Plaintiff invited
32 the Court to find that these matters raised by the Defendant were not instances of prejudice and
33 that that laches should not apply in this case.
34

1 139. I find that the Defendant has not shown that there has been unjustifiable delay in all the
2 circumstances in this case so much so that it has adversely affected his position or that it would
3 be inequitable to grant the Plaintiff the remedy he seeks on this claim.
4

5 **Should the Court order an Account of the Plaintiff's dealings with the property of the Deceased**
6 **between 2007-2011?**
7

8 140. The Plaintiff is granted the relief as claimed as follows:

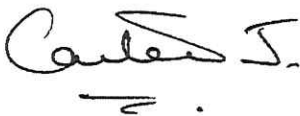
9 (i) The Defendant is to repay the sum of CI\$235,305.94, monies had and received by
10 the Defendant for the benefit of the Plaintiff.

11 (ii) The Defendant is to provide an account of all dealings by the Defendant in the
12 financial affairs of the Deceased, specifically with regard to all of the Deceased
13 accounts at the Cayman National Bank and also with respect to the brokerage
14 account also at Cayman National Bank to which the sum of CI\$329,000 was
15 transferred in 2007.

16 (iii) The transfer of land, Registration Section, West Bay North West, Block 4E,
17 Parcel 581 from the Deceased to the Defendant is hereby set aside.
18

19 141. Costs to the Plaintiff to be taxed if not agreed. The Plaintiff's claim has received funding from
20 the Legal Aid Department. Those funds are to be repaid by the Plaintiff from the Deceased's
21 estate.
22

23 142. Interest on the bank funds at paragraph 140(i) above in accordance with the Judgment Debt
24 (Rates of Interest) Rules.
25
26

27 

28 _____
29 **Justice Marlene I. Carter**
30 **Judge of the Grand Court (Actg.)**

