IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 463 OF 2002

	(DAVID MICHAEL MCHENRY	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(VINCENT HULSE	**DEFENDANT**

BEFORE: The Honourable Justice Sir John Muria

1 June 2009

L. Welch Esq. for the Claimant
F. Lumor S.C. for the Defendant

JUDGMENT

CLAIM *– specific performance – Agreement for Purchase and Sale of Land – alleged forgery of signature – properties included in the agreement subject of bequest under testator's Will – seller as one of the executors and trustees under the Will – seller a life tenant – whether seller has power to sell properties – Settled Land Act 1925 (UK) – whether total failure of consideration – whether specific performance of contract in part – whether presumed undue influence – whether equitable remedy of specific performance should be granted*

Muria J.: This matter was started in 2002 by a Writ issued on 5th September 2002, against the defendant at the suit of the claimant. The defendant is the administrator of the estate of the deceased Bernice Marjorie Hulse who died at Belize City on 22nd January 2002.

The claimant's claim is for specific performance of a written agreement dated 9th December 2001 for the sale to the claimant of properties "*being No.*

7 Southern Foreshore Street, Belize City and all those parcels of land located in Point Placencia, Stann Creek District." In the alternative the claimant claims damages for breach of contract. The said agreement which is challenged by the defendant was entered into between the deceased Bernice Marjorie Hulse and the claimant.

Brief background

A brief background to the case is as follows. The claimant, having visited Belize on several occasions, was interested in purchasing land in Belize City and Placencia. He learnt that the deceased Bernice Marjorie Hulse who was a medical doctor, had properties for sale in Placencia. In 1993, the claimant enquired of the deceased of the possibility of selling her properties at Placencia. At the time, the deceased was not interested in selling any of the properties.

Thereafter the claimant continued to visit Belize and on each occasion would visit the deceased at her residence at No. 7 Southern Foreshore, Belize City. Subsequently the claimant and the deceased became good friends and had discussions on variety of matters including the properties in Placencia. The claimant would bring variety of items for the deceased from the U.S. or sent

them to her. The claimant assisted the deceased's family on the occasions of the funerals of her late sisters, Gwen Hulse who died in October 1999, and Valerie Hulse who died in July 2001.

The culmination of the claimant's friendship with the deceased Bernice Marjorie Hulse, was the Agreement between them dated 9th December 2001, prepared by the claimant, for sale of the properties at Point Placencia and at No. 7 Southern Foreshore, Belize City to the claimant for the price of $500,000.00. There was no one else present except the deceased and claimant at the signing of the agreement. Neither the $500,000.00 nor any part of it was ever paid or tendered by the claimant. The claimant, however, agreed, among other things, to "*provide lifetime care and residency for Dr. Bernice Marjorie Hulse as a condition of the sale of the property*" which care to continue until the death of the deceased. The deceased died on 22nd January 2002.

Following the death of Dr. Bernice Marjorie Hulse, the defendant was granted Letters of Administration over the estate of the deceased. When approached by the claimant to complete the Agreement in question, the defendant refused to complete the same. These proceedings are a

consequence of that refusal. The defendant, however, counterclaims, challenging the validity of the agreement and has denied that the claimant is entitled to enforce the said agreement.

Properties and conditions of settlement

It would be helpful, as part of the background to the case, to set out the nature of the properties and conditions for the sale contained in the '***Agreement of Purchase and Sale***' between the deceased, Dr. Bernice M. Hulse and the claimant, David M. McHenry. The properties to be sold under the Agreement are described as *the properties owned by the Seller in Point Placencia, Stann Creek District, Belize,* and at *No.7 Southern Foreshore Street*, known as ' *Sherwood'*, in Belize City, Belize. Apart from the two Survey Plans in **Exhibit B** to the Agreement, neither the Agreement itself nor the claimant gave any further detailed descriptions of the land to be sold under the Agreement to the claimant. I shall deal with the adequacy of *description* of the land to be sold later in this judgment.

Along with the properties purported to be the subject of sale under the Agreement, there are also set out the "***conditions of settlement***" which are described as follows:

(a) All titles of the land shall be clear, free of clouds and ready for transfer and recordation.

(b) The transfer of properties shall be made by separate deeds at the time of settlement.

(c) The properties in Belize City and Point Placencia are to be free of tenants and encroachments except lifetime occupancy and lifetime care afforded to Dr. Bernice Hulse.

(d) Purchaser may waive any of these stated conditions at any time before or at the time of actual settlement or may choose to delay the settlement until any cures or remedies are affected at the sole expense of the seller.

(e) The titles shall be insurable with a reputable title insurance company at reasonable and marketable rates, at the sole determination of the purchaser.

The Agreement also provides that the *settlement shall occur on a date, at a time and location in Belize, CA to be mutually agreed to in written form by both the Purchaser and Seller at least (45) Forty Five days in advance of said date and time but in no case shall settlement occur later than the (5th)*

Fifth day of August, 2002. That mutually agreed date has, of course, not been reached as yet between the parties, due to the death of Dr. Bernice Marjorie Hulse and also the defendant's refusal to conclude the sale transaction after the death of the deceased.

The Claimant's Case

The case for the claimant as put by his Counsel, Mr. Welch of Counsel, is that the deceased agreed to sell her properties at Point Placencia, Stann Creek district and No. 7 Southern Foreshore, Belize City for $500,000.00. A legally binding agreement was executed for this purpose between the deceased and claimant. As such, the defendant, as Administrator of Estate of deceased should now perform the obligations under that Agreement.

It is the claimant's case also that he has fulfilled all the necessary conditions of the sale as stipulated in the Agreement, including the payment of a deposit as part of the consideration of the Agreement before the death of the deceased. The claimant thus claims that the Agreement is legally binding and should be performed.

It is also part of the claimant's case that the deceased, although had no titles to the said properties, had the right to sell them on the basis that she had lifetime interest in the said properties. Mr. Welch supported that proposition by relying on ***Settled Land Act 1925 (UK)*** and ***Trusts of Land and Appointment of Trustees Act 1996 (UK***). Counsel suggested that under the said legislations a person who holds a property on trust for another may sell or deal with the property as if he or she is the owner, provided that the proceeds are passed on to the beneficiaries. Counsel submitted that these two UK legislations are applicable in Belize.

The claimant denies any fraudulent conduct by way of presumed undue influence on his part in executing the Agreement with the deceased in this case. It is his case that the deceased was of sound mind and body when she entered into the Agreement with the claimant, and so, no influence over her was ever needed.

There was, the claimant says, *consensus ad idem* in this case between the deceased and claimant. That, together with the conditions of Agreement having been fulfilled, entitles the claimant to the equitable relief of specific performance.

In further support of his claim, the claimant called five witnesses, including a retired FBI forensic analyst, Richard M Williams, who has expertise in examinations, identification and/or authentication of handwriting, hand printing, typewriting, graphic arts, photocopying processes, and signatures in documents. He has over 23 years experience in the examination of the type of documents with which we are concerned in this case and had testified more than 250 times in the Federal and State Courts of the United States and its territories as forensic expert.

The defendant's case

The case for the defendant, on the other hand, can be conveniently grouped into four categories. First, the Agreement of Purchase and Sale entered into between the claimant and the deceased is a forgery; second, the said Agreement was procured by presumed undue influence by the claimant over the deceased; third, the deceased could not have sold the properties concerned, since she had no right, capacity or power to do so; fourth, the said Agreement is simply unenforceable.

The evidence to support the defendant's case came from three witnesses including an expert witness, Ms Genoveva Marin, a forensic document examiner who has expertise in examination of handwriting, handprinting, office machine prints, typewriting, letter prints and other special examinations.

In summary, the defendant's case is that the Agreement of Purchase and Sale, prepared by the claimant was not signed by the deceased, Dr. Bernice Marjorie Hulse, and that her signature on the said document was a forgery. In the alternative, the defendant says that if the deceased did sign the document, that it was done under presumed undue influence exerted upon her by the Claimant. The argument being that the deceased who was then 90 years old had come to repose her trust and confidence in the Claimant who was also acting as her "advisor", a relationship which the defendant says had been abused by the Claimant.

The other prong to the defendant's case is pivoted on the unenforceability of the Agreement of Purchase and Sale.

The issues

At the Case Management, the parties had agreed to the issues to be determined at the trial. These issues are:

> "1. Whether the "Agreement of Purchase and Sale" dated 9th December, 2001 between Dr. Bernice M. Hulse and David M. McHenry is a forgery.
>
> 2. Whether the "Agreement of Purchase and Sale" was obtained by undue influence of David McHenry, the Claimant.
>
> 3. Whether the "Agreement of Purchase and Sale" is unenforceable for total failure of consideration.
>
> 4. Whether the "Agreement of Purchase and Sale" is a conditional contract where the conditions were never fulfilled and, therefore, unenforceable.
>
> 5. Whether Dr. Bernice Hulse, being a tenant for life, has any power to effect the sale of the properties (settled properties) contained in the "Agreement of Purchase and Sale."

Expert Evidence

I must record the Court's indebtedness, in particular, to the expert evidence presented on behalf of each of the parties by their highly qualified and experience expert witnesses. Their testimonies have been very helpful in assisting the Court to come to its conclusion on the question of forgery of signature in this case. In saying this, I am not unmindful of the many insightful observations made with regard to the utility of experts in the common law system and its perceived difficulties. As observed by The Honourable Justice P. McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, Australia in ***The Honourable Justice P. McClellan, "Expert Evidence: Aces Up Your Sleeve?"*** **(2007) Vol. 8 No.2 The Judicial Review 215 at 219 and 220:**

> *".... in an adversary system the expert becomes the hired champion of one side....When the adversarial system is employed to resolve civil disputes and parties are allowed to call evidence from their 'own' experts, it is inevitable that the evidence will be infected by adversarial bias. It could hardly be otherwise. Only the most extraordinary person who has been engaged to prepare and give evidence for a client would,*

when cross-examined, readily confess error, accept their view was wrong and the client's money wasted."

With the counsel contained in the above observation, I now deal with the issue of whether or not the deceased's signature was a forgery.

Forgery of signature

On the issue of forgery of the signature of the deceased Dr. Bernice Marjorie Hulse, I am mindful of the allegations raised by the defendant, the evidence presented by and on behalf of both parties, and the arguments advanced by Counsel for each of the parties.

The defendant's evidence here is simply that having looked at the deceased's signature on the Agreement and those on the various cheques which she signed, the signature on the Agreement was not hers. When pressed in cross-examination as to why the defendant said that the signature on the Agreement was not that of the deceased, the defendant replied:

"Because I know her signature. Because prior and after her death, I was able to see 1500 documents that has (sic) her

signature. In that box in there, I have over 200 and more cheques and other documents".

The defendant's expert witness, Ms Marin, after examining the deceased's signatures in the various documents, concluded that the signature of the deceased on the Agreement was not hers. However, Ms Marin did accept in her evidence that the variations in the deceased signature can also be accounted for with the old age of the deceased as well as her physical conditions. That would clearly support the suggestion by Mr. Richard Williams contained in his expert witness statement where he concluded:

"In summation, having had the opportunity to examine the original documents from which the Q-1 and Q-2 photocopies were prepared and having thoroughly examined the submitted questioned and known exhibits, I find myself unable to state beyond a reasonable doubt whether Bernice M. Hulse wrote the questioned Hulse signatures; however, neither am I of the opinion that the questioned Hulse signature are forgeries. Regrettably, Such factors as tremor, patching, re-tracing and/or a slow and deliberate hand, are not only characteristics

commonly associated with forged hand-writing, but are features routinely found in the writing of the elderly and/or infirmed. Given the level of distortion intermittently displayed in Bernice M. Hulse's specimen standards and supposing that the Q-1 and Q-2 signatures were in fact forgeries, it begs asking why a forger would not simply simulate one of her distorted signatures obviating any question as to the signatures authenticity? Further, the prevailing literature on the subject of simulated forgeries states that when executing a simulation, the first order of business is to accurately duplicate the capitol letters while generally ignoring or paying less attention to the lowercase lettering; however, precisely the reverse was observed when examining the Q-1 and Q-2 "Bernice Hulse" signatures. Not only did the capitol "H" in Hulse conform to a seldom used pattern of the letter, but the middle initial "M" was entirely overlooked, in contrast, the lowercase lettering was duplicated in exacting detail. Based on the above, this examiner is of the opinion that a definitive finding is not possible at this time. Should additional signature samples of Bernice M. Hulse from on or about December 2001 become

> *available, it may yet be possible to provide meaningful assistance in determining the authenticity of the questioned signatures."*

In his examination of the specimen signatures of the deceased, Mr. Williams found that the deceased, for the most part, signed her name as "*B. M. Hulse*" when signing on cheques and "*Bernice M. Hulse*" when signing business documents. In the light of such variations, the questioned Q-1 and Q-2 documents "*Bernice Hulse*" signatures do not appear to conform to her customary writing practices. However, the deceased's signatures in her passports (K-1) showed "*B. M. Hulse*" and "*Bernice Marjorie Hulse*" signature appearing on a survey plan (K-4). Mr. Williams then made suggestive remarks that:

> *"For whatever reasons, individuals can and do vary their writing practices from time to time: With that in mind, there is no evidence to suggest that the absence of her middle initial "M" from the questioned signature entries was anything more than one of Bernice M. Hulse's handwriting exceptions."*

The bold suggestion by Ms. Genoveva Marin in her evidence, that signature of the deceased on the Agreement was not hers, in my respectful view, is not supported by the whole of the evidence when put together, even on her own testimony and those of the defendant.

Although Ms Marin made a bold opinion based on her examination that the signature on the questioned document was not of the deceased, she acknowledged the possibility that a person could vary the characteristics of the letters in his handwriting. One factor that could effect such variation is old age.

One factor which is obvious just by observing the deceased's signatures over the years as demonstrated in the cheques (K3 – K13) was the deterioration in the way she signed her signatures, including the characteristics of the 'Letters' in the signatures. By November 2001, the deceased's signature had greatly deteriorated, with the name 'Hulse' appearing to be the stark evidence of a great deterioration in characteristic of the deceased surname (See K13 – XXIV chq.# 930646). By January 2002, the deceased's signature was almost at its last stage of deterioration. The deceased's last name 'Hulse' on the signature has immensely deteriorating features.

It is to be observed also that the signature of the deceased on the questioned document (Agreement for Purchase and Sale) was written out as "Bernice Hulse" and not a signed signature as such, as in the cheques. This is where the difficulty lies in determining whether the questioned document was executed by the deceased or not. Document K14 has the name "Dr. Bernice Hulse" written out followed by the deceased's signature.

The expert evidence adduced on behalf of both parties, does demonstrate the difficulty faced by a party claiming forgery committed upon a deceased person. There is absolutely nothing from the evidence of those alive and testifying to satisfy the court that the signature of the deceased on the Agreement for Purchase and Sale was forged by the defendant. On balance, the court can safely assume that the questioned signature on the Agreement was that of the deceased, albeit, with its deteriorating characteristics.

Fortunately, I need not determine this case on the basis of allegation of forgery. As far as the Court is concerned the only issue that is really of material importance in this case is whether the "Agreement of Purchase and Sale" can be enforced against the defendant who is the administrator of the

estate of the deceased. In order to determine that issue there are two matters which I need first to consider and determine, namely the capacity or the power of the deceased to sell the properties concerned, and legal status of the Agreement itself. The other issues raised, concerning the unenforceability of the contract for failure of consideration and the unenforceability of the contract for non-fulfillment of conditions are part and parcel of the two matters that referred to above.

Power to sell

To assist, not only in determining whether the deceased had power to sell the properties mentioned in the Agreement, but also to ascertain the true status of the properties, as far as the defendant is concerned, I set out hereunder the details and nature of the said properties as given by the defendant in his witness statement. These are

a) *No. 7 Southern Foreshore located in Belize City* - This property has in it two buildings which were situated on the lot, namely –

i) The building, sometime referred to as the "*Sherwood"* property, which was devised under the Estate of Evadne Hulse to the late Dr. Bernice Hulse for her life only. Upon her death the property was vested absolutely in Vincent Hulse, the defendant; and

ii) The building located at No. 2 Adams Lane, Belize City which was also devised under the Estate of Evadne Hulse to the late Dr. Bernice Hulse as lifetime tenant only. The said property is now vested in the Estate of the late Pepita Juliette Butler.

b) *The nine (9) acre parcel of land situated at Point Placencia*, Stann Creek District which was devised as a trust for sale to Dr. Bernice Hulse with the proceeds intended to maintain the upkeep the properties of the Estate of Evadne Hulse.

c) *A lot situated in point Placencia,* Stann Creek District on which five properties were sited namely Bergeville, Beach

cot, The Hut, Red Cottage and Hermitage. The Hermitage development was demolished in late 2001. The Bergeville property was sold to one Allan Duncker by the deceased Dr Bernice Majorie Hulse on 10th December 1998. The said lot was devised under the Will of the late Evadne Hulse to Dr. Bernice Hulse and her sister Valerie Caroline Hulse now deceased.

I shall now consider them each in turn.

i. No.7 Southern Foreshore, Belize City

The Seller, Bernice Marjorie Hulse (deceased), was a life tenant in two of the properties concerned, namely the *"**Sherwood"*** and ***No.2 Adams Lane*** properties at No.7 Southern Foreshore, Belize City. It is conceded by the claimant that the deceased had no title to the properties concerned beside her life estate. Nevertheless, Counsel for the Claimant contended that the deceased had the right to sell the said properties contained in the Agreement. Reliance is placed on the ***Settled Land Act, 1925*** (UK) and the ***Trusts of Land and Appointment of Trustees Act, 1996*** (UK) as the applicable laws here. Counsel did not say why the latter-mentioned Act is applicable in

Belize and so I will leave the issue of the applicability of that legislation to Belize for another day. The ***Settled Land Act 1925 (UK)*** is, however, applicable to Belize. ***See s.153 Law of Property Act (Cap.190) of the Laws of Belize.***

The law is that the tenant for life only has a life estate in a real property that ends at death. This, of course, gave rise to the general common law rule that the owner of the life estate cannot convey a larger interest than what the owner actually owns. The ***Settled Land Act 1925*** ("the SLA"), however, has created exceptions to the common law rule. The statutory exceptions now grant power to the tenant for life to convey the property, whether by way of sale or lease (***ss. 38 and 72 of the SLA***). See also ***Binions v Evans*** [1972] EWCA Civ 6; [1972] Ch 359.

The legal estate therefore can be said to remain in the possession of the tenant for life until he/she disposes of it or dies at which time, the settlement comes to an end and the legal estate vests in the personal representative of the estate. If he/she sells legal estate under his statutory power, it, of course, passes by his conveyance to the purchaser. See ***R.E Megarry and H.W.R. Wade, The Law of Real Property (Fifth Edition)*** Stevens & Sons Limited,

London, (1984) p.337. See also ***Re Dalley*** (1926) 136 L.T.223. There is therefore support for the proposition advanced by Mr. Welch on behalf of the claimant that the deceased, although only a life tenant, has the authority to sell the above two properties in question. That authority or power, is of course, subject to the limitations contained in the Act, and in the settlement document. In this case, that settlement document is the ***Will*** of the late **Evadne Marie Hulse** dated 20th November 1986.

Accepting, as I do, that the deceased was a tenant for life and the two properties mentioned above were settled land pursuant to the *Settled Land Act, 1925*, could the deceased lawfully convey the two properties at No.7 Southern Foreshore, Belize City, to the claimant or to any other person for that matter? To answer that question, one has to consider what were said in the ***Will*** in respect of the properties. This is essential, since the power of the life tenant to dispose of the legal estate in the land concerned cannot be presumed but rather, must be found in the settlement instrument, namely the ***Will*** of the late Evadne Marie Hulse.

In so far as No. 7 Southern Foreshore, Belize City is concerned, as earlier mentioned, the two properties on that Lot are the "***Sherwood"*** property

(building) and the ***No. 2 Adams Lane*** Building. The "Sherwood" property was devised to the deceased, Bernice Marjorie Hulse under the ***Will*** of the late Evadne Hulse for her life, and after her death, to Valerie Caroline Hulse for her life, and after her death, to Pepita Juliette Butler for her life, and after her death, to Vincent Hulse (defendant) and his heirs.

The building at No. 2 Adams Lane, was devised to the deceased Bernice Marjorie Hulse and Valerie Caroline Hulse under the ***Will*** of the late Evadne Hulse for their lives jointly and on the death of the survivor of them, to Pepita Juliette Butler. The property is now vested in the Estate of the late Pepita Juliette Butler.

Clearly the deceased Bernice Marjorie Hulse only had life interest in the two properties in No. 7 Southern Foreshore, Belize City. Her life interest ended in the said properties on her death on 22nd January, 2002. However, prior to her demise, the deceased entered into the disputed Agreement with the claimant on 9th December 2001 for the sale of the properties at No.7 Southern Foreshore, Belize City. In my view, while the deceased Bernice Marjorie Hulse had the power under the SLA to sell the two named settled properties, the exercise of that power had been restricted. Those restrictions

had been placed upon her by the Act as well as by the settlement (the ***Will*** of Evadne Marie Hulse dated 20 November, 1986). First, under the ***Will*** of the late Evadne Marie Hulse, the said properties were to pass on to the respective beneficiaries, namely, Vincent Hulse (defendant) and his heirs, and Pepita Juliette Butler (now deceased). Secondly, since the settlement in this case was made by the ***Will*** of the testatrix Evadne Marie Hulse, vesting her legal estate in the two executors and trustees who were her personal representatives, a vesting instrument or deed ought to have been executed by the personal representatives in favour of the tenant for life (Bernice Marjorie Hulse) so as to enable her to convey the legal estate of the testatrix (Evadne Marie Hulse) to the tenant for life. ***See sections 6 and 8 of SLA***. This is in conformity with the policy of the Act on the requirement of a vesting instrument, and to ensure that there is to be no dealing with a settled land without a vesting instrument. This is because a settlement of a legal estate in land by one document (in this case the ***Will*** of the late Evadne Marie Hulse) did not and could not, by itself create or transfer a legal estate to the tenant for life, Bernice Marjorie Hulse. Until that vesting procedure was done, the tenant for life, Bernice Marjorie Hulse, could not dispose of the properties in question. ***See section 13 of SLA***.

Consequently, the agreement to purportedly sell the properties in question to the claimant can only operate as an agreement to sell the properties pending the execution of the required vesting instrument. This scenario is impossible to achieve on the facts of this case since no vesting instrument had ever been executed in favour of Bernice Marjorie Hulse to enable her to dispose of the legal estate in No. 7 Southern Foreshore, Belize City.

Further, in my view, the deceased as a trustee under the settlement was obliged to act so as not to prejudice the interest of all those entitled under the settlement. It was therefore encumbered on the deceased to consult the beneficiaries having interest in the properties concerned before she could enter into the Agreement with the claimant. This is a statutory requirement. The evidence in this case clearly established that the deceased did not seek out or consult any of the beneficiaries, including the defendant, before entered into the Agreement in question with the claimant.

The court can only conclude, in agreement with the submission of Mr. Lumor S.C., that the tenant for life, Bernice Marjorie Hulse (deceased), had no power or authority to enter into any agreement to sell, let alone transfer, the two mentioned properties to the claimant.

ii. The 9 acre parcel of land in Placencia

The 9 acre parcel of land at Point Placencia, Stann Creek District, was devised to the executors, Gilbert Rodwell Hulse and Bernice Marjorie Hulse, on trust for sale to pay estate duty and to maintain the properties of the late Evadne Marie Hulse. Under the ***Will*** of the late Evadne Marie Hulse the property was "*to be sold and the proceeds of the sale to be used for payment of estate duty and any balance remaining for repairing the houses on my said properties"* i.e. to maintain the testatrix's houses on the property. This property is subject to trust, although it can be regarded as subject to "immediate" trust for sale. The fact that the immediate operation of the trust for sale did not occur does not make it any less a trust for sale. See ***Re Herk Lot's W.T.*** [1964] 1 W.L.R. 583.

In respect of this 9 acre land, the object or purpose of the trust as intended by the testatrix is clear and certain. It is to be sold and the proceeds of the sale to be used for payment of estate duty and any balance remaining to be used for the maintenance of the houses on the testatrix's properties. Any disposition, therefore, of the said trust properties outside the intended purpose would be contrary to the express power granted to the trustee, and

this court will not help to defeat the testatrix's intention. See ***Re Parkin*** [1892] 3 Ch 510; See ***also Beyfus v Lawley*** [1903] AC 411.

In the present case, the purported sale of the said 9 acre piece of land in Placencia to the claimant by the deceased is in breach of the express trust conferred on the deceased and so void.

iii. The Lot with 5 properties in Placencia

As to the Lot situate in Point Placencia, Stann Creek District, and the properties known as Bergeville, Beach cot, The Hut, Red Cottage and Hermitage, these were also held upon trust for sale and so under the control of the executors and trustees. They therefore fall outside the operation of the SLA. They must be distinguished from the "Sherwood" and No. 2 Adams Lane properties which are settled land. See ***section 1(7) of the SLA, 1925.***

The deceased Bernice Marjorie Hulse and Valerie Caroline Hulse were joint beneficiaries in the said properties under the ***Will*** of the late Evadne Marie Hulse. They were not life tenants. Valerie Caroline Hulse predeceased Bernice Marjorie Hulse who became the surviving beneficiary until her death on 22nd January, 2002. The said properties were therefore vested in

her under the ***Will*** and so had the power to convey them. See ***Re Jones*** [1913] 1 Ch 375; See also section 38(3) of the ***Law of Property Act (Cap. 190) – R.E. 2000 of the Laws of Belize***.

The evidence established that Bergeville had been conveyed to one Allan Michael Duncker on 10th December 1998 by the deceased Bernice Marjorie Hulse. No issue has been taken on that transaction and is not a concern in this case.

Thus the only properties which the deceased Ms. Bernice Marjorie Hulse would appear to be entitled to sell were the remaining four (4) of the five (5) properties in the mentioned Lot in Placencia, namely Beach Cot, the Hut, Red Cottage and Hermitage. However, any right to enforce the Agreement under dispute in respect of the four (4) remaining properties in Placencia would depend on the other issues raise in this case, namely whether there is consideration, whether the Agreement can be divisibly enforced in respect of only the four (4) remaining properties in Placencia, and whether the Agreement was procured under presumed undue influence.

To these other issues just mentioned, I now turn.

Failure of Consideration and Conditional Contract

Having found that the deceased Bernice Hulse could not lawfully sell, dispose of or convey the properties at No. 7 South Foreshore Street, Belize City and the nine (9) acre piece of land in Placencia, the issue of consideration is no longer relevant to those properties. The issue of adequacy or failure of consideration is, therefore, limited to the four (4) of the five (5) properties in Placencia which I find the deceased to have the power to sell.

The case for the defendant is that there has been a total failure of consideration in this case. The stipulated purchase price of BZ$500,000.00 has never been paid nor tendered. Against that contention, it was argued on behalf of the claimant that there was total consideration given in this case which consisted of the following, namely, the purchase price and the *personal services* rendered to Dr. Bernice Hulse (deceased), that the claimant was ready and willing to fulfill his obligations under the Agreement, that partial payment for the Agreement had been placed in an escrow account, and that the claimant made lawful tender of payment as per the Agreement. As to the personal services, it is said that these include the

cost of air tickets and all expenses of the deceased's visits to Houston and Miami, USA, a telephone call to the hospital when the deceased was admitted to the hospital shortly before her death, payment of all deceased's medical and utility bills, payment of maintenance cost on the house at No. 7 Southern Foreshore, Belize City, and payment of salaries of the deceased's caretakers.

It will be noted, however, that on settlement date which shall be not later than 5th August 2002, the "*total purchase price, good titles and prepared deeds"* shall be sufficient for settlement of the transaction between the parties. The seller died before settlement could be achieved.

The question naturally arising from the death of the seller is what effect has the death of the vendor/seller on the Agreement in this case? In ***Bradbury -v- Morgan*** (1862) 1 H. & C. 249, the issue arose as to whether the death of the guarantor of a loan determined the guarantee agreement. The Court held that it did not. However, in a case where the personal representative of the deceased does not have the power under the deceased Will to continue with the obligation of the deceased, then the contract is at an end. See ***Coulthart -v- Clementson*** (1879) 5 QBD 42. The position has also been put in

Halsbury's Laws 4th Edition (Re issue) Vol. 9(1), para. 903, page 661 that *"the death of a contracting party will have no effect upon either the contract or rights already accrued under it"* (Underlining added). As a general proposition, I feel it can be said that the death of vendor before the execution of a contract can only determine the contract if, on the true construction of the contract, it is so permitted.

Turning to the issue as to whether there is adequate consideration in this case there is, on the evidence, no dispute that the purchase price of $500,000.00 had not and still has not been paid, nor the earnest money deposit being made. In fact the earnest deposit is waived "*in place of other valuable consideration as defined in ('Exhibit A'), titled 'Personal Conditions'*" attached to the Agreement.

Despite the valiant argument by the claimant that there is adequate consideration given by the claimant pursuant to the Agreement, the evidence does not support the claimant's argument. Apart from the fact that the purchase price has not been paid or tendered and no earnest money deposit has been made, the sworn evidence of the claimant stands in stark contrast to his suggestion that the "*other valuable consideration*" in Exhibit A had been

fulfilled. This is clearly borne out by his answers to the questions put to him by Mr. Lumor SC in cross-examination in which the claimant acknowledged that he did not fulfill the so-called "*other valuable consideration*" set out in Exhibit A. At the end of that long but fair cross-examination, the claimant confirmed the position in his answers to the following questions:

> *Q. I'm going to put the question to you, did you pay for the property?*
>
> *A. No.*
>
> *Q. Did you fulfill any of the conditions that were just read to you?*
>
> *A. No, sir.*
>
> *Q. You did not pay for it, you did not fulfill the conditions?*
>
> *A. Yes, sir.*
>
> *Q. And yet you want the Court to enforce it?*
>
> *A. Yes, sir.*

Thus, the deposit of $5,000.00 being waived and the so-called 'valuable consideration' contained in the Personal Conditions in Exhibit A, not fulfilled, it seems to the Court that the claimant/purchaser is either not

prepared or avoiding to pay any deposit towards the purchase price. In any case, the claimant has demonstrably shown that there is no consideration or the lack of it coming from him.

In addition to that, and in my view also crucial on this issue of consideration, is the uncertainty or vagueness in the terms of the price. On the purchase price, the Agreement states that the *"Purchaser shall pay by wire transfer or cash a total of Five Hundred Thousand Dollars ($500,000.00) and offer other valuable consideration"* in Exhibit A. On settlement the Agreement provides that the "*Total Purchase Price*," good titles and prepared deeds shall be sufficient. Is the total purchase price, $500,000.00 or is it the cash total of $500,000.00 and other valuable consideration in Exhibit A? In my view the price stipulated in the **Purchase Price** clause does not necessarily mean the same thing as "*Total Purchase Price*" as mentioned in the **Settlement** clause.

There is another aspect of this issue of the purchase price. There is the suggestion contained in evidence of the defendant, Mr. Hulse, in his witness statement, (para. 23), and not disputed, that one Mr. Henry Young offered to buy a portion of Bergerville property (one of the five properties in

Placencia) for US$100,000.00 but the deceased refused. The offer was repeated to the defendant who also refused. There was a suggestion also in the evidence of the defendant (and not disputed) that an offer of US$1,000,000.00 for the purchase of the various properties at Point Placencia (the 9 acre parcel of land, and the Bergeville, Beachcot, The Hut, Red Cottage and Hermitage properties). In the present Agreement, the purchase price of BZD$500,000.00, is not only for all the abovementioned properties in Placencia, but also for the properties at No. 7 Southern Foreshore, Belize City. It is hardly surprising that the defendant is not prepared to part with the said properties at that price. This unsettled position is compounded by the fact that there has been no valuation (on the evidence before the Court) of the said properties.

I am mindful of the principle at common law that the Court does not concern itself with adequacy of consideration. See ***Gravely -v- Barnard*** (1874) L.R. 18 Eq. 58. However, equity also recognizes that gross undervalue of a property to be sold can be a ground for equitable relief. See ***Butler -v- Miller*** (1867) Ir.R. 1 Eq. 195, 210.

The test on total failure of consideration is that set out in ***Halsbury's laws of England, 4th Edition (Re-issue)*** Vol. 9 p. 841, para. 1129 where it said:

> *"A complete failure of consideration in a contract occurs were one of the contracting parties fails to receive the benefit or valuable consideration which springs from the root, and is the essence, of the contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract."*

On the evidence in the present case, the court is not satisfied that the deceased Dr. Bernice Hulse had received any benefit or valuable consideration she bargained for under the Agreement. At most, all that she received was the promise for the payment of the "*Total Purchase Price*" whatever that is, on settlement the date which was yet "*to be mutually agreed to*" in writing by the parties.

There is some suggestion by the claimant that he told the defendant that he was willing to consummate the transaction. However, even if he has the money and was ready and willing to consummate the contract, that is

insufficient, since the consideration in a contract of sale of land is usually the payment of the purchase price or a down payment of the purchase price or a promise to obtain financing to secure the seller's promise to sell. This is an Agreement for the sale of land and as such there must be actual tender of the money. That legal position has been succinctly put by the court of Appeal in ***Placencia Bay Development Limited -v- Irene Rochon*** (June 21, 2001) (Court of Appeal of Belize) Civil Appl. 3 of 2000. The claimant has not done any of the above options.

In his own evidence the claimant stated that he had been supplying the deceased with the items mentioned in **Exhibit A** since the 1990's. The provisions of those items, however, were not made as a consideration for a promise by Dr. Bernice Hulse that she would sell land to the claimant. Rather the provisions of those items were really of personal nature for gratuitous services or relationship given by the deceased Dr. Bernice Hulse to the claimant. Such past consideration cannot amount to consideration for the sale of land in the present agreement.

It would be different if the claimant and the deceased Dr. Bernice Hulse entered into an agreement on the consideration that the claimant would do

the things set out in Exhibit A. In such a case the performance by the claimant of the things mentioned in Exhibit A would be the result of or arising out of the agreement between them for the sale of the land. That is not the position in our present case as I indicated earlier. See ***Maddison v Alderson*** (1883) 8 App Cas. 467.

In the present case there is in my considered view, nothing that the claimant confer on the seller Dr. Bernice Marjorie Hulse by way of benefit in return for her promise to sell all the properties mentioned in the Agreement to claimant.

The claimant in this case is seeking specific performance of an agreement and that is an equitable remedy. He bears the burden of satisfying the court that there is basis both in law and equity for the court to grant him the equitable remedy he is seeking. This would include the claimant satisfying the court that what he promised in exchange for the deceased's promise to sell all the land described in the Agreement to him has some real value in the eyes of the law. See ***Thomas -v- Thomas*** (1840) 11 A &E 438.

On the evidence before the court even on the balance of probabilities, the claimant has not discharged that burden.

Enforcement in whole or in part

Part performance is not part of the claimant's case. However, in view of the Court's finding that the deceased had the right to sell the five (5) properties in Placencia, I feel I should briefly deal with it here.

In order for the Agreement in questioned to be enforced in part only, that is, in respect of the four (4) remaining properties in Placencia, there must be provision in the Agreement permitting that to be done. The reason for that, is that if the court cannot order specific performance of the contract as a whole, it will not act to compel specific performance of part of a contract. See ***Ryan -v- Mutual Towline Association*** [1893] 1 Ch. 116, 123.

On reading the Agreement in this case, there is no room provided for enforcement in part of the terms of the said Agreement.

Presumed Undue Influence

The defendant also raised and relied on the alleged "presumed undue influence" upon the deceased in this case. There is without doubt a very close and friendly relationship between the claimant and the deceased Dr Bernice Marjorie Hulse who, due to that close friendship, reposed a lot of trust and confidence in the claimant as her advisor on many matters, including real estate.

The claimant agreed in cross-examination that he and the deceased discussed about real estate matters, including the properties in Placencia and that she relied on him for '*some advice*". When asked, if Dr. Bernice Hulse came to depend on him and his advice more than she would do in her family, the claimant stated:

> *"I am not in a position to say anything about that. I was asked questions about Real Estate, we were discussing and that's the area that I gave advice on or opinion on. With regards to other advise or with regards to the relationship of her family, I have no knowledge about that. I never met the family members with the exception of the day I attended the funeral services."*

The evidence also shows that the claimant was aware that one Mr. Ernest L. Staine was the deceased's attorney then. However there was no communication between the claimant and Mr. Staine about the proposed agreement between the deceased and himself. In his own words, the claimant stated "*I did not seek out Mr. Staine*.' Yet in the Agreement itself, Mr. Staine's name was included as a party to whom notices "shall be given" in respect of matters connected with the Agreement.

Apart from Mr. Staine, the other members of the deceased's families were also not sought out by the claimant regarding his interest in purchasing land from the deceased. This, however, is not surprising because the claimant knew already before the agreement was signed, that the family members, especially, the defendant, were not keen on the claimant buying the properties concerned. Further, after the Agreement was signed, the claimant refused to give the defendant a copy of the Agreement because the defendant *"indicated that he would challenge the validity of any such agreement."* Paragraphs 24, 25 and 26 of the claimant's own Witness Statement convey that message vividly.

"24. Before the death of the deceased Bernice M. Hulse the defendant knew that we were discussing the sale of the properties to me and that we were negotiating the terms of the sale and on or about the month of August 2001, the defendant told me that Bernice M. Hulse was not ready to sell the said properties.

25. After the death of Bernice M. Hulse, I gave formal notice to the defendant and Mr. Ernest Staine Esq several times that I had written and signed agreement made between me and the deceased Bernice M. Hulse for the sale of the properties to me. The defendant requested a copy of the agreement but I refused to give him as he indicated that he would challenge the validity of any such agreement.

26. By letter dated the 28th day of May 2002, through Attorney Lionel LR Welch the defendant was formally given notice of the said written agreement for sale dated the 9th day of December 2001. (See copy of letter dated the 28th of May 2002 marked "DM2" and exhibited hereto.)"

As the name suggests, there is a presumption of undue influence and there must be evidence to ground the presumption. One such evidence is that of an existence of a close relationship, a relationship that bears out trust and confidence between the parties to the transaction.

The evidence, not only from the defendant but also from the claimant himself, clearly established beyond any doubt that there was a close and strong personal relationship between the claimant and the deceased Dr. Bernice Marjorie Hulse. The evidence also demonstrates vividly, in my view, a relationship of trust and confidence between them. That being the case, the position in law is thus expressed in ***Chitty on Contracts, 28th Edition Vol. 1 page 434, at para: 7-043*** as follows:

> "*In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In Class 2 cases therefore there is no need to produce evidence that actual undue influence was*

exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer, to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice."

Quite apart from any wrongful act on the part of the claimant the court has power to interfere and to refuse to order enforcement of the transaction between the claimant and deceased also on the ground of public policy as pointed out by Cotton LJ in ***Allcard -v- Skinner (1887) 36 Ch. D 145m at 171***:

"*First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case, the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to*

exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one should be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In so far as the allegation of presumed undue influence is concerned, I feel it is most pertinent to note that the claimant knew at least in August 2001, before the Agreement was signed, that the deceased Dr. Bernice Hulse was not keen on selling her properties. The claimant also knew that Mr. Staine was the attorney for the deceased and her family during his 'negotiation' with the deceased for the purchase of the properties in question. No approach was made to Mr. Staine by the claimant nor was there any evidence to show that the deceased had been asked by the claimant to seek

out her attorney for independent legal advice on the proposed sale of her properties.

The claimant's approach to his 'negotiation' for the purchase of the properties concerned was further revealed by his refusal to give a copy of the signed Agreement to the defendant when he asked for a copy of the same, since the defendant would "challenge the validity" of the Agreement.

Considering the evidence and the circumstances surrounding the so-called 'negotiation' on the Purchase and sale Agreement, I am satisfied that the deceased was deprived by the conduct of the claimant of the benefit of independent legal advice from her attorney, as well as from her family members before she signed the Agreement on 9th December 2001. It cannot, therefore, be a transaction freely entered into by her.

I am satisfied also that the defendant had made out a case for presumed undue influence, sometimes referred to as 'constructive fraud,' upon the deceased in this case. That being established, the court, in the exercise of its equitable jurisdiction, will set aside a resultant transaction from such conduct. See ***Halsbury's Laws of England*** 4th ed. (Re- issue) Vol. 31 page

516, at para. 838. See also ***Lamare -v- Dixon*** (1873) LR.6 H.L. 414, 423 for the proposition that the conduct of the party seeking relief is always an important factor to be taken into account. In this case, on this basis also, the Purchase and Sale Agreement between the claimant and the deceased Dr. Bernice Marjorie Hulse cannot stand and so it cannot be enforced against the defendant.

Description of Properties

In view of the findings above, this point is no longer decisive. However, as promised earlier in this judgment, I will now briefly deal with the question of the descriptions of the properties to be purchased by the claimant. The properties to be sold are described as:

> *...the Property owned by the Seller located in Point Placencia, Stann Creek District, Belize, CA (more particularly described on the two plats labeled 'Exhibit B' attached hereto; also that Property known as No.7 South Foreshore Street, Lots, improvements and dwellings, known by the Seller as ' Sherwood', located in Belize City, Belize, CA.*

With respect, such descriptions of properties, especially in contract for the sale of land, are too general and imprecise. The words such as "*property owned by the seller in Point Placencia*" even with the added reference to "*the two plats labeled Exhibit B*" are inadequate legal descriptions of the properties to be sold under a contract for the sale of land in Belize. The descriptions of the properties to be sold in the Agreement do not describe the size or area of the property to be sold, more particularly as there are more than one properties (one of which had already been sold) involved.

The property known as "*No. 7 South Foreshore Street"* is also not sufficient as it is only descriptive of an address of the property and not an adequate legal description of the land to be sold. As it turns out from the evidence of the defendant, No. 7 Southern Foreshore has two properties on it, the "*Sherwood*" property and No. 2 Adams Lane property, both of which had been separately catered for under the ***Will*** of the late Evadne Hulse.

The claimant cannot rely on the details of the properties given by the defendant to found his case. He must rely on the strength of his own case. Thus the insufficient legal description of the nature of the properties to be

sold and purchased under the Agreement in this case is also a further factor affecting the exercise of the equitable jurisdiction of the court.

Rights and Obligations of Parties

If I may briefly mention also that for a valid contract for sale of land, the contract must set out the rights and obligations of the parties and consequences flowing from non-compliance with such obligations. Having read the Agreement in question in the present case, I regret to say that the Agreement in question spells out none of these. Such omission is also another factor militating against the enforceability of the Agreement in this case.

Conclusion

There evidence clearly show that the claimant did not consult relevant people, including the deceased's attorney and family members, who might be able to assist him in his interest to purchase land under the control of the deceased in Belize. The evidence also suggests that the claimant did not bother to ascertain the legal status of the properties he wanted to buy. He proceeded to "develop the Agreement" (to use his own words) based simply on his acquaintanceship and personal discussions with the deceased, Dr.

Bernice Marjorie Hulse. Consequently he now finds that the Agreement which he "developed," cannot be enforced.

The claim by the claimant is for specific performance of an agreement for the purchase and sale of land, entered into between the claimant himself and the deceased Dr. Bernice Marjorie Hulse. This is a remedy in equity and granted at the discretion of the court. The claimant must establish the basis for the grant of the remedy in his favour.

In the present case, although I find that the signature of the deceased Dr. Bernice Marjorie Hulse on the Agreement was not a forgery, I am firmly of the view that, and for the reasons set out in this judgment, the said Agreement as a whole is void and unenforceable, and I so find. It therefore cannot be enforced against the defendant, the administrator of the estate of the deceased for the reasons set out in this judgment.

Consequently, I grant the order sought in the defendant's counter-claim, rescinding the Agreement entered into between the claimant and the deceased Dr. Bernice M. Hulse on 9th day December 2001. I so order.

The claimant's claim must be dismissed with costs.

Order: *The claimant's claim for specific performance of the Agreement dated 9th December 2001 between himself and the deceased Dr. Bernice Marjorie Hulse is dismissed.*

The defendant's counter-claim for the rescission of the said Agreement is granted

Costs to the defendant to be taxed, if not agreed.

Sir John Muria
Justice of Supreme Court