PARDEEP SINGH v RAJENDAR SINGH, PUBLIC TRUSTEE OF FIJI AND BALVINDAR KAUR (HBC0250 of 2007L)

HIGH COURT — CIVIL JURISDICTION

NAWANA J

10, 11, 17, 23 November 2011, 19 March 2012

Succession — wills and codicils — executors — heirs — contract — void contracts — non est factum — adopted son signs deed renouncing all rights under father's will — adopted son mistaken as to legal effect of deed — natural son misled adopted son regarding deed — adopted son's rights transferred to mother as executrix of father's will — mother transfers property to herself then to her natural son — mother appoints adopted son executor of her estate — adopted son discovers mistake after death of mother — whether deed void — whether plea of non est factum available — whether deed affected by fraud — whether mother breached fiduciary duties — whether adopted son's claims time barred — High Court Rules O 85 — Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

The deceased had three natural sons and one adopted son. He executed a will which appointed his wife as executrix and gave his adopted son a substantial share of his property. Shortly after the deceased's funeral, the adopted son was told by two of the deceased's natural sons to sign a document which would release the deceased's money to the family. In reality, the document was a deed providing for the renunciation of all of the sons' rights in the deceased's estate in favour of their mother (Deed of Renunciation). The adopted son was never informed of the purpose of the Deed of Renunciation. The deceased's wife, as executrix, subsequently transferred property in which the adopted son would have had an interest under the Will to her own name and then to one of her natural sons. That son, who had induced the adopted son to sign the Deed of Renunciation, was also appointed as the executor of the deceased's wife's estate.

After the death of the deceased's wife, the adopted son became aware of the legal effect of the Deed of Renunciation and commenced proceedings in the High Court of Fiji against the deceased's natural son seeking declarations that the Deed of Renunciation was void and that his rights under the Will had not been altered. The adopted son claimed that he had signed the Deed of Renunciation in circumstances falling within the defence of *non est factum*, that the Deed of Renunciation was affected by fraud and that the deceased's wife had transferred property in breach of her fiduciary obligations as executrix.

The natural son claimed that the Deed of Renunciation was not void and that the adopted son's claims were time barred.

Held –

(1) The Deed of Renunciation is void: it was signed in circumstances falling within the defence of *non est factum* and was affected by fraud.

(2) The adopted son's claims were not time barred.

(3) The deceased's wife breached her fiduciary duties as executrix in transferring property to herself and her natural son in which the adopted son had an interest.

Deed of Renunciation declared void and adopted son's rights under the Will restored.

Cases referred to

Assets Co Ltd v Mere Roihi; Assets Co Ltd v Wiremu Pere [1905] AC 176; *Bradley West Solicitors Nominee Co Ltd. v Keeman* [1994] 2 NZLR 111; *Foster v Mackinnon* [1869] LR 4 CP 704; *Hewitt v Habib Bank Ltd* [2004 FJCA 33; *Narayan and Another v Sigamani and Others* [2008] FJHC 204; 05 September 2008; *Permanent Trustee Co of New South Wales Ltd and Another v Bridgewater* [1936] 3 All ER 501; *Petelin v Cullen* [1975] 132 CLR 355; *Regal (Hastings) Ltd*

v Gulliver [1942] 1 All ER 378; *Rigomoto v NBF Assest Management Bank* [2011] FJCA 42; *Shakuntala Devi v Jai Mangal and Shiu Raj* FCA ABU 082/1984; *Thoroughgood v Cole* ([1582] 2 Co Rep 9a); *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, cited.

Faryna v Chorny [1952] 2 DLR 354; *Mudus v Taveuni Multiracial Probationary Land Purchase Co-operative Society Ltd* [2010] FJHC 274; HBC 22/2004, considered.

Saunders (Executrix of the will of Gallie) v Anglia Buiding Society [1970] 3 All ER 961, applied.

V M Mishra for the Plaintiff.

S K Ram for the First Defendant and Third Defendants.

Nawana J.

BACKGROUND

[1] The plaintiff, Pardeep Singh aka Pradeep Singh, was born into the family of Mr Autar Singh and Ms Mahendar Kaur on 28 September 1962. His birth was marred by the misfortune of losing the mother, Ms Mahendar Kaur, during birth. The infancy of the plaintiff was, nevertheless, taken care of and ensconced in the arms of Ms Channan Kaur and Mr Battan Singh, the grandparents of the plaintiff; and, that was through a process of adoption under the law.

[2] Mr Battan Singh, who was born on 05 June 1906 and living in Mataniqara in Ba, Fiji, was a legend in his own lifetime. He served as a soldier of the Fifth Medium Brigade of the Royal Artillery of the British-India Army; raised a family; acquired substantial property both in terms of money and real estate in India and Fiji and reaped fruits of his accumulated wealth until his death almost an octogenarian.

[3] Mr Battan Singh was the natural father of three sons, being Autar Singh, Balwant Singh and Rajendar Singh, and four daughters. He also became the father of the plaintiff and made his own children brothers and sisters of the plaintiff upon latter's adoption. Consequently, the plaintiff, in the face of legal fiction of adoption, became the brother of his own biological father, Autar Singh, and also of the paternal uncles including Rajendar Singh (the first defendant), and of the rest in the family. The phrase, '*…legal fiction of adoption…',* is advisedly used in context as what transpired in this case was not in accord with the legal effects of an adoption; but, sounded more consonant with the old adage that the *'Blood [was] thicker than water'*.

[4] Be that as it may, Mr Battan Singh looked to the future of the family as a whole and foresaw the need for distribution of his vast property upon his death in the way that he wished. He, accordingly, executed the Last Will dated 31 March 1981[ABOD[1]-1], having appointed his wife, the late Ms Channan Kaur, as the sole executrix and the trustee.

[5] Under Clause 3 of the Last Will, Mr Battan Singh devised and bequeathed the property as follows:

> *(a) To look after, maintain and educate his grandchildren Jasmindra Kaur and Ramini Kaur until they are married;*
>
> *(b) To pay for education of his son Pradeep Singh from monies held by him in Lakshmi Commercial Bank in India and if necessary from Insurance monies receivable from Life Insurance Corporation of India;*

1. Agreed Bundle of Documents

(c) To give all his property in India at Govindpur, Jallundar, Punjab to his sons Autar Singh, Balwant Singh, Rajendar Singh and Pradeep Singh in equal shares absolutely;

(d) To allow his wife Channan Kaur and his sons Balwant Singh, Rajendar Singh and Pradeep Singh to live and occupy the house site presently occupied by him and each shall have equal share in it and no one shall sell his or her share to any outsider provided however each of them may sell his or her share to other partners if the majority of them agree;

(e) To give the rest and residue of his property in Fiji as follows:

(i) 1/2 of the rest and residue to his son Pradeep Singh;

(ii) 1/4 of the residue to his wife Channan Kaur;

(iii) 1/4 of the residue to his son Rajendar Singh.

[6] Mr Battan Singh died on 09 September 1985. And, this case is all about a complaint that the plaintiff has got almost nothing from the estate of his father, the late Battan Singh, upon receipt of the probate dated 05 December 1985 by the widow, Ms Channan Kaur, in her capacity as the sole executrix and the trustee of the estate but the first defendant.

[7] Evidence in the case sheds light as to the circumstances that deprived the plaintiff of his entitlement to the property under Clause 3 of the Last Will. Court is tasked with the finding of answers to the applicable issues, as formulated by parties in terms of the Minutes of Pre-Trial Conference dated 01 February 2011, and decide whether such deprivation of the plaintiff of his shares under the Last Will of the late Mr Battan Singh is permissible under the law.

TRIAL

[8] At the trial from 10-11 November 2011, the plaintiff gave evidence and called witness-Latchman, 57, and relied specifically on affidavits marked 'P-1', 'P-2', 'P-3' and 'P-4' in the plaintiff's Bundle of Documents marked up to 'P-14'. The first defendant, too, gave evidence and closed his case with two affidavits marked 'D-1'-'D-2' and two documents marked 'D-3'-'D-4'. Both parties relied on Document Nos. 1-9 in the ABOD.

[9] Parties also filed extensive written-submissions in support and gave the benefit of oral submissions, too, to court through their counsel at a hearing. There was no dispute that this action had been presented to court as provided for by O 85 of the High Court Rules, 1988.

PLAINTIFF'S EVIDENCE

[10] The plaintiff, 49, an acupuncturist by profession and currently resident in Brisbane, Australia, said that his father died on 09 September 1985 of cardiac arrest. The death occurred only after six months since his commencement of studies at the University of South Pacific (USP) in Suva, Fiji, on his return from the University of Punjab in Chandigarh in India. He returned to Fiji due to ethnic clashes between the Hindus and the Sikh preceding the assassination of Mrs Indira Gandhi, the late Prime Minister of India, in October 1984.

[11] The plaintiff said that his father was financially supporting his studies both in India and Fiji. Further, he said that he was thoroughly saddened and highly distraught by his father's sudden death. He saw the mother, the late Ms Channan Kaur, who was by then in the United States of America (USA), too, coming with his sisters for the funeral on 12 September 1985.

[12] The funeral of the late Mr Battan Singh took place in Mataniqara on 12 September 1985 with a cremation. Post-cremation rituals, according to the Sikh custom of *Bhandara*, continued for thirteen days from that day onwards with the recital of prayers; offering of food for visitors and the reading of the Holy Book *Guru Garanth Sahib*.

[13] It was the evidence of the plaintiff that on 16 September 1985 (the date being confirmed in cross-examination), he was requested by the first defendant and Dr Balwant Singh aka Dr Balwant Singh Rakka, another brother of the plaintiff, to join them to go to the town for some necessities for the post-cremation rituals. The plaintiff obliged the request after informing the mother. The first defendant, having visited a bank in the town on the journey, said on his return that the bank would not give them the money. The plaintiff was then accompanied to a solicitor's office and wanted him to sign some document for withdrawal of money from bank for expenses. The solicitor, whom he did not know before, was about to say something to him; but, was prevented by Dr Balwant Singh. Instead, Dr Balwant Singh got him to sign the document.

[14] The plaintiff said that the deceased-father was living in a big two storied house on a fourteen-acre land with a sugarcane farm on Crown Lease No 5553, which is now transferred to the first defendant on 12 September 2001 as borne-out by ABOD-5 by his mother, having transferred it initially in her name on 22 May 1986 as the executrix and trustee of the estate of his father [P-10]. The plaintiff referred to the Certificate of Title No 8789 [ABOD-4] in respect of the land in an extent of one rood, which was also transferred to the late Ms Channan Kaur on 06 May 1986 [P-9] and then to the first defendant on 31 October 1996 [ABOD-4] on the same basis.

[15] In his further testimony, the plaintiff stated that he had called for copies of all titles of the property in the estate of his father by a letter dated 28 November 2006 addressed to Messrs Doreen Charan and Associates [P-7], who had acted by then as solicitors for the first defendant; and, also lodged a caveat dated 08 May 2007 with the Registrar of Titles [P-8] to forbid any transfer of the property in the Certificate of Title No 8789 [P-4]. By a letter dated 26 May 2007[P-11], the solicitors for the plaintiff, too, informed the Divisional Surveyor/Western of the Lands Department that the plaintiff had a half share in the residuary property in the estate of the plaintiff's father under the Last Will and that such property had been transferred only to the first defendant, followed by the letter dated 15 June 2007[ABOD-7].

[16] The plaintiff reasserted the position, as contained in paragraph 16 of the affidavit dated 10 August 2007 [P-1], that his caveat was returned unregistered allegedly on the basis that he had renounced his shares under a last will. The plaintiff said that he had signed only one document at the instance of his two brothers, being Dr Balwant Singh and the first defendant, only for release of money by the bank. He said that he was not made aware of any last will of his father and denied any renouncing of his shares under such a will as nobody spoke of any renunciation at the rendezvous that he had with his brothers. The plaintiff was emphatic that his mother was not present at the occasion and refuted solicitor-Mr Umarji Mohamed's claim in D-1 that the Deed of Renunciation dated 16 September 1985 [ABOD-6] was executed with his [plaintiff's] knowledge and understanding.

[17] Answering cross-examination by learned counsel on behalf of the first defendant, the plaintiff accepted that his signature appeared on Deed of Renunciation [ABOD-6] but stated that he signed only one document on 16 September 1985 for release of money by the bank for funeral expenses as the first defendant returned from the bank saying that the bank would not give them the money. He said that he was, thereupon, taken to a solicitor's office and got a document signed but denied that he had signed a document renouncing his shares in the estate of his late father.

[18] The plaintiff said that he could not recall attending a family meeting with his mother, Dr Balwant Singh, the first defendant, Autar Singh and two others where a last will of his late father was discussed and a decision taken for all beneficiaries under such a will to renounce respective shares in favour of the mother, Ms Channan Kaur. He said, in any event, he had not taken part in such a meeting as he left for Suva upon fulfillment of *Bhandara*.

[19] Mr Latchman, 57, who was a neighbour of Mr Battan Singh from his birth, recalled in his testimony the late Mr Battan Singh's death and funeral rituals being performed for thirteen days according to Sikh traditions. He said that he had known the Singhs for years and saw the plaintiff during the mourning period over Mr Battan Singh's death in 1985. The plaintiff was seen crying and he was visibly in a state of shock and sorrow. Answering cross-examination, witness said that the expression of sadness was more visible on the plaintiff than on others.

FIRST DEFENDANT'S EVIDENCE

[20] Rajendar Singh, 67, the first defendant, currently resident in the United States of America, testified on his own behalf and also as the executor and the trustee of the estates of Battan Singh and Channan Kaur by way of Chain of Administration. Mr Rajendar Singh said that he had two brothers namely Balwant Singh and Autar Singh (both are dead as of now) and a third, the plaintiff, who was adopted by his parents. Mr Rajendar Singh had studied only up to Class IV and could not proceed beyond that as they were very poor. He could read a little; write his name and his father's name.

[21] The first defendant said that his father, Mr Battan Singh, died on 09 September 1985. He said that all family members were in Mataniqara at the time of Mr Battan Singh's death except Mr Autar Singh and the plaintiff. The plaintiff came on the very day on which the father passed away; and, the mother, who was in the USA, came only on the day of the funeral.

[22] Mr Rajendar Singh said that Dr Balwant Singh went to see the solicitor Mr Umarji Mohamed with whom the father's last will was; and, thereafter, had a discussion on the last will at home. Dr Balwant Singh explained the will and said that 50% of the properties were set-apart to the plaintiff and only ¼ each was for the mother and the first defendant. The question arose, the first defendant said, who was going to look after the mother if the shares allotted to him and the plaintiff were to be sold. They all had, thereupon, come to an agreement to transfer all their shares under the will to the mother. As there was no disagreement from anyone including the plaintiff, they went to Mr Umarji Mohamed, who, after explaining executed, what is called the Deed of Renunciation [ABOD-6].

[23] Autar Singh, however, was not present at the occasion; and, the first defendant said that, in any event, he had no shares for the property in Fiji.

[24] In his testimony, Mr Rajendar Singh further said that there was no restriction for anyone to move around during the mourning period until the fulfillment of *Bhandara* and that the mother would have been more saddened if no property was given to her. The first defendant further said that he had received a letter of 15 June 2007 [ABOD-7] from Messrs Mishra Prakash making a claim on behalf of the plaintiff that he [the plaintiff] was entitled to a ½ share of the estate of his father, even though no such claim was made before by the plaintiff.

[25] Answering cross-examination on behalf of the plaintiff, the first defendant admitted that he and his wife had owned business property in a two storied building with a shop in the front, a flat each on the back and downstairs with bulk storage in Tauvegavega in Fiji independent of his father's property. Dr Balwant Singh was a medical practitioner running a surgery, who was also a politician and functioned as a Senator of the House of Representatives. He was at one time the President of the National Federation Party. Dr Balwant Singh used to support himself and his wives from his own wealth.

[26] Answering further, the first defendant said that he was 41 years old at the time of his father's death; and, that the plaintiff was studying at the USP with the financial support from his father. The plaintiff did not have any income on his own. The first defendant responded to the suggestion that the plaintiff was spending some months on the farm in an evasive manner saying that he was not sure of that and the plaintiff was only grazing the cows. The first defendant said that after the father's death, the farm was in debt but he and Dr Balwant Singh looked after the plaintiff in his studies at the USP. He admitted that it was not true to say that the mother was left with nothing after the father's death and that her farm, in fact, had produced 250-300 MT of sugarcane a year. When the first defendant was referred to Clause 3 (d) of the Last Will where the mother was allowed to live in the house in which she was living with the late Battan Singh, the first defendant said that he was not aware of it. When asked why he had wanted to '*turn around*' the Last Will of the father when it seemed to be sensible, the first defendant soft-pedaled the issue by saying that they had given everything to the mother and nobody-else got the property.

PLAINTIFF'S CLAIMS AND FIRST DEFENDANT'S DEFENCES

[27] It is in light of the above conflicting assertions of the two party-litigants that this court has to decide on the claims made by the plaintiff.

[28] The plaintiff, by his writ of summons dated 10 August 2007, instituted the action claiming *inter alia* that:

> (a) An order that the purported renunciation dated 16th day of September 1985 is a renunciation only as expressed by it and only relates to any claim the Plaintiff may have had to take out Letters of Administration/probate in the Estate of Battan Singh as the same does not mention the last Will;
>
> (b) An Injunction restraining the First Defendant and/or his servants and/or his agents from uplifting any cane proceeds under Farm No 5281 Varavu Sector from the Fiji Sugar Corporation Limited or under any security from any Bank;
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> (c) An Injunction restraining the First Defendant and/or his servants and/or his agents or whosoever from disposing or encumbering Certificate of Title No 8789 and State Lease No 5553;
>
> (d) An Injunction restraining the First Defendant and/or his servants and/or his agents or whosoever from uplifting any further monies or benefits provided in the Estate of Battan Singh;
>
> (e) An Order that the First Defendant provide full accounts of the Estate of Battan Singh;

(f) An Order that the First Defendant do pay the Plaintiff his share of cane proceeds received under Farm No 5281 Varavu Sector and rental from Certificate of Title No 8789 from the date of death of the late Battan Singh;

(g) An Order that the First Defendant do transfer a half undivided share of Certificate of Title No 8789 and State Lease No 5553 to the Plaintiff;

(h) An Order removing the First Defendant as Trustee or Administrator of the Estate of Battan Singh;

(i) An Order that the Plaintiff is entitled to a half of all the Estate of Battan Singh's properties in Fiji and one quarter of all his land and funds or property in India;

(j) An Order that the purported renunciation is void and/or unenforceable and/or of no legal effect;

(k) The First Defendant and the Estate of Channan Kaur do pay the Plaintiff damages;

(l) An Order for distribution of the properties of the Estate of Battan Singh in India and Fiji as provided for in the last Will of Battan Singh;

(m) An Order that the First Defendant and/or the Estate of Channan Kaur do pay the Plaintiff the costs of this action;

(n) The Plaintiff claims interest at the rate of ten per centum per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 of the Laws of Fiji; and,

(o) Costs

on the basis of the pleadings in the statement of claim dated 18 December 2009.

[29] The first defendant denied the contents of the statement of claim and put the plaintiff into their strict proof. The first defendant, moreover, relied on the Limitations Act and pleaded in his amended statement of defence dated 10 November 2011 that the action was time-barred and moved for dismissal of the action with costs.

PLAINTIFF'S EVIDENCE ON WHAT AND HOW HE SIGNED, UNCONTROVERTED

[30] Evaluation of the evidence, in the absence of any inconsistency or contradiction, revealed that the plaintiff had signed only one document on 16 September 1985 before the fulfillment of *Bhandara*, the traditional performance of rituals after the cremation. Parties, however, were at variance as to what the plaintiff had signed and how it came about to be. The plaintiff stated that the first defendant and Dr Balwant Singh got him to sign a document at the solicitor's office for the release of the money by the bank as the first defendant remarked that the bank would not give them the money. The first defendant, on the other hand, stated that the plaintiff signed the Deed of Renunciation [ABOD 6] at the solicitor's office after having fully understood its effects and consequences of renouncing his interests in the estate of the late father after a family meeting.

[31] The hypothesis of having a family meeting, where an agreement was said to have been reached to renounce all proprietary interests under the Last Will in favour of the mother, the late Ms Channan Kaur, emerged only in evidence-in-chief of the first defendant on 11 November 2011. It did not even surface in the affidavit dated 29 October 2007 of the first defendant in reply to the plaintiff's specific assertion that, what he signed was only a document to '*…get monies released for funeral rites of the late Battan Singh*' (Paragraph 20 of P-1 and paragraph 16 of D-2).

[32] Moreover, learned counsel for the first defendant, though cross-examined the plaintiff on the belated version of having a so-called family meeting, did not, however, challenge in cross-examination the plaintiff's assertion that what he signed was only a document to get money released from the bank at the instance

of the first defendant and Dr Balwant Singh whilst on a journey to the town. On the contrary, learned counsel for the first defendant accepted and relied on the evidence of the plaintiff on that point (Paragraphs 64 and 65 of the written-submissions of the first defendant dated 22 November 2011).

[33] The concomitant result is that, while the first defendant laboured to make-out a belated story of a so-called family meeting to add credence to the execution of the so-called Deed of Renunciation [ABOD-6], he left the plaintiff's position that he signed a document only for the release of money by the bank unchallenged when the plaintiff was cross-examined before this court.

APPLICATION OF RULES OF EVIDENCE

[34] The legal effect of failure by a party to challenge and contest in cross-examination a fact relied upon by its opponent is that the tribunal of fact could accept the fact as unchallenged and act upon, if the evidence on that fact is convincing.

[35] *Blackstone's Civil Practice: 2011: Oxford* at page 888, states that:

> *…[c]ross-examination provides the other side the opportunity to test and seek to undermine the evidence given in chief. One of the main obligations of an advocate cross-examining a witness is to put his or her client's case. This means that the witness must be challenged and given an opportunity to comment on the points of conflict between the evidence he or she has given and the case being advanced by the cross-examining party. If this is not done, the court may decide that the witness's account is accepted...*

[36] *Phipson on Evidence*; Fourteenth Ed.: Sweet & Maxwell: 1990 at page 245, dealing with the object and scope of cross-examination at page 245, says that it has two purposes to serve. Firstly, it is to weaken, qualify or destroy the case of the opponent; and, secondly, to establish the party's own case by means of his opponents witnesses.

[37] A party's failure to cross-examine has been discussed in *Cross-examination: Practice and Procedure*; James Lindsay Glissan: Second Edition. It states that:

> *The principle is simple. It is elementary and standard practice to put to each opposing witness so much of one's own case (or defence) as concerns that witness, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is both unfair and improper to let a witness's evidence go unchallenged in cross-examination and later argue that he should not be believed. The rule finds its clearest exposition in Browne v Dunn* (1893) 6 R 67 *in the speech of Lord Halsbury:*
>
> *My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with the witness.*
>
> *Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given and*

the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it.

(At page 81: Emphasis added)

The second part of the rule in Browne v Dunn poses the question: Weight or admissibility? In Bulstrode v Trimble [1970] VR 840 *decided in the Supreme Court of Victoria in 1970, some years before Precision Plastics v Demir, Newton J turned his attention to the second part of the rule in these terms:*

In its second aspect the rule in Browne v Dunn is, in my opinion, as I earlier said, a rule relating to weight or cogency of evidence…in this aspect the rule says no more than, that if a witness is not cross-examined upon a particular matter, upon which he has given evidence, then that circumstance will often be very good reason for accepting the witness's evidence upon that matter. If I may say so, this is little more than common sense. I have used the word 'often' advisedly, because if a witness's evidence upon a particular matter appeared in his evidence-in-chief to be incredible or unconvincing, or it if was contradicted by other evidence which appeared worthy of credence, the fact that the witness had not been cross-examined would, or might, be of little importance in deciding whether to accept his evidence.

(At page 83: Emphasis added)

[38] Thus, the court, if so minded, could decide on acceptance and rejection of the respective version in this case at this point on application of the relevant rules of evidence. I am, however, not inclined to decide on acceptability of either case so pedantically and truncate my adjudicatory deliberations. Instead, I would consider plausibility of alleged renunciation by the plaintiff in the context of the matters relating to the Last Will itself; and, also on a myriad of factors that surround the execution of the so-called Deed of Renunciation [ABOD-6].

OBSERVATIONS ON THE LAST WILL AND THE DEED OF RENUNCIATION

[39] (i) Firstly, the Last Will of the late Battan Singh [ABOD-1] very clearly bequeathed the house that the testator was living in, to the mother, late Ms Channan Kaur, and to three sons with conditions that nobody would sell shares to an outsider. This was how it was devised under Clause 3 (d) of the Last Will:

To allow my wife Channan Kaur and my sons Balwant Singh, Rajendar Singh and Pradeep Singh to live and occupy the house site presently occupied by me and each shall have equal shares in it and no one was to sell her or his share to an outsider, provided, however each of them may sell his or her share to other partners if the majority of them agree.

(ii) Therefore, there was justifiably no reason for the first defendant and others to have been alarmed, frightened or concerned about the mother, the late Ms Channan Kaur, as the late Battan Singh, a thoughtful and a foresighted man he was, had lucidly provided for her well-being, too, in the Last Will itself.

(iii) When the first defendant was confronted with Clause 3 (d) of the Last Will under cross-examination, he said that he was not aware of the mother's right to live in the house; and, regurgitated his answer under evidence-in-chief that the mother was given only ¼ of the share of the property in Fiji in the estate of the late Battan Singh. This shows, on one hand that, when the so-called family meeting was convened, the first defendant was not at least aware of the exact entitlement and the safeguards in favour of the mother, although the concerns over the mother were said to have been expressed at the so-called family meeting, as he forcefully said in evidence. On the other, his answer to the question by learned counsel echoed the displeasure and resentment over the bequeathing only of ¼ of the father's property in Fiji to the mother, the late Ms Channan Kaur, as opposed to the ½ to the plaintiff, even though she had her own property to live on, according to the evidence of the first defendant.

(iv) Based on the evidence in the case, it appears that the so-called family meeting, which was, in any event, belatedly relied upon by the first defendant in these proceedings; and, the purported renunciation in favour of the mother, were ploys deployed by the first defendant to bolster-up background support in order to justify a renunciation by the plaintiff, when circumstances, in fact, did not warrant such renunciation.

[40] (i) Secondly, it is incomprehensible as to why there was such alacrity to deal with matters relating to the Last Will of the late Battan Singh within a period as short as seven days from the death of the maker of the Last Will. It is equally incomprehensible to engage the mother, Ms Channan Kaur, within four days from her return to Fiji from a farther place like the USA. All events leading to renunciation, according to the first defendant, took place prior to the mandatory fulfillment of *Bhandara*, which was due to be performed within thirteen days from the cremation to bless the soul of the late Battan Singh. The first defendant has not shown any reason as to what had necessitated the renunciation to take effect in such an eagerness and haste, when such renunciation ought to have taken place after much thought and consideration by all beneficiaries under the will.

(ii) In the absence of any evidence to the contrary, the only plausible reason that one could deduce from the state of affairs, which the first defendant himself engineered with Dr Balwant Singh, was that they made timely use of the distress that the plaintiff was subject to by the death of the father to deny his [the plaintiff's] entitlement under the will. To put it in a proverbial sense, the first defendant-indeed with Dr Balwant Singh-chose to make hay while the sun was shining.

[41] (i) Thirdly, evidence in the case transpired that the first defendant and Dr Balwant Singh were people of middle age. They, having raised their own families, were commanding certain social status within the community with adequate wealth and means of financial support. Ms Channan Kaur also had income-generating property independent of those of the testate property. Conversely, the plaintiff, having gone through travails of life from infancy, was an impecunious twenty two year old student feeling desolated at the loss of his father, whom he looked forward to build his future.

(ii) It is, therefore, a fathomless assertion by the first defendant that the plaintiff, who was the single largest beneficiary of the estate of their father, had renounced all his shares under a will of his father, whom he had revered most, without having any safeguards at least for his future studies.

[42] (i) Fourthly, it is admitted that the property under the will, more importantly those in ABOD-4 and ABOD-5, now stand transferred to the first defendant well before the death of the mother, whose interests the first defendant strived to preserve. These transfers fundamentally raise two issues. Firstly, if the renunciation was necessitated in order to preserve the interests of the mother, what reasons the first defendant had to have the very property that the late Battan Singh himself allowed the mother to live in, transferred in his [the first defendant's] name by 12 September 2001 [ABOD-5]? Secondly, according to the evidence of the first defendant, renunciation could not be taken as absolute; but, only conditional to preserve the mother's interests. If so, why was the plaintiff, despite his claims such as in ABOD-7, not restituted in his entitlement under the will after the interests of the mother extinguished with her death on 20 October 2006; and, instead allowed this suit to have progressed to determine the plaintiff's claims?

(ii) The first defendant offered no answers and/or reasons to those issues; and, their absence leads court to draw its own inference on the well-established circumstances in this case. The reasonable and rational inference that this court may draw is that the renunciation was only the stepping stone towards the acquisition of the property bequeathed to the plaintiff under the Last Will by the first defendant and to strip the plaintiff of his entitlement.

[43] (i) The first defendant, in terms of paragraphs 28 and 29 of the affidavit dated 29 October 2007 [D-2] in reply to the plaintiff's averments in paragraph 37 of the affidavit marked P-1, stated that the plaintiff had received all benefits under the estate and that the costs of the plaintiff's education were met by the estate funds. Though the statements lacked in detail, the admission is relevant because there was no reason for any 'benefit' to be given or 'costs' to be borne, if the plaintiff had, in fact, renounced all his claims under the Last Will of the late Battan Singh. The admission of the first defendant conversely established that the rights and the interests of the plaintiff under the will were intact.

(ii) Similarly, the late Ms Channan Kaur visited the plaintiff in Brisbane, Australia in January 1990 in order to get the affidavit marked P-6 signed by him for appointment of an attorney to look after the property of the late Battan Singh in India. If the plaintiff had renounced all his rights under the Last Will, which undoubtedly included those in India as well, there was no reason for the late Ms Channan Kaur to get an affidavit from the plaintiff for appointment of an attorney to manage the properties in India. The conduct of Ms Kaur, in her capacity as the sole trustee and the administrator of the estate of the late Battan Singh, estopped the first defendant from relying on the Deed of Renunciation to deny the plaintiff of his proprietary shares under the Last Will.

CONCLUSIONS ON FIRST DEFENDANT'S EVIDENCE

[44] Testimonial creditworthiness of the first defendant with acceptable explanations to the foregoing provisional observations, in my view, is essential for him [the first defendant] to evidentially compete with the plaintiff's unchallenged testimony relating to the circumstances of signing the so-called Deed of Renunciation [ABOD-6].

[45] The first defendant, however, did not discharge that evidential burden both in terms of credit and weight.

[46] As regards credibility, I observed his demeanour and deportment with which his testimony was presented to court. I found that the first defendant was evasive in answers, which were favourable to the plaintiff, and downplayed the presence of the plaintiff on the father's sugarcane farm, as noted above. The first defendant, whose evidence was also tainted with an omission, which, in my view, amounted to a material inconsistency in regard to the fact of having a family meeting to discuss the will of the late father, also offered no explanation to the series of improbabilities that cast upon his version, as set-out above in paragraphs 39-42, affecting the weight, too.

[47] It is also of significance in this regard to note that the first defendant's version was associated with many people, one of whom was Mr Umarji Mohamed, the solicitor. Others were dead. The plaintiff, on the other hand, had only himself to support his position from the very outset until the date of trial. Mr Umarji Mohamed, the only surviving witness, who, the first defendant claimed to have executed the Deed of Renunciation [ABOD-6], was not called to give evidence in support of the first defendant's case notwithstanding the denial by the plaintiff of such notarial execution both in P-1, P-2 and in his oral testimony before this court. Being a material witness, failure to adduce his evidence with

the benefit of test of cross-examination, does not help the first defendant at all especially in light of the foregoing observations concerning the first defendant and his evidence.

[48] In the absence of any acceptable evidence to the contrary, I hold that the foregoing observations in paragraphs 39-42, which I provisionally made, as having been firmly established. In the result, there is no evidence for court to conclude that the version of the first defendant is probable and hence acceptable in light of the above analysis. In the circumstances, I conclude that the first defendant's version lacked both credit and weight. I, accordingly, reject it.

PLAINTIFF'S VERSION AND PREPONDERANCE OF PROBABILITIES

[49] I hold that the plaintiff was truthful in his evidence. The plaintiff's version, which was consistent with his pleadings as set-out in the statement of claim dated 18 December 2009; and, also with the contents of the affidavits dated 10 August 2007 and 20 November 2007 [P-1 and P-2], was devoid of omission or inconsistency so as to affect the credit or the weight. Most of all, the plaintiff's version relating to his signing of a document only for withdrawal of money from bank was not disputed or challenged in cross-examination. Instead, it was relied upon by the first defendant in his submissions as being 'confirmed in cross-examination' and 're-confirmed in re-examination'. (See paragraphs 64 and 65 of the written-submissions on behalf of the first defendant). Thus, the plaintiff's version on the point remained uncontroverted.

[50] The above were not the sole bases upon which I reached the conclusion that the plaintiff's version was acceptable; but, also on the all-important basis that the plaintiff's version was in accordance with the preponderance of probabilities as supported by the myriad of factors as observed in paragraphs 39-42 above. In this regard, I am guided by the dictum in *Faryna v Chorny* [1952] 2 DLR 354 at 357, as reinforced by Calanchini J., in the case of *Mudu v Taveuni Multiracial Probationary Land Purchase Co-operative Society Ltd* [2010] FJHC 274; HBC 22/2004, which read that:

> *… [t]he credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those conditions….Again, a witness may testify what he sincerely believes to be true but he may be quite honestly mistaken. For a trial judge to say 'I believe him because I judge him to be telling the truth' is to come to a conclusion on consideration of only half the problem. In truth it may easily be self –direction of a dangerous kind.*
>
> *The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion'.*
>
> (Emphasis added)

[51] Moreover, the admissions by the first defendant and the conduct of the late Ms Channan Kaur, as shown in paragraphs 43 (i) and (ii) above, are clearly suggestive of the fact that there could not have been any renunciation on the part of the plaintiff so as to affect his proprietary shares under the Last Will of the late Mr Battan Singh. Instead, the proprietary shares under the will were yet to flow even by 1990, much later than the execution of the purported Deed of Renunciation [ABOD-6] on 16 September 1985.

[52] The above conclusion leads me to consider Mr Mishra's submission on the principle of approbation and reprobation, as formulated in Halsbury's Laws of England; 4th Edition; Volume 16 at page 1012. The principle states:

> *… that a person may not approbate or reprobate, a species of estoppel, has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions:*
>
> *(i) That the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and,*
>
> *(ii) That he will not be regarded, in general, at any rate as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.*

[53] The late Ms Channan Kaur and the first defendant could not, in the circumstances, retract from their respective conducts and admissions, as stated above, on the application of the above principle. Their conducts and the admissions, instead, operate as strong factors to advance the probabilities in favour of the plaintiff and render his version truthful, probable and acceptable.

[54] I, accordingly, conclude that the facts of the case do not favour Mr Ram's submission that the plaintiff was unreliable. Instead, I hold, for the reasons set-out above, that the facts, as deposed to by the plaintiff, are in accordance with the preponderance of probabilities for his case to reach the standard of proof on balance of probabilities. The plaintiff has, accordingly, proved his case on a balance of probabilities.

CHALLENGES TO THE SO-CALLED DEED OF RENUNCIATION

[55] It would now be apt for me to turn to the legal bases upon which relief is sought by the plaintiff. Relief, in terms of the statement of claim dated 18 December 2009, is sought principally on the grounds that:

> (i) The Deed of Renunciation was not an act of the plaintiff based on *non est factum*;
>
> (ii) Fraud and collusion in the execution of the Deed of Renunciation;
>
> (iii) Breach of fiduciary duty by the late Mrs Channan Kaur; and,
>
> (iv) The Deed of Renunciation is unlawful and/or unenforceable for its non-compliance with requirements under the law to become a Deed.

[56] Reliefs sought under (i) and (ii) above depend on how the Deed of Renunciation impacts on the plaintiff, while the relief under (iii) needs be considered in relation to the acts of transfer of the property to the first defendant by the late Mrs Channan Kaur in her capacity as the sole trustee and the executrix of the Last Will

[57] The Deed of Renunciation read as follows:

> *'WE, BALWANT SINGH son of Battan Singh of Mataniqara, Ba, Medical Practitioner, RAJENDAR SINGH son of Battan Singh of Mataniqara, Ba, Cultivator and PRADEEP SINGH son of Battan Singh of Mataniqara, Ba, Student and as such are persons beneficially entitled to shares in the estate of the said BATTAN SINGH son of Gyana AND in consideration of Natural Love and Affection which we bear towards CHANNAN KAUR daughter of Dewan Singh, lawful wife of the said BATTAN SINGH deceased, DO HEREBY RENOUNCE all our claims to any shares or interests in the estate of the said BATTAN SINGH deceased AND WE DO HEREBY TRANSFER AND ASSIGN to the said CHANNAN KAUR absolutely all rights, titles and interests to which we may be entitled to in the said estate, AND I, CHANNAN KAUR hereby accept the above.*
>
> *DATED at BA on this 16th day of September, 1985.'*

[58] It is clear that the Deed of Renunciation did not refer to renouncing of any right or beneficial interests that would accrue through a last will of the late Mr Battan Singh. The absence of reference to the Last Will in the Deed of Renunciation was, in fact, not in dispute.

[59] Mr V M Mishra on behalf of the plaintiff, in the circumstances, submitted that the Deed of Renunciation should, therefore, be restrictively construed and be limited only to the extent of renouncing any claim against the late Mrs Channan Kaur over the obtaining of the probate upon the testator's death. Mr Mishra's submission may be sound in an absolute situation on the principle that contents of a document should be literally read; and, also on application of the parole evidence rule where no extrinsic matters could be read into a written document. But, the submission appears incongruous in the context of the facts of this case; because, the plaintiff's evidence was that he had no knowledge of any last will of the late Battan Singh by 16 September 1985. Therefore, the position of the plaintiff subscribing himself to a Deed of Renunciation only to the extent of any grant of the probate is simply irrelevant and plainly out of issue.

[60] On the other hand, Mr Samuel Ram, on behalf of the first defendant, referred the plaintiff to the Deed of Renunciation [ABOD-6] under cross-examination and got him to admit that he [the plaintiff] signed the document. Here again, Mr Ram did not elicit from the plaintiff that he [plaintiff] had signed the document renouncing his shares in the context of the Last Will of the late Mr Battan Singh and thereby failed to establish or impute any knowledge on the part of the plaintiff as to the Last Will.

[61] It is, therefore, quite clear that, inasmuch as there was no reference to the Last Will in the Deed of Renunciation itself, there was no evidence at the trial, too, to show that the plaintiff was renouncing *'…[his] claims to shares or interests in the estate of the [late] Battan Singh…'*, under the Last Will. If the first defendant *et al* were not insidious in their actions and the Last Will was discussed quite openly at a family meeting, a question arises as to what prevented them from referring to the Last Will in the Deed of Renunciation. Failure to correlate the entitlements under the Last Will in the Deed of Renunciation and in evidence at the trial makes renunciation, if any, opaque; and, hence questionable as to its validity.

[62] Evidence of the plaintiff, which court accepted as the truth, revealed no any volitional act/s on his part towards any matter dealing with the property of the late Battan Singh upon his death, before or after. It is the first defendant *et al*, having looked into the Last Will at the solicitor-Mr Umarji Mohamed's office, took the plaintiff to the town and got him to sign a document at Mr Mohamed's office stating that it was for withdrawal of money from bank. It appears, in the circumstances, that the document was thrust upon the plaintiff under a pretext.

[63] Mr Ram referring to the incident of the plaintiff sitting in a lawyer's office and signing a document prepared by a lawyer disparagingly remarked in his written submissions in paragraph 45 that *'…[the plaintiff] certainly would not have been signing a grocery list or ordering a hamburger'…* While such propositions should be avoided by learned counsel, I am of the view that the plaintiff would not have had reason to disbelieve that what he was signing was a document to get money released by the bank for the funeral expenses in view of the representations made by the first defendant and Dr Balwant Singh. In any event, the plaintiff could not have been faulted for such belief because the document, too, was worded in such a manner to give that impression for any

rational reader positioned in plaintiff's standing particularly in the absence any reference to the Last Will of the late Battan Singh dated 31 March 1981. Moreover, there was no reason for the plaintiff to believe that two of his elder brothers were set to deal with the property at a time when preparations were being made to shower blessings on the soul of the deceased-father at a customary ceremony of *Bhandara* scheduled in a few days' time.

[64] The law would not allow denial of personal liberties and renunciation of proprietary rights lightly. In the case of proprietary rights, their renunciation ought to be evidenced by an informed decision. What is paramount in an informed decision is to have equality of arms prevailed in the decision making process. In this case, there is no evidence to suggest that the plaintiff, who was a student of twenty two years of age and unaccustomed to trickery in life; and, whilst being placed in the midst of two middle-aged men in a queer environment soon after the death of his father, could ever have renounced his proprietary rights in such a process. Even if he had, it is open for him to complain subsequently to court in the absence of any time being given for reflection and independent legal advice in such an iniquitous scenario where the emotions of the sorrow prevailed over the might of the wisdom. (See also *Permanent Trustee Co of New South Wales Ltd v Bridgewater* [1936] 3 All ER 501).

PLEA OF *non est factum*

[65] The above conclusion leads me to consider the principal ground of challenge based on the plea of *non est factum*. Both learned counsel, Mr Mishra and Mr Ram have filed extensive written submissions on the issue.

[66] Mr Mishra, in his written submissions at paragraph 33, laid down the principle plainly stating that although a party had signed a document, he was not bound by such document and relied on *Saunders (Executrix of Will of Gallie) v Anglia Building Society* [1970] 3 All ER 961 and *Petelin v Cullen* (1975) 132 CLR 355 in support. Mr Mishra further submitted that, of necessity the boundaries of *non est factum* are narrow; and, it is not confined to the blind and the illiterate but extends to a person, who, due to no fault of his, is unable to have any understanding of the purport of a particular document. He submitted that the burden of proof of the plea in this case was on the plaintiff; but, it shifted to the first defendant to prove that the document was signed without any undue influence because there was a special relationship of trust with the mother and the brothers (Esp. in paragraphs 37-38 and 50 of the written submissions).

[67] Mr Ram in his submissions stated that the plaintiff was literate and was a person of full age and capacity. He further submitted that there was no evidence from any expert or otherwise suggesting that the plaintiff's state of distress at the loss of his father was such that he would not understand what he was signing. Learned counsel cited in support the *Hewitt v Habib Bank Ltd* [2004 FJCA 33 and *Rigomoto v NBF Assest Management Bank* [2011] FJCA 42.

[68] It was further submitted by Mr Ram that factors that had to be considered in dealing with the plea were whether:

(i) Person/s signing the documents had several opportunities to clarify the document/s;

(ii) They had signed the documents before; and,

(iii) They abstained from enquiring because they did not want to know the truth

[69] Learned counsel relied on *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 and submitted that the plea was not available to a signatory who is of full age and capacity and who had not taken all reasonable care in the circumstances to read and understand the document. He submitted that the above principles were confirmed by the House of Lords in *Saunders (Executrix of Will of Gallie) v Anglia Buiding Society* [1970] 3 All ER 961 (Paragraph 50 of the written-submissions).

[70] I have considered the submissions of learned counsel in light of the judicial precedents as set-out above. I am of the view that the decision of the House of Lords in *Saunders (Executrix of Will of Gallie) v Anglia Building Society* [1970] 3 All ER 961, upon which both counsel placed reliance, is the authority on the plea of *non est factum* to deal with the issues at hand in this case.

[71] In its reported history, the plea of *non est factum* dates back to the year 1582, where the plea was originally available only to the blind and to the illiterate as held in *Thoroughgood v Cole* ([1582] 2 Co Rep 9a). Its scope of application was, however, expanded by Byles J. in 1869 in the case of *Foster v Mackinnon* [1869] LR 4 CP 704 at 711 by his oft-quoted words of:

> *It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least there be no negligence, the signature so obtained is of no force. And [,] it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.*
>
> (My Emphasis)

EXPANSION OF PRINCIPLES ON *non est factum*

[72] Lord Viscount Dilhorne in his speech before the House of Lords in *Saunders v Anglia Building Society* (supra), having agreed with Lord Denning MR's exposition that a man of full age and understanding who can read and write cannot be allowed to repudiate his signature to a document, which he knows will have legal consequences if he signs it without reading it, held that:

> *… with greatest respect I think that [that was] more an example of a case where the plea will fail than a rule of general application…*
>
> (At Page 967 e)
>
> and recognized the existence of cases, where a person would forbear to read without being negligent, and applied the principle as formulated by Byles J as follows:
>
> *But the position that, if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities…*
>
> *…The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived not merely to the legal effect, but as to the actual contents of the instrument.*
>
> (At page 968)

[73] Law Lords of the House were consistent and unanimous that the essence of the plea of *non est factum* was the radical, fundamental or material difference between the contents and the character of the document that the person signed and what he intended to sign.

[74] Lord Reid in his speech had this to say:

But the essence of the plea [of] non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case. Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document whether that was his own mistake or that of his advisor. That has always been the law and in this branch of the law at least I see no reason for any change.

(At page 963 h: My Emphasis)

[75] Lord Wilberforce, after surveying all the authorities on the principle of *non est factum*, set-out a more practical and robust approach by which almost all the circumstances were encompassed to ensure justice in the application of the principle in a wider sense. Lord Wilberforce said:

The existing test, or at least its terminology, may be criticized, but does it follow that there are no definable circumstances in which a document to which a man has put his signature may be held to be not his document, and so void rather than merely voidable? The judgment of Lord Denning MR seems at first sight to suggest that there are not and that the whole doctrine ought to be discarded, but a closer reading shows that he is really confining his observations to the plainest, and no doubt commonest, cases where a man of full understanding and capacity forbears, or negligently omits, to read what he has signed. That, in the present age, such a person should be denied the non est factum plea I would accept; so to hold follows in logical development from the well-known suggested question of Mellish LJ in Hunter v Walters[2] and from what was said by Farwell LJ in Howatson v Webb[3]. But there remains a residue of difficult cases. There are still illiterate or senile persons who cannot read, or apprehend, a legal document; there are still persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended. Certainly the first class may in some cases, even without the plea, be able to obtain relief, either because no third party has become involved, or, if he has, with the assistance of equitable doctrines, because the third party's interest is equitable only and his conduct such that his rights should be postponed (see National Provincial Bank of England v Jackson[4] and cf Hunter v Walters[5]). Certainly, too, the second class may in some cases fall under the heading of plain forgery, in which event the plea of non est factum is not needed, or indeed available (cf Swan v North British Australasian Co Ltd[6]) and in others be reduced if the signer is denied the benefit of the plea because of his negligence

(Pg. 971 e)

The preceding paragraphs contemplate persons who are adult and literate: the conclusion as to such persons is that, while there are cases in which they may successfully plead non est factum, these cases will, in modern times, be rare. As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give relief if

2. 1871 7 Ch App 75
3. [1908] 1 Ch 1 at 4
4. 1886 33 Ch D 1
5. 1871 7 Ch App at 89
6. 1863 2 H & C 175

satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.

But accepting all that has been said by learned judges as to the necessity of confining the plea within narrow limits, to eliminate it altogether would, in my opinion, deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice.

How, then, ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, ie more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used-'basically' or 'radically' or 'fundamentally'. In substance, the test does not differ from that which was applied in the leading cases of Thoroughgood's Case[7] and Foster v Mackinnon[8], except in moving from the character/contents distinction to an area better understood in modern practice.

To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in Foster v Mackinnon[9] where it is said that a signature obtained by fraud:

'…is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable.

(At 971-972 h)

APPLICATION OF THE PRINCIPLES

[76] It is, therefore, clear as clear could be that the application of the plea of *non est factum*, as expounded by the Law Lords of the House of Lords, easily fits into the facts of this case in every respect. More importantly, the issue of an innocent third party being affected, which is what courts have always been concerned with in adopting a restrictive approach on application of the plea, is absent in this case. It is the plaintiff, who states that he never signed a document renouncing his interests under the Last Will of his late father; and, was affected having got almost none despite the substantial allocation under the will. It is the first defendant, on the other hand, who reaped benefits from the purported Deed of Renunciation [ABOD-6] leaving no room for any third party or party outside these proceedings to be affected.

[77] Despite the facts being straightforward, Mr Mishra endeavoured to stretch the application of the principle to encompass the doctrine of undue influence outside the evidential parameters of this case. Plainly, evidence did not permit that doctrine to be applied because what the plaintiff had signed was a document to withdraw money from the bank; and, the evidence was not suggestive of exerting any influence over signing of that document. On the other hand, Mr Ram's approach to the principle, in my view, was primordial, which, in fact, was not accepted by the House of Lords in *Saunder's* case (supra); and, the cases

7. 1582 2 Co Rep 9a
8. 1869 LR 4 CP 704
9. 1869 LR 4 CP 711

relied on by Mr Ram are clearly distinguishable from facts of this case. In my view, they are inapplicable to the case before me.

MY CONCLUSIONS:

Non est factum

[78] In light of the above evidential analysis based on the unchallenged testimony of the plaintiff on the point as to how his signature came about to be on the Document-ABOD-6, I conclude that:

(i) What the plaintiff signed was a document only to withdraw money from the bank on 16 September 1985 at the instance of the late Dr Balwant Singh and the first defendant to meet funeral expenses of the late Battan Singh;

(ii) What the plaintiff intended to sign and what the late Dr Balwant Singh and the first defendant made him to sign were radically, fundamentally and substantially different;

(iii) There was no negligence or carelessness in appending the plaintiff's signature on the document as the plaintiff was led to the belief that he was signing a document for withdrawal of money from bank by the circumstances that the late Dr Balwant Singh and the first defendant themselves orchestrated;

(iv) The plaintiff's signature on the Document ABOD-6 was obtained by enacting a trickery by the late Dr Balwant Singh and the first defendant; and, it, therefore, did not carry with it either the intention or the consent to any renunciation of the property by the plaintiff under a will of the late Battan Singh; and,

(v) The conduct of the plaintiff and his forbearance was neither irrational nor improbable; but, consistent with a person of his standing under the circumstances that he was set in at the height of the loss of his father.

[79] Having taken into account the principles on the plea of *non est factum*, as enunciated by the House of Lords in the case of *Saunders v Anglia Building Society* (supra), I hold, in light of the above conclusions, that the so-called Deed of Renunciation [ABOD-6] was void insofar as the plaintiff's rights, interests and shares are concerned under the Last Will of the late Battan Singh dated 31 March 1981; and, it was unenforceable under the law against the plaintiff.

[80] The plaintiff, accordingly, succeeds in this action on the ground of *non est factum,* as set-out in paragraph 55 (i) above.

FRAUD

[81] Mr Mishra submitted that the conduct of the first defendant and the late Dr Balwant Singh towards the plaintiff was designed to achieve an unconscionable bargain from an heir and cited Halsbury Laws of England; 4th Ed..; Vol. 18 on Bargains with Heirs at paragraph 345 in support. It read:

> *The court will always relieve against the fraud which infects unconscionable bargains made with heirs, reversioners or expectants on the security of their expectant or reversionary interests in property, and fraud always is presumed in such cases from the circumstances of the parties contracting namely weakness on the one side and on the other usury, extortion or advantage taken of that weakness. Fraud does not in these cases mean deceit; it means an unconscionable use of the powers arising out of the attendant circumstances and conditions and where the relative position of the parties is such as prima facie to raise this presumption the transaction cannot stand unless the person claiming the benefit of it can prove it to be in fact fair, just and reasonable.* (My Emphasis)

[82] I agree with Mr Mishra on the point. However, in my view, facts of this case transcend the usual boundaries of unconscionable conduct where a party makes use of the weakness of another and of the attendant circumstances *only to*

raise a presumption of fraud against that party. Instead, the act of deceit itself is made-out in this case in the wake of the plaintiff's evidence that he was misled to the belief that the document that he was signing on was a document to withdraw money from the bank.

[83] In the case of *Narayan and Another v Sigamani and Others* [2008] FJHC 204; 05 September 2008, Jiten Singh J, considered the scope of fraud in relation a land transfer under the Land Transfer Act. His Lordship applied the definition assigned to 'fraud' in *Assets Co Ltd v Mere Roihi*; Assets Co Ltd v Wiremu Pere ([1905] AC 176 at 210) where the Privy Council stated that fraud meant actual fraud, ie dishonesty of some sort and not what is called constructive fraud or equitable fraud.

[84] In *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106, the Privy Council again dealt with the issue of fraud and concluded that fraud is suggestive of some act of dishonesty. It was further held that that if the designed object of a transfer is to cheat a man of a known existing right that is fraudulent.

[85] Applying the above principles to the facts of this case, I am convinced beyond doubt that the conduct of the first defendant and the late Dr Balwant Singh was fraudulent. The purported Deed of Renunciation [ABOD-6] was the outcome of a fraud perpetrated by the first defendant and the late Balwant Singh to make the plaintiff disentitled to his existing rights that he was otherwise entitled to under the Last Will of the late Battan Singh dated 31 March 1981.

FIRST DEFENDANT'S DEFENCE:TIME BAR

[86] This conclusion enables me to consider the plea of time-bar raised under Sections 9 and 10 of the Limitation Act by Mr Ram on the eve of the trial on 10 November 2011, in reply to which Mr Mishra pleaded the provisions of Section 15 of the Act in defence. Section 15 provides that where an action is based upon fraud of a defendant, the period of limitation shall not begin to run until the plaintiff has discovered the fraud.

[87] The action, in terms of paragraph 21 read with paragraph 27 of the amended statement of claim dated 18 December 2009 is principally founded on *non est factum* and fraud respectively. The first defendant had advance notice of the two causes of action and he placed the plaintiff on strict proof of those causes in terms of his statement of defence dated 12 April 2010.

[88] The element of fraud is also encompassed in the plea of *non est factum* as shown in the evidential analysis above under the applicable legal principles. In addition, the cause of action of 'fraud' stood on its own. I am convinced, in the absence of any evidence to the contrary, that the fraud was discovered in or about November 2006 following the death of the late Ms Channan Kaur in October 2006 and such discovery was conveyed to the first defendant in writing by the letter marked ABOD-7 on 15 June 2007. In the circumstances, I hold that the plaintiff's action is not time-barred. I, accordingly, reject the plea of time-bar raised by the first defendant under the Limitation Act.

[89] The plaintiff, accordingly, succeeds in this action on the ground of fraud and collusion, as set-out in paragraph 55 (ii) above.

BREACH OF FIDUCIARY DUTIES

[90] Evidence, as supported by documents marked ABOD-4/P-9 and ABOD-5/P-10 show that the properties described therein under the estate of the late Battan Singh were transferred by the late Ms Channan Kaur in the name of the first defendant in her capacity as the sole executrix and the trustee of the Last Will of the late Battan Singh.

[91] Mr Mishra submitted that these transfers of the property under the Last Will of the late Battan Singh, gave rise to the issue of breach of fiduciary duties by the late Ms Channan Kaur in her capacity as the sole trustee and the executrix of the Last Will and cited Halsbury Laws of England; 4th Ed.; Vol. 48 on *Deviation from Terms of Trust* to buttress the point. It is stated at pages 503 and 504 that:

> *Circumstances may arise in which it seems necessary or beneficial for a trustee to deviate from the strict letter of the trust. However, if he does so and his act is subsequently challenged, he will have acted at the risk of being held liable for breach of trust, unless he acted with the consent of all the beneficiaries of whom all were sui juris or he acted under statutory sanction or he obtained the sanction of the court to his act before he so acted…*

[92] Learned counsel also relied on *Shakuntala Devi v Jai Mangal and Shiu Raj* FCA ABU 082/1984, where the decision in *Regal* (Hastings) Ltd *v Gulliver* (note) [1942] 1 All ER 378 at 381 was applied. It was held in that case that:

> *In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for his cestui que trust.*

[93] I agree with the submission of Mr Mishra, as supported by legal texts and judicial precedents, that the late Ms Channan Kaur acted in breach of her fiduciary duties as the sole trustee and the executrix of the Last Will of the late Battan Singh towards the plaintiff when she transferred the property absolutely in the name of the first defendant notwithstanding the shares that the plaintiff was entitled to under the Last Will.

[94] The plaintiff, accordingly, succeeds in his action on the ground of breach of fiduciary duty by the late Ms Channan Kaur, as set-out in paragraph 55 (iii) above.

DETERMINATIONS

[95] In conclusion, I hold that the plaintiff has proved that the alleged Deed of Renunciation marked as ABOD-6 was not his [plaintiff'] act, on a balance or probabilities on the grounds set-out in paragraphs 55 (i) and (ii) above. It [ABOD-6] was not a legally enforceable document *vis-à-vis* the plaintiff; and, it could not bind the plaintiff so as to affect his entitlement to the properties under the Last Will of the late Battan Singh dated 31 March 1981. I further hold that the first defendant, both in person and in the capacity of the trustee of the Last Will by Chain of Administration have unlawfully obtained the properties that the plaintiff was otherwise entitled to under the law in terms of the Last Will of the late Battan Singh dated 31 March 1981.

[96] I further hold that the late Ms Channan Kaur, in transferring the property absolutely in favour of the first defendant, has acted in breach of her fiduciary duty towards the plaintiff for the reasons stated in paragraphs 90-93 above.

[97] The plaintiff did not sufficiently present evidence on the ground set-out in paragraph 55 (iv) above; and, as to the issue of damages. I am, in the circumstances, not inclined to address those matters in my judgment.

ORDERS

[98] I, accordingly, make order:

(a) That the Document ABOD-6 dated 16 September 1985 is invalid and unenforceable in law; and, it had no legal effect against the plaintiff insofar as plaintiff's shares, interests and rights to the properties under the Last Will dated 31 March 1981 of the late Mr Battan Singh [the Last Will] is concerned;

(b) That the renunciation relied on by the first defendant of the *'shares or interests in the estate of [the late] Battan Singh'* against the plaintiff on the basis of the Document ABOD-6 is invalid and unlawful insofar as the Last Will is concerned. The plaintiff is entitled to all proprietary shares and interests both in Fiji and India as bequeathed by the late Battan Singh under the Last Will;

(c) That the first defendant shall transfer a half undivided share each of the properties in the Certificate of Title No 8789 and the State Lease No 5553, which the first defendant holds unlawfully as shown respectively by ABOD-4/P-9 and ABOD-5/P-10, to the plaintiff forthwith;

(d) Granting an injunction restraining the first defendant and/or his servants and/or his agents or whomsoever forthwith from disposing and/or encumbering the property in the Certificate of Title No 8789 and State Lease No 5553 otherwise than in terms of the order in paragraph (c) above;

(e) Granting an injunction restraining the first defendant and/or his servants and/or his agents or whomsoever forthwith from uplifting any further monies or benefits or income or profits from the estate of the late Battan Singh under the Last Will so as to affect the shares of the plaintiff;

(f) Order that the first defendant shall provide a statement of accounts of the estate of late Mr Battan Singh subject to the Last Will from 05 December 1985, being the date of issue of the probate, until this date to this court not later than 30 June 2012 with the plaintiff's shares. The plaintiff is at liberty to move court on matters arising out of such statement of accounts in regard to his shares as bequeathed under the Last Will;

(g) Order that the plaintiff shall be entitled to the interest at the rate of four per centum per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 of the Laws of Fiji, as amended by the Decree No 46 of 2011, until his monetary shares under the Last Will, as ordered under (f) above, are paid in full from 05 December 1985; and,

(h) Order that the first defendant and the estate of Channan Kaur respectively shall pay the plaintiff sums of $ 10,500.00 and $ 7500.00 as costs of this action.

[99] This case is to be mentioned on 30 July 2012.

[100] Orders, accordingly.

Application granted.

Will Bateman
Solicitor