

IN THE SUPREME COURT OF BELIZE, A.D. 2020

CLAIM NO. 267 of 2019

**MARJORIE MAINE-NYARKO
Administratrix of the Estate of Claudius
Antonio Maine**

CLAIMANT

AND

SUNJAY HOTCHANDANI

DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2019

18th and 19th December

Written/Oral Submissions

Claimant – 5th February/6th February, 2020

Defendant – 31st January/6th February, 2020

Decision

20th February, 2020

Mr. William A. Lindo for the Claimant.

Mr. Eamon Courtenay SC with Ms. Sol Espejo for the Defendant.

**Keywords: Contract - Sale of Land - Fraud - Capacity – Completion of
Contract - Insertion of Date on Transfer Instrument and Certificate of**

Identification – Insertion of Date on Contract – Lodgment of Transfer Instrument after Death of Transferor – Death of Transferor before Contract Completed - Specific Performance/Damages - Removal of Caution

JUDGMENT

1. The Claimant, as the administratrix of her father's estate, has brought this claim to impugn a number of documents which she says neither she nor her father (Mr Maine) signed. And, if her father did in fact sign them, he lacked the capacity to understand and consent to what he was doing as he was not of sound mind.
2. She pleads that her father is the registered owner of property in the Caribbean Shores area of Belize City (the Property). On the 15th day of August, 2017 he purportedly entered into an agreement for sale of the Property to Sunjay Hotchandani (the Agreement). However, it is her case that, the signatures on the Agreement which purport to be his and hers (as witness) are false.
3. She goes on to state that the document which appears to be an application by Mr. Maine for the land certificate, accompanied by a statutory declaration are also false as they were not signed by Mr. Maine. Finally, she says that the very transfer instrument for the Property, which was lodged at the Land Registry, (the Lodged Instrument) was not executed by Mr. Maine either. Not only is his purported signature false, but the document is dated 28th February, 2018, a date after Mr Maine had already died. Mr Maine died on the 25th December, 2017. Further, the alleged purchase price was never received for the Property by Mr Maine or his estate.

4. In an effort to protect the estate's interest she lodged a caution on the register and now seeks the Court's intervention in making declarations against the validity of the above mentioned documents and an order directing the Registrar of Lands to cancel the Lodged Instrument.
5. In his defence, Mr. Hotchandani says all of the documents are authentic. Mr Maine voluntarily signed all the documents and he certainly had the capacity to enter into the Agreement and to transfer the Land. At all relevant time, he seemed, to him, to be of sound mind as he spoke and thought clearly.
6. Furthermore, the purported signature of the deceased on the Agreement and an undated instrument for transfer of the Property (the Undated Instrument) were both witnessed by Ms. Maine-Nyarko who also assisted in negotiating the sale. The transfer could not be concluded because Mr Maine was not in possession of the certificate of title for the Property. He, Mr Maine, therefore, applied for a new certificate and executed another transfer document in Mr. Hotchandani's favor.
7. By way of explanation, Mr. Hotchandani says the full purchase price was paid into escrow as was verbally agreed. Accordingly, Mr Maine signed the Lodged Instrument. However, it was only presented to the Land Registry after Mr Maine had passed away because that was when the new certificate was actually issued. In error, the date of registration, rather than the date of execution, had been inserted before it was presented for registration. He adds that he was not the person who inserted the date.
8. He denies the claim in its entirety and counterclaims to have the caution removed and for specific performance of the agreement to be effected through the Administratrix, Ms. Maine-Nyarko's immediate execution of a

transfer instrument for the Property. In the alternative, he prays an award of damages.

9. Ms. Maine-Nyarko remains steadfast in her view that Mr. Hotchandani is not entitled to any of the remedies he claims, since all the documents are fraudulent.
10. The Court is now asked to consider the following issues:
 1. Whether the Agreement, the Undated Instrument and/or the Lodged Instrument are valid:
 - i. Whether Mr Maine signed the said documents;
 - ii. If Mr Maine did sign same, whether, to the Defendant's knowledge, he was non compos mentis at the time of execution
 2. If the documents are valid, are they enforceable: i.
Whether the Lodged Instrument was capable of transferring the Property after Mr Maine had died.
 - ii. Whether the purchase price for the Property has been paid in accordance with the terms of the Agreement or any agreement made between Mr Maine and Mr. Hotchandani
 3. What remedies, if any, are the Claimant or Defendant entitled to.

Whether the Agreement, the Undated Instrument and/or the Lodged Instrument are valid:

i. Whether Mr Maine signed the said documents:

The Evidence

11. Ms. Maine-Nyarko says she visited her father, Mr Maine, in August, 2017. During her visit, she met with Mr. Habet, a realtor, when her father agreed

to sell the Property. They signed only a listing agreement and nothing more as she had informed Mr. Habet that she and her father no longer wished to sell the Property. However, it is admitted by the Claimant in the pretrial memorandum that Ms. Maine's signature appears as witness on the Agreement. The Court accepts that Ms. Maine signed the Agreement.

12. Ms. Maine exhibited a WhatsApp app thread dated 2nd and 4th September where she says she asked Mr. Habet to cancel the sale. She says Mr. Habet insisted that her father had to sell as he had found a buyer. She ended their correspondence there but found out in March, 2018 that the Property had been transferred. She noticed the signature on the transfer was not her father's and that it had been dated after he had already passed away. She filed a police report and placed a caution on the Property.
13. Mr. Carlo Habet, the Real Estate Agent said that on June 1st, 2017 his company 4Realty Limited was contracted by Mr Maine and given the exclusive right to sell the Property. Mr Maine informed him that Ms. Maine-Nyarko had the original land certificate for the Property and would assist Mr Maine in managing his affairs. He, therefore, begun to correspond with Ms. Maine-Nyarko in July of 2017. She informed that she wanted the Property sold as quickly as possible and would travel to Belize to finalize the sale and make alternate living arrangements for Mr Maine.
14. She agreed to accept an offer of \$105,000.00 from Mr. Hotchandani. Both Mr. Hotchandani and Mr. Maine signed the Agreement to this effect in August, 2017. Ms. Maine-Nyarko witnessed Mr Maine's signature. Mr Maine also signed two copies of the Undated Instrument which Ms. Maine-Nyarko also witnessed. Although Ms. Maine-Nyarko promised by email

(exhibited) that she would send the land certificate to Mr. Habet by mail, she never did.

15. Instead, in September, he says she asked him to put the sale on hold as she had not yet found appropriate alternate accommodation for Mr Maine. She then asked that the sale be cancelled. However, Mr. Hotchandani wished to proceed and by 2nd October, 2017 he had paid for the Property in full. Nonetheless, Ms. Maine-Nyarko instructed Mr. Habet to return the money to Mr. Hotchandani, as she was *“not going forward with the sale”*. Mr. Habet then directly enquired of Mr Maine whether he wished to cancel the sale. Mr. Maine was adamant that he wanted to sell, so Mr. Habet continued on as his contract had been made with Mr. Maine not Ms. Maine-Nyarko.
16. Mr. Hotchandani agreed to allow Mr. Maine to stay on the Property until he could locate suitable accommodation. He also invited Mr Maine to his own attorney’s office to sign new closing documents. On 21st October, 2017, Mr Maine attended Attorney Panton’s office as invited and executed the Lodged Instrument which was witnessed by Mr. Frank Symns, Commissioner of the Supreme Court. Mr. Panton had explained the contents and effect of that document to Mr. Maine who acknowledged that he understood and agreed to its contents before signing. Mr. Habet, Mr. Hotchandani and a Ms. Gallego were also present.
17. The Lodged Instrument could not be sent to the Land Registry for registration without the original land certificate. As Ms. Maine-Nyarko had never sent the original, Mr Maine and Mr Hotchandani agreed that the purchase money would remain in escrow until the replacement could be

secured. In November, 2017, Mr. Habet made arrangements for same to be requested from the Land Registry.

18. Mr. Francisco Canul witnessed Mr. Maine's execution of the application and supporting declaration. The replacement was issued on 22nd February, 2018 and Mr. Habet handed it over to Mr. Hotchandani. By this time, Mr. Maine had passed away and Mr. Habet had received no instructions from Ms. Maine-Nyarko regarding where the funds were to be deposited. The funds remain with Mr. Habet up to today's date.
19. Mr. Hotchandani's evidence is similar to that of Mr. Habet. He informs that Mr. Habet enquired whether he would be willing to purchase the Property. He had a site visit where he met Mr. Maine. He made an initial offer which he eventually increased to the accepted, \$105,000.00. He signed the Agreement in August, 2017 and sent the earnest deposit of \$10,500.00 to Mr. Habet in accordance with the terms of the Agreement. The next day Mr. Habet informed him that Mr. Maine had executed the Agreement and two copies of the Undated Instrument. He also provided him with a fully executed copy of the Agreement.
20. In September, Mr. Habet informed him that Ms. Maine-Nyarko no longer wished to proceed with the sale. He, Mr. Hotchandani, did not accept the proposed cancellation and offered to assist in finding Mr. Maine alternate accommodation. On 29th, September, 2017, he duly paid the balance of the purchase price to Mr. Habet who provided a receipt. By 3rd October Mr. Habet again informed that Ms. Maine-Nyarko wished to cancel and return the money. He asked that Mr. Maine be contacted directly and was, subsequently informed, by Mr. Habet, that Mr. Maine wished to proceed.

21. Mr. Hotchandani wanted his own attorney to deal with the closing. His recollection of what transpired at Mr. Panton's office is similar to Mr. Habet's. He said Mr. Maine spoke clearly, articulated his wishes precisely and explained why he needed to sell the Property. "There was nothing about Mr Maine's conduct that would have led me to believe that he was not of sound mind or that he did not understand what he was doing."
22. As per Mr. Maine's request, he then allowed Mr. Maine to live on the Property until he could find alternative accommodation and Mr Maine signed the Lodged Instrument which was left undated. That document could not be registered immediately as the original land certificate was needed. Mr. Habet agreed to assist Mr Maine in securing a replacement. The money was to be escrowed with Mr. Habet until the Property could be transferred.
23. Mr. Maine died in December, 2017 before the replacement was issued in February, 2018. A date in February, 2018, was inserted in the Lodged Instrument and it was presented for registration at the Land Registry. In March, Ms. Maine-Nyarko placed a caution on the Property.
24. Mr. Panton, Mr. Hotchandani's attorney also testified to having facilitated the closing at his office on the 21st October, 2017. He asked Mr. Frank Symns, the Commissioner of the Supreme Court to be present as witness. He explained the nature and effect of the documents to Mr. Maine before he signed. Mr. Maine was willing to sell and even explained his plans for alternate accommodation.
25. There was nothing about Mr. Maine's conduct that led him to believe that he was not of sound mind or that he did not understand what he was doing. He spoke clearly and seemed determined to proceed with the sale.

26. Mr. Panton says that one of his employees erroneously dated the transfer instrument with the filing date (28th February, 2019) rather than the true date of execution (21st October, 2017)
27. The evidence presented to the Court by Commissioner of the Supreme Court, Frank Symns, was that Mr. Maine did appear before him “on or about the 21st October, 2017” and did sign the Lodged Instrument. He was assured of his name and identity by Mr. Maine’s own admission and his production of an identification document. Mr. Symns does not state the nature of that identifying document.
28. He also testified that before Mr. Maine signed, Mr. Panton explained the nature of the Lodged Instrument to Mr Maine who said he understood and that it was his wish to sell the Property. Mr. Hotchandani also signed and Commissioner Symns certified Mr. Maine’s and Mr. Hotchandani’s identity and voluntary execution of the instrument by affixing his own signature and official stamp.
29. Mr. Symns is silent on whether he inserted a date or not on his certificate. The Court was immediately concerned that, in his witness statement, Mr Symns, was unable to state precisely when Mr Maine appeared before him. His certificate of identification, properly completed, ought to have informed him. When he admitted, under cross examination, that Mr Maine did appear before him on the 28th February, 2020 as is stated on the certificate, the Court’s concern was confirmed. This will be discussed later.

Expert Report:

30. Ms. Genoveva Marin, a forensic analyst and expert Questioned Document Examiner was asked to examine the purported signature of Marjorie Maine-

Nyarko on the Agreement, the undated Transfer of Land Instrument (the Undated Instrument) and the undated Transfer of Land Instrument (duplicate).

31. Having compared the purported signatures with specimens obtained from the Supreme Court Registry, Lands Department and a Police statement she concluded that the specimen signatures all showed a wide range of variation. Only the first portion of the signature on the Agreement conformed to the specimens; the first portion of the signature on one copy of the undated transfer instrument conformed to all of the specimens while the second portion conformed to some of the specimens.
32. On the second undated transfer instrument, she found that, the first portion conformed to all the specimens but the second portion conformed to none. She opined that the questioned signatures on the Agreement for Sale and the undated Transfer of Land instruments “*conform to the variations found on specimen signatures and consider there is a high probability that the questioned signatures are genuine.*”
33. The expert also considered Mr Maine’s purported signature on the application for land certificate, statutory declaration, land transfer instrument (Lodged Instrument), listing agreement, agreement for sale and the undated land transfer instrument (duplicate) and compared them with genuine specimens from Social Security and Atlantic and Heritage Banks. She found that the specimens bore two versions of Mr Maine’s signature (a printed and a signature style).
34. Variations found on the printed specimens were also found on the printed purported signatures, while portions only of the signature style were found

to conform to the signature style specimens. She was of the view that the printed signature conformed significantly with the comparable specimen and there was *“a high probability that these signatures are genuine.”* As it related to the signature style, she opined that there was a probability that those signatures were genuine.

Consideration:

35. Firstly, the Court considers that none of the questioned documents were signed under suspicious circumstances. Secondly, Ms. Maine-Nyarko was not being truthful when she said she signed only the listing agreement. She had a great desire to have her father withdraw from the Agreement and so an even greater need to fabricate what had transpired. She, eventually, admitted to signing the Agreement as witness, after Mr Maine had signed it. This removed any doubt which she attempted to create regarding the Agreement.
36. This Court found her to be an unreliable witness and preferred to rely on Mr. Habet’s testimony (which I could find no reason to doubt), the Commissioner’s testimony in part and the expert’s opinion. Having reviewed same, I am satisfied that there is sufficient for a finding that all the documents were signed by Mr Maine and I so hold. We move now to whether he had the capacity to execute these documents.

ii. If Mr Maine did sign same, whether, to the Defendant’s knowledge, he was non compos mentis at the time of execution:

State of the Pleadings:

37. Counsel for the Defendant began the attack by bringing the pleadings into question. She highlighted that the pleadings were deficient as they did not

specifically state that at the time of entering into any of the transactions Mr Hotchandani knew that Mr Maine lacked capacity, that is, that he was of unsound mind.

38. Reliance was placed on **The Imperial Loan Company Limited v. Stone [1892] 1 QB 599 at 601** where Lord Esher M.R. summarized the position as follows:

“This raises the questions whether that allegation is a necessary part of the plea, and if so on whom the burden of proving it lies. I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shews that the law as I have stated it was generally accepted. The burden of proof, in such a case, must lie on the defendant[...].”

39. Counsel then explained that in *“Hart v O’Connor [1985] 2 ALL ER 880, the Privy Council considered whether a contract with a person of unsound mind could be set-aside in equity on the ground of unfairness even though the other contracting party had no knowledge of the incapacity.”* **At 894** it was held that:

“In the opinion of their Lordships, to accept the proposition enunciated in Archer v Cutler that a contract with a person ostensibly sane but actually of unsound mind can be set aside because it is ‘unfair’ to the person of unsound mind in the sense of contractual imbalance is unsupported by authority, is illogical and would distinguish the law of New Zealand from the law of Australia, as exemplified in McLaughlin’s case and Tremills’s case, for no good reason, as well as from the law of England from which the law of Australia and New Zealand and other ‘common law’ countries has stemmed....

To sum the matter up, in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of ‘unfairness’ unless such unfairness

amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.”

40. Counsel then submitted that *“a contract cannot be avoided on the basis of incapacity unless it is also shown that the incapacity existed at the very time of entering into the relevant contract. In **The Estate of Park [1954] P.112** the deceased entered into a marriage contract and executed a will on the same day. The will had already been avoided in a separate action. In considering whether the marriage contract was also avoidable Singleton L.J. stated the following at 126:*

“It is not every unsoundness that will avoid a contract. The degree necessary to produce this effect is fixed by the law, and must be made out by proof. All persons of lawful age are presumed to be capable of contracting, until the contrary is made to appear. So, sanity is presumed, and if the contrary is alleged, it must be proved by the party imputing it. If a state of permanent insanity is once shown, the burden of proof shifts, and a lucid interval must be proved by the other side. But the rule is different in a case of temporary insanity, depending on some exciting cause not in perpetual action. The general rule is, ‘that those who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, or the weakness being so considerable as to amount to derangement are incapable of contracting a valid marriage, or making any other binding contract.’ [...]

“The question, I think, is this: Was the decease on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understand it?”

Consideration:

41. Counsel for the Defendant is quite correct regarding the test for avoiding a contract on the basis of incapacity. While she is also correct that the pleadings are quite deficient, the issue of incapacity was accepted and agreed as live between the parties on their pretrial memorandum. The Court may therefore make a finding. As explained in ***Blackstone’s Civil Practice, 2013 at paragraph 24.24*** *“...if a factual issue has been adequately dealt with at trial and is clearly regarded by all the parties as a live issue which is crucial to the case, the judge is entitled to make a finding of fact, even if the issue was not raised in the*

statements of case, which could have been amended during the trial (Slater v Buckinghamshire County Council [2004] EWCA Civ 1478, LTL 10/11/2004).”

State of Mr Maine’s mind:

42. In his submissions, Counsel for the Claimant sought to highlight particular parts of the evidence which he says supports a plea of insanity. He asked the Court to consider Ms. Maine-Nyarko’s evidence regarding Mr. Maine’s state of mind; Mr. Maine’s neighbor, Ms. Bruce’s, evidence as to his general conduct and the expert’s opinion on the reason for the variances in Mr. Maine’s handwriting. He also asked the Court to draw certain inferences from the fact that the final transfer document was witnessed by five persons while the original was witnessed by only two. (The last proposition may cut both ways).
43. Ms. Maine-Nyarko’s testimony is that when she came to visit Mr. Maine in August, 2017 he did not seem to immediately recognize her at the airport or at his home when she visited him the next day. He actually informed her that he did have a little daughter named Marjorie and a son named Granville but she (the actual Marjorie) was grown up. He eventually realized that she was in fact his daughter, Marjorie. She was distressed, as she believed he was suffering from dementia and was deteriorating rapidly. His memory seemed impaired with sporadic periods of lucidity. She wanted to place him in a nursing home but he strenuously objected to this as he also did to selling the Property.
44. With reference to Ms. Maine-Nyarko’s own evidence as to what she says she perceived Mr. Maine’s condition to be, her response raises serious doubt. The most glaring of which is that Ms. Maine-Nyarko still accompanied her

father to Mr. Habet's office to arrange the sale of his home. There, she witnessed his signature on documents and participated in the arrangements being made. She also decided to leave him alone in that home without making proper arrangements for his care. In the circumstances, this would not be the reasonable response of a caring and concerned daughter. It does not further her claim either.

45. Even the evidence of Jerrylyn Bruce, Mr Maine's neighbour, does not assist the enquiry required to be made by this Court. Ms. Bruce was not present during the signing of the Agreement or the Lodged Instrument so she could not speak of Mr. Maine's condition then. What she does speak of, has no definitive time period. Her concern about his behavior prompted her to do nothing more than attempt to have a conversation with him. She does refer to making a statement at a police station but there was no supporting evidence of this. The Court could not find sufficient to prove Mr Maine's mental condition, far less his condition at the time of signing.
46. The fact that five persons witnessed the signature on the Lodged Instrument raises no suspicion in the Court's mind. As Counsel for the Defendant countered, they were all persons who would be ordinarily expected to be present. Save, perhaps, Ms. Gallego, who was described as Mr Maine's friend and who, understandably, may have been present only in that capacity.
47. The expert's testimony, as Counsel for the Defendant was swift to point out, did not conclude that the only reason for a variance in signatures would be a person's mental state. Actually, the expert said "*(c)onsequently, age, mental state*

or Alzheimer's disease result in variation and changes denoted mainly as signature deterioration rather than the use of two alternating styles over a wide period of time."

48. Even if the variance in the signatures are accepted as having derived from some mental condition, Ms. Maine-Nyarko's own testimony is of lucid moments. Is the Court to simply assume that at the time of signing he did not, perhaps, have a lucid moment if indeed his mental state was somehow impaired. It is to be remembered that a man is presumed sane unless the contrary is proven. None of the evidence presented points to the fact that at the time of execution Mr Maine was not competent and Mr. Hotchandani knew this or that the Court could infer this knowledge to him.
49. This Court, therefore, finds that the Claimant has not proven to the requisite standard that Mr Maine suffered from any mental defect or that at the time of signing any of those documents Mr. Hotchandani knew or had cause to believe that he so suffered and was therefore unable to understand their nature and effect.

Is the Lodged Instrument valid:

50. The parties both agree that the Lodged Instrument was presented for registration after Mr. Maine had died. Mr. Hotchandani was well aware that at the time of Mr. Maine's death, the sale had not yet been completed. He states at paragraphs 14 and 15 of his witness statement:

"The Second Transfer Instrument could not be registered immediately as Mr. Maine did not have the land certificate in respect of the Property. Mr. Habet undertook to assist Mr. Maine to apply for a replacement land certificate and to hold the purchase money in escrow until Mr. Maine had completed everything necessary so that the Property could be transferred to me."

"In December 2017, while watching the news, I found out that Mr. Maine had passed away. I did not think this would affect the sale of the Property since all relevant documents had been signed by Mr. Maine."

51. Mr. Habet was also similarly aware since, when questioned, under cross examination, about paying over the purchase price or part thereof to Mr Maine, he explained: *“I could not pay out when it was not closed. The transfer had not yet been registered, so I held on to the money in escrow.”*
52. The parties seemed to have agreed that although the Lodged Instrument had been executed, it would not be registered until the original land certificate was secured. The Defence says it was also agreed that the purchase price would remain in escrow during that period. We will discuss that issue later. But suffice it to say that the Lodged Instrument was never registered and the money remained escrowed up to the time of Mr. Maine’s death. All this serves to convince the Court that the contract was in fact completed after Mr Maine had died.
53. Since the Property is registered land, under the Registered Land Act (the Act) section 26, it is registration, not the executed transfer document, which vests ownership. Such ownership is subject only to encumbrances, conditions and restrictions shown in the register and those overriding interest which do not require registering.
54. Up to the time of Mr Maine’s death, he was the registered proprietor with absolute title, therefore, he had absolute ownership. The sale had not yet been completed because the original certificate had not been secured. Section 35 of the Act explains the significance of this document to the transaction. Unless the registrar dispenses with its production, the original certificate must be produced on the registration of any dealing with the land to which it relates. Where the disposition is a transfer, then that original certificate is cancelled and a new one is issued in its place.

55. Pursuant to section 40(1) of the Act, Mr Maine could not dispose of the Property except in accordance with the Act. Section 86 of the Act informs that a transfer is only complete by registration of the transferee as proprietor. So, for these parties, completion of the transaction required not only the execution of the Transfer of Land form but also registration of the new proprietor on the register.

56. When Mr. Maine died, having not yet closed the sale, all that Mr Hotchandani possessed was a signed transfer form. Although he subsequently lodged it for registration, it remains, even now, an unregistered instrument. Section 40(2) says such a document may only operate as a contract on which action could be taken. When that section is considered in conjunction with sections 119 and 120 of the Act, the position becomes clear.

57. Sections 119(1) and 120 provide that:

119(1) If a sole proprietor dies, his personal representative, on an application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased....”

120(1)The personal representative, subject to any restriction on his power of disposing of the land, lease or charge contained in his appointment, or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing he shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”

58. The right to the performance of a contract is a chose in action and by operation of law, on the death of either party, it is automatically assigned to the deceased's personal representative. This means that any action which could be taken on the Lodged Instrument as a contract must be taken against the administratrix of Mr Maine's estate. Since the administratrix's registration would date back to the death of the deceased, an action for specific performance could well be entertained.
59. So, while the Lodged Document may be viewed as a binding contract, it certainly cannot be registered where the transferor had died before the transaction had been completed. That being said, the Court will now consider whether the insertion of the date would render the Lodged Instrument invalid.

Insertion of Date:

60. The defence submitted that inserting a later date on the Lodged instrument cannot invalidate the instrument unless the date is material. A material alteration is one which affects the legal effect of the document, that is, the rights and obligations of the parties.
61. Reliance was placed on *Raiffeisen Zentralbank Osterreich AG v Crosseas Shipping Ltd [2000] WLR 1135* where the name and address of the first defendant had been inserted by an employee of the claimant bank on a guarantee given by the fourth defendant to the claimant bank. The fourth defendant sought to avoid the guarantee since the insertion had been made without the fourth defendant's knowledge. At paragraph 27 Porter LJ stated:

"... the would-be avoider should be able to demonstrate that the alteration is one which, assuming the parties act in accordance with the other terms of the contract, is one which is potentially prejudicial to his legal rights or obligations under the instrument. I say "potentially prejudicial" because I do not think it

necessary to show that prejudice has in fact occurred. The rule remains a salutary one aimed at preventing fraud and founded upon inference of fraudulent or improper motive at the time of alteration. It seems to me that, absent any element of potential prejudice, no inference of fraud or improper motive is appropriate.”

62. Counsel also referred to ***Bishop of Crediton v Bishop of Exeter [1904] All ER 552*** where a Bishop altered the deed to insert the date on which he executed it. The court accepted that the space for the day and month having been left blank, indicating that the parties intended for the date of execution to be the date the Bishop signed. So that when he also amended the year, the instrument’s validity was not affected in anyway.
63. These cases cannot be applied to the case at bar in its entirety. In the first place, we are not here only dealing with a contract between two entities. We are also considering a transfer of land instrument where the process is strictly regulated by legislation. Next, there was no evidence proffered of any agreement between the parties for any specific or arbitrary date to be inserted. Furthermore, the parties could not also agree for an insertion on the Commissioner’s Certificate, a document required by the Act.

Effect of insertion on the validity of a transfer of land instrument:

64. While sections 109 and 110 of the Act speak to the signing of the instrument by a natural person, before a prescribed person, who must satisfy themselves of and certify the identity of the person appearing and their voluntary execution of the document, it is silent as to the date of the execution.
65. However, section 42(1) demonstrates the relevance and importance of the date of execution. It mandates that an instrument is to be presented for registration within three months of the date of execution. Delay beyond this

period attracts additional fees. If the date was not material, then the revenue could easily be defrauded even though the rights and interests of the parties may not be affected.

66. In this case, what is even worse, is that the date was not only purported to have been entered on the Lodged Instrument but also on the Certificate of Identification executed by Frank A Symns, a Commissioner of the Supreme Court. It is beyond comprehension that the Commissioner would somehow omit to properly complete the certificate in flagrant derogation from his duty. It is even more disturbing that anyone, could believe it appropriate to insert a date on a document which seeks to certify that parties appeared before the signatory and what their state of mind was at the time of appearance.
67. The Court also noted that the Undated Instrument was not signed before a prescribed person and it was not dated either. In fact, there was no purchaser stated although there was a purchase price. I am compelled to say, here, that prescribed persons ought to execute their duties with more care, diligence and competence. While persons executing documents ought to be far more circumspect, if not at the very least, careful, about what they are willing to append their signature to, on request. It is also quite concerning that there was an Attorney present during the execution of the Lodged Instrument who seemed to have found nothing at all wrong with the procedure.
68. It is beyond alarming to consider how frequently this may be occurring, undetected. This particular incident has only come to the fore, demanding explanation, because the transferor was in fact dead on the date the Commissioner is said to have been in his presence and considered his

circumstance. There is no possible way that this act could be condoned or this document could now be considered a valid and registrable transfer instrument.

Effect of insertion on a contract for sale of land:

69. The law here is different. Section 40(2) of the Act mandates that “..... *no action may be brought upon any contract for the disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person lawfully authorised by him:....*”
70. Since the Court has already found that the Lodged Instrument was in fact signed by Mr Maine, it could operate as a contract for the sale of the land but nothing more.
71. Here, the insertion of the date would not affect any of the rights or obligations arising from the contract. In any event, the Court is allowed to make a determination on the date of execution, notwithstanding the fact that a date appears on the face of the document. The Court, therefore, finds that the Lodged Instrument is a valid contract for the sale of land made between Mr. Maine and Mr. Hotchandani. The Court, having considered the evidence, also finds that that contract had been signed by the parties before Mr Maine’s death in 2018, more specifically, on the 21st October, 2017.

The Undated Instrument:

72. That document, although signed by Mr Maine contains no other party or terms of any agreement. It would fail for uncertainty. This Court can find no good reason to discuss that document any further.

2. If the documents are valid, are they enforceable:

73. To determine the terms of the agreement the Court is allowed to look not only at the written documents, but also any parole evidence provided, if the written document is found not to contain all of the terms agreed. The Lodged Instrument informs that consideration of \$105,000.00 was acknowledged by the transferor. That money is held in escrow even now. It is Mr Hotchandani's testimony that Mr. Habet "*undertook to assist Mr Maine to apply for a replacement land certificate and to hold the purchase money in escrow until Mr Maine had completed everything necessary....*" There is no evidence of Mr. Maine ever agitating for payment before his death. By the time the original certificate was received, Mr Maine was dead. He clearly could not accept payment then.
74. Mr. Habet, swore that "*Mr. Hotchandani and Mr Maine agreed that he should hold the purchase money in escrow until the new land certificate had been issued and the second transfer instrument could be registered.*" He adds that "*(b)y the time the new land certificate was issued Mr Maine had passed away and I received no instructions from Mrs. Maine-Nyarko regarding where the funds should be deposited.*" He does not speak of ever informing Ms. Maine-Nyarko that he had the funds in escrow. Be that as it may, Mr. Habet is not a party to these proceedings.
75. Ms. Maine-Nyarko contends that having not received payment, the Agreement had not been performed in its entirety by Mr. Hotchandani. As such, he is not entitled to specific performance. Counsel for the Claimant also asked the Court to consider Mr. Hotchandani's unclean hands. Reference was made to the insertion of the date on the Lodged Instrument as discussed above and the attempt to register same after Mr Maine had died.

76. This Court finds that when Mr. Hotchandani paid the money over to the escrow agent and Mr Maine signed the transfer acknowledging receipt of same, Mr Hotchandani had done all that he was expected to do under contract. Land is ordinarily considered unique and so damages would not in these circumstances be adequate for the breach.
77. This Court agrees that he who comes to equity must come with clean hands. However, that does not mean unblemished hands. There is no evidence that Mr. Hotchandani inserted the date or that the motive was improper or intended to cause harm in any way. In fact, there was no plea of any fraud on the Defendant's part. While it was plainly wrong to insert the date as had been done, this Court must undertake a balancing exercise. It must also consider the maxim - equity looks on that as done which ought to be done. Mr. Hotchandani has paid as was agreed and he will be granted relief as prayed.
78. Before final determination of this matter the Court acknowledges that the Claimant also raised issues relating to agency and termination of contract by Ms. Maine-Nyarko. However, Mr. Habet's agency agreement was made directly with Mr. Maine, who signed it himself. The Agreement was also made with and signed by Mr. Maine. Although Mr. Habet communicated with Ms. Maine primarily, she had no contractual arrangements with him. She therefore could not terminate those arrangements and even if she purported to do so, Mr Maine clearly did not agree with her decision as he continued to pursue the sale and perform as agreed.
79. Furthermore, since the Lodged Instrument is also a contract for the sale of the Property it overtakes any of the previous written agreements made

between the parties in that regard. The issue raised by the Claimant, as to termination of the Agreement, becomes mute and will not be discussed further.

What remedies, if any, are the Claimant or the Defendant entitled to:

80. The Claimant sought an order directing the Registrar of Lands to cancel the Lodged Instrument. Since the document has only been lodged and not registered there is no need for or even the possibility of cancellation. The Claim form, however, sought further and/or other relief as the Court deems just. The Court is allowed to grant a remedy which is supported by the allegations in the pleadings and is consistent with the relief pleaded. The Court will, therefore, order that the Defendant withdraws the Lodged Instrument before registration. This cannot possibly take the Defendant by surprise considering the Court's findings above.
81. The Defendant/Counter Claimant, having met with success will be granted specific performance and the removal of the caution as prayed, upon the withdrawal of the Lodged Instrument. His award of agreed cost will be reduced by \$3,000.00 to reflect the Claimant's own small success on her claim.

Disposition:

1. The Claim is dismissed save that the Defendant is ordered to forthwith withdraw the lodged instrument before registration.
2. Judgment for the Counter Claimant on the Counter Claim.
3. It is declared that the lodged transfer instrument constitutes a written memorandum of the agreement between the deceased and the Counter Claimant.

4. Upon the Defendant's withdrawal of the lodged instrument:
- A. The Registrar of Lands is ordered to immediately remove the caution registered by the Claimant on the 28th March, 2018.
 - B. The Claimant, in her capacity as Administratrix of the Estate of Claudius Antonio Maine, is directed to forthwith transfer Parcel 3686 Block 16 of the Caribbean Shores Registration Section to the Defendant.
 - C. If the Claimant does not comply with sub paragraph 4.B. above within two weeks of the removal of the caution, the Registrar of the Supreme Court is directed to execute the necessary transfer documents.
5. Costs to the Defendant in the reduced sum of \$32,000.00 plus half of the cost of the agreed expert.

**SONYA YOUNG
SUPREME COURT JUDGE**