

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No. GYCV2015/004
GY Civil Appeal No. 57 of 2006**

BETWEEN

ERROL CAMPBELL

APPELLANT

AND

JANETTE NARINE

RESPONDENT

**Before The Rt Honourable
and the Honourables**

**Sir Dennis Byron, President
Mr Justice A Saunders
Mr Justice D Hayton
Mr Justice W Anderson
Mme Justice M Rajnauth-Lee**

Appearances

Mr Sanjeev J Datadin and Mr Charles Ramson for the Applicant

**Mr Rajendra Poonai, Mr Chandrapratesh Satram and Mr Mahendra Satram for the
Respondents**

JUDGMENT

of

**The President and the Honourable Justices
Saunders, Hayton, Anderson and Rajnauth-Lee**

Delivered by

The Honourable Mr Justice Hayton

on the 17th day of March 2016

JUDGMENT

Introduction

- [1] The dearth of witnesses (two key witnesses having died before trial of the action) and the superficial cross-examination of the two principal witnesses have made this undue influence claim a difficult, finely balanced case to deal with. The trial judge found undue influence to have been established by the plaintiff but the majority of the Court of Appeal found itself able to interfere with the judges' findings and allowed the appeal. This Court, in agreement with Cummings-Edwards JA, finds that there is no sufficient basis to enable the Court of Appeal to interfere with the trial judge's conclusion that undue influence had been established.
- [2] On June 9, 2006, on the basis of the undue influence of Mrs Janette Narine (the Respondent or Mrs Narine), Mr Errol Campbell (the Appellant or Mr Campbell), the executor of the estate of Mrs Hermelita Feinmesser (Mrs Feinmesser), who had died on August 2, 1993, obtained from the trial judge, George J, an order rescinding an Agreement of Sale (the Agreement) between Mrs Feinmesser and Mrs Narine. It was executed on December 16, 1992 when Mrs Feinmesser was in hospital as a result of serious ill-health. The Agreement was for the sale to Mrs Narine of Mrs Feinmesser's house situated at 73/83 Brickdam, Georgetown, Guyana. The purchase price was G\$2.1 million, though at that time the house was found to be worth G\$5.2 million. Mrs Narine's counterclaim for specific performance of the Agreement was dismissed and she was ordered to give up possession of the house within six months, though the claim against her for mesne profits was dismissed for absence of evidence. Mr Campbell was awarded G\$50,000 costs.
- [3] The Court of Appeal by a majority allowed Mrs Narine's appeal and set aside the judge's order. It held the Agreement to be valid and ordered specific performance of it, with costs of G\$150,000 to be paid to Mrs Narine. Mr

Campbell appealed to this Court seeking restoration of the trial judge's order with costs to be paid by Mrs Narine in this Court and the Court of Appeal.

[4] We note with great dismay that the proceedings were instituted by Mr Campbell in December 1996, the trial was held over five days in August and September 2005, with judgment delivered in June 2006. The Court of Appeal heard the appeal on June 29, 2012 and delivered judgment on July 30, 2014. It granted leave to appeal in December 2014 subject to complying with certain conditions. The Certificate of Compliance was issued on March 3, 2015. Delay in the preparation of the Record prevented a case management conference being heard till November 2015 when the appeal was set down for hearing before us on February 23, 2016. In short, almost twenty years have passed since the institution of proceedings and the resolution of those proceedings.

[5] Mrs Feinmesser had died before institution of the proceedings and a Mr Michael Vernon Akai (Mr Akai), an attorney involved in the Agreement and Mrs Feinmesser's subsequent will, died before the 2005 trial. Only Mrs Narine could give critical evidence as to what really happened and she was clearly very much self-interested. Mrs Feinmesser's executor, Mr Campbell, was not in a position to provide much direct assistance, though he could provide some background. The only other witness merely gave evidence as an expert valuer on the value of the Brickdam property back in December 1992 and, as held by the trial judge and the Court of Appeal, there is no reason to doubt his valuation. The contest was thus going to be very one-sided in favour of Mrs Narine as beneficiary of Mrs Feinmesser's largesse, but the law on undue influence can provide some protection for a disadvantaged party.

The relevant law as to undue influence

[6] Counsel for both parties accepted that the law as to undue influence that applies to the current circumstances is as set out below by the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)*¹. Whether a transaction has been brought

¹ [2002] 2 AC 773.

about by undue influence is a question of fact and the legal burden of establishing undue influence rests on the person alleging it.² Their Lordships, however, rejected³ the attempts of earlier judges to classify undue influence into categories of (1) actual undue influence and (2) presumed undue influence with a restricted class A of presumed influence in a few instances of trust and confidence reposed by one person in another (parent and child, guardian and ward, doctor and patient, solicitor and client, trustee and beneficiary, spiritual mentor and disciple) and a class B of other relationships where the requisite degree of trust and confidence was proved to exist. Their Lordships' reason was that in all instances actual undue influence must be established but, because it is difficult to prove directly that property was obtained as a result of actual undue influence, the courts have been ready to infer or presume that such influence was actually exercised. We agree with their Lordships.

[7] We also agree with the following statement of Lord Nicholls in *Etridge*,⁴ “Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs coupled with a transaction which calls for explanation will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties’ relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”

[8] Lord Nicholls was dealing with what would “normally be sufficient” but the range of relevant relationships of trust and confidence is a wide one. In

² *ibid* [14].

³ *Etridge* (n 1) [92], [105], [161] and, seemingly, [14]-[17]; Chitty on Contracts Vol 1 (2012) at 7-084 to 7-085.

⁴ *Etridge* (n 1) [14].

Goldsworthy v Brickell,⁵ Nourse LJ stated that what is required “is that the degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made.” In *Johnson v Buttress*,⁶ Dixon J in the High Court of Australia dealt with the sort of relationship needed to raise the presumption of the actual exercise of undue influence when coupled with the fact that one party to the relationship has obtained a substantial benefit from the other. The relationship arises “whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare.”

- [9] The focus is thus on the extent of trust and confidence reposed by Mrs Feinmesser in Mrs Narine coupled with the circumstances surrounding the Agreement to see if they create a suspicion that that transaction was not readily explicable by the women’s relationship.
- [10] Once such a suspicion has been aroused the evidential burden shifts to Mrs Narine. In order for her to rebut the inference of undue influence it is necessary to show that the transaction “was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor’s will.”⁷ In short, as Lord Evershed has made clear,⁸ it is necessary to establish that the gift was made as the result of “full, free and informed thought about it.” The receipt of legal advice by the donor can help to establish that the

⁵ [1987] Ch 378, 401.

⁶ (1936) 56 CLR 113, 134-135.

⁷ *Allcard v Skinner* (1887) 36 Ch D 145, 171 per Cotton LJ.

⁸ *Zamet v Hyman* [1961] 1 WLR 1442, 1444, followed in *Re Craig* [1971] Ch 95, 105.

gift was so made but the nature of Mr Akai's involvement is unclear when he died before the case was heard and there is no evidence of any advice given by him.

- [11] “The basis of the court’s intervention”, as explained by Mummery LJ, “is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim if the transaction is not satisfactorily explained by ordinary motives.”⁹ Bearing the above matters in mind there has to be a detailed examination of the evidence.

The unchallenged background evidence

- [12] Mrs Narine came to know Mrs Feinmesser and her husband in the 1970s, visiting each other's home. Indeed, Mrs Narine used to have lunch in their home when she was working nearby at the Brazilian Embassy. Mrs Narine and her husband obtained a divorce. Mr Feinmesser fell ill and had to be hospitalised for emphysema before dying in 1983. In that period, Mrs Narine stayed with Mrs Feinmesser in the Brickdam house because she was alone, leaving Mrs Narine's children with her maid in her home. After Mr Feinmesser's death, there was a meeting between Mrs Feinmesser and Mrs Narine and her son and daughter. As a result Mrs Narine and her children moved into the Brickdam house, though her son later went to stay with his father. Mrs Narine used to call Mrs Feinmesser “Auntie Lita.” Mrs Feinmesser made some vacation trips to Canada to see her niece, Nadya, and Nadya's husband, Mr Campbell, the couple, who married in 1968, having emigrated from Guyana to Canada in 1975. Mrs Feinmesser had no child of her own and treated Nadya like a daughter.

- [13] In 1986 Mrs Feinmesser moved to Canada, sponsored by the Campbells, initially living with them before buying a townhouse. In June 1986 Mrs Narine's daughter, Karen, got married, and Mrs Feinmesser agreed that she and her husband, George, could live in the Brickdam house with Mrs Narine. Later in

⁹ *Niersmans v Pesticcio* [2004] EWCA Civ 372 at [20], endorsed in *Macklin v Dowsett* [2004] EWCA Civ 904 at [10].

1986, Mrs Narine said “Mrs Feinmesser insisted that I go to live in Canada with her” and, after much thought because Mrs Narine had “a good job at the Brazilian Embassy” at US\$648 a month, she applied for and obtained a visa, enabling her in October 1987 to go and stay with Mrs Feinmesser in Canada, who had agreed that Karen and George should continue to stay in the Brickdam house. Mrs Narine lived in Mrs Feinmesser’s townhouse before moving with her in 1990 to a bungalow bought with the proceeds of sale of the townhouse. During this period it appears that Mrs Narine and then Karen and George paid for rates, taxes, water and electricity and for some patching up of the Brickdam house. In 1997 Karen and George moved out and Mrs Narine’s nephew occupied the house, such still being the case at trial.

- [14] Mrs Narine considered the bungalow as her home. “We lived in the same dwelling place. I cooked for her and so on.” They visited “a Jewish lawyer” who prepared a will for Mrs Feinmesser leaving “everything she owned to me”. “I know there was a copy in our bank box i.e. mine and Mrs Feinmesser, and there was one in her drawer in her bedroom.” “I know I saw that will.”
- [15] Mrs Feinmesser developed heart problems but not so badly that Mrs Narine could not leave for Guyana to see her daughter and a granddaughter born on October 9, 1992, though delaying the trip until October 23 due to Mrs Feinmesser having to go for some medical treatment. A six months’ visit was envisaged but, when hearing that Mrs Feinmesser had fallen ill and gone into hospital, Mrs Narine returned to Canada around December 7, 1992.
- [16] Leaving aside what controversially happened while Mrs Feinmesser was in hospital, the Agreement was signed there on December 16, 1982 before she came out of hospital “about a week before Christmas” according to Mr Campbell, who visited her once or twice a day and his wife, Nadya, visited more often. Mrs Narine never saw the Campbells when she visited the hospital, though she admitted they did call in at the bungalow to collect things for Mrs Feinmesser. On discharge from the hospital, still in a poor state of health with medication for

heart, lung and kidney problems so that she could not live on her own, Mrs Feinmesser went to stay with the Campbells.

- [17] Mrs Feinmesser's health became good enough for her to go out on her own "to take care of business" (though not telling the Campbells what it was) and to go to California with the Campbells on a ten to fourteen days' trip and (as admitted by Mrs Narine) to visit Mrs Narine who continued living in the bungalow, vacating it in November 1993.

1993 Will and attorneys' letters

- [18] It seems that in May-June 1993 Mrs Feinmesser felt strong enough to try to put her affairs in order without telling the Campbells what she was doing. On May 28, 1993 Mrs Feinmesser made a will in respect of which Mr Campbell obtained Probate on September 13, 1993, such will being witnessed by the attorney, Mr Akai, who had earlier witnessed the Agreement. The will, apart from small legacies, left Mrs Feinmesser's residuary estate equally to her brother, Joseph, and his daughter, Nadya. It is not disputed that the Brickdam house fell into the residuary estate, though not mentioned in the will.
- [19] It also transpires that the following letter, dated June 15, 1993, was sent by a Guyanese attorney, Mr C R Ramson, to Mrs Narine at the Brickdam address.

"Dear Madam,

I have been instructed by Mrs H Feinmesser of Toronto, Canada, that you persuaded her to execute a contract for the sale of her property at N1/2 of W1/2 of Lot 73/83 Brickdam Georgetown at a time when she thought she was terminally ill in hospital. Not only was there no consideration given at the execution thereof but you continued to occupy the property free of rent as you had been doing since her departure from Guyana. The aforesaid contract is therefore void ab initio.

In the circumstances I expect you to call at my Chambers within 14 days of the receipt of this letter to formally execute the Memorandum of rescission, failing which my client will take such other steps as she may be advised."

- [20] Mr Campbell stated that he had no knowledge of either the will or the letter or the Agreement until after Mrs Feinmesser's death on August 2, 1993. It was Mr Akai who, after her death, telephoned his wife and her father as beneficiaries under the will and who told him about the Agreement, nothing about the Agreement having been found by Mr Campbell in Mrs Feinmesser's papers. Moreover, Mr Campbell did not know of the June 1993 letter until making enquiry after receiving a letter dated December 20, 1994 from a Mr Jai Narine Singh acting as Mrs Narine's attorney. The trial judge found no reason to doubt Mr Campbell's evidence.
- [21] Mr Singh's letter stated that, having learned that Mr Campbell was the executor, his client, Mrs Narine, was seeking to enforce the Agreement of December 16, 1992, having "paid the sum of \$100,000 (one hundred thousand dollars) on account of \$2,000,000 (two million dollars) for the property", though the sale price in the Agreement was actually \$2,100,000 as appears below at [24]. His client desired to have transport for the property and would pay the balance on passing of transport. Prompt and immediate attention to the matter was requested.
- [22] Mrs Narine acknowledged that she knew of the June 15 1993 letter, her daughter living at the Brickdam address having read it to her. Mrs Narine accepted that Mrs Feinmesser had sometimes visited her in the bungalow after her discharge from hospital but stated that the issue of the Agreement was not raised by her. It appears that neither was it raised by Mrs Feinmesser. Mrs Feinmesser was re-hospitalized in July and died in August.

Mrs Feinmesser's stay in hospital

- [23] The lapse of nearly thirteen years before evidence was given of Mrs Feinmesser's December 1992 stay in hospital makes it impossible to be precise about the dates of her stay. It is clear that Mrs Feinmesser became seriously ill in December such that on learning of her hospitalization Mrs Narine made arrangements enabling her to go back to Toronto from Guyana around December

7, while Mr Campbell's recollection was that Mrs Feinmesser left the hospital to stay with him and his wife about one week before Christmas and that she had spent two weeks or so in hospital. She spent time in an open ward hooked up to a heart monitor, she spent time in the Intensive Care Unit and received the last rites from a priest. When in the ICU she was heavily sedated, sometimes conscious sometimes not. Mrs Narine's evidence, which Mr Campbell was not in a position to contradict, was that the Agreement was signed when Mrs Feinmesser was in an open ward hooked up to a heart monitor but "she was in ICU after the Bill of Sale was done", and such a memorable event may likely be more reliable than trying to remember particular dates. On this basis Mrs Feinmesser was in a deteriorating position when she signed the Agreement on December 16. If, however, she really left hospital about a week before Christmas she would have been in an improving condition when she signed the Agreement.

[24] The Agreement was executed by Mrs Feinmesser as "Vendor" and Mrs Narine as "Purchaser" and was formally witnessed by the attorney, Mr Akai, and a woman, Ann Vassilian, his secretary. The judge found that Mrs Feinmesser duly put her signature to the Agreement. Her mental faculties were intact though she was seriously ill and so in distressed circumstances. After detailing the parties and the Brickdam house the Agreement continued as follows.

"PURCHASE PRICE \$2,100,000 (Guyana) (TWO MILLION ONE HUNDRED THOUSAND GUYANA DOLLARS) of which the sum of \$100,000 (Guyana) (ONE HUNDRED THOUSAND GUYANA DOLLARS) is paid on account on the signing of this agreement, the receipt whereof the Vendor hereby acknowledges. Balance to be paid on the passing of Transport.

POSSESSION To be given on the signing of this agreement.

TRANSPORT EXPENSES To be borne by the Vendor and purchaser in equal shares

TRANSPORT To be advertised and passed as soon as possible.

RATES AND TAXES To be paid by the Vendor up to the date hereof, thereafter by the Purchaser.

In witness whereof the parties have signed this agreement on the date first above written in the presence of the subscribing witnesses."

- [25] Mr Campbell's evidence could not assist as to how the Agreement came to be entered into by Mrs Feinmesser nor as to her condition on December 16 when she signed the agreement. However, he stated that she never handed over any money to him or his wife when she was in hospital and, as her executor, he had never received any money from Mrs Narine in relation to the Agreement.
- [26] Mrs Narine's evidence in chief was that on returning from Guyana on December 7 or 8, 1992 she went to the hospital and saw Mrs Feinmesser, who was conscious and in an open ward hooked up to a heart monitor. Mrs Feinmesser "called her lawyer, Mr Akai, in my presence. Mr Akai was told to make out a Bill of Sale to me for the house in Brickdam which she wanted me to have." Mrs Narine identified the Agreement as the document she called the Bill of Sale. On cross-examination Mrs Narine retreated from the position that she was present when Mrs Feinmesser first called Mr Akai to prepare the document, falling back to being present only on December 16, 1992 when Mrs Feinmesser "called Mr Akai for me to sign the document."
- [27] In Mrs Narine's evidence in chief she stated that on signing the Agreement on December 16, 1992 she paid over CAN\$1,500 as the conversion equivalent of the G\$100,000 mentioned in the Agreement. Under cross examination Mrs Narine agreed that while she and Mrs Feinmesser had not discussed any sale before Mrs Feinmesser's hospitalization, they had in the hospital chatted about it informally (without Mrs Narine then going into any detail on this) and as a result "I knew I'd have to give her CAN\$1,500. She worked it out because she was a book keeper."
- [28] On further cross examination Mrs Narine admitted she did not tell the Campbells anything about the Agreement, before being questioned about the fact that before Mrs Feinmesser was hospitalized Mrs Narine was fully aware that the will made when she and Mrs Feinmesser visited "the Jewish lawyer" left all of Mrs Feinmesser's property to her.
- [29] The transcript reads as follows.

“Q: The Will you spoke of that you knew about- that will was made before the signing of the agreement?

A: Yes.

Q: And according to you she left everything in that will to you?

A: Yes.

Q: Up to that stage, up to signing of the agreement you were not aware of any other Will signed by Mrs Feinmesser?

A: No.

Q: Can you explain why you would want to buy a property that she had given to you already?

A: Because she had changed her Will.

Q: But as far as you were concerned you knew of no other Will?

A: No answer.

Q: Didn't you just tell us that you knew of only one Will?

A: I may have said so.

Q: If up to that stage you were not aware of any other Will, what prompted you to buy something that was given to you?

A: Knowledge (sic).

Q: At the time when the agreement was signed were you aware of the value of the property?

A: No.

Q: You didn't know whether the value was more or less?

A: No.”

[30] These answers naturally raise suspicions as to how the Agreement came to be made, especially when, in the light of their close relationship, Mrs Narine gave no evidence as to why, when chatting with Mrs Feinmesser in hospital, she did not ask any obvious questions. Such questions being as to why, if the old will had been revoked, she was being disinherited, now having to buy property that was being given to her under Mrs Feinmesser's will; how much of a true value or undervalue was involved; was Mrs Feinmesser in desperate need of cash; did Mrs Feinmesser want to keep the CAN\$1,500 in the hospital or want Mr Akai or Mrs Narine to deal with it e.g. bank it for Mrs Feinmesser or use it to pay some legal or bungalow bills for Mrs Feinmesser? Mrs Narine was most unforthcoming as to what had gone on between her and Mrs Feinmesser.

[31] Furthermore, there is no evidence at all of any legal advice being provided to Mrs Feinmesser, though according to Mrs Narine it was Mrs Feinmesser's lawyer, Mr Akai, who was called by Mrs Feinmesser to prepare the Agreement

before she admitted she was not present when any such call was made, only being present when Mr Akai was called to bring the Agreement for signature. One can infer that he drew up the Agreement which he also witnessed. One notes, against Mrs Feinmesser's interests, that it required her to pay all rates and taxes up to the date of the Agreement when possession was also to be delivered up by Mrs Feinmesser, though Mrs Narine's daughter and son in law had for years been occupying the property, paying rates and taxes. The G\$100,000 also appears to be a part payment not a forfeitable deposit.

[32] As to payment of the G\$100,000, Mrs Narine in cross examination confirmed that she gave the money to Mrs Feinmesser hooked up to a monitor in an open ward but "I can't say whether it was safe or not": she never saw the money again. Mrs Narine accepted that, after leaving hospital to stay with the Campbells, Mrs Feinmesser visited her from time to time at home in Mrs Feinmesser's house. When asked if she received the June 15 1993 letter from Mrs Feinmesser's Guyanese attorney (set out at [19] and denying receipt of any consideration for the contract so that the contract was void and Mrs Marine must execute a memorandum of rescission within 14 days) the transcript is as follows.

"A: Yes, my daughter Karen read it to me. I was in Canada and she was in Brickdam.

Q: While she was alive did you ever instruct any lawyer of yours to respond to that letter.

A: [silence]

Q: There's a letter from Mr Jainarayan Singh Snr –Exhibit 'E' [December 20 1994 letter responding to June 15 1993 letter as appears at [20] above] you recall that?

A: Yes, he was the lawyer handling the matter"

[33] Later the transcript states

"Q: Between the time you became aware of Exhibit 'D' [the June 15 letter 1993] and the time Mrs Feinmesser died did you have any discussion with her about Exhibit 'D'?"

A: No.

Q: You never said to Mrs Feinmesser that you're now saying that I did not pay money to you?

A: No.

Q: Between the time you became aware of Exhibit 'D' and when she died, Mrs Feinmesser would still be visiting you?

A: Yes.

Q: And you never raised anything with her concerning Exhibit 'D'?

A: Never.”

The findings of the trial judge, Madame Justice George

[34] George J rescinded the Agreement on the ground that it was obtained by undue influence or, alternatively, was an unconscionable bargain, but we consider that it suffices to focus upon the ground of undue influence concerned only with whether or not there was a sufficiently informed independent consent to the Agreement¹⁰. If there was no such consent there is no need to consider whether the transaction was also an unconscionable bargain. George J stated,¹¹ “Having considered the evidence as a whole, it does appear to me that the defendant was a trusted companion of the deceased and I am of the view that she exerted some undue influence over her. This is a case where it can be said that the deceased was a person in distressed circumstances having regard to her health condition. In my view the plaintiff has led sufficient evidence to cause a court to be suspicious or at least cautious in assessing the circumstances surrounding the execution of the agreement. Thus it would be for the defendant to prove to the court that there was no undue influence.”

[35] George J concluded her judgment stating as follows:¹² “Generally, I found the defendant’s demeanour to be unsatisfactory and her evidence on material issues not worthy of belief; throughout she appeared to be vacillating and unsure of what she should say. Her evidence is replete with contradictions. She appeared to be very unconvincing in her testimony and I did not get the impression that she was being frank with the court. I had no reason to doubt the plaintiff as regards his evidence that was material in raising the issues that cast doubt as to whether the deceased in fact voluntarily executed the agreement. The plaintiff having cast sufficient doubt in the due execution of the agreement it was for the

¹⁰ See *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710, 713.

¹¹ At p 10 of her judgment, CCJ Record p 152.

¹² At p 12 of her judgment, CCJ Record p154

defendant to rebut the inferences that could be drawn.... I find that the defendant has not rebutted the inferences that have arisen on the evidence. In the circumstances I find for the plaintiff.” Indeed, George J concluded that no payment of CAN\$1,500 had been made by Mrs Narine to Mrs Feinmesser.

The appeal to the Court of Appeal

[36] Singh C (ag) with whom Roy JA concurred held that there was no sufficient relationship of confidence to the degree necessary to establish any undue influence and the undervalue Agreement was a transaction explicable on motives of generosity, kindness and friendship. They ordered the Agreement to be specifically performed on the basis that the CAN\$1,500 had been paid to cover the Guyanese \$100,000 required in the Agreement.

[37] Madame Justice of Appeal Cummings-Edwards accepted the findings of George J and could not fault her for calling on Mrs Narine to rebut the inference of undue influence, so that in the absence of evidence of any independent legal advice the Agreement had to be set aside as George J had rightly done.

Should the Court of Appeal have interfered with the trial judge’s findings of fact in this case?

[38] George J applied the law within the parameters set out above at [6] to [11] and made her finding of undue influence, which is a finding of fact, though it will often involve findings of primary fact and inferences drawn from such facts, inferences having to be drawn in the current case in order to establish that more likely than not there was actual undue influence.

[39] Viscount Simonds in *Benmax v Austin Motor Co Ltd*¹³ emphasised the need “to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as it is sometimes said,

¹³ [1955] AC 370, 373.

between the perception and evaluation of facts.” Byron CJ developed this in *Grenada Electricity Services Ltd v Isaac Peters*¹⁴ as follows.

“It is in the finding of specific fact or the perception of facts, that the court is called on to decide on the basis of the credibility of the witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving testimony. On the other hand, the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inference or to evaluate as the trial judge.”

[40] We also endorse the much-cited view of Lord Sumner in *SS Hontestroom (Owners) v SS Sagaporack (Owners)*¹⁵ that:

“...not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.... If his estimate of the man forms any substantial part of the reasons for his judgment the trial judge’s conclusions of fact should be let alone.”

[41] Indeed, as emphasised by the Privy Council¹⁶ “It is axiomatic that even where a case on paper would support a decision either way, the trial judge’s decision ought not to be disturbed unless it can be demonstrated that it is¹⁷ ‘affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.’”

[42] Finally, we endorse the following observations of the majority of the Canadian Supreme Court in *Housen v Nokolaisen*.¹⁸

¹⁴ Grenada Civil Appeal No 10 of 2002 at [7], endorsed by Burgess JA in *Ward v Walsh* Barbados Civ App No 20 of 2005 at [58.]

¹⁵ [1927] AC 37, 47, endorsed by the Privy Council in *Harracksingh v Att-Gen of Trinidad & Tobago*[2004] UKPC 3, (2004) 64 WIR 362, [10] and *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [14].

¹⁶ *Harracksingh* (n 15) at [11].

¹⁷ Per Lord Macmillan in *Watt or Thomas v Thomas* [1947] AC 484, 491.

¹⁸ [2002] SCR 235 at [14].

“The trial judge has sat through the entire case and his ultimate judgment reflects the total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days , weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged.”

[43] On the basis of the above principles we do not find that an appellate court can interfere with the findings of George J that the relationship between Mrs Narine and Mrs Feinmesser was of a sufficiently influential character that, when coupled with the suspicious circumstances surrounding the Agreement made at the hospital for the sale of a G\$5.2 million house for G\$2.1 million, an evidential burden shifted to Mrs Narine, which she was unable to discharge by showing that the value transferred to her was the result of Mrs Feinmesser’s “full, free and informed thought about it.”

[44] Clearly, there was a close relationship, Mrs Feinmesser missing Mrs Narine’s company so much that she was able to persuade her to move to Canada to live in Mrs Feinmesser’s home, and Mrs Narine was prepared to give up a good job in Guyana to do so. Mrs Feinmesser and Mrs Narine went together to see the Jewish lawyer who drew up Mrs Feinmesser’s will leaving everything to Mrs Narine. The two of them shared a bank deposit box. Mrs Narine “cooked for her [Mrs Feinmesser] and so on”, no doubt covering some care.

[45] Moreover, the sudden need while seriously ill in hospital for Mrs Feinmesser to execute the Agreement at a huge undervalue seems odd when Mrs Narine said she knew there was a will leaving everything to her. Surely, Mrs Narine would be inquisitive as to why she was being asked to pay for property she was expecting to be given to her under the will. Had she been led to believe that Mrs Feinmesser was going to change her will so that she needed to take swift action to preserve her family’s interest in Brickdam? Indeed, was thought given to the fact that if Mrs Feinmesser suddenly died, Mrs Narine as inheritor under Mrs Feinmesser’s will would be selling to herself? Moreover, surely she ought to have known whether the house she was buying was worth more or less than the

G\$2.1 million. She had, after all, just come from spending time in the house with her daughter's family: would she and her daughter not have a rough idea of the value of the house or be able to get a quick valuation of it?

[46] Indeed, if Mrs Feinmesser actually intended to make a gift of a large part of the Brickdam house's value corresponding to G\$3.1 million of its G\$5.2 million, surely this would have come out in the chats that Mrs Narine said she had with Mrs Feinmesser in hospital, but nothing emerged in Mrs Narine's evidence. One can explain on grounds of friendship why Mrs Feinmesser allowed Mrs Narine and then Mrs Narine's daughter and son-in-law to live rent-free in the Brickdam house but in the above circumstances it is difficult to explain the sale at a gross undervalue. Mrs Narine was most unforthcoming and, of course, it is only her evidence that there was a will in her favour and that Mr Akai was Mrs Feinmesser's lawyer and not representing Mrs Narine's interests. Then, trying to sort out her affairs in June 1993 Mrs Feinmesser had her Guyanese lawyer write to Mrs Narine claiming that the contract she had been persuaded to sign when she thought she was terminally ill in hospital was void, and that no consideration had been paid by Mrs Narine so that Mrs Narine must execute a memorandum of rescission within 14 days. Mrs Narine said that Mrs Feinmesser visited her after she had learned of the letter's contents but she did not raise the issue with Mrs Feinmesser. Too many question marks arise as to Mrs Narine's behaviour, particularly taking account of the transcripts set out at [29], [32] and [33] above.

[47] As respects the alleged payment of the CAN\$1,500 that George J found not to have been paid, the majority of the Court of Appeal made much of the formal acknowledged receipt of the CAN\$1,500 in the Agreement that was witnessed by the lawyer, Mr Akai, and his secretary and so amounted to strong evidence of payment. The majority then held that there was insufficient other evidence to counter such written receipt. We disagree.

[48] We accept that a presumption of payment arises from the formal acknowledgment in the Agreement, but in the other suspicious circumstances of

this case there has to be a doubt whether Mrs Feinmesser fully realised she was giving a written receipt while signing an agreement for sale at a time when Mrs Narine seemed more concerned for her own interests than the wellbeing of Mrs Feinmesser. George J persuaded herself that no sum of CAN\$1,500 was paid over at the signing of the Agreement because Mrs Narine could not have known how much money was required to be paid over by her as the equivalent of G\$100,000 till the time of such signing, only then having discovered this from Mr Akai. However, the evidence in the transcript is a little uncertain and unreliable so that it may well be that Mrs Narine had previously learned of the position from discussion with Mrs Feinmesser. George J was, no doubt, influenced in her view of the chronology by her finding that Mrs Narine's evidence that she paid the money over to Mrs Feinmesser hooked up to a heart monitor "defied belief", though as indicated at [31] above such a payment may be explained on various grounds, but no evidence of such was given by Mrs Narine.

[49] Support for George J's finding that there was no payment made by Mrs Narine can, however, be justified against the background of the suspicious circumstances by looking at her answers in cross examination set out at [32] – [33]. In [32] one might expect to have heard some surprise at receiving such a letter denying receipt of any payment and some swift response, while in [33] Mrs Narine accepts that Mrs Feinmesser visited her after she had received the letter from Mrs Feinmesser's attorney yet she never raised this issue with Mrs Feinmesser.

Conclusion as to undue influence and the payment of CAN\$1,500

[50] The Court has sympathy for Mrs Narine, who did so much for Mrs Feinmesser as a trusted companion, but the Court finds that the Court of Appeal had no basis to interfere with George J's adverse view of Mrs Narine, taking account of the relationship of trust and confidence between Mrs Feinmesser and Mrs Narine. The Agreement to sell a house worth G\$5.2 million to Mrs Narine for a mere G\$2.1 million, made with a seriously ill person in hospital and kept secret from

her close relatives, requires better support than the evidence provided by Mrs Narine in her own interest. Her evidence did not remove the inference of undue influence arising from the insufficiently explained circumstances, so that the Agreement could not be accounted for on ordinary motives of friendship and generosity as the result of full, free and informed thought about it. Thus this Court rescinds the Agreement on the ground of Mrs Narine's undue influence.

Incidental Matters Concerning the Pleadings.

[51] Mr Poonai on behalf of Mrs Narine rightly complained about the weakly pleaded statement of claim of February 8, 1997. The claim was as follows.

1. The Plaintiff is the Executor named in the resealed Grant of Probate #4593/93 in the Estate of Hermelita Feinmesser, formerly of Toronto, Canada and the Defendant is and was at all material times the occupier of the premises situate at Lot 73/83 Brickdam, Georgetown, and a close associate and confidante of the aforesaid Hermelita Feinmesser.
2. On or about the 16th December, 1992, at Scarborough, Ontario, Canada, the aforesaid Hermelita Feinmesser hereinafter called the owner was induced by the Defendant to execute a contract of sale of her property situate at Lot 73/83 Brickdam, more particularly delineated on N1/2 of W1/2 of Lot numbered 73 also known as 83 situate in the Stabroek District, in the city of Georgetown, in her favour.
3. At the time of the execution of the aforesaid contract the owner was a patient in the Intensive Care Unit of a Toronto hospital terminally ill and no consideration was given therefor notwithstanding the acknowledgment contained therein.
4. In or about the 15th June, 1993, after consultation with her Attorney-at-Law in Guyana, the owner thereof caused to be sent the hereinafter set out letter [being that set out at [19] above] but she died on the 2nd August, 1993.

5. Notwithstanding the demands of the owner, the Defendant continued to unlawfully occupy the aforesaid premises free of rent or other emoluments.
6. Since the resealing of the Grant of Probate the Defendant was requested to vacate the aforesaid premises by the Executor of the aforesaid Estate, the Plaintiff herein, but she has failed and/or refused to do so , and is thereby a trespasser therein.
7. In the premises the Plaintiff claims against the Defendant:-
 - (a) A Declaration that the agreement of sale executed on the 16th day of December, 1992 at Scarborough, Ontario, Canada, between the deceased and the Defendant is null, void and of no effect.
 - (b) Alternatively, Rescission of the Contract dated 16th day of December, 1992 at Scarborough, Ontario, Canada, between the deceased and the Defendant.
 - (c) Mesne Profits at the rate of \$10,000 (ten thousand dollars) *per mensem* from the 1st January, 1993 until vacation of the premises situate at Lot 73/83, Brickdam, Georgetown.
 - (d) An order for Possession of the property situate at 73/83 Brickdam. Georgetown.
 - (e) Any other order as may be just.
 - (f) Costs.

[52] Singh C (ag) in giving the majority judgment of the Court of Appeal strongly criticised these pleadings as deficient pleadings which should have been much clearer, taking account of the requirements of RSC Order 17 r 6. The pleadings did not allege “undue influence” nor “unconscionable bargain” and no particulars were provided to detail matters supporting such claims, so as to give the defendant full knowledge of what she faced. Mrs Narine’s attorney, however, did not apply to strike out the claim or seek further particulars, nor was

complaint made to the trial judge. Mrs Narine's attorney thus thought that the statement of claim sufficiently informed him of the case that he had to answer.

[53] Cummings-Edwards JA in her dissenting judgment considered that sufficient detail was provided in the first three paragraphs so that the Defendant came to court prepared to deal with issues of undue influence and unconscionable bargain. On this basis, citing *Linton v Haynes*¹⁹ and *Bephia v Thani*,²⁰ she was of the view that there was no need to require the parties to amend and traverse the issue of undue influence and unconscionable bargain, while noting that under RSC Order 23 r 4 "nothing in these rules shall be construed to prevent the court from giving effect to any point of law appearing on the record or at the hearing of any action or matter although not raised by either party in his pleadings or otherwise."

[54] We agree with her view, but hasten to add that clear pleadings are of cardinal importance for both parties to be in a fully informed position so that all relevant issues are thoroughly investigated at trial. Parties should strive to be as detailed as possible in the material aspects of their pleadings and if requests for further and better particulars are justified this should be reflected in costs orders.

Disposition

[55] As stated at [3] above, Mr Campbell seeks restoration of the order of George J appearing at [2] above, so that no issue of mesne profits arises in respect of others' occupation of Brickdam.

[56] The appeal is allowed and the order of the Court of Appeal is set aside. It is ordered that:

1. The Agreement dated December 16, 1992 made between Mrs Feinmesser and the Respondent, Mrs Narine, is hereby rescinded.

¹⁹ (1974) 21 WIR 255.

²⁰ (1972) 18 WIR 248.

2. The Respondent's Counter-claim for specific performance of the Agreement of December 16, 1992 is dismissed.
3. The Respondent is to give up possession of the property situate at 73/83 Brickdam, Georgetown, to the Appellant within six months of the date hereof.
4. The Respondent is to pay the Appellant, Mr Campbell, his costs here and below.
 - (i) In relation to the appeal before this Court, those costs have been agreed by counsel at G\$2,700,000.
 - (ii) In relation to the High Court proceedings, these costs are the G\$50,000 originally awarded to the plaintiff, Mr Campbell.
 - (iii) In relation to the Court of Appeal, the figure for Mr Campbell's costs shall be the amount of G\$150,000 corresponding to the costs awarded by the Court of Appeal to Mrs Narine.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W. Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee