

ST. LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 689 OF 1995

MARIE MADELEINE EGGER

Claimant

V

HERBERT EGGER

Defendant

Appearances:

Mr. Peter Foster for Claimant

Mr. Anthony C. McNamara for Defendant

2000: October 17th, 18th & 19th
2002: April 29th, May 2nd, 3rd, 6th,
31st, June 18th

JUDGMENT

- [1] **d’Auvergne, J.:** The parties were married on the 9th of June 1982 in Eschenbach, State of St. Gall (Swiss Confederation). The Claimant had just three days earlier celebrated her 55th birthday having been born on the 6th June 1927 and the Defendant was then 57 years old for he was born on the 7th of August, 1924. This was the fourth marriage of each party for they had both previously gone through three ceremonies of marriage with different people.
- {2} Unfortunately, on the 11th of July 1991 this marriage (supra) was also dissolved and on the 27th day of September 1995 the Claimant filed a writ seeking the following:

- (1) A declaration that the Plaintiff was induced to sign the Power of Attorney, appointing the Defendant as her Attorney and the Deeds of Sale admitting that the Defendant acquired the five properties described in paragraph 8(i) – (iv) and together registered at the Land Registry as Parcel No. 1457B 178 and in paragraph 8(v) registered at the Land Registry as Parcel No. 1457B 30, by the undue influence of the and Defendant a declaration that the said immovable properties which were conveyed to the Defendant solely are the properties of the Plaintiff solely or alternatively, that the said immovable properties are the joint properties of the Plaintiff and Defendant.
- (2) Alternatively, a Declaration that the Defendant holds and has held the aforesaid immoveable properties registered in the Land Registry as Parcel Nos. 1457B 178 and 30, together with the building erected thereon as trustee for and on behalf of the Plaintiff.
- (3) An Order that the Defendant do execute all such documents and do all such acts and things as may be necessary to transfer to the Plaintiff solely the said immovable properties or a half interest therein.
- (4) An injunction to restrain the Defendant whether by himself his servant or agents or howsoever otherwise from transferring, selling, leasing, donating, hypothecating, assigning, or in any way dealing with the said immovable properties registered as Block No. 1457B Parcel Nos. 178 and 30.
- (5) An account of all dealings by the Defendant of the monies derived from the sale of her property aforesaid in Switzerland, and from the bank account aforesaid, and of all monies received by him, and of all monies paid by him as to their source, for the purchase of the said immovable properties in St. Lucia.
- (6) Further or other relief.
- (7) Cost hereof.

[3] The Claimant, a Swiss citizen, lives out of the jurisdiction but the Defendant, an Austrian by birth, is presently a resident of St. Lucia. They are both elderly and are sick people. The Claimant suffers with her nerves and legs and has been provided with two curators since their divorce while the Defendant is a chronic diabetic. The Defendant has been out of the jurisdiction due to illness, hence the reason for the many adjournments and the delay in beginning and concluding this matter.

[4] At the trial, Pierre Roosevelt, a former Curator of the Claimant, Daniel Kloiber, a District Attorney who worked as an assistant at the District Attorney's Office in Zurich, Switzerland, and the Claimant herself gave evidence on her behalf while an attorney from St. Lucia, Tyrone Chong and the Defendant gave evidence for the defence.

The Evidence

Undisputed Facts:

[5] The evidence discloses that the Claimant is a wealthy woman with three grown up children, offsprings of her former marriages. Roy Cortell is the eldest son from her first marriage and a daughter, Mrs. Seiben and second son Alex from another marriage. The Defendant stated and the Claimant confirmed that at the time they met, twenty years ago, she was a well educated, outgoing lady who spoke four languages, experienced in the world with business working experience; that the parties lived in style at expensive hotels and travelled a lot.

[6] At the time of the marriage the Claimant owned a large house in Switzerland which was put up for sale with an estate agent firm comprising of a husband and wife, a Mr. & Mrs. Alfred Schwitter. The house had been placed on the market before the marriage, remained unsold and after the marriage was again placed for sale with the above noted firm of estate agents. The house though valued at 2 million Swiss Francs was eventually sold for 1.75 million Swiss Francs and after the various deductions the parties were given and accepted 725,000 Swiss Francs as the proceeds of sale.

- [7] The evidence further discloses that the marriage started out on the usual basis of love and companionship. That the Claimant was having serious problems with her children, they were costing her a great deal of money on account of their life styles and she wanted to be independent of them; that the Claimant was also an alcoholic.
- [8] The Defendant told the Court that he was and is well off financially, for he inherited much, from his third wife. This bit of evidence was not denied by the Claimant.
- [9] The evidence also discloses that, after this action was filed the Defendant was arrested at the Austrian border upon a complaint brought without the knowledge and authorization of the Claimant by Pierre Roosevelt, Roy Cortell and Mrs. Seiben. That after the Defendant was kept in custody, deprived of his medication for two days he was released by Daniel Kloiber after signing an agreement.
- [10] The gist of the agreement is that, this present case would be discontinued and all criminal charges brought against the Defendant would be dropped upon delivery of the keys of the house in St. Lucia followed by a transfer of the title deed to the Claimant; that the Defendant would receive as payment for the house and furniture there at, only the sum of 200,000 Swiss Francs.
- [11] Daniel Kloiber told the Court that he personally investigated the matter after the arrest of the Defendant, that the Claimant could not remember any incident which had occurred between the Defendant and her nor could Mrs. Seiben remember the content of the telephone conversation which formed the basis of the report and that Roy Cortell's statement was "too vague and unclear to represent due legal proof of any coercion" so he dismissed the charges against the Defendant but he allowed the Claimant and Defendant to sign the above noted agreement and that this was done while the latter was still in custody.

The Claimant's Case

[12] The Claimant's case is that a mere fortnight after their marriage, viz the 23rd June 1982 the Defendant induced her to sign a general Power of Attorney in his favour giving him complete control over all her property, movables as well as immovables and to sign cheques so that he could draw out monies from her account which he kept and applied towards the purchase of lands in St. Lucia; that he kept the 725,000 Swiss Francs from the proceeds of the sale of her house. (I pause to note that in the statement of claim the amount is stated as 850,000 SF).

[13] She also said that they arrived in St. Lucia on the 1st of January 1984 and whilst there, he had her to give him another Power of Attorney dated 3rd July 1984 after he had her to act as an intervenor to three deeds of sale, viz:

Deed of sale dated 24th March 1984 by Marcia Pinnock to Herbert Egger for \$300,000.00

Deed of Sale dated 28th March 1984 by David Adrian Chastanet, M.D. to Herbert Egger for \$40,000.00

Deed of Sale dated 3rd July 1984 by Jeannita Collins to Herbert Egger for \$80,000.00.

[14] The Claimant's case is also that after she left St. Lucia, during the month of July 1984, leaving the Defendant in St. Lucia he procured for himself two other properties in which he used the Power of Attorney, of 3rd July 1984 which authorized him to act as intervenor on her behalf. The properties acquired were:

(a) Deed of Sale dated 21st October 1985 by Keith Fletcher to Herbert Egger for \$65,000.00.

(b) Deed of Sale dated 18th May 1989 by Lorraine B. Williams (nee Huusbands) to Herbert Egger for \$112,206.00.

- [15] The Claimant with much emphasis told the Court, "I cannot remember signing any document in St. Lucia I never went to Castries to sign any document before a lawyer. I do not think I cannot recall. No one explained to me any documents I may have signed. No, lawyer explained to me the implications of what I had signed."
- [16] She also said, "I saw a Chinese person at the hotel. He was very nice. I did not understand what was going on."
- [17] It is noteworthy that Mr. Tyrone Chong who is of Chinese origin was the executing notary of the five deeds and the Power of Attorney dated 3rd July 1984 registered in St. Lucia.
- [18] The Claimant told the Court that she trusted and had all confidence in the Defendant and that he breached that trust and confidence by unduly influencing her to represent in the deeds of sale mentioned above that the immovable properties described therein were purchased with the Defendant's separate funds and to admit that the purchased properties belonged solely to the Defendant.
- [19] She said that when she gave the Defendant the proceeds of sale of her house and executed the first Power of Attorney in favour of the Defendant so that he could withdraw monies from her account, she was under the honest belief that the properties that were to be purchased in St. Lucia would be for their benefit and joint use and occupation.
- [20] The Claimant denied that she had been or was being influenced by anyone, in particular her son Roy Cortell and her curators past and present. She accepted that she loved the Defendant very much but denied that she still did. She portrayed the Defendant as a selfish man who only loved himself but admitted that for many years after they were parted and before they were divorced she wrote him love letters.
- [21] The Defendant's case is that he never wrongly procured or induced the Claimant to withdraw any funds or that he kept and applied such funds towards the purchase of lands in St. Lucia.

[22] He admitted drawing on an account belonging to the Claimant but said that he did so upon the Claimant's instructions and those funds were used either by the Claimant personally to support her extremely high and extravagant life style as well as dealing with her personal family problems or as a contribution towards the joint living expenses of the Claimant and himself on her instructions.

[23] He insisted that the 725,000.00 Swiss francs, the proceeds of sale of the Claimant's house was used by the Claimant for her own use and that of her family.

[24] The Defendant told the Court that the Claimant personally intervened at the making of the five deeds mentioned earlier after her position was properly explained to her by the executing Notary; that she assured the said Notary that she fully appreciated her position and what she was signing.

[25] He said that on the 10th July, 1991, at their divorce proceeding the Claimant consented to a judgment of the District of Gastein, in Austria, on their jointly filed Petition for Divorce which reads as follows:

"Both Petitioners mutually waive any support, even in the event of altered circumstances distress or altered legal situation.

Both Petitioners declare irrevocably that they already made a Court regulation for all claims under property rights so that neither of the Petitioners shall claim anything from the other."

[26] The Defendant told the Court that he was married to his third wife for ten (10) years before she died of cancer leaving her lucrative dental practice and three houses to him. Moreover he said, "I worked with the stock market and made money from it." He further said referring to the marriage between the Claimant and himself "when we got married we were well off."

- [27] The Defendant told the Court that after marriage they first lived at the Claimant's house in Eschenbach then left for Austria where they lived at a hotel apartment for a while, that while in Austria they paid 200,000 Swiss Francs monthly towards maintenance of Claimant's son Alex who was a sick man. He recalled an occasion when medical bills, to the value of 800,000 Swiss Francs, incurred on behalf of Alex had to be paid without a refund from any insurance company.
- [28] The Defendant denied ever beating or abusing the Claimant. He insisted that was not his style. He said, "It is the most terrible thing for a man if he beats a woman." He said of the Claimant, "The lady needed a certain amount of alcohol but she always knows what she is doing, together we made decisions."
- [29] The executing attorney of the five deeds and Power of Attorney dated 3rd July 1984 said that he first met the Defendant when the latter solicited his assistance in obtaining an Alien Land Holding Licence; that the Defendant came to his office with the Claimant who acted as intervenor to the three earlier deeds.
- [30] Mr. Chong said that he explained on each occasion to the Claimant that what she was signing meant that the Defendant, her husband, would become the sole owner of the property under consideration having stated that they were bought with his separate funds and she would have no part of it. He said he spoke in the simplest terms so that the Claimant could understand; that the Claimant replied, the exact words he could not recall, to the effect that she had no problem with the situation.
- [31] Mr. Chong told the Court that he did not observe anything extraordinary about the Claimant, that she appeared to be quite normal and in control of her mental faculty. Neither did she indicate to him that she was not feeling well or did not understand what was taking place.
- [32] Under rigorous cross-examination Mr. Chong maintained that there was nothing extraordinary, for a wife to act as an intervenor at the execution of a conveyance, that was a usual everyday occurrence at his law office.

- [33] In answer to the hypothetical questions put to him by Counsel on behalf of the Claimant he said that had he been aware that the cash used to purchase any of the properties was in fact belonging to a wife who was then acting as an Intervenor he would have suggested that the wife sought independent legal advice.
- [34] He said that on those occasions when the wife acted as intervenor there was nothing to indicate that the purchase money was her property and she was being forced to sign that the property in question, belonged solely to the Defendant.
- [35] Mr. Chong concluded his evidence by telling the Court that he saw nothing fishy, neither did the Claimant in any way indicate to him that anything was wrong. He recalled that the Defendant had previously told him that he the Defendant, inherited money from his former wife who was a dentist with a lucrative dental practice.

Legal Arguments

- [36] Learned Counsel for the Claimant through his skeleton arguments claimed that the Defendant pressured the Claimant into signing the documents [supra]; that the Claimant was unable to form a full and independent resolution to contract and therefore the Defendant should not be allowed to benefit from his own fraud or wrongful acts. That the Defendant acquired influence over the Claimant and abused it and also betrayed the confidence she reposed in him. **Chitty on Contracts General Principles Vol. 1 27th Edition 1994 page 417 para 7-024. Smith v. Kay (1859) 7 HLC 750, 779.**
- [37] Counsel claimed that the transaction was manifestly disadvantageous to the Claimant. That Claimant trusted the Defendant and he was in a position to exert influence over her and moreover she did not have competent and independent advice.
- [38] It was submitted on behalf of the Claimant that proceedings to avoid a transaction may be taken at any time while the influence still persists, however long after the transaction, that where a husband received property belonging to his wife, and the circumstances were not such as to establish a gift or loan to him he is accountable as a trustee for her.

- [39] It was further submitted that the Claimant was ignorant of the fact that she had a remedy hence the reason for the delay; that a careful consideration of the relevant circumstances would infer unconscionable conduct on the part of the Defendant. Boustany v. Pigott (1993) 42 WIR page 175.
- [40] In Zanet and others v. Hyman an another 1961 3 A.E.R. page 933 it was held that the party benefited must prove that the other party completed the transaction after full, free and informed thought.
- [41] Learned Counsel for the Defendant using Allcard vs Skinner 1887 36 Ch. D. 145 as his authority submitted that a person is free to do as he or she pleases with his or her property or interest especially if this is being done with full knowledge and understanding of the situation and if it is the correct and right thing to do in the particular circumstances; that proof of victimization was a pre-requisite with regard to a claim of undue influence.
- [42] Counsel pointed out that the relationship of husband and wife is not a special relationship which raises the presumption of undue influence as a matter of law. In other words there is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor, is invalid. Howes v. Bishop and wife (1907) 2 KB 304 – Court of Appeal, Barclays Bank PLC vs. O'Brien (1994) 1 A.C. at 180, Society of Lloyds v. Khan (1998) Q.B.D. (Commercial Court).
- [43] It was further submitted that where there is no special relationship then the onus is upon the person seeking to avoid the transaction, to establish that undue influence existed, for example coercion by the Defendant over the Claimant or that the Defendant exercised such a degree of general domination or control on her mind that her independence of decision was substantially undermined.
- [44] It was submitted on behalf of the Defendant that the judgment of Divorce from the Court of Austria is a final judgment and therefore the matter is *res judicata*, that the Plaintiff is estopped from bringing this action or obtaining judgment.

- [45] It was pointed out that both parties signed a consent order which was made an order of the Court and he quoted Donald Halstead vs Attorney General et al Civil Appeal No. 10 1993 – Antigua in particular pages 5 and 7.
- [46] Learned Counsel submitted that the Claimant is prevented from claiming any right to interfere with the absolute title to the properties in St. Lucia held by the Defendant for she is statute barred from bringing any claim in relation to the title of the land after the Defendant has been in possession for 10 years by virtue of a written title deed Article 2121 of Chapter 242 of Civil Code of St. Lucia.
- [47] The suit was filed on the 22nd September 1995 and as such all properties purchased before the 22nd September 1985 were beyond any claim by the Claimant; that those purchased after were within the ten (10) year period; that the Claimant had not shown any evidence of undue influence to the Court, that any contract would be statute barred after 6 years. He noted that the Claimant gave evidence that the Defendant promised to buy her a house in St. Lucia and that the Defendant vehemently denied that allegation.
- [48] Counsel concluded that any allegation by the Claimant of trespass to her goods or money for example using her money without her consent, would be a tort or delict prescribed after 3 years under Article 2122 of the said Civil Code of St. Lucia and therefore the Claim should be dismissed.

Conclusion

- [49] The doctrine of undue influence has been defined as the unconscionable use by one person of the power possessed by him over another in order to induce the other to enter into a contract.
- [50] In Barclays Bank PLC v. O'Brien (1994) 1 A.C. 180 at 189 Lord Browne-Wilkinson delivering the unanimous judgment of the Court said,

“A person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed.”

- [51] Adopting the undue influence classification of Bank of Credit and Commerce International S.A. v. Aboody [1990] in Q.B. 923 at 953, Lord Brown-Wilkinson noted the following:

“Class 1 Actual undue influence

In these cases it is necessary for the Claimant to prove affirmatively that the wrongdoer exerted undue influence on the Complainant to enter into the particular transaction which is impugned.

Class 2 Presumed undue influence

In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In Class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned. Once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example, by showing that the complainant had independent advice.”

- [52] Precedents show that certain relationships have been deemed ‘special relationships’ and as a matter of law the presumption of undue influence will be taken as having been exercised, but the relationship of husband and wife does not fall into that category. The presumption is not made from the mere fact of marriage. Barron v. Willis (1899) 2 Cha.

578, Howes vs. Bishop and wife (1907) 2 KB 304, Society of Lloyds vs. Khan (1998) QBD (Commercial Court).

- [53] It therefore follows that in this case the Claimant will have to prove the acts of undue influence. The onus is now on the Claimant to show actual coercion by the Defendant or that the Defendant exercised such a control over her that she was unable to form an independent decision. Bank of Montreal vs. Stuart (1911) AC 120.
- [54] In my judgment the next step for consideration having reviewed the relevant law with regard to undue influence, is to consider the evidence and determine whose money bought the properties which the Court is being asked to transfer to the Claimant.
- [55] It is undisputed that the Claimant is a well-educated wealthy woman who sold her house and was paid the proceeds viz 725,000 Swiss Francs. From the conflicting evidence it is impossible to ascertain whether the money was placed into the Defendant's black bag or the Claimant grabbed it. What I am certain of, is that quite a bit of money was spent on the Claimant's children and herself. Her son Alex needed medical bills paid, her son Roy needed to upkeep his extravagant life style and much money was needed to upkeep the Claimant at hotels (eating properly and drinking wine).
- [56] The Defendant told the Court that he had money of his own inherited from his third wife; was cross examined as to the various properties inherited and his dealings with the stock market but no rebutting evidence was given to dispel the fact that the Defendant was also a man of some means and was able to buy properties with his own money.
- [57] It is noteworthy, though it could be considered a self-serving statement, that the attorney Tyrone Chong said that he had been informed by the Defendant that the latter had inherited properties from his deceased former wife who was a dentist. In the last Power of Attorney granted to the Defendant by the Claimant in April 1991, the Defendant is referred to as a businessman.

- [58] The evidence clearly discloses that the Claimant was very much in love with the Defendant but in my judgment, she was quite capable of making an independent decision. The fact that she had a Power of Attorney executed in his favour in Switzerland and two years later another in St. Lucia, in my opinion, was done to facilitate the smooth running of their affairs as partners.
- [59] With such a relationship one would have expected that the properties bought would be in their joint names but this was not the case. The Defendant wanted to buy properties in his own name and he gave as his reason that he did not want the Claimant's children to inherit through him.
- [60] I now turn to consider the actions of Mr. Chong the executing attorney. In my judgment he did all that was expected of him in the circumstances. I accept that he had no indication that the Claimant was being pressured in any way; that he explained to her the consequences of acting as an intervenor and that the various properties would become properties belonging solely to the Defendant.
- [61] In Re Coomber, Coomber v. Coomber (1911) Ch 723, 730, Fletcher Moulton L.J. summarizing the general rules applicable to cases of persons who are competent to form an opinion of their own said, "I do not think that independent and competent advice means independent and competent approval." When Mr. Chong explained to the Claimant the nature and practical consequences of her signature as intervenor, she had a choice as to sign or not to sign. She gave the impression that it did not matter and signed. Consequently, I find that the Doctrine of Undue Influence is not applicable.
- [62] The next legal doctrine to be considered is that of Estoppel and Res Judicata. This is a case of a Consent order and the case of Donald Halstead vs. (1) The Attorney General (2) Cosmos Phillips (3) Wright George – Civil Appeal No. 10 of 1993 Court of Appeal of Antigua clearly states the principles to be applied.
- [63] At page 5 of Halstead's case Sir Vincent Floissac said:

“Since admittedly the Consent order is an expression of a contract with judicial force, the interpretation of the consent order must be governed by the rules and principles which regulate the interpretation of contracts.”

[64] In this case it is clear that the parties specifically agreed (a) that they had settled all property matters between them and (b) that there would be no future claim by either of them against the other. There is therefore no doubt that the purpose of the consent order of the divorce proceedings was the judicial determination of the parties’ rights.

[65] In Charrington & Co. Ltd. vs. Wooder 1914 A.C. 71 Lord Kinner said, “evidence is not admissible to put a peculiar meaning upon plain and unambiguous words.” These words were re-iterated by Sir Vincent Floissac in Halstead’s case.

[66] The parties agreed and eventually declared in a consent order that they would have no future claims with respect to each other. The Claimant must abide by that order. She cannot and will not be allowed to reopen the matter either by instituting a different kind of proceeding or relying on a different right of action in another jurisdiction. There must be an end to litigation.

[67] I agree with Counsel for the Defendant that the judgment of divorce and settlement order from the Court in Austria is a final judgment governing the rights, properties and interest of the parties and a waiver of all future claims.

[68] Article 2112 of the Civil Code of St. Lucia Chapter 242 Volume IV of the Revised laws of Saint Lucia provides:

“He who acquires a corporeal immoveable in good faith under a written title, prescribes the ownership thereof and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of the said title during ten (10) years.”

- [67] It was submitted on behalf of the Defendant that he has been in possession of the five properties noted earlier from the dates of execution of the deeds of sale. The first three in excess of ten years and the final two within ten (10) years but over 6 years, the limit on prescription on contracts.
- [68] This action was filed in 1995, some twelve years after the Claimant said the Defendant promised to purchase a house for her and therefore even if the Claimant is to be believed that contract would be statute barred.
- [69] As I see it, even a claim for trespass to her money would be prescribed after three years. **Article 2122 of the Civil Code of St. Lucia.**
- [70] Having reviewed the evidence and applied the law, I am unable to accept that the doctrine of undue influence applies as said earlier. In my judgment the Claimant loved the Defendant very much, and would do and did in fact do, more than is expected of a wife, in order to retain his love. Even after they were parted for over six years from July 1984 to when they met in April 1991 after giving a Power of Attorney to her son Roy she once more gave another Power of Attorney to the Defendant and withdrew the one given previously to her son Roy Cortell.
- [71] The Claimant did not prove that the amounts of money withdrawn from her accounts were withdrawn by the Defendant. In fact she agreed that the Defendant was not in Europe at the time some of the cash withdrawals were made and therefore other people could have drawn the money.
- [72] Finally, in my judgment the Claimant has failed to prove the case against the Defendant. The doctrine of Undue Influence does not apply for the reasons given, the contracts if there were any, are now statute barred and moreover the claims have all been settled and the principle of Res Judicata applies.
- [72] Accordingly, I should dismiss the case.

[73] My order is as follows:

The case is dismissed.

The Claimant is to pay costs in the sum of \$20,000.00 to the Defendant

Suzie d'Auvergne
High Court Judge