SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2002

BETWEEN:

MARIE MADELEINE EGGER

Appellant

and

HERBERT EGGER

Respondent

Before:

The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr Hugh Rawlins — Justice of Appeal [Ag.]

Appearances:

Mr. Peter I. Foster with Mrs. Claire Greene-Malaykhan for the Appellant
Mr. Anthony McNamara Q.C. with Mr. Bota McNamara for the Respondent

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2004: February 19;
April 26.

JUDGMENT

[1] ALLEYNE, J.A.: The Appellant Marie Egger and the Respondent Herbert Egger were married on the 9th June 1982 in Eschenbach, Switzerland. The wife was at the time 55 years old and the husband was 57. They had each been married three times before. On 11th July 1991 the marriage was dissolved, and on 27th September 1995 the wife filed a writ seeking various declarations and orders, including declarations that she was induced to sign a power of attorney in favour of the husband by undue influence exerted by the husband. She also sought a declaration that her signature to the deeds of sale respecting three properties in

St. Lucia, in which she admitted that the said properties were the separate property of the husband, was procured by the undue influence of the husband, as was her signature to a power of attorney by virtue of which he signed, purportedly on her behalf, admissions on two further deeds conveying land to her husband solely. She sought a declaration that the said properties are the properties of the wife solely or alternatively are the joint properties of the husband and the wife; and that the husband holds the said properties in trust for the wife. She sought an order that the husband execute all necessary documents to transfer title to the said properties to the wife solely, or alternatively a half-share interest therein; an injunction restraining the husband from transferring, selling or otherwise dealing with the said properties; and an account of all dealings with the said properties.

[2] The wife was a wealthy woman at the time of the marriage. She was well educated, outgoing, a woman of the world, who spoke four languages. In her own words 'I am a lady of the world. Ups and downs survived them admirably.' She had three grown up children from her previous marriages, with whom she was having serious problems. She was also an alcoholic.

[3] At the time of the marriage on 9th June 1982, Mrs. Egger owned a large house in Switzerland, which she claimed was worth 2 million Swiss Francs (SFr), and which she had put on the market before her marriage. No sale had been effected, and shortly after her marriage to Mr. Egger the property was again put on the market and sold on 17th August 1983 for 1.25 million SFr, from which Mrs. Egger realized a net amount of SFr 725,000. She claims that Mr. Egger placed this sum, in cash, in a black leather bag which he always carried, and she said 'that was goodbye to the money.'

[4] Mr. Egger had inherited two houses and a dental practice from his former wife who had died some 4 or 5 years prior to his marriage to Mrs. Egger. He appears to have come out quite well from that earlier marriage. He sold the two houses and the practice which he had inherited, and claims to have been well off financially.

[5] A mere 2 weeks after the marriage, Mrs. Egger signed a power of attorney empowering her new husband to perform legal acts of any kind on her behalf, and on 8th September 1982, Mrs. Egger signed a general power of attorney giving her new husband, whom she had met only some 3 months before the marriage, complete control over all her property, movable as well as immovable.

[6] The couple left Switzerland and went to live in hotels in Austria, the country of the husband, and in January 1984, some four and a half months after the sale of her house in Switzerland they came to St. Lucia. It was not long before he had acquired three properties in St. Lucia, in respect of which transactions he had procured her signature as intervenor, admitting that the property belonged solely to the husband, the same having been purchased with his separate funds, and thereby surrendering any interest to which she might have been entitled by law under the community of property provisions applicable to land acquired in St. Lucia during the currency of marriage. Those transactions concerned:

[a] Deed of sale dated 24th March 1984 for $300,000.00.

[b] Deed of sale dated 28th March 1984 for $40,000.00.

[c] Deed of sale dated 3rd July 1984 for $8,000.00.

[7] Also on 3rd July 1984 the husband had procured the wife to execute in his favour a power of attorney conferring upon him power, *inter alia:*

[1] To take charge of, manage, transact and administer all and singular THE CONSTITUENT'S affairs, business and property in the State of Saint Lucia in such manner as THE ATTORNEY shall think fit.

[2] To acquire by purchase or otherwise in THE CONSTITUENT'S name and on THE CONSTITUENT'S behalf any real estate or immovable property in Saint Lucia from any person or persons and for such price or prices and subject to any covenant or covenants, servitude or servitudes and such other conditions as to THE ATTORNEY shall think fit.

[9] To sell convey or otherwise dispose of to all or any person or persons all or any part of THE CONSTITUENT'S movable or immovable property for such price and upon such terms and conditions as THE ATTORNEY shall seem fit.

[16] To make, sign, execute and deliver all deeds, documents or instruments in writing requisite or necessary in the premises.

[18] Generally to do all other acts, deeds matters and things whatsoever in or about the premises for and on THE CONSTITUENT'S behalf as fully and effectually in all respects as THE CONSTITUENT could do if personally present.

[8] On the very day that the power of attorney was executed, the husband purchased another portion of land in St. Lucia for $80,000.00, and signed the deed of sale on his own behalf as purchaser, the wife signing as intervenor admitting that the property belongs solely to the husband, the same having been purchased with his separate funds.

[9] On 21st October 1985 the husband acting on his own behalf as purchaser, and under authority of the power of attorney made on 3rd July 1984 acting on behalf of the wife as intervenor, executed a deed of purchase whereby he purchased a further portion of land in St. Lucia for $65,000.00, and on behalf of his wife admitted that the property belongs solely to him, having allegedly been purchased with his separate funds.

[10] In the same manner, on 18th May 1989 the husband purchased a further portion of land for $112,206.00, and again, as attorney for the wife, intervened in the deed and admitted his sole ownership of the land then purchased.

[11] Between his arrival in St. Lucia in January 1984, 18 months after their marriage, and May 1989, some 2 years before their divorce, the husband had acquired 5 separate properties in St. Lucia, totalling some 3.95 acres at Cap Estate, for which

he had paid a total of $525,206.00, and from any interest in which the wife, who *prima facie* was entitled to a half share interest by virtue of the community of property law of St. Lucia[1], had been excluded either by her own direct act or by the act of the husband under authority of the power of attorney which she had executed in his favour.

[12] The wife asserts that she trusted and had all confidence in her husband, and that he breached that trust and confidence by unduly influencing her to represent in the deeds of sale to which she appended her signature that the immovable properties described therein were purchased with his separate funds and were his sole property, and in respect of the deeds which he signed on her behalf under authority of the power of attorney, that this was done without her consent and in breach of his duty as her attorney.

[13] It is the case of Mrs. Egger that the funds used to purchase the said properties were hers in whole or in part, being the SFr 725,000 from the sale of her house in Switzerland which he had put into his black leather bag, and various other sums which she claimed he withdrew from her bank account over time under the powers of attorney which she had executed in his favour. She points to the fact that despite her solicitor's written request for further and better particulars contained in a letter to his solicitors dated April 22nd, 1996, Mr. Egger had failed to give particulars of the alleged authorisation to withdraw funds from her account, the use to which the said funds were applied, and of his separate funds, how such funds were acquired and from what source. Even up to and including the trial, no such particulars were forthcoming.

[14] Mr. Egger in his evidence said that he used his own money to buy the property in St. Lucia, and that he put it in his sole name because he did not want her children to inherit any part of his property. He claimed that his wife agreed. He said he was given the power of attorney 'to buy the land and the land was to be bought in

[1] Civil Code of St. Lucia, Chap. 4.01, article 1191, 1192(3), 1193

my name and she had agree(d) to that. Power of attorney was used to sign on deeds that she had no interest before.' Despite being pressed in cross-examination, Mr. Egger failed to produce any documents, tax returns, bank statements, evidence of the value of his inheritance from his third wife, his alleged stock market trading, or any other evidence to verify that he had the resources to finance the purchases of these properties. He provided no documentary or independent evidence as to how or when the money came into St. Lucia, or from what source or sources. Mr. Egger signed the receipt for the sum of SFr 725,000, and Mrs. Egger asserted that he put the cash into his expensive leather bag. The learned trial Judge declared that from the conflicting evidence on this issue, it was impossible to ascertain whether the money was placed into Mr. Egger's black bag or whether Mrs. Egger (to whom, incidentally, the money belonged) 'grabbed' it.

[15] Mr. Egger explains his failure to produce any documents to show that he had the financial ability to purchase the properties in St. Lucia 'because it was not necessary.' He admitted drawing funds from an account belonging to Mrs. Egger, but said that he did so on her instructions and that the funds were used either by Mrs. Egger herself to support her extremely high and extravagant lifestyle, and to deal with her personal family problems, or as a contribution to their joint living expenses, on her instructions.

[16] Mr. Egger asserts that the implications of her signing the deeds were properly explained to her by the attorney who had conduct of the various transactions, and that she assured the attorney that she fully appreciated her position and what she was signing.

[17] The divorce proceedings in Austria ended on July 11th 1991 with a consent order by which both parties waived any support and declared:

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

[18] On 11th March 1996, Mrs. Egger signed a document in which she declared that she wished to irrevocably withdraw and discontinue the suit out of which this appeal arises. However, on 7th March 1997, Mr. Egger signed a settlement agreement 'in order that the civil proceedings being conducted on St. Lucia may be brought to a conclusion.' This settlement agreement involved the transfer by Mr. Egger of the real estate with house on it in St. Lucia to Mrs. Egger, in exchange for the payment of SFr 200,000. The settlement agreement has not been implemented, and the case went to trial and judgment.

[19] The grounds of appeal can be summarised as follows:

[1] The learned Judge erred in law in failing to find that the impugned transactions were procured by the Respondent's exertion of actual undue influence over the Appellant.

[2] The learned Judge erred in law in failing to find that by virtue of the trust and confidence generally reposed by the Appellant in the Respondent in relation to the management of the Appellant's financial affairs and by virtue of the nature and circumstances of the said transactions, there was a legal presumption that the said transactions were procured by the exertion of undue influence.

[3] The Respondent failed to explain and prove the source of funds for the purchase of the disputed properties, or that the said properties were bought wholly from his own resources.

[4] The Respondent failed to ensure that the Appellant was appropriately, fully and independently advised in relation to her interest in the said transactions.

[5] The trial Judge erred in failing to find that the Respondent continued to exert undue influence over the Appellant for several years after the execution of the impugned deeds, by reason of which time would not run against the Appellant in relation to laches, acquiescence, waiver or affirmation until the cessation of said influence.

[6] The Judge erred in applying the doctrines of positive and negative prescription in light of Articles 2094 and 2112 of the Civil Code of St. Lucia.

[7] The Judge erred in finding that the action was barred by prescription on the basis of contract and trespass, or of delict or quasi delict, since the action was for equitable relief based on undue influence.

[8] The trial Judge erred in finding that the action was barred by the principle of *res judicata,* and in ignoring the Swiss agreement and inchoate consent order which discharged the Austrian consent order by mutual agreement.

[9] The trial Judge erred in finding that a number of vigorously disputed facts were undisputed, and otherwise in her findings of fact.

[10] The trial Judge failed to consider whether the Respondent held the property on trust for the Appellant.

[20] Learned Counsel for the Appellant identified the principal issues as:

[1] Whether on the facts of this case, the purchase by the Respondent of the five immovable properties in St. Lucia in the sole name of the Respondent

[a] was procured by the Respondent's exertion of actual undue influence over the Appellant or;

[b] was procured by virtue of the trust and confidence generally reposed by the Appellant in the Respondent in relation to the management of the Appellant's financial affairs and;

[c] whether there was a legal presumption that the impugned transactions were procured by the Respondent's exertion of undue influence over the Appellant;

[d] whether the learned Judge applied the correct test as to the burden of proof on the Appellant and or the Respondent; and

[e] whether the trial Judge applied the correct legal principles touching the giving of appropriate and necessary advice to rebut the presumption of undue influence, in particular the testimony given by the Respondent's legal advisor at the trial.

[2] Whether the Appellant had lost her right to rescind the impugned transactions.

[3] Whether the trial Judge has applied the correct principles regarding prescription to the impugned transactions.

[4] Whether the Austrian divorce proceedings was *res judicata*, and or whether the trial Judge erred in law in ignoring and giving proper effect to the Swiss Inchoate consent order, which discharged the Austrian consent order by mutual agreement and whether the Respondent was estopped by the Swiss inchoate consent order from averring that the Austrian consent order was or was intended to be *res judicata.*

[5] Whether the properties in St. Lucia are the sole property of the Appellant or whether the Respondent holds the said properties on trust for the Appellant or whether the Appellant and the Respondent are joint owners of the property.

Actual undue influence

[21] Learned Counsel for the Appellant pointed out that at the time of her marriage to the Respondent, Mrs. Egger was a divorcee, unwell, an alcoholic, and desperately in need of love. Counsel argued that Mr. Egger encountered a vulnerable elderly woman, saw an opportunity and embarked on a process of 'milking' her of everything she possessed. Two weeks after their marriage he procured her signature to a power of attorney giving him authority over all her affairs, and shortly thereafter took her to her bank in Zurich and had her withdraw a large sum in cash from her account. Three months later her home was put up for sale. He appears on the sale documents as a part-owner of her property, and receives all of the net proceeds of sale. He removes her from her home in Switzerland, from her family and her familiar surroundings and takes her to live in an hotel in Austria, and later to St. Lucia, where he engages a solicitor to assist him in acquiring a number of valuable properties, the first not much more than six months after the sale of her house and his taking possession of her SFr 725,000. On the advice of his solicitor, she signs away her interest in three properties acquired by him, later

signs a further power of attorney giving him full authority over all her affairs, and leaves St. Lucia to return to Austria alone, while he remains in St. Lucia. On the strength of the power of attorney, he signs away in his own favour all her interest in two further properties which he acquires in St. Lucia. The result is that while he owns five valuable properties in St. Lucia, including at least one with a valuable dwelling house on it, she has no home and no land, either here or in Europe, and claims to be destitute and dependent on welfare. All this within 7 years of the parties meeting each other. In 1991, after having achieved his objective, he divorces her, but continues to exercise influence over her. Mrs. Egger was put under the protection of a curator, first one Helen Fielder and later, in 1995, Mr. Pierre Rosselet, by the Guardianship Board of Zurich, Switzerland. The curator's duties were to safeguard Mrs. Egger's interests, especially in her administrative and financial affairs, and to see that she received necessary social and medical care. Despite this, in March 1996, almost 5 years after they had been divorced, Mrs. Egger signed a document declaring that she wished to irrevocably withdraw and discontinue the suit out of which this appeal arises. This was done without the intervention of her curator.

[22] This document was signed in the presence of Mr. Egger's lawyer in Austria, without the knowledge or involvement of either party's lawyer in St. Lucia, or Mrs. Egger's curator, who was appointed by the Swiss authorities to protect her financial, property and other interests.

[23] Despite their separation, Mrs. Egger continued writing love letters to Mr. Egger right up until 1989, expressing her longing to be with him. When in 1990 Mrs. Egger's son Roy Cortell went to St. Lucia to investigate his mother's affairs, Mr. Egger learned of this and promptly went to Austria and obtained from Mrs. Egger a further power of attorney dated April 1991 authorising him to handle all her affairs, and also procured from her a general withdrawal of any power of attorney she may have granted to Roy Cortell. This latest power of attorney was executed a mere three months before the divorce proceedings were concluded.

[24] On these facts learned Counsel for the Appellant contends that the case for actual undue influence was made out. Counsel relied on the cases of Allcard v Skinner[2], CIBC Mortgages Plc v Pitt[3], Royal Bank of Scotland v Etridge (No.2)[4].

[25] In Allcard v Skinner, Lindley, L.J. at page 181 distinguishes between two classes of case involving undue influence. The first requires proof by the person seeking to set aside the transaction of 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.' The second class of case 'consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him.' In CIBC Mortgage Plc v Pitt Lord Browne-Wilkinson distinguished the two classes of case as 'actual' and 'presumed' undue influence respectively. At page 209, his Lordship says:

> "Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right."

This case also clearly confirms that the onus is on the person seeking to set aside the transaction to prove actual undue influence.

[26] In Royal Bank of Scotland plc v Etridge Lord Clyde said, at paragraph 93:

> "There is a considerable variety in the particular methods by which undue influence may be brought to bear on the grantor of a deed. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion. Certainly it can be recognised that in the case of certain relationships it will be relatively easier to establish that undue influence has been at work than in other cases where that sinister

[2] (1887) 36 Ch.D 145 (C.A.)
[3] [1994] 1 A.C. 200 (H.L.)
[4] (2001) 3 WLR 1021 (H.L.)

> conclusion is not necessarily to be drawn with such ease. English law has identified certain relationships where the conclusion can prima facie be drawn so easily as to establish a presumption of undue influence. But this is simply a matter of evidence and proof. *In other cases the grantor of the deed will need to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship, or the abuse of a trusting and confidential relationship resulting in for the one party a disadvantage and for the other a collateral benefit beyond what might be expected from the relationship of the parties.* At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence."

[27] Lord Hobhouse of Woodborough, at paragraph 103 of the judgment, said:

> "(Actual undue influence) is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other's will. … He who alleges actual undue influence must prove it."

[28] In his response to this ground of appeal learned Counsel for the Respondent submitted that the issue of actual undue influence is a question of fact the onus of proof of which rested on the Appellant. This submission is borne out by the cases and other authorities cited on behalf of both parties and we accept it as a correct statement of the law. The learned trial Judge found on the evidence that the Appellant had failed to prove actual undue influence, and we see no reason to interfere with that finding. That ground of appeal fails.

Presumed undue influence

[30] Learned Counsel for the Appellant submitted that there are two prerequisites to the legal presumption that a transaction was procured by a dominant party's exertion of undue influence over a complainant. Counsel submitted that these prerequisites are first, the existence of a legally accredited relationship of trust and confidence from which it will be legally presumed or inferred that the dominant party acquired influence over the complainant, and second, the fact that the nature of the transaction was not readily explicable on the basis of the said relationship or on the basis of the ordinary motivations of actions of ordinary men and women and therefore calls for an explanation that the influence was not undue or abused.

[31] In Royal Bank of Scotland plc v Etridge (No. 2)[5] Lord Nicholls of Birkenhead had this to say:

> "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."

And at paragraph 219 of the same judgment, Lord Scott of Foscote said:

> "The presumption of undue influence … is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between the parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption."

[32] In Inche Noriah v Shaik Allie Bin Omar[6] Lord Hailsham, L.C. delivering the judgment of the Court said in relation to the class of case where the relations between the donor and the donee have been such as to raise a presumption that the donee, at or shortly before the execution of the gift, had influence over the donor:

> "The court sets aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of the free exercise of the donor's will. … The court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public

[5] [2001] 3 WLR 1021, para. 14
[6] [1929] AC 127 at 133

policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

[33] In the Royal Bank of Scotland case[7] Lord Nicholls recognises that the influence one person has over another in particular circumstances provides scope for misuse without any specific acts of persuasion, typically where one person places trust in another to look after his affairs and interests, and the latter abuses his influence and betrays this trust by preferring his own interests. His Lordship affirmed the well-established need to prevent abuse of influence in these cases despite the absence of evidence of overt acts of persuasive conduct. According to his Lordship, the question is whether one party has reposed sufficient trust and confidence in the other to raise the presumption. He said the principle is not confined to cases of abuse of trust and confidence but includes, for instance, cases where a vulnerable person has been exploited. To quote the learned Law Lord, 'Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand, and ascendancy, domination or control on the other.'

[34] Counsel for the Appellant submitted that the second prerequisite to the legal presumption is satisfied if the complainant proves that the nature, including the irrationality, abnormality, exceptionality, disadvantageous quality, unfairness, unconscionability, impropriety or wrongfulness of the transaction was of a degree which was not readily explicable on the basis of the relationship between the complainant and the dominant party or on the basis of the ordinary motivations of actions of ordinary men and women and which therefore calls for an explanation that the influence was not undue or abused. Counsel cited in support of this proposition the case of Bank of Montreal v Stuart[8] , a decision of the Privy Council on appeal from the Supreme Court of Canada, and the Bank of Scotland case *supra.* In the former case the wife repudiated the notion that any influence was exerted or any pressure put upon her. She said that she acted of her own

[7] [2001] 3 WLR 1021 at paragraphs 9, 10 and 11
[8] [1911] AC 120

free will and that she would have scorned to consult anyone. The Court found that she certainly knew that she was incurring liability in order to help her husband and the company in which he was interested. Nevertheless the Court was of the view that 'Her declarations in the course of her cross-examination that she acted of her own free will and not under her husband's influence merely showed how deep-rooted and how lasting the influence of her husband was.'

[35] Notwithstanding the wife's assertion of the absence of any undue influence or pressure on her in the Bank of Montreal case, their Lordships said this, at page 137:

> "It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognised doctrine of Courts of Equity, to entitle Mrs. Stewart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also it must be added by Mr. Bruce (the solicitor for the bank)."

[36] Learned Counsel for the Respondent contended that the issue of presumed undue influence does not arise as the presumption does not apply to husband and wife. Counsel cited a number of cases in support of this view, including Royal Bank of Scotland *supra*, Howes v Bishop[9], Barclays Bank plc v O'Brien[10], and Dailey v Dailey[11]. These cases do not support learned counsel's contention. In Dailey at paragraph 19 Lord Hope of Craighead, delivering the judgment of the Court in this appeal against a judgment of the Eastern Caribbean Court of Appeal, said:

> "the relationship of husband and wife does not, *as a matter of law,* raise a presumption that undue influence has been exercised. In other words, if there is to be a presumption of undue influence, the fact that there was an opportunity for this has to be demonstrated. This may be done by showing that the wife generally reposed trust and confidence in her husband, was compliant to his wishes and simply did what he suggested without bringing a truly independent mind to bear at all on what he was asking of her."

[9] [1909] 2 KB 390
[10] [1994] 1 AC 180
[11] Privy Council Appeal No. 45 of 2002.

[37] The Bank of Montreal case is another clear illustration of the application of the presumption as between husband and wife where the prerequisites have been proved. And in Royal Bank of Scotland Lord Nicholls, at paragraph 10, affirmed that 'the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type.'

[38] The elements to be proved in order to raise the presumption have been set out in paragraph [31] of this judgment, as defined in the 2001 case of Royal Bank of Scotland v Etridge (No.2)[12]. In her judgment the learned trial Judge said, at paragraph [53]:

> "in this case the claimant will have to prove the acts of undue influence. The onus is 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."

[39] At paragraph [72] the learned trial Judge held that the Claimant/Appellant had failed to prove the case and that the doctrine of undue influence does not apply 'for the reasons given.

[40] The reasons given appear at paragraphs [70] and [71] of her Ladyship's judgment in the following terms:

> "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."
>
> 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

[12] [2001] 3 WLR 1021

defendant was not in Europe at the time some of the cash withdrawals were made and therefore other people could have drawn the money.

[41] These paragraphs summarise the learned Judge's findings of fact in paragraphs [54] to [59] of the judgment.

[42] It seems to me that in so finding, the learned trial Judge failed to address the real questions in contention in relation to the issue of presumed undue influence. Indeed her finding at paragraph [70] tends to prove rather than disprove 'that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs' as set out in the Bank of Scotland case. An analysis of the totality of the evidence, in my view, leads inexorably to the inescapable inference that from shortly after they met and at least until 1991, the Appellant placed complete trust and confidence in the Respondent in relation to the management of her financial affairs (indeed of all her affairs). The Appellant was evidently a very vulnerable person. Contrary to what the learned trial Judge held, it seems to me that, as in the case of Bank of Montreal v Stuart[13] the evidence taken as a whole gives rise to the unavoidable inference that the husband's influence over her was 'deep-rooted' and 'lasting'.

[43] The second issue which needs to be proved by a person seeking to raise the presumption of undue influence as between parties in such a relationship of trust and confidence is that the nature of the transaction was not readily explicable on the basis of the said relationship or on the basis of the ordinary motivations of actions of ordinary men and women and therefore calls for an explanation that the influence was not undue or abused.

[45] On this issue the learned trial Judge seemed to express the view, at paragraph [54] of her judgment, that the deciding factor, if not the only factor, was to determine whose money bought the properties. The learned Judge did not

[13] [1911] AC 120 at 137

explicitly make a finding on that issue, but it may reasonably be inferred from the tenor of her judgment that she concluded that it was the husband's money that was used. Does this resolve the question? In my view it does not. In the absence of her intervention in the various deeds, it is common ground that the wife would have been entitled, by the operation of Articles 1191 and 1192 of the Civil Code of St. Lucia[14], to a half-share interest in the property, declared to be property of the community.

[46] Shortly after their marriage the parties had sold the only home, indeed the only land, which the wife owned. Whether the money was "grabbed" by Mrs. Egger, to whom it rightfully belonged, or taken by Mr. Egger, as the learned Judge held, a question which the learned trial Judge declined to decide, the evidence is clear that Mrs. Egger was then, and continued thereafter until at least 1991 to be, deeply dependent on Mr. Egger for the conduct of her affairs, including her financial affairs. Within a matter of months after the sale of her only real property asset, Mr. Egger embarked on a programme of acquiring land in St. Lucia. Over a period of approximately 5 years he acquired no less than 5 valuable properties in St. Lucia, from all of which he deliberately excluded her from what would otherwise have been her legal entitlement to a half share. He had her to sign away her interest in three instances, and did so on her behalf under power of attorney in two. His explanation was that he did not want her children, with whom he had a bad relationship, to inherit through him.

[47] I do not think that the wife surrendering her interest in this manner (and incidentally depriving her children, whom she loved deeply, of potential inheritance) is readily explicable on the basis of the said relationship or on the basis of the ordinary motivations of actions of ordinary men and women. In those circumstances, the presumption of undue influence would have arisen. The Respondent did not proffer an explanation, nor did the learned trial Judge find one, that the influence was not undue or abused. I find that the Respondent abused

[14] Chap. 4.01, Laws of St. Lucia

the influence he acquired in the relationship. He preferred his own interests. He did not behave fairly to the Appellant. It seems to me that the evidence is not sufficient to rebut the inference of undue influence. The onus of negativing that inference, once the presumption was established by evidence, as I hold it was, fell on the Respondent. He has not discharged that onus; Royal Bank of Scotland v Etridge[15].

Independent legal advice

[48] To assist him in procuring the various properties in St. Lucia, and, I may add, to exclude Mrs. Egger from any interest in those properties, Mr. Egger engaged the services of Mr. Tyrone Chong, at the time a young lawyer with one year's experience at the Bar, and with no experience and little expertise in the area of the law of equity or undue influence. Mr. Chong was paid by Mr. Egger, and was introduced to Mrs. Egger by him. All contact between Mr. Chong and Mrs. Egger took place in the presence of Mr. Egger. Mr. Chong acknowledged that he worked for Mr. Egger, never for Mrs. Egger.

[49] At their first meeting, according to Mr. Chong, at which time he was engaged in preparation of a conveyance and drafting of Aliens Landholding licence, he 'explained to her that this transaction was going through, property being purchased by her husband as his sole property with his separate funds and she would have no part of it. She said something. I cannot recall exactly but it was to the effect that she had no problem with the situation. Mrs. Egger did not say anything nor say or indicate in any way that she did not understand what her position was in the matter.'

[50] Mr. Chong, in recounting the signing of that first deed, said in evidence 'Mrs. Marie Egger signed this deed personally … after I had explained as already indicated.' In relation to the second purchase, Mr. Chong said 'On that occasion I explained

[15] [2001] 3 WLR 1021 at 1030, para. 14

again to her. Property would belong to her husband solely and she had nothing to do with it. In my opinion she fully understood what I was saying she had no claim no right that it belonged to Mr. Egger solely. She raised no objection. She did not hesitate, she went ahead and signed the document. She did not indicate that she had any problems or did not understand. … Like in the first there was this intervention clause which I explained property would be sole property of her husband.'

[51] In relation to the power of attorney and the third deed Mr. Chong's evidence is that 'I told Mrs. Egger that this was an all-encompassing power of attorney and this would authorise Egger to do anything on her behalf. … She did not do or say anything which indicated that she was executing this power of attorney other than voluntarily. … Mrs. Egger executed (it) before me after I had explained to her what it is that she was signing. Judging from my recollection I must have repeated this over and over to her that this power of attorney would enable her husband to do any and everything. I told her he could buy or sell. … She had no objections she signed it in my presence. … Mrs. Egger did not say or indicate or do anything which suggested that she was in any way being pressured or influenced to sign these four documents. Absolutely not.

'I did not in this particular case tell parties they could have documents reviewed by another attorney. The reason, I explained to Mrs. Egger absolutely in my own words what she was signing and the consequences of what she was signing. I would say several times before she signed and I was convinced that she understood what I was saying because the terms I used to explain it were very simple. With regard to the three deeds that the property that was being purchased would belong solely to her husband Mr. Egger, and she would have no claim to it. … If I had the slightest doubt in my mind that she did not understand what I was saying to her or she raised any objections I would not have executed that deed or those deeds.'

[52] Mr. Chong acknowledged in cross-examination that if he had known about the sale of her land in Switzerland he 'would have some concerns'. He said if he had known that Mr. Egger had control over her bank accounts he 'would definitely have advised Mrs. Egger in the absence of Mr. Egger'.

[53] Lord Nicholls, at paragraph 20 of his judgment in Royal Bank of Scotland v Etridge[16] had this to say on the matter of independent advice:

> "Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

Also at paragraph 291 of the judgment Lord Scott highlighted the need for evidence of independent legal advice to rebut the presumption of undue influence which had arisen. The observation is certainly no less apropos in this case.

[54] The learned trial Judge did not approach the matter in this way, holding only, at paragraph [60], that Mr. Chong 'did all that was expected of him in the circumstances.' Her Ladyship accepted that Mr. Chong had no indication that Mrs. Egger was being pressured in any way. She gave no consideration to the question of independent advice in the context of all of the evidence, having regard to the principles regarding presumed undue influence and the onus having shifted to the Respondent, in the circumstances, to prove the absence of the exercise of undue influence or abuse of the relationship of trust and confidence. In Inche

[16] [2001] 3 WLR 1021,1032, para. 20

Noriah v Shaik Allie Bin Omar[17] the learned Lord Chancellor illustrated the nature of the independent advice that ought to have been given in that particular case. Similar observations seem to me to be appropriate in this case.

[55] In particular, Mr. Chong does not appear, on the evidence, to have advised Mrs. Egger fully or at all on her rights to community property under the Civil Code of St. Lucia.

[56] Equally apt to the facts of this case are the observations of Lord Macnaghten in Bank of Montreal v Stuart[18] concerning the duty of a solicitor in circumstances such as these. In that case his Lordship recognised and acknowledged that probably if not certainly the wife would have rejected the husband's solicitor's full and plain advice given in the absence of the husband, in which case his Lordship expressed the view that the solicitor then ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which the wife reposed in the husband, he ought to have retired from the business altogether. The circumstances in that case were even more extreme than in the present, and involved the solicitor himself having a personal financial interest in the affair, and benefiting personally from the wife's action, and I am far from suggesting that Mr. Chong was in a similar position. However, I am firmly of the view that his intervention did little if anything to protect Mrs. Egger from the abuse by her husband of the relationship, and does not help to rebut the presumption of undue influence. See also Allcard v Skinner[19] where Lindley L.J. said that the Court throws upon the donee the burden of proving that he has not abused his position and in particular that in such cases it is considered necessary to show that the donor had independent advice and was removed from the influence of the donee when the gift to him was made.

[17] [1929] AC 127 at 136
[18] [1911] AC 120 at 139
[19] [1887] Ch. 145 at 181

Prescription

[57] The learned trial Judge appears to have held that the action was statute barred because 12 years had passed since the Respondent had allegedly promised the Appellant that he would purchase a house for her and more than 3 years had passed since the Respondent allegedly committed acts of trespass to the Appellant's money. However the claim was not based on the alleged promise or on trespass to money. The claim was clearly a claim in equity grounded on undue influence.

[58] Snell's Equity thirtieth edition at paragraph 38-22 says:

> "Proceedings to avoid a transaction may be taken at any time while the influence still persists, however long after the transaction. But after the influence has ceased the donor must commence the proceedings within a reasonable time or he will be taken to abide by the transaction and confirm it."

[59] As I have earlier said, it appears clear to me that the Respondent's influence over the Appellant clearly persisted until at least 1991, and probably well beyond that time, indeed up to 1996 when she signed the document referred to in the next following paragraph. I have no hesitation in holding that the learned trial Judge was wrong in holding the action to be statute barred on the grounds which she applied, and I am myself of the view, on the facts of the case, that the claim ought not to be disallowed on the ground of delay.

The consent orders, estoppel and *res judicata*

[60] In divorce proceedings in the Austrian Court, in which Mr. Egger is described as the first applicant and Mrs. Egger as the second applicant, and in which Mr. Egger was represented by an attorney at law and Mrs. Egger was unrepresented, a divorce by mutual consent was granted. A Court Settlement was recorded by which both parties waived their rights for maintenance and support and 'irrevocably declare(d) that any matrimonial proprietary claims have been settled

out of Court, so that the applicants have no claim whatsoever with respect to each other.' This document is dated July 10th 1991. On 11th March 1996, at a time when a curator had been appointed by the Guardianship Board of Switzerland to take care of her affairs, Mrs. Egger, without the knowledge or intervention of her curator, signed a document in which she expressed her 'wish to irrevocably withdraw/discontinue' her civil suit in the High Court of St. Lucia against Mr. Egger.

[61] However, on 7th March 1997, Mrs. Egger, represented by her officially appointed curator, attorney at law Pierre Andre Rosselet, and Mr. Egger, represented by his attorney at law Patricia Ruegg, and in the presence of Daniel Kloiber, District Attorney, signed an agreement by which Mr. Egger 'approves the transfer of the (identified) real estate property located in St. Lucia' on certain conditions.

[62] By the agreement the parties agreed to instruct their respective legal representatives in St. Lucia to submit the settlement to the competent Court 'in order that the civil proceedings being conducted in St. Lucia may be brought to a conclusion.' Mr. Rosselet was to withdraw the criminal complaint against Mr. Egger, and also undertook on the occasion of the transfer of the real estate to Mrs. Egger to pay to Mr. Egger SFr 200,000 in cash, while Mr. Egger undertook to deliver the keys to the house on the said real estate. This document was signed by Mr. Rosselet on behalf of Mrs. Egger, by Mr. Egger personally, and by Mr. Kloiber, in the presence of a British Consular official, after the parties had concluded the agreement and had had lunch together at a restaurant. It is to be noted that Mr. Egger's lawyer, Patricia Ruegg, was present representing Mr. Egger throughout this period. Mr. Egger also signed a consent order for submission to the Court in St. Lucia, incorporating the terms of the agreement, and additionally ordering 'That the document purportedly dated the 2nd January 1996 and signed at the end of March 1996 (the document referred to at the end of paragraph [60] of this judgment) stipulating that the plaintiff (Mrs. Egger) wished to discontinue this suit is hereby declared null and void and of no effect.'

[63] Mr. Egger reneged on his agreement and argued in the Court below that the consent order in the Austrian divorce proceedings is final and binding, that he signed the agreement of 7th March 1997 and the draft consent order for submission to the Court in St. Lucia under duress, and that the Appellant Mrs. Egger is estopped by *res judicata* from relying on the said agreement. The learned trial Judge agreed with the Respondent's submissions. She held that there must be an end to litigation, that the Appellant would not be allowed to re-open the matter but must abide by the order, and that the judgment of the Court in Austria 'is a final judgment governing the rights, properties and interest of the parties and a waiver of all future claims.'

[64] Learned Counsel for the Appellant contended that a consent order can be set aside by agreement between all the parties; Halsbury's Laws of England fourth edition volume 26 paragraph 562. The learned author cites the cases of Emeris v Woodward[20] and Ainsworth v Wilding[21] in support of the principle there stated. A careful reading of the text and of the judgments in the cases makes it clear that the agreement between the parties which is referred to is an agreement not to insist on the need for a fresh action for an application to set aside the consent order, not an agreement that the consent order be set aside. In the absence of agreement that the issue be determined in the original action, the application to set aside must be tried in a separate action.

[65] On the other hand the Civil Procedure Rules 2000 (CPR) at Part 42.7(2)(b), provides that 'none of these Rules prevents the parties agreeing to vary the terms of any Court order.' It is significant, I think, that rule 42.7, as indicated by the rubric, applies specifically to 'Consent judgments and orders', (although perhaps the application of sub-rule (2)(b), given its terms, is not limited to consent judgments and orders, but I make no finding on that question). It is my view that the parties can agree to set aside or vary any order obtained by consent, which, as

[20] (1889) 43 Ch D 185
[21] [1896] 1 Ch. 673

has been said[22], 'is an expression of a contract with judicial force', and, like any agreement between parties, can be varied or set aside by the parties themselves agreeing to do so.

[66] Halsbury's Laws of England fourth edition, volume 16, paragraph 1520 declares that the efficacy of a final judgment obtained by consent or default is somewhat strictly limited. The point is illustrated in the case of New Brunswick Railway Company v British and French Trust Corporation[23] where Lord Maugham L.C., addressing the issue of estoppel and *res judicata* by a default judgment, expressed his view that not all estoppels are 'odious', but that 'the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw although they were doubtless filed) had decided as a matter of inference his only defence in the second action.' The learned Lord Chancellor cited with approval, (although, it must be said, with some reservation) the words of Willes J. in Howlett v Tarte in the following passage at page 21:

> (Quoting Willes J.) "But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action." In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense. If that be the principle, the appellants are not in the present case estopped from raising any contention they think fit …

His Lordship continued:

> I think it right to observe that it is in my view undesirable that judges should make declarations as to the true construction of documents on

[22] Sir Vincent Floissac, C.J. in Halstead v Attorney-General & Ors., Civil Appeal No. 10/1993, Antigua & Barbuda
[23] [1939] AC 1 at 19 *et seq.*

> motions for judgment in default of defence. … As far as possible the court should make such declarations only when the matter has been argued by counsel on each side, and is then the subject of adjudication by the judge."

[67] I think the principle to be gleaned from these passages is that, where there is a challenge as to the effect of a judgment, the binding authority of the judgment, in the sense of estoppel or res judicata, only arises when the Court has had the benefit of argument by counsel on both sides and has actually adjudicated the question. A consent order, like a default judgment, is not the result of adjudication by the Judge, but of agreement between the parties, or, in the case of a default judgment, of failure of the defendant to take a procedural step within a prescribed time or at all.

[68] The judgment relied on was a judgment of a foreign Court. No expert evidence was led as to the effect of such a judgment under Austrian law.

[69] Learned Counsel for the Respondent argued strenuously that estoppel and res judicata apply in the circumstances of this case. Counsel submitted that all the elements necessary for the application of those defences had been established, and, on the authority of Donald Halstead v Attorney-General & Ors.[24], that a judgment by consent which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent, default or as a result of admission. That case was primarily concerned with the interpretation of the consent order and its intended scope. It did not involve an application to set aside the consent order. Having determined the true intention of the parties as expressed in the consent order, the Court considered the attempt to relitigate the very questions in a new action an abuse of the process of the Court, 'even if arguably the Appellant may not strictly have been estopped per rem judicatam from instituting the suit.'

[24] Civil Appeal No. 10 of 1993, Antigua and Barbuda.

[70] It is my view that the Appellant was not estopped by the consent order in the Austrian divorce proceedings from pursuing her claim in the civil proceedings in the Eastern Caribbean Supreme Court in St. Lucia, where the subject property is located, and which Court has full jurisdiction over property rights in St. Lucia.

[71] I am also of the view that the parties, by mutual agreement, discharged the consent order of the Austrian Court and opened the way, if it was ever closed, for a determination of the issues by the High Court of St. Lucia. I do not accept the view of counsel for the Respondent that the circumstances surrounding the signing of the Swiss agreement and the inchoate consent order amount to a clear case of duress exerted against the Respondent, resulting in his signing the agreement and the consent order against his will. The learned trial Judge made no such finding, nor do I think that the evidence leads to such a conclusion.

[72] In all the circumstances, and for the reasons given above, I would allow the appeal, discharge the order of the learned trial Judge, enter judgment for the Appellant for:

[1] a declaration that the Appellant was induced to sign the power of attorney appointing the Respondent as her attorney, and the deeds of sale, admitting that the Respondent acquired the five properties together registered at the Land Registry as Parcel No. 1457B 178 and Parcel No. 1457B 30, by the undue influence of the Respondent.

[2] A declaration that the said immovable properties which were conveyed to the Respondent solely are the joint property of the Appellant and the Respondent.

[3] A declaration that the Respondent holds and has held the said properties together with the building erected thereon as trustee for and on behalf of himself and the Appellant.

[4] An order that the Respondent do execute all such documents and do all such acts and things as may be necessary to transfer to the Appellant her half share interest in the said properties.

[5] An injunction restraining the Respondent, whether by himself his servants or agents or howsoever otherwise from transferring, selling, leasing, donating, hypothecating, assigning or in any way dealing with the said immovable properties otherwise than as herein directed.

[6] Costs in the Court below in the sum of $72,760.00, and of the appeal in the sum of $48,506.00, based on a value of the claim taken as $525,206.00, the amount paid for the properties in dispute.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

[Sgd.]
I concur.

Hugh Rawlins
Justice of Appeal [Ag.]