THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

HCVAP 2011/0030

BETWEEN:

[1] MARGUERITE DESIR
[2] MARGUERITE DESIR
(Qua Executrix of the Will of the late Albertha Bella Butcher)

Appellants

and

SABINA JAMES ALCIDE

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]
The Hon. Mde. Gertel Thom — Justice of Appeal [Ag.]

Appearances:

Mr. Peter Foster, Diana Thomas with him, for the appellants
Mr. Dexter Theodore, Eaghan Modeste with him, for the respondent

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2012: June 27;
September 18.

Civil appeal – Saint Lucia Civil Code – Undue influence – Improbation of a deed – Bias on the part of the trial judge – One attorney as notary signing deed for vendor – Second attorney as friend and confidant of purchaser advising vendor on preparation of documents transferring vendor's property to purchaser – Vendor an ill and wealthy person dying shortly after the properties were transferred – The two attorneys subject to rigorous cross-examination at trial on how they performed their roles – Duty of an attorney-at-law who witnesses the signature of an elderly and infirm party on a deed of conveyance – Need for judge to make a finding on the issue – No evidence of bias on part of judge.

A very wealthy but ill, elderly and incapacitated lady opened a joint account with a younger lady into which she placed substantial funds. She gave instructions to a Notary to prepare her last Will in which she left most of her property to the young lady. She had the Notary prepare a general power of attorney over all her business and private affairs in favour of the younger lady. She formed through the Notary a company to which she had two shares issued to the younger lady and two shares to herself. She transferred to this company her

major asset, a Parcel of land valued at over $7 million, for the expressed consideration of $644,000.00. On this Parcel of land were commercial warehouses producing income of some $65,000.00 per month. She was, due to illness, unable to sign the deed of conveyance. The deed was signed by another Notary for her and on her behalf before the first Notary. Shortly thereafter she died. Her niece, who had an expectation to be a major beneficiary to her estate, on learning she had been essentially disinherited, though she remained a minor heir, filed a claim against the younger lady alleging either fraud or undue influence on her part. She subsequently sought improbation of the deed. Both Notaries filed witness statements and appeared as witnesses for the younger lady. At the trial, both Notaries were subject to intense cross-examination as to the way they performed their roles. The judge did not find fraud on the part of the young lady but did find undue influence on her part over the deceased. He expressed strong criticism of the two Notaries for the way in which they had conducted themselves. He found that the opening of the joint account and the conveyance of the property had been achieved by the younger lady as the result of undue influence over the deceased and that the deceased had not intended the younger lady to become the owner of her monies and her property. He ordered the younger lady to account to the niece, and he ordered the deed of transfer improbated.

Held: allowing the appeal in part and quashing the order for the improbation of the deed, while dismissing the appeal against the finding of undue influence, and dismissing the appeal as regards bias shown by the judge, and awarding one half of the costs in the court below to the appellant:

1. The learned trial judge properly applied the common law on undue influence to the facts as found by him, and the appeal against this part of his judgment is dismissed.

   Polinere and Others v Felicien (2000) 56 WIR 264; Stoneham and Tewkesbury (United Districts) v Ouellet [1979] 2 S.C.R 172; and Archambault v Archambault [1902] AC 575 considered

   Murray v Deubery and Another (1996) 52 WIR 147; and Egger v Egger St. Lucia High Court Civil Appeal No. 17 of 2002 (Delivered 26th April 2002, unreported), applied.

2. A deed in Saint Lucia may only be improbated if all parties to it are joined in the litigation. The failure to join the two notaries who participated in the signing and execution of the impugned deed rendered the action for improbation impossible.

   Civil Code, Article 1142; and the Code of Civil Procedure, Article 148 and Article 179 applied

   Immeubles Canton Ltd v Imperial Oil Ltd [1975] J.Q. no 51; Gingras v Poulin [1929] Q.J. No 3 or 48 B.R. 410 or No 1873 (S.C. 1452); Brossard v Brossard [1926] JQ No 6 or 41 BR 484; Burland v Moffatt (1885) 11 S.C.R. 76 followed.

3. The fact that a company is owned and controlled by a party to an action does not avoid the necessity of joining the company as a party to the action where one of the remedies sought is the deprivation of property or the affecting of the rights of the company. The failure to join the company which was the purchaser under the deed as a party to the action further rendered the action for improbation impossible.

   Salomon v Salomon (1897) AC 22; and Code of Civil Procedure, Article 148 applied.

4. Bias is not shown by a trial judge severely criticizing witnesses and parties when he makes harsh and severe findings against their conduct if such findings are required by the pleadings, the nature and direction of the cross-examination of witnesses, or his findings as to their conduct.

5. An attorney-at-law who witnesses the signature of an elderly and infirm party on a deed of conveyance must prepare to be questioned about the steps he took to ensure he was not being used as part of an enterprise to defraud or harm the individual or his or her family. A careful lawyer is well advised not to prepare, far less witness, a deed or transfer form for such a person in circumstances that are capable of raising the slightest suspicion without demanding a medical certificate relating to the person.

6. An attorney, far less a Notary Royal, who is called on to sign a deed of conveyance on behalf of a party who is not able to write her name due to age and infirmity must expect to be questioned in due course on oath about the circumstances in which he so acted. One would ordinarily expect the attorney, as with any qualified, and ordinarily competent and careful solicitor, to make a written note of the circumstances, the questions he asked the party to ascertain if she was aware of all the implications of the transaction, and the answers that showed him she fully and voluntarily consented to it. The attorney would carefully preserve the contemporaneous note for production in the event that he is called on to testify, perhaps many years later, as to the circumstances that existed at the time. In a suitable case, a careful attorney might even send a subsequent letter to the client confirming the instructions that had been received, the advice that had been given, and any action that had been taken. A filed copy of that letter would be carefully retained to substantiate the attorney's response to a claim of negligence or improper conduct. An attorney-at-law is a learned person, advising a client for a fee on the contents of a document whose execution he is witnessing, he is not a lay person merely witnessing a signature over the counter.

   Hawkins v Clayton (1988) 164 CLR 539 applied.

JUDGMENT

[1] MITCHELL JA [AG.]: When Albertha Bella Butcher died in Saint Lucia on 13th April 2007 she had been ill and in failing health for some years. Her husband Epiphane Butcher had died on 1st November 2005 in Venezuela, and she had no children of her own. Her favourite niece, Sabina James Alcide, had emigrated to the USA and was stuck there unable to leave because of immigration issues. She principally relied on Marguerite Desir to assist her in her business and personal affairs. When she died, she left surviving her in Saint Lucia various close relatives, including her mother, her sister, her brother, nieces, nephews, and cousins.

[2] In their earlier years, she and her late husband had been successful business persons and had acquired substantial assets in Saint Lucia. One was a property with commercial warehouses on it held by her in her name and registered as Parcel No 1257B 6. It was valued in 2005 at $7,442,726.00.

[3] In 1974, when Mrs. Alcide was only a few months old, she was taken in by her aunt, Mrs. Butcher, who raised her as her own child. In 1981 Mrs. Butcher migrated to Texas in the USA leaving Mrs. Alcide behind and did not return to Saint Lucia until 1994. In 2002 Mrs. Alcide herself emigrated to the United States to further her education with financial support from Mrs Butcher. She remained there, unable to leave the USA because of immigration complications. When she married in the year 2003, Mrs. Butcher attended her wedding in the USA. Similarly, in 2004, after the birth of her daughter, Mrs. Butcher came to visit her in the USA. They never saw each other again, but it was not disputed that they remained close and frequently spoke over the telephone.

[4] During Mrs Butcher's last illness, and at her funeral, Mrs. Alcide was represented by her husband as she was not in a position to be able to travel out of the USA. She testified that during her lifetime Mrs. Butcher repeatedly told her and others that everything which she owned would upon her death be passed on to her.

Mrs. Alcide expected, from what Mrs. Butcher told her, that she would be one of Mrs. Butcher's heirs after her death. Mrs. Alcide did not know of Mrs. Desir until on 9 November 2005 she received a telephone call from someone in Saint Lucia who identified herself as Marguerite Desir and who told her that she was handling some matters for Mrs. Butcher. That would have been just over a week after Mr. Butcher's death.

[5] Mrs. Desir testified that she knew Mrs. Butcher from the time that she was a child of 12 years when her sister worked as a nursing aid with Mrs. Butcher who was a nurse. She began working at the National Commercial Bank in 1991 and thereafter became close with Mrs. Butcher and her husband. She assisted Mr. Butcher with his banking and later became involved in Mr. Butcher's business by providing assistance to Mr. Butcher. She took him to doctor's appointments and generally assisted him as he was frequently sick in his later years.

[6] The evidence was that after Mr. Butcher's death, Mrs. Desir not only assisted Mrs. Butcher in her business affairs but became close to her. She took Mrs. Butcher to church, often visited her, took her places and met the many demands made of her by Mrs. Butcher. Mrs. Butcher also visited Mrs. Desir's home and spent weekends there. When Mrs Butcher could not attend to personal matters herself, it was her preference to have Mrs. Desir do this for her in preference to her nurse, Albertha Harris, the household help hired to carry out that function, her niece Glenda James, or even Mrs. Alcide's mother and her own sister, Monica James.

[7] It was on 22nd November 2005 that Mrs. Butcher executed before Mrs. Verneuil a General Power of Attorney in favour of Mrs. Desir. It appointed Mrs. Desir to take charge of managing, transacting and administering all and singular her affairs, business and property in Saint Lucia in such manner as she shall think fit.

[8] On the same day, Mrs. Butcher also opened a joint bank account with Mrs. Desir into which she deposited some $213,214.50 withdrawn from one of her bank accounts. There was no explanation why she did so, other than Mrs. Verneuil's

testimony that Mrs. Butcher was determined to make sure that her family would not come into possession of any of her money, but that it should all go to Mrs. Desir. The bank mandate was in the usual form:

> "To the Bank of Saint Lucia Limited. Please open an account in your Bank in the joint names of the undersigned. All monies deposited in this account from time to time, and the interest thereon are to be paid upon the signature of either of the undersigned and in the case of the death of either, upon the signature of the survivor."

According to Mrs. Desir, the bank staff explained to Mrs. Butcher at the time what the consequences of the opening of a joint account were. If she, Mrs. Desir, survived Mrs. Butcher, she would be able to deal with the money on her own. Mrs. Desir testified that Mrs. Butcher told her that was just what she wanted. None of her family was to benefit from her monies after her death.

[9] On 22nd November 2005, Mrs. Butcher also executed her last Will and Testament before Mrs. Verneuil and Mary Juliana Charles, another Notary in Mrs. Verneuil's chambers. She left specific bequests to individuals including (i) her shares in the company Bella Warehousing Ltd to Mrs. Desir and Mrs. Alcide equally; and (ii) all her shares in the company called Island Foods Ltd and a half-share in her home at Cap Estate to Mrs. Alcide.

[10] In December 2005, Mrs. Desir telephoned Mrs. Alcide in the USA and told her that Mrs. Butcher needed someone to handle her accounts and her affairs. She, Mrs. Desir, suggested Monica James, Mrs. Butcher's sister and the mother of Mrs. Alcide, but Mrs. Butcher did not agree. Mrs. Desir asked Mrs. Alcide if she would be willing to take up that responsibility, and Mrs. Alcide confirmed that she would, and asked her to send her the papers. Some time afterwards, Mrs. Desir telephoned to say that she lived too far away and that it would be better if someone in Saint Lucia could handle Mrs. Butcher's affairs. She said that Mrs. Butcher had agreed to let her take care of her affairs. In January 2006, Mrs. Desir telephoned Mrs. Alcide to advise that Mrs. Butcher had done her Will, and she promised to ask the lawyer for a copy for her. In subsequent telephone conversations, Mrs. Desir advised Mrs. Alcide that the attorney advised that a copy

of the Will could not be given until after Mrs Butcher's passing.

[11] During the course of 2006, Mrs. Alcide continued to speak to Mrs. Desir by telephone, by which time Mrs. Butcher was becoming seriously ill and was using a wheelchair. She suffered from diabetes and had a bad foot which took a long time to heal. In her last years, she became affected by Cerebral Degenerative Disease which caused her significant motor deficiency, ie, it affected her ability to walk, to use her hands, and eventually by January 2007 caused her to have slurred speech, which made it difficult for her to be understood. She was however ambulant at least up to the year 2005 when she travelled to Venezuela and back to Saint Lucia on her own when her husband died. The medical evidence was that she became affected by Cerebral Degenerative Disease which caused significant motor deficit, ie, affected her ability to walk, to use her hands, and eventually caused her to have slurred speech. There can be no doubt that she was reliant on others to take care of her physical needs. There is, however, no evidence that prior to her death she had lost any of her cognitive functioning.

[12] Mrs. Desir telephoned Mrs. Alcide to advise that she was now a signatory on Mrs. Butcher's bank account so that she could handle her affairs for her. She omitted to tell Mrs. Alcide that a joint account had been opened between herself and Mrs. Butcher and that Mrs. Butcher had transferred a large sum of money to it. In December 2006 Mrs Butcher told Mrs. Desir that she wanted to come to the Untied States to spend some time with her, but Mrs. Desir subsequently telephoned to say that she did not think it was a good idea because of the weather and because Mrs. Butcher was awaiting results for some medical tests.

[13] On 8th January 2007, some three months before she died, Mrs. Butcher had Mrs. Verneuil incorporate a company called Commercial Warehouses Ltd. She issued two shares to herself and two shares to Mrs. Desir. There was no suggestion that Mrs. Desir contributed any capital to the company or gave Mrs. Butcher any consideration for this one half equitable ownership in the company. Mrs. Butcher then transferred Parcel 1257B 6 to the company at a

consideration expressed to be $644,000.00. This property was the largest revenue earner of Mrs. Butcher's estate, yielding approximately $65,000.00 per month and with one single debtor owing over $100,000.00, amongst others. When Mrs. Butcher signed her last Will, she did not mention the new company Commercial Warehouses Ltd specifically, as it had not yet been incorporated, so that when she died it passed with the residue of her estate.

[14] Mrs. Butcher left the residue to Mrs. Alcide and Mrs. Desir equally. The result of this residuary bequest is that Mrs. Desir has become entitled to three quarters of the company Commercial Warehouses Ltd which she now controls. The remaining quarter passed to Mrs. Alcide. The gift of Island Foods Ltd was empty as the company was wound up by the time Mrs. Butcher died. Similarly, Bella Warehousing Ltd owned nothing by the time of Mrs. Butcher's death. Mrs. Butcher's major assets at the time of her death were her half interest in her home and her half interest in the company Commercial Warehouses Ltd.

[15] Mrs. Butcher's deed transferring Parcel 1257B 6 to the company was executed on her behalf by attorney Shawn Innocent, Notary Royal, in the presence of Mrs. Verneuil. Although Saint Lucia has a Registered Land Act, the legislature has chosen not to include in its provisions the simple process for transfer of title by registration of a transfer form found in other of our islands with the same Act. Real estate in Saint Lucia is instead transferred by registering a deed with an attorney-at-law, styled[1] a Notary Royal, who then, subsequently, prepares a notarial instrument incorporating the terms of the deed.[2] The Notary registers a copy of the notarial instrument in the Land Registry which then effects the transfer of the title. In this case, the resulting notarial instrument states,

> ". . . the parties thereto had set their hands after due reading thereof as follows: THE PURCHASER and the VENDOR by one of the said notaries SHAWN INNOCENT at Castries on the 26th day of January 2007 in the

[1] By section 54 of the Legal Profession Act Chapter 2.04 of the Revised Laws of Saint Lucia.
[2] Article 1147: Copies of notarial instruments, certified to be true copies of the original, by the notary or other public officer, who has the legal custody of the original, are authentic and prove the contents of the original.

> presence of the said notaries THE VENDOR having declared her inability to sign her name on account of illness her signature being hereunto required by law."

[16] The evidence was that the deed was signed by Mr. Innocent on Mrs. Butcher's behalf on 26th January at her home, but the date of execution of the notarial instrument placed in evidence was 10th April 2007, some three days before Mrs. Butcher's death. Also, the place of execution of the deed was stated to be Castries, which was not the home address of Mrs. Butcher where it had been signed by Mrs. Butcher and Mrs. Desir. Mrs. Verneuil's testimony was that the "date of execution" was not the date of the signing by the parties, but was the date she gave to the notarial instrument when she registered it in her office. She gave the place of execution as Castries because that is where her office is located and where the original deed was registered. Also appearing strange to the learned trial judge was that Mrs. Verneuil registered the notarial instrument in the Land Registry on 22nd May 2007, over one month after Mrs. Butcher's death. Mrs. Verneuil arranged with Mrs. Butcher's bank for the mortgage charge, debentures and other securities to be transferred to the new title. The amount of the mortgage was $881,000.00; a sum which Mrs. Verneuil testified had accumulated owing by Mrs. Butcher's business affairs. Mrs. Verneuil testified that it was the preparation of these securities which delayed her executing the deed and registering it in the Land Registry prior to Mrs. Butcher's death. The learned trial judge would have been aware that in the other islands of our jurisdiction a deed executed by a person who has died is incapable of lawful registration. A transfer form signed by a person who has died is similarly not normally accepted by a Land Registry for registration. There was no suggestion that the law in Saint Lucia is any different.

[17] It is apparent from the judgment that the attorneys for the parties did not explain to the learned trial judge the peculiar Saint Lucian system governing the recording of a deed. Nor was there any explanation as to the legality of the registration in the Land Registry after the death of the vendor. The judge found "*glaring discrepancies in the date and place of the purported execution of the deed of sale*"

which perceived discrepancies "*cast grave doubt in my mind on the authenticity of the document*". This caused him even more concern in light of the fact that Mrs Butcher did not herself actually sign her name to the deed.

[18] Mrs. Butcher suffered a sudden heart attack and died on 13th April 2007. Some three weeks after the death of Mrs Butcher, Mrs. Desir travelled to the United States with her husband and children and came to visit Mrs Alcide at her home in New Jersey. That was the first time that Mrs. Alcide ever saw Mrs. Desir.

[19] Within one month of Mrs. Butcher's death, Mrs. Desir transferred the funds in the joint account to different accounts that were solely in her name. Mrs. Desir testified that she did so on the basis that at the time of Mrs. Butcher's death those bank accounts were jointly held by the deceased and herself personally. Mrs. Butcher had told her that the funds were for her after her death. Also, she moved the funds to her own account only after seeking legal advice from Mrs. Butcher's Notary, Mrs. Verneuil who advised her that she was now solely entitled to the money by virtue of the right of survivorship. The learned trial judge did not believe Mrs. Desir and he did not accept the accuracy of the legal advice. He noted that all the funds in the joint account were derived from Mrs. Butcher who was then almost 60 years old, had been recently widowed, and was in failing health having suffered from strokes and heart attacks and was suffering from other debilitating medical conditions. Mrs. Desir by contrast was a highly qualified business executive aged 30 years, was Regional Human Resources Manager at Harris Paints, earning a salary of some $27,000.00 per month, and had over 12 years banking experience up to management level. One such joint account Mrs. Desir disclosed in cross-examination stood at $662,000.00. The judge concluded that the fact that Mrs. Desir needed legal advice before she had the confidence to transfer the funds out of the joint account into her personal account indicated that prior to Mrs. Butcher's death she did not believe that she was lawfully entitled to the funds.

[20] After Mrs. Butcher's death, Mrs. Alcide learned that Mrs. Desir had been receiving a salary from Mrs. Butcher which she believed was for assisting in the care of Mrs. Butcher and in the handling of her accounts. Mrs. Desir's stance was that this was a salary which varied from month to month for assisting in the management of Mrs. Butcher's business.

[21] On 6th June 2007, Mrs. Alcide filed a claim in the High Court against Mrs. Desir seeking, *inter alia*, an injunction restraining her dealing in Mrs. Butcher's accounts and an order that she render an account of her dealings with those accounts. In the style of Saint Lucia no cause of action is pleaded, only the claim for an injunction. By the statement of claim filed the same day we learn that the claim is that Mrs. Desir got her name on the accounts by actual or constructive fraud. The "nature of the case" pleaded is that Mrs. Butcher was seriously ill in the last few years of her death and Mrs. Desir, who was a total stranger, took advantage of her and manipulated her causing her to sign a power of attorney and other documents in her favour which she used to get her name onto Mrs. Butcher's bank accounts. It is pleaded alternatively that Mrs. Desir obtained the signature of Mrs. Butcher by undue influence. Mrs. Desir worked her way into Mrs. Butcher's confidence knowing of her vulnerability. She assumed complete domination over her and caused her to sign the documents. Thirdly, it is pleaded that alternatively Mrs. Butcher had not known what she was doing as a result of her medical condition.

[22] A Defence was duly filed on 28th June 2007, in which Mrs. Desir denied the allegations. Mrs. Butcher was at all times mentally competent, very headstrong, mentally independent and a determined lady, not at all vulnerable to the wishes or dictates of any other person. She was disenchanted with many of her relatives and was reluctant to assist them financially.

[23] On 22nd November 2007, having learned of the existence of the Will and the registration of the transfer of Parcel 1257B 6 to Commercial Warehouse Ltd for the sum of $644,000.00, Mrs. Alcide amended her statement of claim to add

Mrs. Desir as Executrix of the Will as a separate party, to seek an order for her to account as Executrix, and to seek additionally an order that the deed of sale dated 10th April 2007 be improbated. A consequential amended defence was duly filed. The claim for improbation was thus tacked on to the original claim and did not form a part of the original remedies sought.

[24] After a trial lasting some 7 days between 5th December 2008 and 9th February 2009, and after hearing 17 witnesses, on 22nd August 2011 Ephraim Georges J [Ag.] delivered judgment. Both Mr. Innocent and Mrs. Verneuil filed witness statements on behalf of Mrs. Desir and attended at trial to testify on her behalf. The learned trial judge found in favour of Mrs. Alcide and ordered Mrs. Desir to render an account of her dealings with the bank accounts and other property of Mrs. Butcher and of Mrs. Butcher's companies. He did not make any finding as to fraud, but he did find that Mrs. Butcher's transferring of the money into the joint account with Mrs. Desir and the transfer of the Parcel of land to the company controlled by Mrs. Desir was as a result of undue influence. He ordered that the deed of sale dated 10th April 2007 be improbated, and that Mrs. Desir render all further and consequential account to Mrs. Alcide without undue delay. He called for submissions on costs, which issue has not yet apparently been dealt with.

[25] On 30th September 2011, Mrs. Desir filed a Notice of Appeal in which she took issue with a number of findings of fact and of law by the learned trial judge, and with the orders which he made. The main issues on the appeal were whether the judge was right to find that Mrs. Desir exercised undue influence over Mrs. Butcher in relation to the opening and operation of the bank accounts and in relation to the transfer to the property to Commercial Warehouse Limited; whether the court was right to order the improbation of the deed; and whether, in particular from the comments made by the judge against the lawyers who had participated in the various challenged transactions, there was apparent bias leading to a denial of Mrs. Desir's right to a fair trial; and, finally, whether the evidence had been properly weighed and considered.

[26] The judge placed a great deal of responsibility for the saga that was the genesis of this lawsuit on Mrs. Verneuil and Mr. Innocent, Notaries Royal. Mrs. Verneuil testified that she acted throughout as Mrs. Butcher's attorney. The judge concluded that she not only took instructions from but also gave instructions to Mrs. Butcher, and on occasion that she had admitted that she had declined to carry out some of Mrs. Butcher's specific instructions. In particular, she testified that Mrs. Butcher had told her that she wished to change her Will to remove Mrs. Alcide's name from the legacy of an interest in her half share in the house, and from the residuary clause. Mrs. Verneuil testified that she hesitated to carry out the instruction and asked Mrs. Butcher to give it some time. She was subject to intense cross-examination to the effect that as a friend of Mrs. Desir she knowingly participated in the transfer of Mrs. Butcher's wealth to Mrs. Desir to the exclusion of others who would otherwise been Mrs. Butcher's heirs. Counsel for Mrs. Alcide put it to her that the real reason why she did not carry out this final instruction to remove Mrs. Alcide as an heir was that she realised that it would look suspicious. It would have given impetus to the scandal if the one remaining vestige of her bequest or legacy to her family were removed from her Will. Counsel suggested to Mrs. Verneuil that she was very alive to that possibility, but she denied it and said that it was the last thing on her mind. The judge, however, did not believe her as is evident from the language in his judgment.

[27] The learned trial judge was not impressed either with the evidence given by Mr. Shawn Innocent, Notary Royal. He was also subject to relentless cross-examination over his conduct in signing the deed on behalf of Mrs. Butcher. He testified that this had been his one and only interaction with Mrs. Butcher, which may have lasted no more than 45 minutes to an hour. Yet, he had certified that, despite her slurred speech and shaky hands, she appeared to him to be sound in mind and memory. He admitted that he had no idea what influences had prevailed over Mrs. Butcher prior to her signing of the deed. This lack of knowledge on his part rendered his evidence as to her voluntarily signing the deed perplexing to the judge. The judge was even more concerned over the method he chose to supervise the signing on behalf of Mrs. Butcher. He gave her the pen to

touch, and he then used the same pen to sign the deed on her behalf. Mrs. Desir next executed the deed on behalf of the purchaser Commercial Warehouse Ltd. Mrs. Verneuil then signed witnessing their signatures. None of the attorneys at trial appear to have made any effort to point the learned trial judge to the law and practice in Saint Lucia governing the peculiarly unique method of the execution of a deed by a person who does not have control of her hands, in particular, Article 1139 of the Civil Code.

[28] The land law of Saint Lucia is not derived from common law but is to be found in the Civil Code which is based on the Napoleonic Code Civil. The Civil Code provides at Article 1139 for the authenticity of a deed signed before a Notary Royal.[3] It provides that a notarial instrument other than a will is authentic if signed by all the parties before one notary. If one of the parties is unable to sign, then it is to be executed by one notary in the presence of either another notary or of another witness.

[29] The language of Article 1139 is obscure and ambiguous to a lawyer trained in the common law, but Mr. Foster has explained it this way. The procedure that is followed in Saint Lucia where one of the parties to a deed cannot sign is to have one Notary act for that party by executing the deed before a second Notary. The impugned deed in this case expressed that Mr. Innocent signed on behalf of Mrs. Butcher in the presence of Mrs. Verneuil. This, he urges, met all the formalities required by Article 1139. This deed was a valid notarial act passed subject to being impugned for falsity by the singular process of improbation.

[30] Not having been advised of the special law on the execution of deeds in Saint Lucia, the learned trial judge observed that the correct practice in these circumstances is, "*to have the individual concerned place his or her mark (usually*

[3] Article 1139: A notarial instrument other than a will is authentic if signed by all the parties, though executed before only one notary.
If the parties or any of them be unable to sign, it is necessary to the authenticity of the instrument that it be executed by one notary, in the actual presence of another subscribing notary, or of a subscribing witness.
…

an "x") to signify his or her understanding, approval and agreement to the contents of the document." That is no doubt the correct procedure in the common law jurisdictions of our region. He concluded that, given this testimony, on the whole, the witness impressed as being confused and ambivalent and in fact "*cut a sorry figure at the witness stand for a person of professional standing*." His judgment does not show that he was aware that there is in Saint Lucia no requirement that the person be required to make a mark on the deed in place of a signature. It would no doubt have been helpful if at the trial the attorneys had pointed this unique Article 1139 legal provision out to the learned trial judge instead of leaving it to him to attempt to understand what had transpired.

[31] The judge found the reasons advanced by Mrs. Desir under cross-examination for the sale of the property to Commercial Warehouse Ltd as what he described as "*such a gross undervalue (actually 9 percent of the market value)*" as "*absolutely preposterous and bordering on the ludicrous*". Mrs. Desir challenges this finding. She testified that the sale occurred for the purpose of paying Mrs. Butcher's debts which she said stood at $881,000.00. The judge found this mystifying, as the evidence disclosed that at the time of the signing Mrs. Butcher had substantial bank balances as well as debtors and other lucrative income-bearing assets so that she could easily have paid off the debt. Another reason offered by Mrs. Desir was that Mrs. Butcher wanted to die with peace of mind, and her business creditors were pressing her. She wanted the charge registered in her name put instead in the name of a company as the debt had been incurred by her husband in the business before he died. The judge found there was no evidence of any actual creditor bearing down on her. Mrs. Desir's final reason offered in explanation was that the price was undervalued so as to mitigate the incidence of stamp duty and land tax. What Mrs. Desir was testifying to was a transaction where a property worth over $7 million was being transferred to a company half owned and entirely controlled by Mrs. Desir by way of what was said to be a "sale" at a massive undervalue. The judge understandably found this testimony to be suggestive of "*a gross attempt to defraud the revenue*". As the judge saw it, the only person who plainly stood to benefit from "*that monstrous transaction*" was

Mrs. Desir, the majority shareholder of Commercial Warehouse Ltd, and its Managing Director and Controller. He concluded that,

> "Having regard to the obvious degree of trust and confidence reposed by Mrs. Butcher in Mrs. Desir in the management of her personal business and financial affairs as well as the paramount domination which she exerted over her as a result of her vulnerability, failing health and general medical and physical condition Mrs. Desir was clearly able to take and indeed took unfair advantage of Mrs. Butcher by use of her dominant influence over her. And I so find. This was without doubt an unconscionable transaction."

[32] Part of Mrs. Desir's defence was that Mrs. Alcide was only one of several persons raised by Mrs. Butcher and cared for as her own child. Mrs. Alcide had no reason to feel she would be specially treated. But, the judge noted that Mrs. Desir did not produce any evidence of who exactly were these several other persons allegedly raised by Mrs. Butcher. Mrs. Verneuil and other witnesses testified that Mrs. Butcher in fact detested her family and had come in the end to resent that Mrs. Alcide was not helping her in her old age. The judge did not believe them but accepted the contrary evidence of continuing affection and support from Mrs. Butcher for Mrs. Alcide.

[33] The learned trial judge considered other aspects of Mrs. Desir's testimony and concluded that it was "*characterised by half-truths and blatant untruths*." In particular, he considered her testimony that she was a Eucharist Minister at her Catholic Church and she was only doing what she did for Mrs. Butcher as a friend. Yet, she had ended up with a multimillion dollar property of Mrs. Butcher. He also considered, among other things, the evidence that Mrs. Desir had caused Mrs. Butcher to sign various documents so that several hundreds of thousands of dollars had ended up in a joint account with Mrs. Desir, which account had been closed after Mrs. Butcher's death and the funds appropriated by Mrs. Desir. The total amounts so transferred had not been disclosed, but the judge found that they would have been substantial. As a result, there was not sufficient cash available to pay the various pecuniary legacies that Mrs. Butcher had made in her own Will, or even the death duties when they will came to be assessed.

[34] The judge concluded from the evidence that the avowed purpose of Mrs. Butcher opening the joint accounts with Mrs. Desir was for Mrs. Desir to assist her with her banking business which she could no longer carry out personally. Mrs. Desir was on her own admission being paid a salary for personal care and other services rendered. He considered the law on joint accounts, particularly the judgments of Dixon and Evatt JJ in the case of Russell v Scott,[4] 451, the Irish case of Marshal v Crutwell,[5] and Re Harrison.[6] He concluded that Mrs. Butcher's opening of the joint account was not intended to be a gift to Mrs. Desir. He found as a fact that Mrs. Butcher had not intended that Mrs. Desir should have the benefit of the balances on the joint account either before or after she died.

[35] Mr. Foster on behalf of Mrs. Desir accepted that undue influence is not expressly provided for in our Civil Code.[7] However, he urged that the learned trial judge erred in looking entirely at English law to assist in providing the answers to the legal issue of the definition of undue influence and the burden of proof in relation to gifts *inter vivos* and wills. Mr. Foster submitted that Article 925,[8] Article 926,[9] and Article 927[10] of the Civil Code of Saint Lucia are applicable. These Articles provide for error, fraud, violence, fear or lesion to be causes of nullity in contracts. He urged that Article 695,[11] Article 696,[12] and Article 697[13] also apply to the issues

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[4] [1936] 55 CLR 440.
[5] [1875] LR 20 Eq.328.
[6] [1920] 90 L.J. Ch. 186.
[7] The Civil Code Cap 4.01 of the Revised Laws of Saint Lucia 2001.
[8] Article 925: Error, fraud, violence, fear, or lesion is a cause of nullity in a contract, in so far as to give right of action or exception , with a view to its rescission or modification.
[9] Article 926: Error is a cause of nullity only when it occurs in the nature of the contract itself, or respecting that which is the subject of the contract, or the principal consideration for making it.
[10] Article 927: Fraud is a cause of nullity when the artifice practised by one party or with his knowledge is such that without it the other party would not have contracted. It is never presumed and must be proved.
[11] Article 696: Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition.
[12] Article 696: Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition.
[13] Article 697: A will is an act of gift in contemplation of death, by means of which the testator, without the intervention of the person benefited, makes a free disposal of the whole or of a part of his property, to take effect only after his death, with power at all times to revoke it. Any acceptance of it purporting to be made

in this case. These Articles provide the rules for gifts made *inter vivos* and by will. Mr. Foster relied on the judgment of Lord Hoffmann in Polinere and Others v Felicien.[14] This is authority for the principle that in Saint Lucia in matters which are within the ambit of our Civil Code, the Civil Code of Quebec 1865, and the Civil Code of France, have, at the very least, considerable persuasive authority and it is unwise to attempt to interpret the Civil Code of Saint Lucia without reference to that background. Mr. Foster took us to the authorities such as Stoneham and Tewkesbury (United Districts) v Ouellet[15] and Archambault v Archambault.[16] Stoneham dealt with the question of undue influence in relation to a will and its effect on the unfettered freedom to devise. Archambault dealt with the burden of proof and the authority of the Court of Appeal to interfere with a trial judge's finding of fact where the evidence has not been adequately weighed or considered. None of these cases assists Mrs. Desir in challenging either the findings of fact made by the learned trial judge or his application of the law. I am not persuaded that in this case the evidence has not been adequately weighed or considered by the learned trial judge in making the findings of fact that he did.

[36] The learned trial judge dealt in detail with the common law cases on undue influence. These included the leading cases of Murray v Deubery and Another;[17] and Egger v Egger.[18] Egger's case was a case of undue influence in relation to purchases of land made by a husband in Saint Lucia as a result of a power of attorney given to him by his wife. The trial judge had found on a prescription point that the case of undue influence was not made out by the appellant. But a strong Court of Appeal, consisting of Alleyne JA, subsequently Sir Brian Alleyne acting Chief Justice; Rawlins JA [Ag], subsequently Sir Hugh Rawlins, Chief Justice; and Saunders JA, later acting Chief Justice of our court

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in his lifetime is of no effect. Every will is construed with reference to all property comprised in its disposition, as though it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

[14] [2000] 56 WIR 264.

[15] [1979] 2 SCR 172.

[16] [1902] AC 575.

[17] [1996] 52 WIR 147.

[18] Saint Lucia High Court Civil Appeal No. 17 of 2002 (Delivered 26th April 2002, unreported).

and after that a member of the Caribbean Court of Justice, had no difficulty in applying the common law and finding undue influence had been made out. Neither Mr. Foster for the appellant nor Mr. McNamara QC for the respondent in Egger's case suggested that the common law did not apply in Saint Lucia in that case. I am satisfied that the learned trial judge properly applied the common law on undue influence to the facts as he found them in this case.

Improbation of a deed of sale

[37] What is of more concern is not the factual basis upon which the learned trial judge came to his judgment. There are two troubling technical, related points which do not seem to have been brought to the judge's attention during the trial. The first is the need to name the Notaries as parties to the litigation if a claim is made for the improbation of a deed. The second is the consequence of the rule in Salomon v Salomon[19] which established the doctrine of corporate personality, ie, that a company is a separate person from the person who owns and controls it, to the relief of improbation sought by Mrs. Alcide at the last minute in this case. The first question then is can Mrs. Alcide ask the court to improbate the deed which conveyed property to Commercial Warehouse Ltd when she does not name the Notaries as parties to the action? The second, is can she ask the court to take away title to property from a limited company in a case which does not name the company as a party? Both questions arise from the provisions in the Civil Code and the Code of Civil Procedure of Saint Lucia when the court is considering a question of improbation.

[38] Article 1142 of the Civil Code[20] provides for impugning a deed. A deed may be impugned and set aside only upon an improbation in the manner provided in the Code of Civil Procedure. The Code of Civil Procedure deals at Article 148[21] and

[19] [1897] AC 22.

[20] 1142: An authentic writing may be impugned and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.

[21] Article 148: The nullity of a deed may be invoked by any pleading. All the parties thereto having been put in the case, judgment may be given without its being necessary to bring a direct action.

Article 170[22] with the procedure to be followed on improbation. In particular, all the parties to the deed must be made parties to the litigation.

[39] There can be no doubt that this claim affected the rights and interests of Commercial Warehouse Limited as a separate legal entity and which was a party to the deed by which it acquired title to the property. The fact that Mrs. Desir is the majority or even the only shareholder in the company does not avoid the application of Article 148. The control of the company is not the issue. Control of a company is not a good reason for not naming the company as a party to a suit to which it should properly be made a party. The law of Saint Lucia is, as elsewhere, that the fact that a company is owned and controlled by a party to an action does not avoid the necessity of joining the company as a party to the action where one of the remedies sought is the deprivation of property or the affecting of the rights of the company. The trial judge in this case had no power under the laws of Saint Lucia to pronounce for or against the validity of the deed in question without Commercial Warehouse Ltd being joined as a party. It would have been helpful if this had been argued at first instance instead of it being raised for the first time on appeal.

[40] Then, there is the question of the dating of the deed. A notarial deed in Saint Lucia is not the same as a deed of conveyance at common law. It is registered in the attorney's office, which is an official receptacle for deeds, not in a Registry of Deeds as in other jurisdictions of our region. A notarial instrument subsequently prepared is a report by a Notary Royal of what he did and of what occurred in his presence. The truth of this report cannot be denied otherwise than by the special, difficult and expensive procedure called improbation. The date given to a notarial deed is not the date when it is signed by the parties: Abraham Hamel & Ors v The Honourable Louis Panet.[23] The Notary gives the deed a date of execution when she completes it by signing it and registering it in her office, even if the

[22] Article 170: No action shall be dismissed by reason of the mis-joinder or non-joinder of parties. The Court may in every action deal with the matter in controversy, so far as regards the rights and interests of the parties actually and properly before it.

[23] [1876] 2 App Cas 121.

signing by the parties was on an earlier date. It would have been helpful to the learned trial judge if one of the attorneys had explained to him at the trial this peculiar Saint Lucia provision instead of leaving it to him to apply the laws and procedures that are more normally found throughout this region.

[41] Then, there is the question whether the Notaries were required to be made parties to the action. Neither the Civil Code nor the Code of Civil Procedure of Saint Lucia contains a provision that a Notary must be made a party to an action to improbate a deed. However, there are authorities which appear to establish that such is the necessary procedure to be followed. So, in the Immeubles Canton case,[24] in the Quebec Court of Appeal, the court cited with approval the textbook Nadeau and Ducharme, *Traite de droit civil du Quebec, tome 9, no 330*, where they wrote:

> ". . . the notaries have a great interest, professionally and in their capacity as public officials, not to have parties who have come to an agreement state that their instruments are false, without themselves being heard to support, if necessary, the authenticity of the instrument they have notarised."

[42] And, in Gingras v Poulin,[25] in the Quebec Court of Appeal, Howard JCA said at paragraph 31:

> "31. Another point was submitted by the appellant which I think is also well founded, and that is, that the action in improbation should have been directed against all the persons who had an interest in having the validity of the deed of acquittance upheld, chief among whom obviously is the original debtor of the obligation or his legal representatives. The record discloses that the original debtor, Augustin Gingras, was the father of the appellant and that he has departed this life. But, that is not sufficient to create a presumption that the appellant is his sole legal representative. As a matter of fact that has not been alleged by the respondent nor has the appellant been impleaded except as the tiers detenteur of the property in question."

[43] And, from Brossard v Brossard,[26] we see that the fact that the Notaries appeared as witnesses at the trial is not a sufficient substitute for their being

[24] 1975] J.Q. no. 51 – Opinion of Turgeon J. at paragraphs 8-13.
[25] [1929] Q.J. no. 3 or 48 B.R. 410 or No 1873 (S.C. 1452) – Opinion of Mr Justice Howard at paragraph 31.
[26] [1926] J.Q. no. 6 or 41 B.R. 484 – Notes of Dorion J. at paragraph 11.

named as parties to the suit. From the notes of Dorian J at paragraph 11:

> "11. There is another serious objection to the action of improbation: it cannot be granted without all of the parties to the deed being present. Their appearance as witnesses cannot substitute for their impleading, because their subpoena to testify did not constitute official notice and because there is no *res judicata* between them. They had no opportunity to present any potential legal arguments against the action of improbation."

Similarly, Burland v Moffatt[27] is authority for the proposition that the nullity of a deed should not be pronounced without putting all the parties to it *en cause en declaration de jugement commun*.

[44] Mr. Theodore submits in reply that the rules applying to improbation only apply in a case of an improbation action, where a party says, eg, this is not my signature, or, I never appeared before this Notary. Then, the Notary must be made a party and be permitted to defend the notarial instrument he prepared. He submits that the rules do not apply to a case where a party seeks in a suit to have a deed declared null, eg, due to undue influence. However, he has not produced any law or authority on which he relies in support of his submission. As a result, I find that Mr. Foster's submissions have merit and the law of Saint Lucia is that a deed may not be improbated unless the Notaries who made it are named as parties to the litigation. It is a pity that this law was not shown to the learned trial judge instead of being left to be raised for the first time on appeal.

Bias

[45] The one matter that remains to consider is whether the learned trial judge was so biased against Mrs. Desir and the attorneys who featured in the preparation of the legal documents between Mrs. Butcher and Mrs. Desir that Mrs. Desir did not get a fair trial. Mr. Foster described the learned trial judge as having severely vilified both Mrs. Desir and the lawyers. He urged that there was nothing in the transcript which justified the trial judge from coming to the conclusions he did. He pointed out that Mrs. Butcher made her last Will on the same day as she executed the

[27] [1885] 11 S.C.R. 76.

impugned general power of attorney in favour of Mrs. Desir and set up the questioned joint account which facilitated the transfer to Mrs. Desir of Mrs. Butcher's cash in the bank. He makes the point that this suit may be all but purposeless if it does not include an attack on the Will. Any transfer of property by Mrs. Butcher to Mrs. Desir's company which is set aside has the effect of returning the property to the residue of Mrs. Butcher's estate. Similarly with the money that Mrs. Desir obtained from Mrs. Butcher's accounts. This residue will by the Will itself pass in equal shares to Mrs. Alcide and Mrs. Desir. Indeed, the very formation of the company and the issue to Mrs. Desir of two shares which took place without any apparent investment by Mrs. Desir, and to which the property was transferred, has not been challenged. Those, however, are not questions that are for resolution in this appeal.

[46] Mr. Foster submits that the pleadings did not provide a basis for a ruling by the judge on undue influence by Mrs. Desir. Thus, there was no allegation in the pleadings of a relationship between Mrs. Butcher and Mrs. Desir. There was no allegation that there had been a failure of Mrs. Butcher to have independent legal advice. There was no mention in the pleadings of the doctrine of survivorship. There were only general allegations of fraud, undue influence and incapacity, but no particulars pleaded. None of the witness statements filed by Mrs. Alcide indicated any of the requirements needed to substantiate the causes of action that were generally pleaded in this case. The most one could discern from the witness statements, he submitted, were statements of guesswork, conjecture and suspicion. If Mr. Foster is correct in this analysis, then I would only observe that it was a pity that Mrs. Desir's attorney at the trial did not point it out to the learned trial judge. The parties and the trial judge appear to have proceeded with the trial on the basis that the pleadings were adequate to deal with the issues raised. This court has regularly ruled that it would not be proper for a court of appeal to decide on a point questioning the sufficiency of the pleadings when that point had not been raised in the court below and ruled on by the trial judge. In any event, as Mr. Theodore responds, Mr. Foster's submissions seem to suggest a need for a claimant to plead law, which is not a procedure to be encouraged. The modern

rule is that a party is required only to plead sufficient facts which go to show the existence of a cause of action. You are required to plead the facts, not the law applicable to those facts. In this case, I am satisfied that all the facts necessary to raise the issue of undue influence were pleaded in the total of the Claim Form, the Statement of Claim, and the Witness Statements.

[47] Mr. Foster submits that the transcript contains many instances when the judge referred to the lawyers as liars. He characterises the words of the judge as shocking and disturbing. He urges that they clearly set out what the judge's mind-set was. The judge had made up his mind that the lawyers were not telling the truth. He accuses the judge of having engaged in an improper descent into the arena. I have examined the transcript. It is evident that what the learned trial judge was doing was to repeat a common West Indian joke that plays on the similarity in the pronunciation of the words “lawyers” and “liars”. He nowhere describes the attorneys who testified as witnesses in the case as liars. What he does is to remind the attorneys appearing before him of the joke that is common throughout our islands. At no point during the trial did the learned trial judge say anything that suggested that he had formed a firm view in favour of one side's credibility.

[48] The transcript reveals that the attack on the credibility and professionalism of the Notaries arose in cross-examination. Mrs. Verneuil in her witness statement protested that Mrs. Alcide had wrongfully accused her of fraudulent behaviour. In cross-examination, counsel for Mrs. Alcide pointed out to her that no such accusation had been made of her personally, but only of Mrs. Desir. Illustrative of the ferocity of the cross-examination, he put it to her that she had so associated herself with the interest of Mrs. Desir that she considered that insofar as an allegation was made against Mrs. Desir it was equally made of her. Mrs. Verneuil denied this, but, at the end of the day, the judge had to make a finding about Mrs. Verneuil’s conduct. He found that in all Mrs. Butcher's transactions prior to her death Mrs. Verneuil played a significant role and featured prominently, and as a result Mrs. Desir benefitted handsomely.

[49] The learned trial judge came to the conclusion that Mrs. Desir was assisted in her acquisition of Mrs. Butcher's wealth by her 'friend, lawyer, confidante and advisor,' Mrs. Verneuil. The trial judge saw and heard the witness and he was entitled to draw his own conclusions based on her behaviour in the witness box. He was concerned that Mrs. Butcher had not had independent legal advice in any of these transactions. He found that she had been plainly incapable of competently engaging or giving her true consent to the matters which she was called on to deal with.

[50] Mrs. Desir, he found, had taken advantage of her dominant position and influence over the vulnerable and seriously ailing Mrs. Butcher following the death of her husband to so contrive and manipulate her personal business and financial affairs that in short order nearly all of the deceased's money and the bulk of her estate and possessions fell into her hands, and in doing so she had contrived to supplant Mrs. Alcide in the affections of Mrs. Butcher.

[51] He found that the evidence of Mrs. Verneuil of her visit to Mrs. Butcher at the Hospital two days before her death, and the detail she gave of their conversation, was false since the evidence was that Mrs. Butcher had not been at the Hospital for at least three weeks before she died. Mr. Foster has suggested that Mrs. Butcher may have been visiting the Hospital to see the doctor. Mrs. Verneuil testified as to various details, eg, that Mrs. Butcher had held her hand and told her that she did not wish to see her family who had come to visit her at the Hospital. The learned trial judge found that this piece of testimony was designed to demonstrate that Mrs. Butcher was of sound mind and good memory just two days before she died. He found that she had spoken a blatant untruth and made a complete fabrication which had been calculated to lend credence to the defence story that Mrs. Butcher had developed an intense dislike and contempt for her own family which would account for the manner in which she treated them and favoured Mrs. Desir in the disposition of her properties and monies.

[52] The transcript reveals that Mrs. Desir denied that Mrs. Verneuil was her lawyer, but the judge must have noted that Mrs. Desir testified that she had confided in her and consulted with her on her inheritance from Mrs. Butcher. Counsel suggested to her repeatedly in cross-examination that Mrs. Verneuil was her friend. She chose not to deny it once. Indeed, in cross-examination she referred to Mrs. Verneuil by her first name, not by her last name as she did with the other Notaries. Mrs. Verneuil, similarly, did not on one of the several occasions when it was suggested that Mrs. Desir was her friend, deny it. This became a major issue in the course of the trial, and the learned trial judge must have considered that he was required to make a finding on it based on his having seen and heard the witnesses and observed their demeanour in cross-examination. In none of this or the other matters raised by Mr. Foster on this appeal do I find any evidence of an appearance of bias on the part of the learned trial judge.

Conclusion

[53] It has now been long established that an appellate court is in as good a position as the trial judge in considering a judge's finding of fact, in determining what inferences should be drawn from the proven facts, where the appellate tribunal is satisfied that the judge had misdirected himself and drawn erroneous inferences from the proven facts. The burden on the appellant is a very heavy one, and the appellate tribunal will only interfere if it finds that the inferences drawn by the trial judge were clearly and blatantly wrong: Golfview Development Limited v St Kitts Development Corporation and Michael Simanic.[28]

[54] The judge in this case was making a finding that he was entitled, even required, to make on the testimony before him. Here was an elderly lady whom the Notaries must clearly have observed was debilitated and not functioning normally. She was a wealthy old lady who was seeking to transfer her property to a company that she was forming jointly with a young businessperson, and in what turned out to be her

[28] Saint Christopher & Nevis High Court Civil Appeal No. 17 of 2004, (delivered 20th June 2007, unreported).

final days, so that the young person would remain the sole shareholder. She was giving this person a general power of attorney over all her affairs. She was opening a joint bank account into which she was transferring all or substantially all of her spare cash, which amounted to many hundreds of thousands of dollars, an amount in our islands that is a small fortune. She was making a Will which substantially cut out all of her living family members. The Notaries took the risk that their actions were capable of being interpreted as their working to assist Mrs. Desir in the transfer of Mrs. Butcher's wealth to her. Not one of them considered that she might not be in complete control of either her faculties or her business and personal affairs, or made any effort to obtain a professional opinion before acting on her instructions.

[55] An attorney at law, in our islands, whether he be a Notary or not, who witnesses the signature of an elderly and infirm party on a deed of conveyance must prepare to be questioned about the steps he took to ensure that he was not being used as part of an enterprise to defraud or harm the individual or his or her family. It is for that purpose that a careful lawyer is well advised not to prepare, far less witness, a deed or a Transfer Form for such a person in circumstances that are capable of raising the slightest suspicion without demanding a medical certificate relating to the person. The certificate should be obtained not from any doctor, but from one who is informed about the relevant test of legal capacity. In the case of a Will this has been described as a Golden Rule. By this precaution we may lose a fee, even a valued client, but our credibility and integrity cannot then be questioned. That is a small price to pay for the many years spent building up a reputation for integrity that may be lost by one act of carelessness.

[56] An attorney, far less a Notary Royal, who is called on to sign a deed of conveyance on behalf of a party who is not able to write her name due to age and infirmity must expect to be questioned in due course on oath about the circumstances in which he so acted. One would ordinarily expect the attorney, as

with any qualified, and ordinarily competent and careful solicitor,[29] to make a written note of the circumstances, the questions he asked the party to ascertain if she was aware of all the implications of the transaction, and the answers that showed him she fully and voluntarily consented to it. The attorney would carefully preserve the contemporaneous note for production in the event that he is called on to testify, perhaps many years later, as to the circumstances that existed at the time. In a suitable case, a careful attorney might even send a subsequent letter to the client confirming the instructions that had been received, the advice that had been given, and any action that had been taken. A filed copy of that letter would be carefully retained to substantiate the attorney's response to a claim of negligence or improper conduct. An attorney-at-law is a learned person, advising a client for a fee on the contents of a document whose execution he is witnessing, he is not a lay person merely witnessing a signature over the counter. What one would not expect is for an attorney to venture into the witness box, as happened in this case, with neither file nor contemporaneous note, relying on his memory, and a general assurance to the court that he was satisfied that the client understood and consented to what was being done on her behalf. To act in this way risks placing ones credibility on the chopping board. A trial judge might be entitled to hold such sloppiness as evidence of unprofessionalism, to make his findings accordingly and to severely criticise the attorney-at-law concerned.

[57] The learned trial judge appears to have been outraged at the role, inadvertent as it may have been, played by the Notaries in the evident advantage that he found was taken of this old lady by Mrs. Desir. He saw the witnesses. He heard their testimony. He came to the conclusions he did. Given the evidence before him, I see no reason to find that the inferences he drew relating to the evidence given by Mrs. Verneuil or Mr. Innocent was wrong, or unjustified by the evidence. Bias is not shown by a trial judge severely criticizing witnesses and parties when he makes harsh and severe findings against their conduct if such findings are required by the allegations in the pleadings, the nature and direction of the cross-

[29] Per Deane J in Hawkins v Clayton (1988) 164 CLR 539 at 580.

examination of witnesses, or his findings as to their conduct. The errors that he made and which have been dealt with above did not significantly mislead him into coming to the conclusions about the witnesses that he was required by their cross-examination to come to. Other than errors he made on technical points, I am not prepared to find that he was in any way unjustified in the outrage that he felt. His only problem was that, in all of this, he was not assisted as well as he might have been by the attorneys in the case on the proper law relating to the issues of the due execution of a deed and the rules for improbation of a deed in Saint Lucia.

[58] For all the reasons given above, I am satisfied that the judge erred in ordering the improbation of the deed. The appeal is allowed and this order is set aside. I would uphold the remaining orders and findings made by the learned trial judge.

[59] Given that Mrs. Desir has succeeded in part in her appeal, I would order that costs in the amount of one half of the amount that she would be entitled to under CPR 65.13 be paid by Mrs. Alcide to Mrs. Desir.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Davidson K. Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal [Ag.]