THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2008/0066

BETWEEN

ADNAN MKHOUL

of Arnos Vale

CLAIMANT

and

SANDRA JOHN

of Redemption Sharpes

DEFENDANT

Appearances:

Mr. Emery Robertson Snr. for the claimant.
Dr. Linton Lewis for the defendant.

2015: Jun. 16
Jul. 9
Sept. 22, 24
Oct. 8
2016: Jun. 28 & 30
2017: Feb. 16

JUDGMENT

BACKGROUND

[1] **Henry, J.:** This case is about a business relationship gone bad between Mr. Adnan Mkhoul, a Syrian national and Ms. Sandra John a Vincentian native. Mr. Mkhoul migrated to Saint Vincent and the

Grenadines and established himself as a businessman. When he met Ms. John he owned a store trading as Taxi Boutique. It had three outlets respectively in Georgetown on the mainland and on Bequia and Union Island in the Grenadines. He decided to operate a clothing store trading under the name of Traffic Variety Store ('TVS'). In 2006, he and Ms. John entered into a verbal agreement to jointly own and manage TVS ('partnership arrangement').

[2] The following year, on or about 22nd August, 2007, they executed an agreement ('termination agreement') under which Mr. Mkhoul agreed to transfer his interest in TVS to Ms. John for the sum of US$63,000.00. One of the clauses in the agreement stated that Ms. John would 'take over' all of the stock in trade and assume all liabilities for the business. They agreed that Mr. Mkhoul's interest would not pass to Ms. John until she made the final payment. The arrangement did not proceed as planned. Ms. John made only partial payment to Mr. Mkhoul.

[3] Mr. Mkhoul has claimed a declaration that Ms. John holds the stock in TVS as trustee for them both until he is paid in full. He sought damages for breach of contract; US$47, 909.00 being the balance of the purchase price with interest at 6% per annum; payment of US$25,525 to outside creditors at 3% interest per annum; an order that Ms. John account for monies recovered from the sale of stock and costs.

[4] Ms. John claimed that from time to time Mr. Mkhoul requested and received advances from TVS. She alleged that the termination agreement was partly oral and partly written. She claimed that they orally agreed that overseas creditors would be paid in full within one year and that advances totaling ECD$85,408.74 to Mr. Mkhoul from TVS would be deducted from the US$63,000.00 she agreed to pay him.

[5] She claimed that in breach of his fiduciary duty to her, Mr. Mkhoul failed to disclose to her the full extent of TVS' outstanding liabilities or the true value of its stock as at 22nd August, 2007. She contended that she entered into the agreement because she was induced by and acted in reliance on false misrepresentations made by Mr. Mkhoul regarding the amount of his investment in TVS, its liabilities and in general TVS' poor financial state. She asserted that Mr. Mkhoul procured her agreement by exerting undue influence over her. She also claimed that Mr. Mkhoul breached the oral agreement to make equal financial contributions to TVS'.

[6] Ms. John contended that she has suffered loss and damage and she counterclaimed for a declaration that she validly rescinded the agreement. She sought damages for breach of contract and misrepresentation; return of $41,000.00 paid to Mr. Mkhoul; payment of $222,377.63 which she claimed she contributed to TVS and $85,408.74 in advances purportedly made to Mr. Mkhoul. She alleged that she bought property at Belvedere which was registered in their joint names. Ms. John claimed that Mr. Mkhoul agreed to transfer his interest in it to her. She sought a declaration to that effect and costs. Mr. Mkhoul is liable to Ms. John for false misrepresentation, undue influence and breach of contract. Ms. John is holds TVS' assets in trust for her and Mr. Mkhoul.

ISSUES

[7] The issues are whether:

1. Mr. Mkhoul induced Ms. John to enter into the partnership agreement by making false misrepresentations or through undue influence?
2. Mr. Mkhoul and Ms. John operated TVS as partners?
3. Mr. Mkhoul induced Ms. John to enter into the termination agreement by making false misrepresentations or through undue influence?
4. Ms. John or Mr. Mkhoul has breached the termination agreement?
5. Ms. John holds the stock in TVS as trustee for her and Mr. Mkhoul?
6. Ms. John is entitled to sole ownership of the Belvedere property?
7. To what remedies are Mr. Mkhoul and/or Ms. John entitled?

ANALYSIS

Issue 1 – Did Mr. Mkhoul induce Ms. John to enter into the partnership arrangement by making false misrepresentations or through undue influence?

[8] Mr. Mkhoul and Ms. John acknowledged that they jointly operated TVS from mid-2006 to August 2007. Mr. Mkhoul characterized that arrangement as a partnership. Ms. John described it as an 'oral business arrangement'. Mr. Mkhoul testified that he has been a business man for over 40 years. He

claimed that when he met Ms. John in 2005, Taxi Boutique had branches operating in on mainland Saint Vincent in Georgetown, and in the Grenadines on Bequia and Union Island. Mr. Mkhoul claimed that Ms. John expressed an interest in learning how Syrians make money, he agreed to teach her and they became partners in Traffic Variety Store, a new venture on which he was embarking in Kingstown. He testified that he invested $93,000.00 and Ms. John contributed a total of $95,000.00 which she gave him by an initial cheque of $10,000.00, and by installments every 2 to 4 months in cash or by cheque, sometimes payable to Taxi Boutique. He said too that Ms. John contributed $85,000.00. His testimony was characterized by inconsistencies.

[9] Ms. John described herself as a business woman and entrepreneur and said that she previously worked as administrative officer at the Housing and Land Development Corporation. She refuted Mr. Mkhoul's claims that she was an accountant. She explained that she became acquainted with Mr. Mkhoul in 2004. She recalled him visiting her at work and encouraging her to go into business with him. Those discussions persisted into 2005. She testified that he complained repeatedly that it was difficult doing business in Saint Vincent and the Grenadines or getting involved in extensive business activities. She claimed that he told her that he got poor treatment through the unfairness of others.

[10] Ms. John said that she believed Mr. Mkhoul when he confided in her that his health was poor and that he had to have open heart surgery. She testified that she contemplated assisting him in Aug. 2005 when he offered to sell his business in Bequia to her for $50,000.00. However, she was somewhat reluctant and did not take up his offer because she lived on the mainland. After many conversations she said she became sympathetic towards him, formed the impression that he was sincere and came to repose tremendous confidence and trust in him.

[11] Finally, in January 2006, Ms. John said that Mr. Mkhoul came to her with a proposition for them to become partners in TVS, a business he was about to launch on Sharpes Street, selling mainly garments and other merchandise. Mr. Mkhoul said that TVS was registered in Jan. 2006 but no registration documentation was produced in proof. Ms. John recalled him saying that rent would be reasonable, because the landlord owed him $100,000.00 and refused to pay him. She claimed that he told her that he did not have a lot of money. She decided to become part owner.

[12] Ms. John claimed that they were each required to make equal financial contributions to the business and share in the profits 50/50. Mr. Mkhoul denied that this was part of their agreement. They agreed that Mr. Mkhoul would carry out the daily business activities including managing the store while she would deposit the daily earnings and pay bills. TVS started as a going concern in 2006. Mr. Mkhoul stated that it was roughly 1-2 months before Carnival[1]. Ms. John said the opening took place on 30th June, 2006. Based on these accounts, TVS opened for business around June 2006.

[13] Mr. Mkhoul maintained that when TVS opened, he had already invested $77,570.00. He accepted that he had no evidence of this and insisted that it amounted to $93,000.00. Ms. John vigorously refuted that Mr. Mkhoul contributed $93,000.00 or any other sum to TVS. Mr. Mkhoul indicated that Ms. John started making financial contributions to TVS in Jan. 2006. At first he was evasive when asked about the contributions but eventually admitted that he received money from her towards their joint enterprise.

[14] Ms. John said that she gave Mr. Mkhoul $1570.00 by personal cheque as her first deposit on 20th Jan. 2006, and made several other contributions subsequently in cash and by cheque. She averred that those sums were to be utilized to purchase stock and improve the building by installing fixtures and fittings, electrical services, painting, tiling, etc. She claimed that she borrowed $15,000.00 on 26 Oct. 2006 which she delivered to Mr. Mkhoul on 30 Oct. to buy stock. She produced no conclusive documentary evidence of her contributions but exhibited a one page document headed 'Funds Invested by Sandra D John in Traffic Variety Store'. It described amounts in cash and cheque alleged paid to Adnan Mkhoul and others. No cancelled cheques, invoices, receipts or other supporting documentation were exhibited. That page is therefore of no probative value.

[15] Ms. John contended that the partnership arrangement with Mr. Mkhoul were vitiated by his false misrepresentations to her and undue influence he exerted over her to induce her to enter into the arrangement. She made similar allegations in respect of the termination agreement. She relied on certain events to support her claims. The allegations in respect of each are identical but for ease of analysis are examined separately. Those relating to the termination agreement are considered later.

[1] Observed the first week of July each year.

In order to prevail in her claim of false misrepresentation or undue influence, Ms. John must plead and establish each respectively by supplying credible evidence.

False Misrepresentation

[16] A claim alleging false misrepresentation is proved if the claimant establishes that the defendant made a false representation to him or her:

1. knowingly;
2. without belief that it is true; or
3. recklessly (i.e. being careless as to whether it is true or not.[2]

[17] The misrepresentation may be conveyed by words, conduct and may be in writing. It must be communicated with the objective of inducing that other person to act on it, to his or her detriment.[2] The expression 'false misrepresentation' is used interchangeably with deceit and fraud. Fraud is categorized as either 'actual' or 'constructive' fraud. 'Constructive fraud' involves the exertion by the perpetrator of 'unconscientious use of power', 'victimisation', the 'active extortion of a benefit' or 'the passive acceptance of a benefit in unconscionable circumstances.'[3]

[18] Ms. John alleged in her defence and counterclaim that Mr. Mkhoul falsely represented to her that he had invested EC$93,000.00 into TVS; and that TVS owed overseas creditors $69,348.87 or US$25,525.00.

She also pleaded that although Mr. Mkhoul was in a fiduciary relationship with her, he did not disclose to her that the:

1. liabilities of the business excluding overseas creditors amounted to EC$53,939.93 (as listed in tabular format in exhibit S2 attached to the defence and counterclaim.
2. stocks in TVS as at 22nd August 2007 were valued at $140,000.00.

[19] Ms. John claimed that Mr. Mkhoul's representations and conduct were false because:

1. he did not invest $93,000.00 in TVS;

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[2] Derry v Peek (1889) 14 App Cas. 337; at page 374 per Lord Herschell.

[3] Hart v O'Connor [1985] 2 All ER 880 at 891, 892, PC (Lord Brightman).

2. the overseas creditors were owed US$34,189.00 and not US$25,525.00 as stated in the 22nd August 2007 agreement;
3. the credits given by the overseas creditors were obtained by Taxi Boutique and not by TVS; and
4. on 22nd August 2007 TVS' liabilities were in excess of the value of the stocks.

[20] She alleged that Mr. Mkhoul must have known that his representations and/or his conduct were false or he was reckless, not caring whether they were true or false. She pleaded that in his capacity as manager, he was aware of TVS' poor financial state. She averred that she discovered the falsity of the representations when she removed the stocks and conducted an extensive audit of the business' performance.

[21] In her pleadings and submissions, Ms. John conflated factual allegations of events which purportedly transpired before the 'partnership arrangement', with events which allegedly took place subsequently. For example, she claimed that she was induced to partner in TVS with Mr. Mkhoul by his false misrepresentation that the overseas creditors were owed a certain amount. Logically, if this transpired after she agreed to be Mr. Mkhoul's business colleague, it could not have operated on her mind to influence her decision to become joint owner, as she claimed. Nonetheless, for completeness, her several assertions are evaluated against the relevant legal principles.

[22] Essentially, Ms. John has accused Mr. Mkhoul of inducing her to enter the partnership arrangement by false claims that he invested $93,000.00; that TVS was indebted to the overseas creditors for over US$34,000.00; and that TVS' stock was more than and the liabilities less than they were in actuality. Her testimony and that of her witnesses did not support her assertions that such misrepresentations were made at that time or that she was induced by them to invest in TVS. No other witness testified about this issue.

[23] She testified that she accepted Mr. Mkhoul's proposal to be a partner in TVS because she sympathized with him due to his ill health and the myriad problems he reportedly encountered and that she reposed much trust and confidence in him as he appeared to be sincere. She maintained that when they were negotiating the partnership agreement, Mr. Mkhoul misled her regarding the

amount that TVS owed the overseas creditors. For his part, Mr. Mkhoul denied making such representations to Ms. John before she became a partner in TVS.

[24] Mr. Mkhoul made no submissions on the issue of false misrepresentation. Ms. John submitted that he has not been able to provide documentary or other evidence to support his contention that he made contributions towards TVS' operations. She submitted further:

> 'When under cross-examination the claimant was asked whether another court of law requested him to produce evidence that he contributed $93,000.00 to the partnership, I was precluded from continuing that line of examination and was restricted to only asking him about the result of the criminal matter against the defendant. The defendant was reluctant to answer that question which was then posed to him twice by the judge before he reluctantly answered that the defendant was acquitted of all criminal charges. The judge enquired as to whether I am prepared to produce the record of the criminal matter to support my line of questioning.'

[25] She added:

> '… the claimant knowingly and recklessly has been able to gain a substantial and unfair advantage by falsely representing to the defendant that he had contributed $93,000.00 as capital to the partnership when in fact he has not done so. This led the defendant to rely on his false representation into believing that he had made such a contribution … (and) induce the defendant to believe that she was in a partnership with the defendant, … the claimant knew that he was not honest about his false representations and … knew that his representations were false and designed to deceive the defendant in order to induce her into entering into a partnership agreement … The evidence provided in his witness statements, under cross examinations and in his pleadings are clear and unequivocal demonstrations of his trickery and deceit.
>
> … a partnership was not created and the agreement should be set aside on the basis of

fraudulent misrepresentation. … section 3 of the Partnership Act … applies and provides certain remedies.' (underlining added)

[26] Ms. John submitted that no partnership was created and in the event that such a finding is made, that the partnership should be set aside due to fraudulent misrepresentation. In summary, Ms. John contended that Mr. Mkhoul made those statements to her before she invested in TVS. She posited that he must prove that he made contributions of $93,000.00 to TVS and he has not done so. Further, she argued that he made those claims to her, knowing that they were false or being reckless as to their veracity and with the intention to deceive and induce her to become a partner.

[27] A fundamental principle of law requires that a party making a claim must prove it on a balance of probabilities. The burden remained on Ms. John to establish each element of her claim. It was not for Mr. Mkhoul to disprove. Ms. John had to prove that:

1. Mr. Mkhoul represented to her that:
   (a) he contributed $93,000.00 to TVS;
   (b) TVS owed overseas creditors US$34,000.00; and/or
   (c) TVS' stock was more than $140,000.00 and its liabilities less than its assets;
   to induce her to become a partner in TVS; and
2. that those misrepresentations were false; and
3. made fraudulently to induce her to invest as partial owner; and
4. she was so induced.

[28] Mr. Mkhoul denied telling Ms. John that he had invested $93,000.00 at that point in time. Ms. John's 'say so' is not enough. Realistically, she would have been expected to have access to or be able to retrieve and produce some documentary proof of TVS' finances at the point she took over management, not limited to bank statements, receipts and invoices, to demonstrate with some degree of clarity, what the deposits were made to the business' account, the types of merchandise acquired and the periods of acquisition. This would have assisted the court in arriving at a fair assessment of the respective contributions made by the parties. This was not done.

[29] Ms. John explained that Mr. Mkhoul had selected and hired Ralph Baynes to prepare accounts for TVS from time to time. She subsequently contracted Mr. Baynes to prepare financial statements as to the business' financial condition. It does not appear that Ms. John obtained any of those records to shed light on the business operations for the period she was in partnership with Mr. Mkhoul. She supplied no explanation. While she did say that the sales books were soaked with water on Mr. Mkhoul's instructions, this does not explain the absence of accounting materials which would have reflected the business' true financial position.

[30] Mr. Mkhoul denied asking his staff to wet records so that Ms. John would not be able to access them and said he had no knowledge of anyone doing so. Interestingly, in his reply, he contended that he was in Syria at the time of the alleged wetting. However, Ms. John had say in her defence or witness statement when the books were allegedly soaked. There was no reason for him to respond in that way unless he was aware that such an incident had taken place. Mr. Mkhoul accused Ms. John of wetting the books and saying that he did it. I do not believe him.

[31] Be that as it may, even if this happened, there is no evidence that the store's receipts or other records were damaged or lost. Moreover, Ms. John admitted that she had access in electronic format to all TVS' information from the time she assumed management. She indicated that she kept it on a hard drive and in soft copy. Yet she brought none to court. No explanation was provided regarding the absence of bank records. She admitted that TVS had cashbook, deposit book and excel records of its data. She testified that they did not experience a breakdown in the excel electronic system. There is no room for speculation on this very important issue.

[32] Ms. John contended that Mr. Mkhoul did not provide evidence of such contributions. Neither did she supply proof that he made no such contributions. She did not provide adequate evidence that Mr. Mkhoul represented to her that he contributed $93,000.00 to TVS; that TVS owed overseas creditors US$34,000.00; and/or that TVS' stock was more than $140,000.00 and its liabilities less than its assets at the material time (i.e. before she made investments in TVS) and that she was thereby induced to become a partner. Likewise, Ms. John provided absolutely no evidence that Mr. Mkhoul represented to her at that time that TVS owed overseas creditors US$34,000.00 or that its

stock was more than $140,000.00 and its liabilities less than its assets. In the absence of such proof, there is no factual basis to justify a finding that he deceived her at that time as alleged.

[33] Ms. John argued that her attempts to obtain copies of the criminal record from the registry were successful. She attached to her submissions a copy of a letter to the learned registrar seeking a copy of the transcript of those proceedings. Ms. John's decision to present this material as part of her written submissions and not as part of her evidence at trial is unorthodox and contrary to established rules and norms. It would generally not be entertained. However, recognizing that she is relying on this incident as part of her case, it seems to me that fairness requires that it be mentioned at this stage.

[34] In this regard, Ms. John contended:

> 'The transcript will reveal that the claimant never produced any such evidence and had no reasonable explanation as to why he did not obtain the information from the bank.'

She continued:

> 'This issue is crucial since it clarified the contention that the claimant contributed $93,000.00 capital to the partnership. In the absence of such contribution the oral agreement that created the partnership would have been breached and therefore casts doubts on the existence of a partnership. Moreover, the defendant alleges that the claimant induced her into executing the contract by stating amongst other things that he invested $93,000.00. It is therefore contended that the claimant has not been able to show when, where and how that $93,000.00 was contributed to the capital of the partnership and therefore the conclusion is that no such contribution was made.' (underlining added)

[35] Ms. John has complained that she was prevented from pursuing a line of cross-examination which (if allowed) would have established that at the criminal trial, Mr. Mkhoul did not produce:

1. any evidence of his $93,000.00 contributions; and
2. no reasonable explanation as to why he did not obtain such information from the bank.

[36] It is irrelevant that Mr. Mkhoul did not provide proof of his contributions. It bears repeating that Mr. Mkhoul had no duty to establish Ms. John's case. Furthermore, even if the line of questioning was permitted and Mr. Mkhoul admitted that he had not supplied the criminal court with such evidence or explanation, such admission would not amount to proof of false misrepresentation as alleged. Suffice it to say, that to the extent that Ms. John's cross-examination was curtailed, the court is authorized to do so pursuant to CPR 39.2 in appropriate circumstances.

[37] She also contended that a fiduciary relationship existed between them at the time. She quoted a pronouncement by Vice Chancellor Bacon from the case **Helmore v Smith** where he said:

> 'If a fiduciary means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business goes on.'[4]

[38] Mr. Mkhoul submitted that the parties remained joint owners and a fiduciary relationship did a rise whereby they owed a duty of loyalty, trust and good faith towards each other. The learned authors of Halsbury's Laws of England proferred a description of fiduciaries. They state:

> 'Fiduciary relationships, such as those between … director and a company, which by their nature are relationships of good faith, frequently involve obligations of confidence.'[5]

[39] Nothing has been urged on me which leads me to conclude that Ms. John and Mr. Mkhoul were in a fiduciary relationship when they agreed to become joint owners of TVS. Ms. John's claim on this score is meritless. She has not proved that Mr. Mkhoul made the alleged false misrepresentations to her before she made her first investment in TVS as part owner. There is therefore no basis on which to find that any she was induced by such false misrepresentations to become a partner in TVS. This aspect of her claim fails.

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[4] (1886) 35 ChD 436 at 444.

[5] Vol. 47 (2014) para. 44.

Undue Influence

[40] Ms. John claimed that Mr. Mkhoul exerted actual and presumptive undue influence over her to induce her to enter into the agreement. She contended that undue influence was exerted when she agreed to be a partner in TVS and also when she executed the termination agreement.

[41] Undue influence is characterized by:

(1) use of deceit or other means of extortion by which the complainant is rendered or feels powerless to resist the perpetrator's demands; and

(2) unwilling and involuntarily acts or conduct by the victim by which he transfers a benefit to another as a result of the perpetrator's extortionate actions.

[42] Undue influence may be inferred and presumed if the complainant establishes that she '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, … failing satisfactory evidence to the contrary'[10]. Typical cases involve scenarios where a dominant party abuses the trust of the less dominant party and takes unfair advantage of the trust reposed in him.[6] The court is entitled to find in such circumstances that the alleged perpetrator 'abused the influence he acquired in the relationship … (and) preferred his own interests.'[7] Proof of actual undue influence is made out by evidence which demonstrates that the complainant was subjected to duress or other use of force which rendered her powerless and incapable of exerting her free will and which resulted in her submitting to and complying with the beneficiary's or his agent's demands.

[43] In deciding whether a claim of undue influence is made out, the court will examine all of the circumstances including 'the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship,'[10].

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[10] Allcard v Skinner (1887) 36 Ch D 145.

[7] Royal Bank of Scotland v Etridge (No. 2) and other appeals [2001] UKHL 44 and paras. 13 and 14; Per Lord Nicholls of Birkenhead in.

[44] Ms. John pleaded that Mr. Mkhoul exerted undue influence over her as a result of which she became party to the partnership arrangement. In this regard, she alleged that:

1. She and Mr. Mkhoul had a partnership arrangement to carry on the business of TVS;
2. She reposed tremendous trust and confidence in Mr. Mkhoul;
3. She contributed $222,377.63 to TVS by depositing much of those contributions either into his personal banking account or Taxi Boutique's banking account, instead of TVS' banking account at the Bank of Nova Scotia;
4. Mr. Mkhoul constantly represented to her that he was sick and she was most helpful in extending business advances to him to enable him to seek medical attention;
5. When Mr. Mkhoul wanted to open a pharmaceutical business, she facilitated the process by financing the partitioning of the accommodation that housed TVS;
6. She paid for a property in Belvedere and granted permission for Mr. Mkhoul's name to be entered on the Deed of Conveyance as joint owner even though he made no financial contribution to its acquisition;
7. She permitted Mr. Mkhoul to withdraw funds from TVS' account to shop in Curaçao and Trinidad even though he had failed to account on other occasions for the manner in which the funds were spent;
8. She entered into an agreement with Mr. Mkhoul on 22nd August, 2007 which was partly oral and partly written;
9. She visited the office of Mr. Mkhoul's attorney at law when the agreement was signed and was not given any independent legal advice;
10. When she asked Mr. Mkhoul's attorney to include the terms of the oral agreement in the written agreement, the attorney informed her that they can be dealt with only in another arrangement between them;
11. Mr. Mkhoul represented to her that he had to get out of the business because of ill health;
12. She trusted Mr. Mkhoul who managed the day to day affairs of the business, to provide her with accurate details of its performance.

[45] Ms. John expressly pleaded actual undue influence, and implied that she was also subjected to presumed undue influence. Some of the pertinent facts are rehearsed above. She has presented

no evidence that she was coerced or compelled to become a 'partner' in TVS. The facts do not bear out that she had a relationship of trust and confidence with Mr. Mkhoul before she became part owner of TVS or that Mr. Mkhoul took advantage of her by exerting undue pressure over her to compel her to do so. Apart from her say so, there is no evidence that a trust relationship existed between them which created a dynamic of opposing positions of dominance and subservience between them, which created the climate for Mr. Mkhoul to take advantage of her.

[46] She did not lead evidence of being coerced, pressured to or of actually contributing $222,377.63 to TVS or extending business advances to Mr. Mkhoul to enable him to seek medical attention, prior to being a partner. Similarly, there was no evidence of her:

1. assisting Mr. Mkhoul to open a pharmaceutical business;
2. purchasing a property in Belvedere and granting permission for Mr. Mkhoul's name to be entered on the Deed of Conveyance as joint owner;
3. permitting Mr. Mkhoul to withdraw funds from TVS' account to shop in Curaçao and Trinidad;
4. concluding the 22nd August, 2007;
5. visiting the office of Mr. Mkhoul's attorney at law and not being provided an opportunity to obtain independent legal advice;
6. being denied the opportunity by Mr. Mkhoul's attorney, to include the terms of the oral agreement in the written agreement,;
7. being told by Mr. Mkhoul that he had to get out of the business because of ill health;

before she entered into the partnership arrangement.

[47] I find that none of this happened. Ms. John may not rely on those allegations to ground a claim for undue influence in relation to the partnership arrangement. Her claim of undue influence on these bases, has not been made out and therefore fails.

Issue No. 2 – Did Mr. Mkhoul and Ms. John operate TVS as partners?

[48] Ms. John submitted that she and Mr. Mkhoul were never partners in TVS. She seemed ambivalent in this regard since she contended elsewhere that 'a partnership was not created'; and further that the mere fact that they 'conducted the affairs of the store in a manner which could give the impression that

a partnership existed in fact, does not necessarily mean that partnership also existed in law'; and 'the partnership agreement was breached and (Ms. John) is the sole owner of the store.'

[49] Mr. Mkhoul was adamant that they were partners prior to 22nd August, 2007. He contended that a partnership existed and they are each entitled to shares proportionate to their capital contribution. A determination regarding whether they were partners is critical to assessment of their respective rights, entitlements and obligations. Their interactions up to and after 2007 are relevant.

[50] The Partnership Act ('the Act')[8] codified the legislative framework governing the operation of partnerships in Saint Vincent and the Grenadines at the material times. It provided that a partnership exists 'between persons carrying on a business in common with a view to profit'[9]. In determining whether Mr. Mkhoul and Ms. John shared a partnership, the court must take into account several factors including whether a contract for remuneration as employee, contractor or agent existed between them[10] and whether they:

(a) owned property in common as joint tenants or tenants in common or otherwise;

(b) shared the gross returns; or

(c) shared the profits or obligations such as debts.[10]

The law recognizes that property bought with money belonging to the firm is deemed to belong to the firm[11].

[51] It was evident from the evidence, that Mr. Mkhoul and Ms. John performed their mutual obligations in accordance with their oral agreement. Mr. Mkhoul took care of TVS' daily management activities including recruiting staff. Mr. Mkhoul, his adult son Ghandi Mkhoul and two other employees were engaged in the everyday running of the business including attending to customers. Mr. Adnan Mkhoul travelled abroad to purchase stock from time to time. Ms. John deposited the earnings.

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[8] Cap. 109 of the 1990 Revised Edition of the Laws of Saint Vincent and the Grenadines. It has since been replaced.

[9] Section 3 (1) of the Act.

[10] Section 4 of the Act.

[11] Section 23 of the Act.

[52] Ghandi Mkhoul testified that Ms. John was responsible for collecting all monies from the store, making deposits and payments to the bank. He explained that when she did not come, she would send someone to collect the deposit book and make the deposits. Sometimes he did. He said that he managed TVS in July, August and September/October 2007 when his father went away. He claimed to have done so too in July/August 2009 but that is impossible because by that time the store was closed. I think Mr. Ghandi Mkhoul was mistaken about that latter period or possibly misconstrued the question as he appeared to do on occasions. I infer that it was the latter. He testified that although Ms. John and his father were partners, Ms. John never had keys to the store before Mr. Mkhoul sold TVS to her.

[53] Ms. John's son, Cuthbert Drakes assisted at TVS with customer service duties on afternoons after school, Saturdays and during the school holidays. He served as cashier and sometimes made bank deposits. He acknowledged that his mother used to keep the deposit books and take up cash. According to him, when given the opportunity, she would collect money for deposit at the end of the day. He said that no balance of cash took place when Mr. Mkhoul had guests of his nationality. He insisted that his mother did not get an opportunity to collect cash on those days. I believe him.

[54] Ms. John submitted that the provisions of the Partnership Act, Cap. 155 of the 2009 Revised Laws are applicable to the conduct of partnerships. Cap. 155 and the Act contain similar provisions, however the former was not in force at the material times and is not applicable in this case.

[55] Ms. John maintained that a partnership was created by parole and entered into for an indefinite period. She reasoned that she and Mr. Mkhoul seem to be satisfied that a partnership existed. She contended that they conducted the business of TVS with a view towards making a profit. Inexplicably, she argued that by failing to make the contribution of $93,000.00 capital to TVS partnership, Mr. Mkhoul breached the oral agreement which created the partnership and this cast doubt on the existence of a partnership. This is in direct conflict with her other submission.

[56] A partnership may be created orally, in writing or by the parties' conduct. Ms. John and Mr. Mkhoul are in agreement that they jointly owned TVS and did so from 2006. They described in similar terms

their consensual arrangement for management of the business. From both accounts, they admittedly embarked on a common business enterprise, the main purpose of which was to realize profits. However, neither Mr. Mkhoul nor Ms. John gave evidence of sharing of profits. It appears that this did not take place. Nevertheless, I accept their testimony that they agreed to become partners in TVS and in furtherance of that agreement Ms. John gave Mr. Mkhoul monies to acquire partnership property and to pay outgoings. Mr. Mkhoul admitted accepting such sums in his personal capacity and also as owner of Taxi Boutique, on the understanding that they were to be applied towards the firm's business, which he actioned.

[57] Ms. John expected and appeared to have assumed that Mr. Mkhoul had invested an amount corresponding to $93,000.00 as he alleged. He insisted that he made contributions of his own. Mr. Lemmew Samuel testified that he undertook carpentry and other work for Mr. Mkhoul at the business location before TVS started operating. There is no way of knowing how much either party invested in the firm but I am satisfied that they both did. They functioned on that basis until 2007 when they decided to terminate the partnership arrangement.

[58] Although theoretically they had an arrangement for sharing of profits, no such sharing was carried out at any time. They do not appear to have had meetings or discussions about when profits would be determined and shared. Neither of them gave any account of any such meeting or sharing of profits. However, Ms. John made generous allowance for Mr. Mkhoul to receive monetary advances to seek medical attention abroad. Mr. Mkhoul admitted receiving US$1500.00 on 6th Feb, 2007 from TVS to travel to Syria; and $10,000.00 in January 2007 by cheque dated 8.1.07[12] when went to Syria in 2007. Ms. John seemingly did not benefit from similar facilities. I accept that Mr. Mkhoul routinely received monies from time to time to re-stock the business and to apply towards personal wants. No record was produced in proof of the amounts or dates. The entire operation seemed to have functioned rather loosely without regard for proper accounting and business standards. In this regard, Ms. John seemed to have been quite naïve and relaxed in her management style. Mr. Mkhoul appeared to have taken full advantage of that.

[12] Numbered 729404.

[59] It seems that Mr. Mkhoul and Ms. John did not share much information regarding how the business was progressing. I so infer. There is no evidence that they kept any current accounting records except for deposit books, credit sales books, cashbooks and other entries in a series of manual ledgers which employees were charged with updating during the course of the day on an unregulated and unsupervised basis. Ghandi Mkhoul and Cuthbert Drakes described how it operated and said that the entries were not always made. None was presented to the court.

[60] Neither Mr. Mkhoul nor Ms. John supplied concrete proof of their respective financial contributions to the firm. It was clear that they did not account to each other about such matters. Nonetheless, I accept that they each made investments into the business. Even without accounting records, if one party was not keeping his or her end of the bargain to contribute to their joint investment, either of them should have been able to recognize at a much earlier stage than mid-2007. He or she would have been put on alert by the sheer financial strain reasonably attendant on bearing all obligations. Neither of them struck me as being particularly undiscerning or gullible.

[61] Ms. John and Mr. Mkhoul complied substantially with their agreement for managing TVS and they proceeded along without any major issues until 2007 when Mr. Mkhoul signaled that he wanted to exit the arrangement. In the intervening period, they had made an agreement for payment of salaries to themselves. Mr. Mkhoul would earn $3000.00 per month while Ms. John would receive $1500.00. This reveals that they were more than likely convinced that the business was profitable enough to cover the additional expense. I am satisfied that Mr. Mkhoul and Ms. John became partners in TVS in 2006 by informal verbal agreement as demonstrated by their conduct. I accept their testimony that Ms. John paid sums to Mr. Mkhoul personally and in the name of Taxi Boutique for the sole purpose of becoming a partner, that Mr. Mkhoul made investments of his own into the business and outgoings were paid from the store's intake.

[62] By contributing monies to the acquisition of property in the firm, Ms. John accepted Mr. Mkhoul's offer to become a partner. Although they did not have a formal written agreement to memorialize that intention, they functioned as partners until 2007. In the absence of contrary indicia, their separate contributions to the firm constituted them as equal partners in the firm Traffic Variety Store from mid-2006 to 22nd August, 2007. I so find.

Issue No. 3 – Did Mr. Mkhoul induce Ms. John to enter into the termination agreement by making false misrepresentations or through undue influence?

False misrepresentation

[63] Ms. John's pleadings and submissions in relation to the termination agreement have already been set out. Her evidence is that she and Mr. Mkhoul negotiated certain terms which were formalized by written agreement on 22nd August, 2007. She averred that they agreed that she would pay:

1. to Mr. Mkhoul $93,000.00 which he represented he had invested in the business; and
2. US$25,525.00 (equivalent to EC$69,348.87) to the overseas creditors.

She alleged that Mr. Mkhoul falsely misrepresented to her that the overseas creditors were owed that amount when in fact, the outstanding debt was US$34,000.00. Neither Ms. John nor Mr. Mkhoul produced any evidence of the identities of those overseas creditors or proof that TVS owed monies to such persons. There is however consensus that the debt is unpaid.

[64] Ms. John explained that after concluding the agreement with Mr. Mkhoul, she discovered that he had not contributed $93,000.00 to TVS or any other sum and that many of the goods which he reportedly acquired from overseas creditors on behalf of TVS were never received by TVS. She maintained that she was an absentee partner and did not have intimate knowledge of the financial aspects of the business. She claimed that she trusted Mr. Mkhoul to manage the day to day affairs of the business, make all decisions including when to pay creditors and she went along with him. She testified that she trusted him to provide her with accurate details of its performance and that he failed to do so.

[65] Mr. Mkhoul testified that he had invested $93,000.00 in TVS by August 2007. He said that Ms. John was TVS' accountant and he gave her receipts of all purchases of stock made for the store. He claimed that he frequently asked Ms. John for accounting and bank statements but that she never provided him with any. He said that as a result he became angry and frustrated and demanded that Ms. John buy him out or permit him to buy her out. She denied this. According to her, she often permitted him to withdraw funds from TVS' account for personal expenses and to shop for the business in Curaçao and Trinidad but he usually failed to account to her for how he spent the monies. On one such occasion in June 2007, she alleged that he took US$16,700.00 and travelled

to Curaçao to shop and when she asked him to account he became upset and angry and failed to provide the accounting. Mr. Mkhoul denied that he habitually went to her for money or that he left the business because she refused to accede to his requests.

[66] Ms. John testified that she refused to give him $15,000.00 to assist with the purchase of a property from one Keith Henry, whereupon he told her that he was too old and sick and wanted to get out of the business. She said that he later changed his mind and said he wanted to be compensated. They negotiated the terms of the termination agreement and signed it.

[67] Mr. Mkhoul admitted telling Ms. John that he had invested EC$93,000.00 into TVS before the termination agreement was executed. He also acknowledged that Ms. John agreed to buy his share in TVS for US$63,000.00 (or EC$170,730.00) part of which was reimbursement of his $93,000.00 investment. He thereby admitted making that representation to her, but maintained that he did invest that sum in the business. Ms. John insisted that this representation induced her into executing the contract. I believe her.

[68] Ms. John has not proved what, if any, sum Mr. Mkhoul invested in the business. She relied on the existence of a fiduciary relationship between them to anchor her assertion that he had a duty to make full disclosure to her before the contract was finalized. She cited the case of **Law v Law** in which Cozens-Hardy L. J. opined:

> 'Now, it is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows; and that unless such information has been furnished, the sale is voidable and may be set aside.'[13]

[13] [1905] 1 Ch. 140.

[69] Mr. Mkhoul submitted that the general principles applicable to fiduciaries are outlined in the decision in **Canadian Aero Services Limited v O'Malley**[14], and that they apply with equal force in the instant case. He posited that the decision established that the standards of loyalty, good faith and the avoidance of conflict and self-interest must be tested by factors which cannot be exhaustively enumerated. In that regard, he submitted that a fiduciary:

1. owes to the other person loyalty, good faith and an avoidance of a conflict of duty and self-interest; and
2. should not divert to himself a maturing business opportunity which the other person is pursuing even after he has terminated the fiduciary relationship.

[70] The legal principles advanced by Mr. Mkhoul and Ms. John find expression partially, in the Act. Section 30 provides:

> ' 30. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.'

It follows that if the parties were partners, they owed a mutual obligation to account to each other regarding the business' affairs. Even if they were not partners, but were otherwise concerned in operating TVS in mutually beneficial capacities, their relationship would attract the duties applicable between fiduciaries. In his pleadings, Mr. Mkhoul denied being in a fiduciary relationship with Ms. John but in his submissions conceded that their relationship was fiduciary in nature. Ms. John was likewise ambivalent about this.

[71] I am satisfied that their relationship was one which required mutual trust, confidence and accounting between them. Although Mr. Mkhoul said that he provided receipts to Ms. John and that she was the accountant, I do not accept that as being correct. Ms. John stated that Mr. Mkhoul hired Mr. Ralph Baynes to prepare accounts and financial statements for TVS from time to time. I believe her.

[72] I also accept Ms. John's account that Mr. Mkhoul did not provide her with the requisite accounting details to enable her to have a full appreciation of his contributions to the business. By failing to give her such information, he was reckless concerning the truth of the statement he made as to his

[14] 40 DLR (3d) 371.

contributions. Nevertheless, Ms. John has not established that he did not contribute $93,000.00 as he claimed. In the premises, there is no way for the court to determine if the representation was false. I make no finding that his representation was deceitful. However, I find as alleged that he was in breach of his fiduciary duty to give her full disclosure about the material details regarding his contributions.

[73] In response to Ms. John's accusations that Mr. Mkhoul deceived her about the sums due and owing to the overseas creditors, he stated that the overseas creditors were owed US$34,000.00. There is therefore common ground between them that TVS owed overseas creditors US$34,100.00 and not US$25,525.00 as written into the contract. Mr. Mkhoul testified that Ms. John proposed that figure for inclusion in the agreement. He explained that he was not sure how much was owed and only realized the error subsequently. He also testified that although he knew that the correct figure was $35,500.00 he said nothing because he trusted her and she did the accounting. He also stated that he did not have the figure in mind at that time, but he went back later and checked. He said that when he returned to the lawyer to have the figure changed he was told that it was too late.

[74] I do not accept that account. It is just too convenient and does not have the ring of truth to it. Mr. Mkhoul was the one to arrange for his lawyer to prepare the contract. As a businessman, he would reasonably be expected to go to the meeting armed with all of the necessary information or to postpone conclusion of the agreement until he was able to ascertain the true position. His answer in that regard is not credible and is rejected.

[75] By concluding the agreement with that figure, he did represent to Ms. John that the amount owed to overseas creditors was US$25,525.00. Mr. Mkhoul either knew the correct figure or was reckless as to whether it was accurate or not. He had a duty to disclose this information to his partner. He failed in the discharge of that duty. I accept Ms. John's testimony that the misrepresentation operated on her mind and induced her to enter into the agreement. I find that Mr. Mkhoul deceitfully misrepresented the debt outstanding to TVs' external creditors and that Ms. John was thereby induced to conclude the termination agreement with him.

[76] Ms. John alleged that when she executed the contract, she was unaware that TVS' real indebtedness to its other creditors amounted to $53,939.93. She recalled too that after getting control of the business, she conducted a stock count and hired Mr. Ralph Baynes to prepare a financial statement for TVS. She said that TVS' stocks were approximately $140,000.00 while its total liabilities were in excess of $140,000.00. She concluded that Mr. Mkhoul abused and misused the confidence she reposed in him and misrepresented TVS' real state of affairs.

[77] Mr. Baynes acknowledged that in November 2010, he prepared a financial statement in respect TVS' operations, for the 14 month period ending 31st August 2007. He indicated that Ms. John provided him with the necessary information. He could not vouch that the data she supplied was free from error or omissions. He admitted that Mr. Mkhoul was not present to assist him when he carried out the exercise. He claimed to be relatively satisfied that although the data he received was limited, it was sufficiently accurate and that the financial statement was reasonable and fair given the circumstances under which they were assimilated.

[78] He did not describe those circumstances or provide his reasons for arriving at that conclusion. However, he did say that an estimate was done to arrive at the closing inventory of around $140,000.00. This conflicts materially with Ms. John's statement that she conducted a stock check. If she had done this, she would and should have been able to provide an accurate count to submit to the court. I am not impressed with the level of candour demonstrated by her or Mr. Mkhoul. It fell short of the duty of full disclosure and is frowned upon.

[79] Although Ms. John claimed that TVS' other liabilities amounted to EC$53,939.93 she did not provide proof of those debts. Mr. Mkhoul denied making such representations to her. Ms. John claimed that they were made verbally. No such figure appears in the termination agreement. It simply provided that Ms. John would take over:

'all other current liabilities of the business as at the date of this agreement'.

The clause clearly reflects that the parties contemplated and agreed that there were outstanding liabilities separate and apart from the overseas creditors. Ms. John insisted that Mr. Mkhoul did not

inform her that the amount owed was almost $54,000.00. Mr. Mkhoul's bare denial does not adequately address that allegation. I remain mindful that he does not have to disprove anything.

[80] Mr. Mkhoul denied making any representation to Ms. John as to the outstanding debt to TVS' local creditors. In face of the clause referencing such obligations, I find it difficult to accept that he did not. His admitted failure to proffer an alternative figure leads me to the ineluctable inference that he did not inform Ms. John of the true debt. It seems that it was not discussed completely, but in order to find expression in the agreement, it must have been raised and I so find. Ms. John testified that she paid off loans from Bank of Nova Scotia in respect of an outstanding loan they acquired to finance land purchase and in respect of an overdraft facility.

[81] Mr. Mkhoul admitted knowledge of the existence of both facilities. I am not sure what was the total debt to local creditors. Neither party provided adequate proof. Although it seems that Mr. Mkhoul once again withheld certain important information from Ms. John, without a firm idea about what was or was not said, this does not prove false misrepresentation, merely breach of duty to account. I accept that Mr. Mkhoul knew or ought to have known how much was in fact owed. After all, he had the responsibility for daily management of the business and would have been very familiar with its financial condition, and I daresay more so than Ms. John. Notwithstanding, failure to account does not constitute false misrepresentation.

[82] Mr. Mkhoul testified that before they executed the agreement, he and Ms. John estimated the stock value to be between $600,000.00 and $650,000.00 consisting of curtains, Clark shoes. Esko shoes, Nike shoes and slippers, clothing, jewelry, cushions, blenders, sheets, pressure cookers, pot sets and 30 bolt of cloth for cushions among other things. Ms. John denied this. Mr. Mkhoul indicated that he got this information from a document that he had previously but which Ms. John has kept. He did not say under what circumstances it was given to her and why he allowed her to have it. Ms. John was not asked about this. She denied that the stock was worth that much and maintained that it was worth only $140,000.00. Their economy with release of these details does not aid resolution of the issues.

[83] Remarkably, Mr. Mkhoul has indicated that Ms. John and he concluded the termination agreement based on an estimation of the stock value. This seems to accord with Ms. John's posture although she stopped short of saying on what basis the agreement was concluded or what she believed the stock value to be at that time and on what basis she so concluded. I find this incredible. This marked laisser-faire approach suggested that one or more of the parties were either naïve and inexperienced or operating from a position of inflated confidence as to the business's finances, which may or may not have been based on empirical data.

[84] Ms. John has claimed ignorance. I am inclined to accept her account that she did not know. That could be the only explanation for her to enter into an agreement under which she assumed all liabilities without knowing the correct financial position of the business. I am reasonably satisfied that Mr. Mkhoul knew or ought to have known the true financial position of the business when they executed the termination agreement. He was in the store on a daily basis supervising its operations. When he was not there, he left his son Ghandi in charge, particularly when he travelled abroad and despite the fact that he had a contributing partner who remained behind.

[85] Mr. Mkhoul admitted that Ms. John was working fulltime elsewhere when he was managing TVS. He on the other hand, would have gained a full appreciation of the business' fate and an excellent idea of what its assets and liabilities were since he bought all the merchandise for resale and paid the creditors.

[86] I remain mindful of Ms. John's testimony that Mr. Baynes had previously done accounting work for TVS at Mr. Mkhoul's request. Mr. Mkhoul did not deny this. Ms. John indicated that she was not privy to those records. Incredible as it seems, I believe her. I infer that there was a measure of naivety on her part in this regard, an overabundance of trust in Mr. Mkhoul and very little scrutiny of TVS' operations.

[87] Apart from her oral testimony, and that of Mr. Baynes, Ms. John supplied no evidence as to TVS' assets and liabilities after 22nd August, 2007. Although she indicated that she arranged for a stock count, she produced no documentary record of her findings. Moreover, she and Mr. Baynes testified

that the $140,000.00 figure was arrived at through estimation. This account contradicts her statement that inventory was taken of the stock. It was unclear when the estimate or inventory taking was alleged to have taken place. Mr. Baynes indicated that the estimate was made as at 31st August, 2007. Ms. John indicated that this was done in September, 2007. The question arises as to what stock remained in the store between 22nd August 2007 and either date. No evidence was given in this regard.

[88] Mr. Mkhoul's assertions that the stock value as at 22nd August 2007 was between $600,000.00 and $672,000.00 is just as inconclusive as is his averment that he and Ms. John estimated the value. In any event, Ms. John denied that this was done. Although this might have happened, I infer from all the surrounding circumstances that it did not. Interestingly, Ms. John did not accuse Mr. Mkhoul of positively misrepresenting the stock value. Rather, she complained that he did not disclose to her that the stocks were then only worth $140,000.00. She confirmed that she conducted an extensive audit of the business' performance. She produced no part of the record to assist the court in making a determination. There is no evidence of the stocks' worth and I make no finding one way or another.

[89] Mr. Mkhoul contended that Mr. Baynes prepared the financial statement without any input from him Mr. Baynes accepted that this was so. Mr. Mkhoul challenged the reliability of the underlying figures and the conclusions. In view of the foregoing, I am not satisfied that Mr. Baynes has sufficiently demonstrated the factual basis on which his computations were calculated. They cannot be reasonably taken into account in assessing TVS' financial position during the period under consideration. It would be unfair to accept them in face of the reasonable questions raised by Mr. Mkhoul as to their authenticity and reliability. I refuse to do so.

[90] Mr. Mkhoul denied that the stock in TVS was worth only $140,000.00 at the date of execution of the termination agreement. Ms. John did not provide any proof of the stock count or liabilities as at that date or even how much she believed it to be. There is no factual basis on which to make a finding that the stock value was then $140,000.00 or that the liabilities were in excess of that figure, and I make none. I also make no finding that Mr. Mkhoul fraudulently misrepresented the stock value to Ms. John or that she was induced by such false misrepresentation to induce her execute the

agreement. Ms. John complained that the items Mr. Mkhoul bought from overseas creditors were taken to Taxi Boutique. She supplied not one shred of evidence to establish this. I make no such finding.

[91] Neither party produced any documentation regarding the identities of overseas creditors who provided goods and/or services to TVS during the relevant period. No invoices, statements, receipts or demand notices from such overseas creditors were adduced in evidence. In the absence of hard evidence, Ms. John's and Mr. Mkhoul's insistence that he credited goods for TVS on Taxi Boutique's account with overseas creditors while it might be factual, does not translate into a finding of the amount owed. Nor does it establish whether TVS or Taxi Boutique was the creditor, recipient or beneficiary of those items. Accordingly, I make no finding regarding which of the businesses (TVS or Taxi Boutique) was indebted to the overseas creditors. There is no way of knowing what, if any, sum TVS owed to the unidentified 'overseas creditors'. I cannot determine if Mr. Mkhoul misrepresented the amount to Ms. John and I make no finding that he did.

[92] I harbor no doubt that Mr. Mkhoul had a pretty good idea that the business would not have been able to generate the necessary profits to enable Ms. John to service the termination agreement and meet her several obligations in the termination agreement. Notwithstanding, without credible data as to the stock value, liabilities and assets as at 22nd August, 2007 or proof that Mr. Mkhoul had this information, I am unable to conclude that he falsely misrepresented TVS' financial position to Ms. John to induce her to execute the termination agreement. The one exception is in relation to the overseas creditors.

Undue influence

[93] Ms. John relied on the same allegations of undue influence to impugn the termination agreement as she invoked to challenge the partnership arrangement. Her assertions were referable to the tremendous trust and confidence she allegedly reposed in Mr. Mkhoul. She asserted that this led her to contribute $222,377.63 to TVS by making payments to Mr. Mkhoul. He denied that she contributed that much money but he did not specify what amount she contributed. Ms. John did not articulate

how making her contributions as alleged were used by Mr. Mkhoul to pressure her or influence her to execute the termination agreement. I fail to see how this was possible.

[94] She alleged also that Mr. Mkhoul represented to her that he was sick and she was most helpful in extending business advances totaling $85,408.74 to him to enable him to seek medical attention. Implicitly, this assertion conceals a claim that she was thereby inveigled into signing the termination agreement and did not receive a corresponding benefit from the firm but was left holding the bag. I do not see a qualifying correlation between the two which would amount to undue influence.

[95] Ms. John also claimed that she facilitated Mr. Mkhoul's interest in starting a pharmaceutical business, by partitioning the accommodation that housed TVS. She did not indicate what loss she incurred by doing so or how this became undue influence. It did not. She alleged that she paid for the Belvedere property and allowed Mr. Mkhoul to place his name on it although he did not contribute to the purchase price. Even if this happened, Ms. John did not say in what way she was thereby induced to sign the termination agreement. I cannot understand how those two events are connected.

[96] Further, Ms. John alleged that she permitted Mr. Mkhoul to withdraw funds from TVS' account to shop in Curaçao and Trinidad even though he had failed to account on other occasions for the manner in which the funds were spent. Once more, I fail to see the connection between that assertion and how she was thereby influenced to be party to the termination agreement. There appears to be none. The foregoing allegations of undue influence are baseless for the reasons provided.

[97] Ms. John's most substantial allegations were that she entered into the termination agreement without the benefit of independent legal advice; and without accurate details from Mr. Mhkoul (who she trusted to manage its day to day affairs) about TVS' performance. Mr. Mkhoul denied exerting any undue influence over Ms. John. He made no submissions on the subject.

[98] Mr. Mkhoul argued that the case of **Boardman v Phipps**[15] illustrates that a 'a fiduciary partner who obtains information by virtue of such position of trust and who uses that information for his own

[15] [1966] 3 AER 721.

advantage is liable to account for any profits made in such circumstances'[15]; and that the information so obtained 'may be considered property'[15]. Mr. Mkhoul stopped short of indicating what information Ms. John allegedly used to her advantage in this manner which imposed a duty on her to account to him for profits. The facts as rehearsed do not permit a finding of that nature in the issue under consideration.

[99] Ms. John submitted that 'the creation of the partnership and the subsequent agreement were entered into because of undue influence.' She contended that she reposed a tremendous amount of trust and confidence in Mr. Mkhoul and decided to assist him by entering into a business arrangement with him because:

(1) he kept visiting her at her office where he discussed business propositions with her and suggested that she should do business with him;
(2) he complained to her about his ill health and treatment by others; and
(3) he promised to show her how to conduct business.

She maintained that Mr. Mkhoul never adduced any evidence to demonstrate that he has made any contributions to TVS' operations or creation of the partnership.

[100] Ms. John submitted that within the Vincentian society, the Syrian community appears to be comprised of extremely successful business people and as one of them, Mr. Mkhoul would have been able to influence her into entrusting large sums of money to him. Neither Ms. John nor her witnesses gave evidence of such perception of Syrians in the community or of such influence being exerted by the Syrian community in general or on her in particular. Ms. John did not attribute her decision to give Mr. Mkhoul money to any such influence or perception. There is therefore no factual basis on which to find that undue influence has been made out in this regard. Ms. John contended that it is quite unusual or unremarkable for an adult to deliver to Syrian nationals hundreds of thousands of dollars without the usual due diligence and accountability, simply because they are viewed as successful business people. I reject that idea as being completely unsubstantiated and not representative of the conduct of a reasonable or normal person.

[101] Quoting Lord Millet in the case of **National Commercial Bank of Jamaica Ltd. v Hew**, she submitted that:

> 'Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.'[16]

Adopting the words of Lord Hobhouse in **Royal Bank of Scotland and Eteridge**[17], she submitted further that it 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.'

[102] Ms. John cited with approval an extract from the advice of the Privy Council in **R v Attorney General for England and Wales**[18] where Lord Hoffman opined:

> '… undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. Undue influence has concentrated in particular upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other.
>
> The burden of proving that consent was obtained by unacceptable means is upon the party who alleges it. Certain relationships – parent and child, trustee and beneficiary, etc – give rise to a presumption that one party had influence over the other. … Even if the relationship does not fall into one of the established categories, the evidence may show that one party did in fact have influence over the other. In such a case, the nature of the transaction may likewise give rise to a prima facie inference that it was obtained by undue influence. In the absence of contrary evidence, the court will be entitled to find that the burden of proving unfair exploitation of the relationship has been discharged.'

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[16] [2003] UKPC 51 at para. 29.

[17] [2001] UKHL 44 at para. 103.

[18] [2003] UKPC 22 at paras. 21 and 22.

[103] Ms. John contended that the burden of proving undue influence rests on her and once she has done so, the court must intervene and set aside the partnership contract and the agreement. She cited **Royal Bank of Scotland plc v Etridge (No.2)** where the court posited:

> 'Proof that the claimant 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 an 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.'[19]

[104] She argued that the manner in which she was making contributions to Mr. Mkhoul for the purpose of the store and the circumstances surrounding the execution of the agreement were not normal and '… the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.' She maintained that she was otherwise employed while Mr. Mkhoul was involved in the day to day managements of the store. She contended that she therefore trusted him to provide her with accurate details of the store's performance and that she readily gave Mr. Mkhoul money to buy stock for the store whenever he requested and contrary to his testimony that he gave her receipts for everything he bought, he did not always account to her for the manner in which he spent those funds. She argued that Mr. Mkhoul used illness as a reason to extract money from her and TVS and he was able to influence her to finance construction work in preparation for a pharmaceuticals supplies business that he told her he was going to open.

[105] Ms. John posited that there was no evidence that Mr. Mkhoul bought any stock from his personal resources or that he used his personal resources wholly and exclusively for such purposes. She

[19] [2001] UKHL 44.

submitted further that his withdrawals of advances from the store without attracting much enquiry, censorship or acrimony is not acceptable in the ordinary scheme of business, nor was the fact that she was not in possession of keys to the store which she owned and financed.

[106] Ms. John contended further that Mr. Mkhoul testified that she trusted him when she refused to go overseas to shop and told him 'No, we trust you.' She argued that she has established that she trusted him unquestionably and he abused that trust by taking stock without paying for them and failing to account for them. She relied on her 'itemized schedule' as proof of her assertions that he owed the store $85,408.74 in advances. This does not assist her. As explained previously, the list is self- serving and has no probative value.

[107] Ms. John submitted that the undue influence was so startling that Mr. Mkhoul was able to influence her to agree and execute the agreement which was advantageous to him and grossly disadvantageous to her. She compared Mr. Mkhoul's evidence with his pleadings and argued that he was inconsistent in the valuation he ascribed to the stock. In this regard, she pointed out that his Reply and Defence to counterclaim applied a value of $672,000.00 to the stock as at 22nd August, 2007 while in his evidence he estimated the value to be between $600,000.00 and $650,000.00.

[108] Ms. John contended further that Mr. Mkhoul realized a further benefit of $41,000.00 which she paid towards satisfying the US$63,000.00 in the agreement. She cited **Law v Law**[20] in it was held that a co-partner has a duty to disclose to the other partner material facts in relation to the partnerships assets if he knows more than the other. If he fails to do so the transaction is voidable. She posited that she has established the presumption of undue influence against Mr. Mkhoul based on the existence of a fiduciary relationship between them and pursuant to which she reposed trust and confidence in him.

[109] Ms. John submitted further that Mr. Mkhoul was able to obtain information from the bank about TVS' deposits and withdrawals as evidenced by his testimony and pleadings. She pointed to his admission that he was one of the signatories on the account and one of the persons entitled to

[20] [1905] 1 Ch. 140.

receive information from the bank as to the status of the account. She urged that her testimony should be accepted over Mr. Mkhoul's which she described as untruthful and implausible. She argued that she had established a presumption of undue influence and Mr. Mkhoul has failed rebut it by showing she acted off of her own free will in entering into the partnership or the termination agreement. This she contended was exacerbated by her not being afforded an opportunity to have independent legal advice. She relied on the case of **Egger v Egger**[21] in support.

Independent legal advice

[110] The absence of independent legal advice is not conclusive and will not necessarily lead to an imputation of undue influence or invalidate the agreement. The court must decide if Ms. John's concurrence was arrived at freely, voluntarily and based on a full grasp and understanding of all pertinent details. In view of the earlier findings that:

1. she did not know the true financial state of the business;
2. The parties were in a fiduciary relationship which embodied a duty to account to each other; and
3. Mr. Mkhoul would reasonably have been expected to have that information and that he withheld it from her;

it seems to me that Ms. John was in a disadvantageous position compared to Mr. Mkhoul. This was compounded by the fact that Ms. John did not receive advice from her own lawyer.

[111] She contended that she was deprived of independent legal advice because Mr. Joseph did not insist that she seek such advice. She argued that Mr. Mkhoul has therefore not discharged the burden of rebutting the presumption of undue influence by demonstrating that she had independent legal advice. She characterized Mr. Mkhoul's conduct as unconscionable especially since he did not provide proof that he contributed any funds to the store's operations but benefitted greatly from its operations. She maintained that Mr. Mkhoul exploited the trust and confidence she reposed in him by among other things, selling TVS stock from the back of his vehicle for over a year without accounting to her for the monies he received. She urged that the court should deny Mr. Mkhoul the reliefs sought and set aside the agreement.

[21] Saint Lucia, Civil Appeal No. 17 of 2002.

[112] Ms. John acknowledged that she and Mr. Mkhoul have differing views of what transpired at the lawyer's office. She accepted that they both went to the office. She complained that Mr. Joseph provided no advice to her and this would not have made any difference since Mr. Joseph acted on Mr. Mkhoul's behalf and would not have been in a position to provide her with independent legal advice. She noted that Mr. Joseph subsequently wrote her demand letters on Mr. Mkhoul's behalf and this demonstrated that he represented Mr. Mkhoul. She asserted that Mr. Mkhoul was being untruthful when he testified that she directed Mr. Joseph what to include in the contract and when he said that Mr. Joseph asked her who her lawyer was and on learning that it was Mr. Jack tried to contact him on her behalf.

[113] Ms. John submitted that she was in the habit of acceding to Mr. Mkhoul's requests and therefore if he wanted her to have her lawyer present he would have ensured that the agreement was not executed until she sought independent legal advice. Citing the judgment in **Inche Noriah v Shaik Allie Bin Omar** Ms. John quoted extensively from the decision of Lord Hailsham who stated among other things:

> 'It is necessary … to prove that the gift was the free exercise of the independent will. The obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the done and with the full appreciation of what he was doing; … where independent legal advice is relied upon … it must be given with knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interest of the donor.'[22]

[114] She also quoted from Lord Nicholls of Birkenhead's judgment where he said:

> '… 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

[22] [1929] AC 127, para. 135.

subsequent completion of the transaction was free from exercise of undue influence.

[115] The surrounding circumstances reveal that Ms. John executed the agreement in which she undertook all responsibility for outstanding debts while Mr. Mkhoul was on the receiving end in respect of payment for his interest in the firm. He acknowledged receiving advances, yet he made no provision for them to be repaid. It is patently obvious that Ms. John reposed tremendous trust and confidence in Mr. Mkhoul. She expected him to look out for her interest but he was consumed by his own. This was unconscionable and unfair to Ms. John. In the premises, I find that she was subjected to undue influence by him which induced her to executing the termination agreement. She did so without all relevant details and is therefore entitled to have it set aside.

Issue No. 4 – Did Ms. John or Mr. Mkhoul breach the partnership arrangement or the termination agreement?

Alleged breaches by Ms. John

[116] Mr. Mkhoul claimed that Ms. John violated the terms of the termination agreement by:

1. failing to pay him $52,000.00, being the balance of the purchase price for his interest in TVS;
2. failing to pay the outside creditors the sum of $25,525.00 with interest at 3%; and
3. taking the stock in TVS, selling it and failing to account to him for the proceeds.

[117] Under cross-examination, Mr. Mkhoul acknowledged that Ms. John had paid him US$14,000.00 of the $63,000.00 price of his share in TVS. He adjusted the outstanding balance to US$47,909.00 This accords with Ms. John's testimony. Mr. Mkhoul testified that after Ms. John failed to pay him the balance, he had his lawyer write to her repeatedly. He produced copies of the letters. At first she agreed to p ay of the balance and requested additional time to secure funds to do so. She ultimately refused to honour her agreement to pay. Mr. Mkhoul submitted that Ms. John had no intention to honour her bargain.

[118] Ms. John admitted that she agreed to pay Mr. Mkhoul US$63,000.00 for his interest in TVS, that she paid him part of the agreed price and has not paid the balance. She explained that they had

agreed orally that Mr. Mkhoul would repay the advances totaling $85,408.74 and that they would be offset against the US$63,000.00 payable to him. She indicated that she asked at the time that those oral terms be included in the written agreement, but Mr. Mkhoul's lawyer declined her request and told her instead that the oral terms could be made the subject of another agreement. She testified that she decided to discontinue further payments to Mr. Mkhoul after:

1. he failed to honour the oral part of their agreement;
2. she discovered that he had misused and abused the confidence and trust she reposed in him; and falsely misrepresented to her, the business' dismal financial state.

[119] She acknowledged receiving repeated demands from Mr. Mkhoul's lawyer to pay the balances due under the agreement, that she kept promising to do so and requested further time to make the payments. She also indicated that she told Mr. Mkhoul that she would need to get a loan to pay him. In face of the documentary and corroborative testimonies from the parties, I accept that Ms. John repaid only part of the sums outlined in the termination agreement.

[120] Mr. Mkhoul admitted that he received monies from TVS to assist with his medical expenses while he was in Syria. He agreed that he might have taken $600.00 from TVS on 28 March, 2006, to insure a vehicle but says that the vehicle was working for the store. He acknowledged taking $6000.00 on March 30, 2007 to licence his vehicle. He also accepted that he might have taken $6000.00 from TVS on 6 June, 2007 to go shopping at Radio Centre; and that on 5 July 2007 he bought a plane ticket with monies from TVS to go to St. Lucia. He could not recall taking $547.00 from TVS on 7 July 2007 to go to St. Lucia and he denied crediting goods valued at $7,789.00 from TVS without paying for them. These acknowledgements demonstrate that Mr. Mkhoul received advances from TVS from time to time as alleged by Ms. John. He denied agreeing to repay those sums. Whether he repaid them is uncertain.

[121] It makes no sense to me that Ms. John would grant Mr. Mlkhoul substantial advances from the business without obtaining a corresponding benefit or requiring him to reimburse them. That would be disadvantageous to Ms. John and goes against all common sense, reason and logic. I reject Mr. Mkhoul's story. Ms. John's version is more credible. I therefore accept that she and Mr. Mkhoul had

an oral collateral agreement whereby he agreed to repay the advances by offsetting them against the amount owed to him. I find to that there was no agreement for payment of interest. The termination agreement contained no such provision. Mr. Mkhoul did not allege that there was an oral agreement to this effect and I conclude that there was none.

[122] A party to a contract is entitled to terminate it in response to a substantial, or serious failure by another party to fulfil his obligations under it.[23] Such failure may manifest as partial or total failure of performance by the defaulting party. Where the partial or non-performance has deprived the other party of a substantial benefit termination of the agreement by the innocent party is justifiable and constitutes a defence to an action for recovery. In deciding whether the termination was justifiable, the court would examine the effect of the default on the contract and what relief is appropriate in the circumstances.[24]

[123] In the case at bar, Ms. John stands in the shoes of that aggrieved party. She made good faith efforts to hold up her end of the bargain and was met by an unconscionable insistence by Mr. Mkhoul that she shoulder all obligations for TVS while he reaped the benefits. I find that Mr. Mkhoul completely defaulted in fulfilling his obligations under the termination contract. Ms. John was therefore justified in ceasing payments to him. In those circumstances, she is not liable to him for breach of its terms and conditions.

Alleged breaches by Mr. Mkhoul

[124] Ms. John claimed that Mr. Mkhoul breached the termination agreement by failing to:

1. make equal financial contributions to TVS; and
2. repay the advances made to him from the business' assets.

She alleged further that in breach of the oral part of the termination agreement, he refused to transfer his interest in the Belvedere property to her.

[23] Halsbury's Laws of England, Vol. 22 (2012) para. 553.

[24] Ibid. at para. 55 of Halsbury's Laws of England.

[125] Mr. Mkhoul denied all those assertions and contended that he never agreed to put equal finances into TVS. He pleaded that the terms of the termination agreement was reduced in writing and was binding on the parties. Mr. Mkhoul claimed that his English is not very good. He did seem to have difficulty understanding some words but demonstrated a comprehensive understanding of English adequate enough to communicate comfortably and effectively on all aspects of the case. He was able to respond to questions posed and instructions given except in a few limited instances.

[126] Having resided in Saint Vincent and the Grenadines as long as he stated, and being assimilated into the business communities on the mainland and two sister islands, one would expect him to have a rounded command of the language to maintain his businesses. He demonstrated as much. It was clear that he was not unduly handicapped in his ability to communicate. In view of my earlier observations regarding breaches of the termination agreement, I find that Mr. Mkhoul breached the termination agreement by not repaying the advances. I make no finding that he failed to contribute equally to TVS. There is insufficient evidence of this. Mr. Mkhoul is liable to Ms. John in respect of the referenced breach.

[127] He denied agreeing to transfer his interest in the Belvedere property to Ms. John. Ms. John insisted that this was part of their oral agreement. The evidence revealed that the property was the subject of a mortgage with the Bank of Nova Scotia and was not discharged until years after the termination agreement was formalized. With the best intentions, Mr. Mkhoul could not transfer his interest in it until satisfactory arrangements were made to pay the loan and overdraft facility. Moreover, the combined value of the Belvedere property and the ascribed tally of advances 'purportedly' made to Mr. Mkhoul would be almost equal to the consideration that Ms. John agreed to provide in the termination agreement.

[128] In my opinion, such an arrangement would not be profitable to Mr. Mkhoul. Neither he nor Ms. John appeared to be clueless about negotiating commercial bargains. On the contrary, their overall conduct as described during the case, portrays them both as rather clever and wily business people who are not averse in the least to obtaining the best deal, and perhaps rightly so. I am not convinced that Mr. Mkhoul agreed to transfer his share of the Belvedere property to Ms. John.

[129] Ms. John argued that the only contributions which were proved to have been made to the establishment and operations of store were hers. She contended that the partnership agreement was breached, she is the sole owner of the store and Mr. Mkhoul functioned as an agent in it. She reasoned that the termination agreement was fundamentally flawed because Mr. Mkhoul would be unable to establish any interest in the business. I disagree.

[130] Ms. John appears again to be using a broad brush to colour the partnership agreement with similar allegations of impediments which she claimed plagued the termination agreement. The weight of the evidence leads inexorably to a finding that she and Mr. Mkhoul functioned as partners of TVS until late 2007 when she obtained the keys to the store and removed the merchandise and other assets from the building on Sharpe Street. She has not been able to prove that Mr. Mkhoul made either no contributions to TVS or less than she did; or that she is its sole owner and Mr. Mkhoul functioned as her agent. A finding that Mr. Mkhoul was an agent would be inconsistent with the notion that he induced her by false misrepresentation or undue influence to become part owner. I make no such findings. Mr. Mkhoul's singular default was failing to repay the advances.

Issue No. 5 – Does Ms. John hold the stock in TVS as trustee for her and Mr. Mkhoul?

[131] Mr. Mkhoul claimed that Ms. John failed to make the payments to him, to the external creditors and other creditors of TVS as agreed in the termination agreement. He contended that consequently his interest in the business did not pass to her pursuant to clause 5 of the agreement which states:

> 'The interest in the business owned by Adnan Mkhoul shall not pass
> to Sandra John until the final payment is made.'

He pleaded that Ms. John moved the stock out of the building, took it elsewhere, sold it and has never accounted to him for the proceeds. He claimed that she therefore holds the stock on trust for him until she completes payments in keeping with the termination agreement.

[132] He explained that Ms. John took the goods and material he made a report to the police, as a result of which she was arrested, charged and tried in 2009. He claimed that no verdict has been rendered. I find that hard to believe. Ghandi Mkhoul corroborated aspects of his father's account. He said that his father gave him the keys to the store when he traveled abroad in Sept. 2007. He testified further

that Ms. John was his (Ghandi Mkhoul's) woman. He asserted that Ms. John encouraged him to leave his Dad's house which he did, that she rented an apartment for him, offered him sex which he accepted, and attempted to turn him against his father. He said he turned over the keys to the store to her after they had sex and she took everything out of the store and never paid for them. He claimed that she caused him tell the landlord that his father died, whereupon the landlord gave her a lease in her own name. He said that she was in control of all finances and did not take monies from store to the bank but instead kept them for herself. It is quite understandable if she did this after the termination agreement was executed.

[133] He also asserted that his dad gave her receipts whenever he went overseas to buy things. He testified that after he caught himself, he went back to his dad. He later said that he never held keys to TVS. This inconsistency is quite remarkable. On further examination of all the circumstances, it is reconcilable with the other accounts within the contextual background. Ghandi Mkhoul is young adult. He struck me as one who endeavoured to be frank although perhaps partial to his father. He seemed somewhat academically and developmentally challenged. For this reason, it is conceivable that he might have interpreted the expression 'held keys to TVS' in a very literal sense meaning 'retain in one's custody'.

[134] Interestingly, Ms. John's account of how she obtained access to the store to remove the stock was very sketchy. She could not remember when she got the keys or under what circumstances but she admitted removing the stock. She indicated that Mr. Mkhoul and his son had the keys and that they were going in and taking stock from the store after 22nd August, 2007. I accept Ghandi Mkhoul's testimony regarding how Ms. John got hold of the keys to TVS. In the absence of a contrary account by Ms. John, his version is compelling and credible. It also merges logically with the narrative surrounding Mr. Mkhoul's and Ms. John's dealings after 22nd August, 2007.

[135] Ms. John admitted that she did not pay Mr. Mkhoul, the external and other creditors the full amounts she contracted to pay under the termination agreement. She maintained that Mr. Mkhoul was still running the business after 22 Aug. 2007 and that she did not have access to the store without his children and him being present. She claimed that after she took over control Mr. Mkhoul

went to the store making confusion, reported her to the landlord and because the lease was not in her name, the landlord told her to surrender the place to Mr. Mkhoul or face legal action. After obtaining the keys, she gave instructions for the stock to be taken from TVS to Campden Park.

[136] Mr. Mkhoul was out of the jurisdiction at that time. He said that he handed over control of the business to Ms. John in September 2007 and 3 days or so after his departure to Syria she moved all the stock to a storeroom in Campden Park and has been selling them on the streets. He complained that she did not return any to the business and has never accounted to him regarding how much she received for sale of the stock. He insisted that the store's inventory had an estimated value of $600,000.00 to $650,000.00 at that time. He contended that she moved the stock on December 7th 2007 without his knowledge and/or consent and confiscated and/or appropriated it to herself. Ms. John could not give an accurate figure of stock she moved from the store. She reasoned that Mr. Mkhoul was not entitled to any information regarding TVS' operations after the termination agreement was executed, and there was no written or other requirement that she account to him for their sale.

[137] I find that Mr. Mkhoul retained control over the business even after executing the termination agreement. Ms. John decided to put her female persuasive abilities to good use and they were apparently quite convincing to Ghandi Mkhoul who handed over the keys to her. She proceeded to empty the store and has not provided any account to Mr. Mkhoul for the items she removed.

[138] Mr. Mkhoul submitted that if his interest in TVS did not pass to Ms. John, the court must decide what is the legal position of the parties; whether the parties remained joint owners in the business and owed each other a fiduciary duty; and whether Ms. John was liable to 'account to (him) for monies had and received for and on their account' from 22nd August 2000 (sic) to 30th June 2016, 'the date of conclusion of the case'. He submitted that damages are payable to him in a sum as may 'fairly and reasonably be considered' either arising naturally according to the usual course of things from the breach of the contract, or as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract. He asked that judgment be entered for him and that Sandra John be compelled to account to him and pay him such sums of money as he ought to have realized as profit from the business.

[139] Mr. Mkhoul cited the case **Brian Pty Limited v United Dominions Corporation Limited**[25] as authority for the proposition that 'joint ventures had obligations to each other or one another analogous to partners'. He submitted that a fiduciary 'could not without expressed authority from its co-adventurer, obtain an advantage for itself in relation to their joint venture'. He contended that **Construction Services Limited v Daito Kogyo Co. Limited**[26] is further authority for that proposition and concluded that Ms. John holds the property on trust for him at an interest rate of not less than the statutory rate of. He argued that the parties remained joint owners and a fiduciary and accordingly Ms. John holds the stock in TVS as trustee for them both until such time as he is paid in full and further that Ms. John is liable to account to him.

[140] The Trustees Act[27] describes 'trust' and 'trustee' to include:

> 'implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property and the duties incident to the office of personal representative of a deceased person'.[28]

[141] A trust may be created orally, in writing, by conduct or through operation of law. The law recognizes different types of trusts including constructive and resulting. Mr. Mkhoul did not specify any particular kind. The learned authors of Halsbury's Laws of England posit that a constructive trust:

> 'is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of particular property to hold it purely for his own benefit.' [29]

Mr. Mkhoul's submissions are most closely aligned to this characterization of a constructive trust than any other kind. His assertions are accordingly evaluated against this legal construct.

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[25] [1983] New South Wales LR 490.

[26] (1994) 49 WIR 310.

[27] Cap 494 of the Revised Laws of Saint Vincent and the Grenadines, 2009, sections 22 (g), 30 and 32.

[28] Section 2 of the Act.

[29] 4th Ed. Reissue, 1995 at para. 524.

[142] Having found that Mr. Mkhoul and Ms. John were equal partners in TVS, it is necessary to consider the provisions of the Act to assess whether there is merit to Mr. Mkhoul's submission and if so to determine their respective interests at the relevant time. Central to resolution of that issue is whether the partnership outlived the termination agreement or was dissolved by it. The Act provides that a firm may be dissolved:

(1) at the end of a fixed term, if it was established for a definite period;

(2) at the termination of an adventure or undertaking, where it was established for that single adventure or undertaking;

(3) if entered into for an indefinite period; by one partner giving notice to the other(s) of his intention to dissolve the partnership; and in such a case the partnership is dissolved from the date of the notice;

(4) by the death or bankruptcy of a partner, or if one partner agrees for his share in the partnership property to be charged for his separate debt;

(5) by order of the court.[30]

[143] The case in point is not captured strictly by the foregoing provisions. The evidence disclosed that TVS was conceived as a venture for an indefinite term. Neither party gave written notice to the other of a desire to terminate the partnership. However, by signaling his intention to withdraw from the partnership Mr. Mkhoul for all intents and purposes issued such notice and this decision was formalized by the termination agreement. While the letter of the law was not fully complied with, the spirit was observed. I am satisfied that Mr. Mkhoul substantially complied with the notice stipulation and effected a dissolution of the partnership in that way.

[144] The Act mandates partners to:

> account to each other and the firm and provide full accounts of all matters affecting the partnership[31]; and share responsibility for the firm's liabilities and distribute surplus assets between them on dissolution[32].

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[30] Sections 28, 34, 35 and 37 of the Act.

[31] Sections 30 and 31 of the Act.

[32] Sections 41 and 44.

These are mandatory statutory obligations, whose objective is patently obvious – ensuring that fairness prevails in apportionment of liabilities and benefits. Mr. Mkhoul and Ms. John took no such measures. They therefore did not comply with the legal requirements for dissolution of the partnership. The Act stipulates that the rules of equity and common law remain in force in construing its provisions except where they conflict with each other. I perceive no such inconsistency and no reason why Mr. Mkhoul and Ms. John are not bound by them.

[145] The dissolution of Adnan Mkhoul's and Sandra John's partnership in TVS was effected in violation of the Act, was irregular and unlawful. In the premises, for the purposes of dissolution, Mr. Mkhoul remained a full partner in the firm of TVS even after the termination agreement was executed. He remained entitled to share equally with Ms. John in the assets, obligations and liabilities. It follows that all assets and liabilities belonging to TVS as at 22nd August 2007 (wherever located), are to be shared equally between Mr. Mkhoul and Ms. John in accordance with the Act. It is therefore declared that as at 22nd August, 2007, Sandra John and Adnan Mkhoul severally and jointly held and continue to hold all assets in TVS in trust for each other. The obvious corollary is that they are equally liable for all liabilities of TVS as at 22nd August, 2007 irrespective of what they purported to agree in the termination agreement.

Issue No 6 – Is Ms. John entitled to sole ownership of the Belvedere property?

[146] The Belvedere property was registered by Deed No. 1266 of 2007. It is expressed to be a Deed of Gift between Jennifer Quammie nee Henry and Isaac Quammie on the one hand and Adnan McKhul and Sandra John on the other. It comprises 5,844 sq. ft. and has a concrete structure on it. On its face, the Deed signified that it was conveyed between the transferors and transferees for natural love and affection. However, Ms. John averred that the property was purchased from her personal savings for $18,500.00. She indicated that Mr. Mkhoul carried out negotiations with Mr. and Mrs. Quammie, but she alone paid the purchase price.

[147] She explained that because of the trust she had in Mr. Mkhoul as her business partner, the property was conveyed in their joint names and they mortgaged it in early 2007, along with another parcel she owned to secure a commercial overdraft account and a loan with the Bank of Nova Scotia for TVS. She testified that the Belvedere property could not secure the loan so she had to put up her other property because Mr. Mkhoul told her that he had no property.

[148] Ms. John maintained that during their negotiations in connection with the termination agreement, they agreed that among other things Mr. Mkhoul would transfer his interest in the Belvedere property to her She insisted that she told the lawyer Mr. Carl Joseph to include provisions in the contract to address this but he said they would have to prepare another contract.

[149] Mr. Mkhoul testified that there was never any agreement to transfer his interest in the Belvedere property to Ms. John and that the Belvedere land was never part of the 22nd August, 2007 agreement. He indicated that it was given to him as gift, he shared it with her and the deed was used to raise funds for TVS. He testified that he gave Jennifer and Isaac Quammie $18,500.00 for the land even though they asked for $16,000.00. He also said that they were given $18,000.00. On another occasion, he said that Ms. John gave him $18,500.00 and he gave her $9000.00. His testimony was riddled with inconsistencies and is therefore rejected. It was not supported by the documentary evidence. He submitted that property at Belvedere in which he and Ms. John have interests, was used to secure the overdraft and loan at Bank of Nova Scotia and 'the fiduciary duty towards each other continues until the debt is repaid and the properties reconveyed to the respective parties.'

[150] The Inland Revenue certificate attached to the Deed ascribed the figure of $31,000.00 as the consideration (price) paid for the land. This belies Mr. Mkhoul's and Ms. John's testimony. It suggests that either they were both untruthful to the court or to the revenue collection authorities. In either case, the value of the property and/or the price paid, if any, is uncertain. I do not accept Ms. John's assertion that she paid the purchase price on her own.

[151] She maintained that the $18,500.00 was her personal money and that she was able to adduce evidence to corroborate her contention. She argued that after giving evidence refuting that she paid $18,500.00 for the subject land, Mr. Mkhoul subsequently testified that he gave her $9000.00 as a contribution towards the acquisition of the Belvedere property. She submitted that he did not say where he got the money, when he paid it or whether it was in cash or by cheque. She argued further that Mr. Mkhoul did not adduce any further evidence to corroborate his oral testimony that he paid $9000.00 contribution.

[152] The deed on its face reflects that the land was conveyed to Mr. Mkhoul and Ms. John for natural love and affection. Neither party produced satisfactory evidence that they paid any monies to the Quammies and if so, how much. No cancelled cheques or receipts were exhibited. Having heard Mr. Mkhoul's and Ms. John's respective testimonies, I was left with the distinct impression that both parties were not being totally frank with the court about their dealings surrounding the acquisition of the land. Neither satisfactorily explained why it was necessary to register it in both names. Ms. John seemed to imply that they needed to have collateral to secure a loan and credit facilities from the bank. In such a case, it is not clear why the property was not conveyed to TVS as an entity and why Ms. John would have needed to contribute the full price without making adequate arrangements to protect her purported singular interest in it. For his part, Mr. Mkhoul provided no evidence of his contribution to the purchase price, if payment was actually exchanged. There is inadequate factual basis on which to conclude that they obtained the property as part of the partnership property. I make no such finding.

[153] The Registration of Documents Act[33] provides that documents registered under its provisions, convey to the named transferee(s), the interests, rights and title that the transferor(s) expressly purported to transfer. It also stipulates that a conveyance takes effect from the date of such registration, operates in priority to any subsequent registration and is effective at law and in equity. Documents registered in this manner constitute conclusive proof of and give notice to all the world of the interests and rights thereby registered.

[154] Neither Mr. Mkhoul nor Ms. John provided any documentation evidencing payment of any monies to the Quammies for the subject land. Ms. John supplied no sufficient proof that it was purchased or that she purchased it solely. The deed purported to convey joint title, rights and interest in the Belvedere property to Mr. Mkhoul and Sandra John. In the absence of evidence to the contrary, I find that the property registered by Deed of Gift No. 1266 of 2007 is owned jointly by Mr. Adnan Mkhoul and Ms. Sandra John, in accordance with the express terms of the said deed.

[33] Cap. 132 of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 5.

Issue No 7 - To what remedies are Mr. Mkhoul and Ms. John entitled?

Accounts

[155] Mr. Mkhoul has prevailed in his claim for a declaration that Ms. John holds the stock in TVS in trust to be shared jointly with him, subject to the discharge of all TVS' liabilities. The Act outlines the matters which partners must finalize at the time of dissolution of a partnership. Specifically, it stipulates that:

1. each partner is jointly and severally liable for all debts and obligations incurred by the firm while he or she is a partner, 'subject to the prior payment of his separate debts';[34]
2. The partners' rights and duties which are imposed by law or agreed between or among them may be varied by agreement between them;[35] This is subject to their duty of disclosure referenced earlier and their mandatory statutory obligations;
3. All property acquired by the firm and all rights and interests in such property ('partnership property') must be held by the partners exclusively for the purposes of the partnership and in accordance with their agreement;[36]
4. Partners are required to render to any partner or his legal representative, true accounts and full information of all things affecting the partnership;[37]
5. On dissolution of the partnership each partner is entitled as against the other to have the partnership property applied in payment of the firm's debts and liabilities and to have the surplus assets applied towards payment of each partner's respective liabilities to the firm and the balance distributed among each partner equally;[38] and
6. After a dissolution of a partnership, accounts must be settled in a strict order as outlined in section 46 of the Act.

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[34] Ibid. at sections 11, 14 and 16 of the Act.

[35] Ibid. at section 21 of the Act.

[36] Ibid. at section 22 of the Act.

[37] Ibid. at sections 30 and 31 of the Act.

[38] Ibid. at sections 41, 44 and 46 of the Act.

[156] In view of all that has transpired in this convoluted saga, the interests of justice would best be served by requiring Mr. Mkhoul and Ms. John to undertake all the requisite statutory obligations to complete dissolution of the partnership in accordance with the applicable law. They would need to collaborate for the purpose of retrieving and reconstructing all their financial data, some of which Ms. John indicated was preserved in electronic format. The paucity of information submitted to the court made it impossible to make a finding on quantum in relation to contributions, assets or liabilities. To their detriment, neither party was sufficiently forthcoming in the manner contemplated by the disclosure provisions of the CPR.

[157] Having regard to the totality of the evidence, it is declared that the firm Traffic Variety Store was dissolved as at 22nd August, 2007 and that within the next 60 days, the partners Adnan Mkhoul and Sandra John assume and execute their statutory obligations towards each other and TVS in respect the firm's operations, pursuant to section 46 of the Act. Adnan Mkhoul and Sandra John are directed to collaborate in settling the accounts of TVS as stipulated in law. For this purpose, Mr. Mkhoul and Ms. John are each required to file and serve on or before 17th April 2017, a legible, articulate and comprehensive statement of accounts containing details of each transaction they and their partner was party to on behalf of TVS, during the life of the partnership, accompanied by legible copies of bank statements, invoices, receipts and other supporting documentation. Adnan Mkhoul and Sandra John are required to collaborate on identifying and satisfying all debts and obligations of TVS pursuant to section 46 of the Act, on or before 30th June, 2017.

[158] The parties are to agree and retain on or before 10th March, 2017, a qualified accountant to prepare financial statements for the partnership for the 12 month period ending 22nd August 2007. The accountant shall endeavour to finalize and submit an original set of accounts to each party, on or before 5th May, 2017. Based on the assessed net value of the assets, each party is to:

1. contribute equally to satisfaction of the firm's liabilities; and
2. receive 50% of the value of the partnership's assets;

as at 22nd August, 2007. Mr. Mkhoul and Ms. John shall equally bear the expenses associated with the preparation of those accounts.

Rescission

[159] A party to a contract may become entitled to have the contract voided if fraud or misrepresentation is established.[39] Ms. John has established that Mr. Mkhoul made certain false misrepresentations to her which induced her to execute the termination agreement to her detriment. On this basis, she was entitled to rescind the contract as she did. A contract may be set aside for undue influence if claimant proves that undue influence was exerted.

Damages

[160] A party to claim who establishes false misrepresentation, may recover damages if she proved that she suffered loss as a consequence.[40] While Ms. John proved that she suffered loss as a result of the false misrepresentation, it is not evident that such loss exceeds the amount she would expect to receive through dissolution of the partnership in the prescribed manner. If so, she may apply to the court for those consequential losses to be assessed. For the foregoing reason, no order is made at this juncture for Ms. John to recover:

1. $41,000.00 paid to Mr. Mkhoul;
2. Contribution from Mr. Mkhoul of $222,377.63; or
3. $85,408.74 representing advances made to Mr. Mkhoul;

as claimed.

[161] Where a party to an agreement fails to perform a contractual obligation, if the failure constitutes a breach the injured party has a right to damages for consequential loss. Ms. John has established that Mr. Mkhoul failed to honour his obligation to repay advances. She thereby became entitled to recover the amount outstanding or for damages to be assessed.

[162] Similarly, the termination agreement having being rescinded, no order is made for Mr. Mkhoul to recover:

1. the balance of US$47,909.00 under the termination agreement or interest on that sum;

[39] Halsbury's Laws of England, Vol. 95 (2013) 422.

[40] Section 43 of the Act.

2. payment of US$25,525.00 allegedly owed to outside creditors or interest on that sum; or
3. damages for breach of contract;

as claimed.

ORDER

[163] It is accordingly declared and ordered:

1. Traffic Variety Store be dissolved pursuant to section 37(f) of the Partnership Act,[2] with effect from 22nd August, 2007.

2. Within 6 months, (i.e. on or before 17th August 2017) Adnan Mkhoul and Sandra John must assume and execute their statutory obligations towards each other and TVS in respect the firm's operations, pursuant to section 46 of the Partnership Act.

3. Adnan Mkhoul and Sandra John are directed to:
   1) collaborate in settling the accounts of TVS as stipulated in law;
   2) file and exchange on or before 17th April 2017, a legible, articulate and comprehensive statement of accounts containing details of each transaction of which he or she has knowledge or information that:
      (a) he/she; and/or
      (b) his/her partner

      was party to on behalf of TVS during the life of the partnership; accompanied by legible copies of bank statements, invoices, receipts and other supporting documentation;
   3) agree to and retain on or before 10th March, 2017, a qualified accountant to prepare financial statements for the partnership for the 12 month period ending 22nd August 2007. The accountant shall endeavour to finalize and submit an original set of accounts to each party, on or before 5th May, 2017;
   4) equally bear the expenses associated with the preparation of those accounts;
   5) on or before 30th June, 2017, collaborate on identifying all debts and obligations of TVS pursuant to section 46 of the Act;

4. Adnan Mkhoul and Sandra John are directed to on or before 28th July, 2017:

1) contribute equally to satisfaction of the firm's liabilities pursuant to section 46 of the Partnership Act; and
2) distribute between them, 50% each of the value of the partnership's net assets;

based on the assessed net value of the assets, as at 22nd August, 2007.

5. The termination contract executed by Adnan Mkhoul and Sandra John is void and rescinded *ab initio.*

6. Sandra John shall on or before 30th September, 2017, file an application for damages to be assessed in respect of any loss suffered by her in connection with Mr. Mkhoul's false representations and undue influence, and for which she is not adequately compensated through her share in the firm's assets.

7. Mr. Mkhoul's claims for:
   1) the balance of US$47,909.00 under the termination agreement and interest on that sum;
   2) payment of US$25,525.00 allegedly owed to outside creditors and interest on that sum; and
   3) damages for breach of contract;

   are dismissed.

8. Ms. John's claims for:
   1) $41,000.00 paid to Mr. Mkhoul;
   2) contribution from Mr. Mkhoul of $222,377.63; and
   3) $85,408.74 representing advances made to Mr. Mkhoul;

   are dismissed.

9. Mr. Adnan Mkhoul shall pay prescribed costs of $7500.00 to Ms. John, pursuant to CPR 65.5.

[164] I am grateful to counsel for their written submissions. I wish to also apologize for the delay in delivering this judgment. This was attributable in large measure to the disjointed manner in which the

trial bundles were prepared including the fact they did not contain all of the pleadings and supporting documentation.

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Esco L. Henry
HIGH COURT JUDGE