THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(Civil)

SAINT LUCIA

CLAIM NO.SLUHCV2009/0338

BETWEEN:

[1] DELLA VALLERY NOLAN nee JUDE
[2] BEVERLEY JUDE-PORTER

Claimants

and

[1] DIANE JUDE
[2] VANDYKE JUDE

Defendants

APPEARANCES:
Maureen John-Xavier and Bertram Xavier for the Claimants
Dexter Theodore, QC and Barbara Vargas for the First Defendant
Esther Greene-Ernest and Petra Nelson for the Second Defendant

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2017: March 17, 31;
July 5.

JUDGMENT

[1] SMITH J: The parties to this claim are siblings. After the death of their father, Austin Jude, in September 2007, the Claimants, Della and Beverley, filed a claim against the Defendants, Diane and Vandyke, in June 2009. They say that Diane and Vandyke through undue influence, unconscionable bargain, abuse of trust and confidence or conflict of interest managed to get deeds of transfer conveying title to certain highly valuable lands ("the disputed lands") to themselves, which ought properly to have vested in their father's estate. They are asking the Court to set

aside these transfers; to order their transfer back to their father's estate, his beneficiaries or heirs-at-law; to order that the Registrar of Lands registers the cancellations; to order that the Defendants account to the estate; to make various declarations regarding undue influence and to order the payment of interest and costs.

[2] The Defendants deny all the allegations. They counter-attack by taking a number of preliminary objections, namely, that: (1) the claim is an administration claim; (2) the Claimants lack the *locus standi* to bring the claim; (3) the claim is prescribed; and (4) the deeds sought to be impugned cannot be improbated without joining the notary who executed them.

[3] Before considering either the preliminary or substantive issues, it is perhaps best to sketch out the relevant factual background. I use the phrase "relevant factual background" guardedly since the court documents that have amassed since the filing of this case in 2009, eight years ago, are better measured in feet rather than counted by number of pages. The body of facts, incidents and transactions upon which the allegations are founded is nothing short of behemothic. In the sketch that follows, I will endeavor to capture the essential narrative, leaving other details to be examined, so far as relevant, when each individual allegation is analyzed. I do not think a review of the interlocutory skirmishes that have protracted this case will serve any useful purpose.

Relevant Factual Background

[4] Austin Jude and his wife, Sheila had a turbulent marriage that ended in divorce in 1997 and acrimonious court proceedings over matrimonial property. In order to hide property from Sheila in the divorce proceedings, Austin caused parcel 48 (the matrimonial property) held by his company Austinsheil Properties Ltd ("Austinsheil") to be transferred to his sister, Martina Jude on 6th January 1999. On the 12th January 1999 Austinsheil transferred parcels 56, 60 and 103 to

Austin's cousin, Loretta Lansiquot. The Court of Appeal eventually ordered that Sheila was entitled to 10 lots of her choosing from the lands owned by Austinsheil.

[5] The tempestuous marriage that led to a bitter divorce came full circle with Austin's remarriage to Sheila sometime in 2005. Austin had become terminally ill and apparently wanted reconciliation with his wife before his life tenancy expired. The other *dramatis personae* are their children Della, Beverley, Vandyke, Diane and Yasmin. Yasmin was not a party to the claim but gave evidence on behalf of the Claimants.

[6] The bulk of the disputed lands that form the subject matter of the claim were held in the name of Kenneth Monplaisir, QC, a long-time business associate and attorney for Austin. Together, they had acquired certain valuable lands, a portion of which remained unpartitioned.

[7] Mr. Monplaisir had purchased, in his sole name, certain lands situated at Marigot Bay in the Quarter of Castries by public auction. By agreement dated the 15th day of September 1977, Mr. Monplaisir agreed with Austin that the property belonged to them both equally and that a Deed of Sale to that effect would be made upon payment by Austin of his half share. Apparently, the Deed of Sale was never drawn up. Instead, they agreed, by letter, on how they would proceed to share the land.

[8] On the 25th day of June 1984, a portion of the land was partitioned, creating 46 parcels. Of the 46 parcels, Mr. Monplaisir and Austin received 23 parcels each. Austin later transferred his parcels to Austinsheil. His interest in the remainder of the unpartitioned lands was protected by a registered inhibition that restricted all dealings by Mr. Monplaisir with the unpartitioned lands unless Austin consented.

[9] One of the central facts underpinning the claim is that Vandyke and his father had a vitriolic relationship. They had a physical fight in 1997 that left Austin

unconscious. Following this, Vandyke and his father did not speak for about eight years: from 1997 to early 2005. As already mentioned, Austin became very ill. He was suffering from the effects of a stroke, prostate cancer and complained of feeling confused and having memory lapses. It should perhaps be stated upfront that there was no admissible medical evidence as to the condition of his mind. This is important since the Claimants, in their statement of claim, pleaded that Austin was suffering from "weakness of mind and senility". There was no evidence to support this.

[10] Despite the stormy relationship between Austin and Vandyke, upon Austin's death in September 2007, much of his valuable property had been transferred into Vandyke's name (and some parcels into Diane's name). His sisters, Della and Beverly, found this to be inexplicable and highly suspicious given the terrible relationship that had existed between father and son. Less so for Diane who, they admitted, was their father's favorite child. But Diane was also made a Defendant to the claim.

[11] The Claimants lived in England, far removed from where the acts of actual undue influence allegedly occurred. This perhaps partially explains why their witness statements filed in this claim, especially that of Beverley, was replete with bald, self-serving assertions, inadmissible hearsay evidence, irrelevant and scandalous matter and information. They portrayed Vandyke as an aggressive, violent, domineering, corrupt person about whom it could be believed that he bent his father's will and caused him to take certain decisions and actions that resulted in property being transferred to Diane and himself. A substantial portion of this evidence was struck out in a decision of this Court handed down on 31st March 2017 based on preliminary applications made by the Defendants.

[12] It was not disputed that some time in early 2005, Sheila, on behalf of Austin, contacted Vandyke in California where he had been living and asked him to come back to Saint Lucia to assist his father in recovering the remainder of the

unpartitioned lands that Austin jointly held with Mr. Monplaisir. Understandably, the dying Austin wished to order his affairs before arriving at his terminus.

[13] Vandyke's evidence was that Austin expressed concern that his deteriorating health and medical condition did not allow him to effectively manage his affairs. He complained of experiencing some lapses in memory and that he also suffered from confusion. Vandyke said that when he met his father, he looked 'frail'. The Claimants did not dispute this.

[14] Diane gave a similar description of the state of her father's health. His 'health showed signs of deterioration'. Her evidence was that, in the early part of 2005, they spoke and in the course of the conversation he told her that his memory was sometimes failing him. Diane stated that he told her that he was beginning to feel overwhelmed and did not have the energy, desire or motivation to deal with his business affairs. He was having problems in his business relationship with his long-time business partner and legal advisor Mr. Monplaisir. The Claimants did not dispute this.

[15] Vandyke pleaded in his defence that he "imposed" certain conditions on his father which had to be met before he would agree to assist him with recovering the unpartitioned lands from Mr. Monplaisir. Among those conditions was that Vandyke wanted Diane to have power of attorney as he wanted to report to one 'Master'; he was fearful of his father's 'reputation of saying one thing and thereafter doing something completely different'. The Claimants placed tremendous emphasis upon this particular pleading in the Defendants' joint defence as evidence of actual undue influence.

[16] Other conditions imposed by Vandyke were:

(i) That parcel 48 be returned to Sheila or any one of the other children of the family. If Austin caused parcel 48 to be transferred to Diane, Vandyke would then discontinue a fraud claim that he had filed against Austin, Martina Jude and Austinsheil sometime in 2003-2004 for the recovery of parcel 48. Vandyke felt his

mother's rightful interest in parcel 48 had been frustrated when Austin transferred it to Martina to shield it from the divorce proceedings;

(ii) That parcels 103 and 56 had to be transferred to Diane with the express approval and consent of Loretta Lansiquot since these properties had similarly been transferred by Austin to defeat any interest that Sheila could claim in them during the divorce proceedings;

(iii) That Austin 'cause the unobstructed transfer of land' to Sheila in fulfillment of the Court of Appeal award to her. This comprised 10 parcels of land of her choosing on the south-shore of Marigot Bay and 4 acres of the undivided north-shore lands known and registered as Block and Parcel No. 0444B 4. (The South-shore lands comprised all lands except Block and Parcel No. 0444B 4 – what is referred to as the North-shore lands);

(iv) That Austin cease 'obstructing' Vandyke's purchase of parcels 147, 148 and 157 from Mr. Monplaisir. Though Austin had a restriction registered against parcels 147 and 148, Mr. Monplaisir was claiming these as his sole property. Austinsheil held an undivided half share in parcel 157. Vandyke required that the value of Austinsheil's undivided half share in Parcel 157 be applied as part payment towards Vandyke's legal fees for his services in the anticipated negotiations with Mr. Monplaisir.

[17] It appears that all the conditions "imposed" by Vandyke on Austin were complied with, since:

(1) A power of attorney was granted by Austin in favour of Diane on the 7th day of June 2006, authorizing her, inter alia, to "*sell, convey, dispose of on behalf of [Austin] any real estate or immovable property in Saint Lucia or elsewhere and any movable property in Saint Lucia or elsewhere in [Austin's] name upon such terms and conditions as [Diane] shall deem fit*".

(2) By deed of sale dated 10th June 2005, Martina Jude, by her attorney Austin Jude, conveyed parcel 48 to Diane.

(3) Loretta Lansiquot transferred parcels 56 and 103 to Diane on the 7th day of June 2006.

(4) Parcel 157 was transferred on the 25th day of August 2005; Parcel 147 was transferred on the 8th April 2005; Parcel 148 was transferred on 26th April 2005.

(5) The 10 parcels of land were transferred to Sheila on the 4th day of November 2005.

[18] Vandyke met Mr. Monplaisir around January 2006 to discuss the partition and completed the negotiations with Mr. Monplaisir in February 2006. Vandyke stated that prior to, as well as during the negotiation, he purchased several parcels of land in which he had an interest from Mr. Monplaisir. Following the partition with Mr. Monplaisir, he then held the lands he had purchased from Mr. Monplaisir jointly with Austin.

[19] Vandyke's evidence was that his father wanted his (Austin's) portion of lands from the partition to be transferred to his company, Austinsheil but that he, Vandyke, would not agree. Vandyke provided a number of reasons for not doing so. In their Defence, Vandyke and Diane stated, among other things, that Austin did not want lands vested in his name because he was dying and because of an outstanding court judgment against him referred to as "the Endura judgment".

[20] The bulk of the transfers occurred on the 23rd day of August 2006 by two separate Deeds. These are referred to as the July 23rd 2007 transfers as they were signed/executed by Clarence Rambally, the executing Notary, on that day.

[21] Diane, acting under the power of attorney, transferred all the disputed lands to Vandyke, except for parcels 147 and 148 which were transferred directly from Mr. Monplaisir to Vandyke. Although a restriction was registered against these parcels of land, Austin did not intervene in the transfers.

[22] In his evidence, Vandyke states that he waited from February 2006 to July 2007 before he could get an understanding as to who Austin wanted to have his unpartitioned lands and was very surprised to learn that Austin had instructed that these lands be unconditionally transferred to him.

[23] Diane's evidence is that on the night of 19th July 2007 before Austin flew back to Saint Lucia from England to live his last days, Austin, in the presence of Della and her two sons, instructed Diane to have all of the allocated lands negotiated from Mr. Monplaisir transferred to Vandyke. She executed that instruction.

[24] The Claimants rely on a letter dated 18th April 2007, purportedly written by Austin in which he stated: "I revoke the power of attorney you Diane have, over my properties". The Defendants dispute that this letter came from Austin and assert that Della, who had Austin under her care at the time in England, in fact wrote it.

[25] In a letter to her siblings dated 21st April 2007, Diane reported that Austin's memory was fading and he was prone to bouts of confusion and forgetfulness and that he had directed Vandyke to guide her on how to transact his affairs. She further stated in that letter that their parents directed and stated that:

(1) Vandyke hold their parents' North shore lands until a sale is made at a price he finds suitable;
(2) Upon sale, Austin's share of proceeds was to go to his daughters and Sheila's share to be held on trust until she said what to do with it;
(3) Beverley has been allotted parcel 126, Yasmin 120 and Della 105;
(4) In exchange for his interest in the house and buildings he (Austin) is to be given 0443B 211 and 160, leaving a balance owing to him of $240,000;
(5) Austin had gone through the receipts for all repairs;
(6) Austin knew that Vandyke holds parcels 41, 45, 46, 47, 55, 138, 162, and 223 jointly with Austin (purchased from Monplaisir). An allocation of these lots had been agreed;
(7) Lots allocated to Diane were as a result of Austin's request that Vandyke resolve title problems. Consideration was received by Austin for his lots.
(8) Diane was authorized to develop the lots received from Monplaisir as she saw fit;
(9) Sheila had 6 lots plus her share in the North-shore lands.
(10) Austin had instructed Diane to consult him on every action, but he approved and forgets. But he repeats he is satisfied with Diane and Vandyke's work.
(11) That Diane knew Della was telling Austin that Diane had not done everything Austin told her to do just so as to undermine their parents trust in Diane and Vandyke.

[26] By email to her siblings dated 8th July 2007, Diane reported that Vandyke admitted at a bedside meeting with Austin on 3rd July 2007 to holding lands on trust for him. In the said email, Diane also reported that Austin confirmed that he wished that the Defendants would continue acting for him.

[27] The Claimants say that though Vandyke alleges that he had reconciled with his father, he never once called or contacted him to find out how he was doing. They point to the fact that, of the two years after the supposed reconciliation, Austin spent about half this time in England and about half this time in Saint Lucia. The inference they would like the Court to draw is that there would have been little time for Austin and Vandyke to have reconciled to the extent of leaving all the lands to him, given their stormy relationship in the past. Vandyke acknowledged under cross-examination that although he and his father had reconciled, there were still trust issues.

[28] This, then, was the *mise-en-scène* for the ensuing litigation.

Issues

[29] The issues for the determination of this Court are as follows:

(1) Whether this is an administration claim;
(2) Whether the causes of action became prescribed before the claim was filed;
(3) Whether the Claimants have *locus standi* to bring the claim;
(4) Whether the claim impugning the power of attorney and the transfers to Diane can be brought without joining the executing notary;
(5) Whether undue influence can be exerted through third parties;
(6) Whether the power of attorney was revoked;
(7) Whether Vandyke and Diane exercised actual undue influence over Austin;
(8) Whether there was presumed undue influence;

(9) Whether the Power of Attorney executed in favour of Diane, and the subsequent transfer of lands to the Diane and Vandyke, acting under that power of attorney, were as a result of an abuse of trust and confidence;

(10) Whether the lands are being held on trust by the Defendants on behalf of Austin and/or his estate;

(11) Whether either Diane or Vandyke acted in conflict of interest;

(12) Whether the Defendants are liable to render an account of all dealings from the date of the grant of the Power of Attorney and from the date of being appointed Legal Advisor, respectively, until payment in full.

Is this is an Administration Claim?

[30] The Claimants' amended Fixed Date Claim Form is intituled "*In the Matter of Rule 27.2 and Part 67 of the Civil Procedure Rules 2000*". Rule 27.2 deals with the first hearing of fixed date claims. Part 67 deals with administration claims. The Defendants, relying on Intrust Trustees (Nevis) Limited and Others v Naomi Darren[1], contend that these proceedings cannot be dealt with under Part 67.

[31] In Intrust Trustees the Court of Appeal explained that:

> "8 The tenor of CPR 67 clearly contemplates and affords an avenue for executors, trustees and the like to seek the court's guidance and directions in a non-adversarial manner with regard to the administration of a deceased's estate or with respect to the execution or administration of a trust. The Part 67 procedure is not designed and accordingly is not intended to resolve factual disputes.
>
> 9 The instant case cannot on any view be considered as being non-adversarial. The respondent alleges breach of fiduciary duties and breach of trust in respect of duties which in essence she says were owed to her as a beneficiary in relation to the appellants, as Trustees and Protector of a trust. She seeks damages from the appellants personally in relation to the alleged breaches. In short, this is an action in tort. I agree with counsel for the respondent that this would clearly call for a determination of serious and complex factual issues and thus not one suited to the CPR 67 procedure. Indeed I venture to say that the claim, given its nature as set out, does not fall to be considered under the CPR 67 procedure at all."

[1] [2009] ECSCJ No. 72.

[32] A cursory look at the pleadings in the instant case will reveal that it is nothing if not hotly disputed on the facts and adversarial. Cleary, it is not suited for the CPR 67 procedure. The matter has however proceeded to trial and the point was only taken in written closing submissions after the trial had concluded. Other than giving a perfunctory judicial nod to the Defendants' arguments on this point, I do not see how, given the overriding objective of the CPR, I could take the point any further. In any event, as InTrust Trustees went on to point out at paragraph 10 of the judgment: "*To sacrifice substance by way of slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of CPR rather than gives effect to it*."

Are the Causes of Action Prescribed?

[33] The Defendants' contend that (1) all the Claimants' causes of action (undue influence, unconscionable bargain, abuse of trust and confidence) can be considered delicts under the Civil Code of Saint Lucia with a prescriptive period of three years; (2) the effect of prescription is to extinguish the right and the remedy; (3) the instruments transferring the land in dispute had been executed more than three years before the filing of the claim. What does the Civil Code provide in relation to delicts?

[34] Article 917A of the Civil Code provides as follows:

> "(1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to this Colony, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris":
>
> Provided, however, as follows:-
>
> a) the English doctrine of consideration shall not apply to contracts governed by the law of the Colony and the term "consideration" shall have the meaning herein assigned to it;
> b) the term "consideration" when used with respect to contracts shall continue as heretofore to mean the cause or reason of

entering into a contract or of incurring an obligation; and consideration may be either onerous or gratuitous;

c) third persons shall continue to have and exercise such rights with respect to contracts as they heretofore had and enjoyed under article 962 or any other statute.

(2) Paragraph (1) of this article shall not be construed as affecting the provisions of the Ninth Chapter of this Book (which relate to Proof of Obligations), or as affecting the provisions of the Fifth to Sixteenth Books of this Part or of any other statute relating to specific contracts save in so far as the general rules relating to contracts are applicable to such contracts.

(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail. (Added by Act 34 of 1956)"

[35] In Dorina Joseph and another v Nora St. Louis and another[2], the Court of Appeal of Saint Lucia held that issues of breach of trust fell squarely within the realm of a delict or quasi-delict. In other words, the substantive rights (trusts) are imported by Article 916 A but the remedy for the breach of those substantive rights, as in this case, are provided for by the provisions of the Civil Code. The cause of action for breach of trust, being a delict or quasi-delict, is prescribed having been filed and served well outside the three-year prescription period under Article 2122 of the Civil Code. It therefore does appear that the claim is prescribed.

Do the Claimants have *locus standi*?

[36] Lord Justice Luxmoore in Ingall v Moran[3] stated as follows:

> "It is I think well established that an executor can institute an action before probate of his testator's will is granted, and that so long as probate is granted before the hearing of the action, the action is well constituted although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary

[2] [2009] ECSCJ No. 99.
[3] [1944] K.B.160.

> only because it is the only method recognized by the rules of Court by which the executor can prove the fact that he is the executor."

[37] Lord Goddard LJ put it this way:

> "There is no doubt that where a deceased person leaves a will and therein names an executor the latter can institute actions before obtaining probate, though the actions may be stayed until the probate is granted: *Tarn v. Commercial Bank of Sydney* (1). The reason for this is, no doubt, that the executor's title is derived from the will which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue, but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed."

[38] This locus standi point was previously taken in a preliminary application before this Court, fully argued and disposed of in favour of the Claimant. In any event, this eight year old case having proceeded to trial over the course of two days, no useful purpose would be served in staying the proceedings until the a purported will under which an executor is named is probated. The interest of justice and of all those concerned is much better served by dealing with the claim on its substantive merits.

Can the Claim succeed without joining the Notary?

[39] In Desir v Alcide[4] the Court of Appeal at para 41 stated:

> "Neither the Civil Code nor the Code of Civil Procedure of Saint Lucia contains a provision that a notary must be made a party to an action to improbate a deed. However, there are authorities which appear to establish that such is the necessary procedure to be followed … the law of Saint Lucia is that a deed may not be improbated unless the notaries who made it are named as parties to the litigation"

[40] The Defendants submit that the Claimants' failure to join the executing notaries means that the relief sought of the cancellation of the power of attorney or of the

[4] [2012] ECSJ No. 285.

transfers cannot be granted since the executing notaries were not made parties to the claim. They contend that it is too late for the Claimants to add the executing notaries to the claim since CPR 19.2 (7) provides as follows:

> "The court may not add a party (except by substitution) after the case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference."

[41] They submit that there has been no change in circumstance which only became known after the case management conference.

[42] Insofar as the Claimants seek the relief of setting aside the power of attorney and deeds of transfer from Clarence Rambally to the Defendants, the failure to have joined Mr. Rambally as the executing notary is fatal to the Claimants claim. Nevertheless, in the event that I am wrong on this, I will go on to consider the substantive issues. Witnesses for the Claimants were Martina Jude, Beverley Jude, Della Nolan nee Jude, Yasmin Jude. Witnesses for the Defendants were Diane Jude, Vandyke Jude and Antonia Alcindor. The witness statement of each stood as his/her evidence in chief. Each witness was cross-examined.

Was there actual undue influence?

[43] The question here is whether Vandyke and Diane exercised undue influence over Austin in having him execute a power of attorney in favour of Diane resulting in the disputed lands being transferred to themselves.

[44] The classic exposition on undue influence in Saint Lucia is from Chief Justice Sir Vincent Floissac in Robert Murray v Reuben Duberry and Denfield Matthew[5]

> "The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another person (the complainant) to enter into

[5] (1996) 52 WIR 147 at 151.

> the transaction. According to the doctrine, if the transaction is the product of the undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is voidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission. The modern tendency is to classify undue influence under two heads namely, Class 1 (actual undue influence) and Class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is Class 2 A which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitors and client, medical advisor and patient, parent and child and clergyman or religious advisor and parishioner or disciple. The second sub- head is Class 2 B which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in the dominant party."

[45] I must therefore carefully sift through the evidence looking for any acts on the part of the Defendants that, on a balance of probabilities, can be said to amount to the exertion of influence over their father. Or, I must look for "*some unfair or improper conduct, some coercion from outside, some overreaching, some from of cheating*" as it was put in by Lindley LJ in Allacard v Skinner;[6] or something they did "*to twist the mind*" of their father as it was alternatively put by Ward LJ in Daniel v Drew[7]; or some express conduct overbearing their father's will as it was put by Lord Hobhouse in Royal Bank of Scotland v Etridge (No 2).[8]

[46] It is important to appreciate from the outset that the disputed lands were not in Austin's name. He could not execute their transfer to the Defendants. They were either held by the company Austinsheil or they were held by Martina Jude and Loretta Lansiquot on behalf of Austin, or, they were lands that were eventually partitioned and transferred by Mr. Monplaisir on the instructions of Diane who held power of attorney for Austin. Diane would have lifted the cautions against the disputed lands to enable their transfer. To succeed with the claim, Della and

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[6] (1887) 36 Ch D 145.
[7] [2005] EWCA Civ 507
[8] [2001] UKHL 44.

Beverly must therefore establish that Vandyke exercised undue influence over Austin to cause him to execute a power of attorney in favour of Diane.

[47] Austin Jude was an accountant and businessman. According to the evidence, he was no "pushover" and might even be considered to have been a crafty businessman. It is not in dispute that during the last couple years of his life he became very ill, did not feel that he could manage his business owing to his illness and lapses in memory, and asked for a meeting with Vandyke. It is also not in dispute that it was a commonly held view in the family that Diane was the favorite child of Austin.

[48] Neither Della nor Beverley was in Saint Lucia at the time of the meeting between Vandyke and Austin. Vandyke and Diane stated in their joint defence that Vandyke "imposed conditions" on Austin Jude for assisting him with recovering the unpartitioned lands from Mr. Monplaisir. The Claimants weaponized that statement. Indeed, it became the fulcrum for their allegation of actual undue influence against Vandyke. They point to the fact that, under cross-examination, both Vandyke and Diane confirmed that Vandyke imposed conditions on Austin Jude that he transfer Parcels 48, 56 and 103 to Sheila Jude or any one of the children of the family.

[49] The Claimants in their submissions contended that the word ""*impose" is defined as (i) to force on someone; (ii) to exert firm control over; (iii) to take advantage of someone by demanding their attention or commitment. Examples of synonyms are force, abuse, exploit, misuse, ill-treat, manipulate*." They argue that, in giving his consent to execute a power of attorney to Diane, Austin could not have been acting voluntarily and could not have given his full, free and informed consent, free from influence from Vandyke in circumstances where he was being forced to accept the conditions imposed by Vandyke in order that he assist with the unpartitioned lands. By imposing conditions, it meant that negotiations were on Vandyke's terms and were not agreed; Austin was not exercising a free choice.

[50] The evidence, however, does not appear to support such a conclusion. The evidence is that Vandyke and Austin did not get along. There was not even a patina of civility between them. They had come to blows and not spoken for about eight years. When he became very ill, Austin sent for Vandyke, who was an attorney, to help him negotiate the unpartitioned lands with Mr. Monplaisir. Vandyke set some pre-conditions before agreeing to assist him. At that point Vandyke was hardly in a position of trust or confidence with Austin so as to be able to sway his mind or overcome his will. Austin did not have to accept Vandyke's pre-conditions. He could just as easily have rejected the conditions and retained the services of another attorney such as Clarence Rambally who, according to the evidence, had provided legal services to Austin over the years.

[51] Put another way, at that moment in time Vandyke held neither trust, confidence, nor power of any kind over Austin that would have required Austin to yield to Vandyke's conditions. There is no admissible medical evidence before the Court to suggest that Austin's mind was in any way enfeebled or that his faculties were so diminished that he could not understand that he was free to accept or reject his son's conditions for agreeing to assist with the partitioning of lands.

[52] I found Vandyke to be honest, direct and very forthright as a witness. There was no attempt at prevaricating. Quite the opposite in fact. He seemed completely candid and open about all that had happened in his family. I found him to be truthful and very credible as a witness. He stated plainly that he did not want to report to his father on matters relating to his engagement with Mr. Monplaisir because his father had a history of saying one thing today and doing another tomorrow. He therefore wanted to report to Diane who would hold power of attorney. On the totality of the evidence, I am satisfied that Austin was not a man with whom it was easy to get on with. I therefore find it quite credible that Vandyke would not wish to report to him but rather to Diane. I also find it equally credible that it required no bending of Austin's will to get him to grant power of attorney to

his favorite child and that he did so without any undue influence being exercised by either Vandyke or Diane.

[53] Furthermore, although Austin gave Diane a power of attorney, he made her sign an agreement executed by a lawyer that she would consult him on everything. It was Diane's evidence that he '*was not ready to turn over the full mantle of responsibility to me and if he gave me such powers I could only exercise them with proper consultation and authority for my actions from him*'. In an email to her siblings, Diane stated: "*Daddy is unfortunately no longer competent to manage his affairs. This he recognized and re-iterated on many an occasion when I have discussed his affairs with him. We have an agreement duly lodged with a lawyer that I am to consult him on every action. I have complied with out agreement every step of the way. Daddy has always been informed and his approval sought. He approved and agrees but forgets…*"

[54] Requiring his favorite child (to whom he had already given a power of attorney) to sign an agreement to consult him on everything, is not the action of a man who is openly trusting and whose will is easily dominated. He recognized that owing to the state of his health he could no longer manage his affairs on his own and needed his children's help but he still wanted to call the shots.

[55] The Claimants highlighted the evidence of Vandyke's stormy relationship with Austin to suggest that, firstly, it would not be out of character for him to have bent Austin to his will and, secondly, Austin would never have freely agreed to Vandyke's conditions. On the evidence before the Court, however, I am satisfied that his terrible relationship with his father was because of the physical abuse meted out to his mother by his father. The physical fight between Vandyke and Austin in 1997 was over Austin's treatment of Sheila. Vandyke was very protective of his mother. According to Beverley's testimony, Vandyke was his mother's "knight in shining armour".

[56] Vandyke believed that Austin transferred parcels 48, 56 and 103 to his sister, Martina Jude and to his cousin Loretta Lansiquot, respectively, to defeat any interest Sheila could claim in them during divorce proceedings. He wanted this redressed before he agreed to assist his father with anything. Again, Austin was free to accept this pre-condition or to reject it. There was no evidence of any threat. I find that Austin consciously, freely and deliberately accepted Vandyke's conditions as an exercise of his own free will.

[57] As evidence of undue influence, the Claimants also point to Vandyke's witness statement in which he stated that Austin Jude *'conceded'* that he had no interest in parcels 147 and 148. They argue that the term 'concede' denotes that Austin Jude formed an opinion based on incomplete information. For the reasons already set out in relation to Vandyke's imposing of conditions, I cannot share the Claimant's interpretation in that regard.

[58] As it relates to the transfer of the undivided half share of Parcel 157 owned by Austinsheil to himself, Vandyke's evidence is that this was in lieu of legal fees for the work he would be undertaking for his father. That work was to assist Austin in the management of his business affairs and, in particular, to achieve a final partition of all lands held with Mr. Monplaisir. The Claimants say this was a condition imposed on Austin. They contend that Austin was not in a position to determine whether the transfer of that undivided half share was reasonable for the service to be provided, particularly as he was concerned about the costs of legal fees. I find it difficult to accept that contention. There is nothing in the evidence to suggest that at that moment in time he was not in possession of his mental faculties. I find that he would have known whether or not the exchange of a share in land for legal services was reasonable. His decision to agree to this was an exercise of his free, clear will and deliberate judgment.

[59] The Claimants also allege that Vandyke, as legal advisor to Austin, failed to ensure that he understood the nature and effect of the general power of attorney

which was drafted in very wide terms by Clarence Rambally, a relative of the parties, who, as pointed out earlier, had provided legal services to Austin over the years (he also acted for the Defendants in drafting and registering all the disputed transfers). Had he done so, they contend, Austin would have realized that the agreement he made Diane sign did not prevent Diane from exercising any authority granted to her under the power of attorney, and that she would be able to transact on his behalf in respect of any matter even though she did not consult him. I do not see how the Claimants can succeed with this assertion. Firstly, there is no evidence that Austin misunderstood the nature and extent of the power he was granting to Diane. Secondly, there is no evidence that Austin was dissatisfied with the exercise by Diane of the power of attorney he had given her. Thirdly, the question of whether Vandyke fell below any duty of care he might have owed to Austin as his legal advisor is not properly the subject matter of the pleadings this case.

[60] The Claimants also contend that it was an improper act of pressure on the vulnerable Austin, for Vandyke, who had filed a claim on behalf of his mother in 2003 against Austin to recover parcel 48, to have used the inducement of the withdrawal of the claim to get him to transfer parcel 48 to Diane only, when Austin had expressed a clear intention to transfer it to all his daughters. Sheila Jude, they argued, had already been properly compensated for her loss of the matrimonial home by a Court of Appeal award of ten lots of her choosing from those registered in the name of Austinsheil Properties Limited, therefore, for Vandyke to have filed a claim alleging fraud against Austin in order for Sheila to get parcel 48 would be to obtain an award not intended by or in keeping with the Court of Appeal Order.

[61] Further, they say, the effect of demanding that Parcel 48 be transferred to Diane only, meant that Austin was being asked to exclude all of his other children even though Vandyke acknowledged in his evidence that Austin wanted Parcel 48 in the name of his girls.

[62] The suggestion that it was improper for Vandyke to have brought a claim in 2003 alleging fraud against his father knowing full well that his mother had already been compensated for the loss of the matrimonial home is not a matter that this Court is required to make a determination upon in this claim. That he held out withdrawal of the claim as inducement for Austin to transfer parcel 48 to Diane could not, in my view, amount to coercion since Austin was free to accept or reject that pre-condition. Vandyke held no Svengalian sway over him.

[63] The Claimants then identify a number of instances where they allege that Vandyke failed to carry out the wishes of his father concerning lands to be transferred from Mr. Monplaisir. For example, Austin wanted his share of the lands held with Mr. Monplaisir to be transferred to his company, Austinsheil, but Vandyke would not agree. Vandyke admitted be would not agree for a number of reasons including that Austinsheil was not a company in good standing and owed taxes. The Claimants reject that explanation. They contended that although Austinsheil may have owed taxes to the Inland Revenue Department this could have been paid from the proceeds of certain sales. They point out that Diane, acting under the power of attorney, sold, on the 10th day of October 2005, a portion of land owned by Austinsheil measuring 0.20 hectares for $430,372.80. Also Vandyke knew and/or ought to have known, having enlisted the services of an accountant, that the tax liability had been resolved or was in the process of being resolved and/or was close to being resolved. As such, this could not be a reason for not transferring the lands to Austinsheil as instructed by Austin. It does appear that much of the Claimant's suspicions were aroused because they did not understand the complexities of their father's business.

[64] The difficulty with concluding that Vandyke somehow failed to carry out the wishes of his father and that this, presumably, amounted to undue influence or breach of trust and confidence is that it fell to Diane to execute the wishes of her father under the power of attorney which she held. Secondly, there is no evidence that

Vandyke was giving his father bad advice. Thirdly, the fact that the Claimants might have advised their father differently had they been in a position to do so is not a proper basis for impugning Vandyke's advice. After listening to and observing the Claimants under cross-examination, it appears to the Court that they knew or cared very little about the complex and entangled details of their father's business affairs. Conversely, Vandyke demonstrated a thorough understanding of the intricacies of his father's business affairs and what was needed to clear it up.

[65] In fact, there were instances during the cross-examination of Vandyke where it appeared to the Court that the questions were aimed at eliciting answers about aspects of Austin's estate that the Claimants did not know about and wanted to understand, rather than at eliciting answers that would support the allegations against the Defendants. The Court was obliged to observe to counsel that the case was not about getting answers to questions about the estate, it was about whether the allegations could be proved.

[66] Vandyke maintained that transfer of lands to Austinsheil would not be done unless the affairs of the company were regularized. In his professional opinion he felt that this could not be achieved without a declaration from Austin admitting to misconduct in the management and operation of the company. Austin did not consider that an option. The Claimants submitted that such a demand by Vandyke was unconscionable as he was asking Austin to admit to wrongdoing in writing when Austin was clearly of the opinion that his activities and dealings with Austinsheil were legal. They point out that in one of his affidavits in other proceedings, Austin had deposed that the incorporation of his companies Austinsheil Properties Limited and Marigot Bay Properties was 'good business practice and perfectly legal.' He further deposed that 'all sales of lands by Austin Jude to Austinsheil Properties Ltd, is perfect and legal; also all sales by Austinsheil Properties is also legal'.

[67] The Claimants then question Vandyke's negotiation and settlement of the partition with Mr. Monplaisir. They were suspicious that Mr. Monplaisir was not owed that which he claimed he was owed and, presumably, that the decisions reached by Vandyke in settling the long outstanding matter with Mr. Monplaisir were not transparent or at arms length.

[68] Vandyke said his father owed Mr. Monplaisir approximately one hundred and twenty-five thousand dollars, not including interest for legal fees related to the lands they jointly obtained; legal fees of approximately $75,000 incurred during his long and acrimonious divorce with Sheila; 10,000 pounds sterling for the 1992 Development Plan and Proposal prepared by Touche Ross Accountants for their (Mr. Monplaisir and Austin) intended development of the Marigot sea front areas; and $140,000.00 for monies advanced to Austin from properties sold.

[69] The Claimants say that Vandyke produced no invoices to substantiate these sums allegedly owed to Mr. Monplaisir, some of which they said would be prescribed in any event. They emphasize the fact that Vandyke's evidence is that his father disputed the debt claimed to be owed by Mr. Monplaisir and asked him to take Mr. Monplaisir to court and let the court decide how the lands should be partitioned.

[70] Vandyke admitted that he refused to follow his father's instructions to take Mr. Monplaisir to court for the following reasons: (1) Austin would be a terrible witness in court proceedings for a partition of the undivided lands; (2) the balance of equities clearly favoured Mr. Monplaisir who appeared mentally exhausted and beat up by his business relationship with Austin and who in his capacity as a Queen's Counsel owed a greater duty to the court to be honest, transparent, and to speak and represent facts which are the truth; (3) Austin's financial records would be an issue; (4) Austin's credibility would be severely undermined because of the material non-disclosure that he had engaged in during the divorce action; (5) Austin did not have the physical or mental strength to endure court proceedings.

[71] Vandyke stated that it was at this point his father "capitulated" and instructed him to do his best to negotiate a deal with Mr. Monplaisir. The Claimants submitted that "capitulate" means to cease to resist an opponent or an unwelcome demand. They submitted that Vandyke's refusal to contest what Mr. Monplaisir said was owing to him was unreasonable, unfair and unconscionable because, as legal advisor to Austin, he ought to have known that most of the demands made by Mr. Monplaisir were prescribed in law, could not be sustained and could not be revived. Further, Vandyke should not have accepted the amount provided by Mr. Monplaisir without proof. Yet, according to his evidence, he agreed that Austin would relinquish his interest in parcels 45, 46, 47, 139, 147, 148, 251, 252 and 254 in consideration for debts owed to Mr. Monplaisir.

[72] I do not view Austin's capitulation in the circumstances described above as capitulation arising from coercion, a twisting of his mind by Vandyke or any kind of over-reaching or attempt by Vandyke to overbear his will in order to get some personal advantage. Vandyke, throughout his cross-examination, was remarkably honest and prepared to volunteer more than he needed to. It was clear that he wanted the Court to understand all the intricacies of his father's estate. There was never any guardedness about him. I believe that given the long history of the outstanding matters between his father and Mr. Monplaisir, and given his own view of his father's less-than-transparent business dealings, coupled with his terminal illness, Vandyke was trying to bring closure to the whole sordid affair before his father died. I believe he had the best interest of the entire family at heart in the handling of his father's affairs. To have taken his father's advice and litigated the matter of what sums were owed to Mr. Monplaisir decades ago may or may not have brought resolution to the matter before Austin died. The question will never now be answered. Suffice it to say that Vandyke made a judgment call to settle rather than fight. I can find nothing untoward about that.

[73] Given the overall lack of records, the evidence of Austin's past history of sequestering assets during legal proceedings, his terminal illness, the fact of Mr.

Monplaisir's stature as a Queen's Counsel, I cannot conclude that Vandyke's decision to settle was unreasonable, unfair or unconscionable. Further, I do not find any evidence that Vandyke deliberately concealed any material information from Austin or was placing improper pressure and demands on him in an effort to overcome his free will.

[74] Vandyke admitted under cross-examination that he has a temper, that he once stole money from his father when he was 16 years old and that he once physically beat his father. The Claimants suggest that these facts, Vandyke's personality and past behaviour is consistent with him exerting pressure on Austin Jude in his weakened state to bend him to his will.

[75] The Claimants submit that Vandyke and his father had a history of physical violence and that, although it occurred years ago, the court may infer that Austin may have been afraid of Vandyke and about what may have happened to him if he did not submit to his demands. I do not feel able to make that inference on the available evidence. There was only one instance of physical violence and the Court accepts Vandyke's overall narrative as follows:

> "My father was frequently violent… He beat my mother with regularity and caused her to have three nervous breakdowns…The argument resulted in him [Austin Jude] giving her [Sheila Jude] a severe beating which cracked some of her ribs ... Following this incident I planned my revenge. I asked him for money to buy books for school. He gave me a cheque to cover the amount requested. I stole his chequebook and prepared a cheque of $25,000.00…. Contrary to what my father told the divorce court, my mother had nothing to do with this set up - it was all my doing….I advised against the transfer of properties to Austinsheil unless the affairs of the company were regularised. I felt that this could not be achieved without a declaration from my father admitting misconduct in the management and operation of the company…. My mother worked really, really hard to give her children a good standard of living without support from my father. She deserved a comfortable retirement for the lifetime of abuse she had endured for her children….A study of the entire business relationship between my father and Mr. Monplaisir would show a pattern of deceit and misconduct by my father which had contaminated their relationship …All

> of you forget what a crooked, mean and selfish man daddy was for most of his life"

[76] Under cross-examination, Della admitted that Vandyke was, at the time of the forgery of the cheque, 16 years old and that her father, Austin, had told her the money was given to their mother by Vandyke. Beverley stated that Vandyke was his mother's knight in shining armour. The Claimants stated under cross-examination that they remained neutral during their parent's divorce. I find that the evidence, rather than supporting the conclusion that Vandyke was a miscreant who stole from his father and physically intimidated him, in fact supports the conclusion that he acted with courage and nobility in defence of his physically abused mother. I also believe that Della and Beverley knew that it was Austin's abuse of Sheila that created enmity between Austin and Vandyke, yet when they were cross-examined on it, they avoided the questions by saying they were not around or were not aware. I am left to infer that they have deliberately sought to mischaracterize Vandyke's actions in order to succeed in this claim. By doing so, they severely undermined their credibility in the eyes of the Court.

[77] I found Diane to be an honest and credible witness who made no attempt to avoid answering questions directly. She too was straightforward, open and candid. There was no attempt to obfuscate or cloud issues. I believe her evidence that although her father:

> "was sick he was still a stubborn man, with a strong independent mind. The renewed relationship between him and Vandyke was at times difficult. He did not always like Vandyke's advice and believed that Vandyke was using this as an opportunity to vest more land in our mother's name. Right up until the time of his death, my father maintained the unfortunate position that our mother was not really entitled to any of the Marigot properties, even though he had reluctantly acquiesced to the transfer to her of the properties awarded as a result of the divorce."

[78] I accept as true her testimony found at paragraph 24 of her witness statement that:

> "We spent time and effort to ensure that any proposed course of action would be consistent with our father's wishes. He was kept fully informed at

> all times of our actions. We were satisfied that he clearly understood the implications of every action, although his erratic memory often caused difficulties and he would change his mind many times of one issue."

[79] To sum up on the issue of actual undue influence, the difficulty with accepting any of the Claimants' allegations of undue influence is that, though there was clear evidence that Austin was frail and not the man he once was, there is no admissible evidence that he was of a feeble state of mind.

[80] Antonia Alcindor was an accountant who gave evidence on behalf of the Defendants. Her evidence was that Austin was an elderly man; he had retained her to regularize his companies; she recognized that he knew some accounts from the way he spoke; she maintained that he is the one who gave her instructions and not Vandyke Jude nor Diane. Ms. Alcindor is a professional accountant. She is not personally interested in these proceedings. The picture she painted was that Austin, though ailing, was still mentally competent to instruct her in relation to his companies and business affairs. I had no reason whatsoever to doubt the veracity of what she said.

[81] Though there was some measure of reconciliation with Vandyke it was not as if Vandyke was suddenly in a position of trust and influence over Austin so as to be able to overbear his will. Austin knew he had a terminal illness; his business affairs were in a mess; he had had a terrible relationship with Sheila and Vandyke. It is probable that, seeing his last days before him, he wanted to make amends and order his estate. Della testified that on his sickbed, on one occasion, Austin looked happy to see his family around him.

[82] I therefore conclude that the evidence, on a balance of probabilities, does not support a finding that there was any actual undue influence exerted on Austin by the Defendants.

Was the Power of Attorney revoked?

[83] While Austin was in the care and control of Della in England, a letter, said to have been dictated to Della by him on 18th April 2007, was sent out which stated, *inter alia*, "*I revoke the power of attorney you Diane have, over my properties*."

[84] The Claimants contend that this was all that was needed to revoke Diane's power of attorney, because article 1656 of the Civil Code provides:

> "The principal may at any time revoke the agency, and oblige the agent to return to him the power of attorney if it be an original instrument."

[85] I do not believe Della's evidence that Austin dictated the letter revoking the power of attorney to Diane. Her evidence was that: she was the black sheep of the family and an "outsider"; she was not interested in her father's business affairs; he tried on a number of occasions to engage her but she had her own issues to deal with; she would however type letters for him. My evaluation of Della as a witness is that she was not lacking in guile.

[86] What upends the picture she paints of herself as being disinterested in her father's assets are the following findings of fact which I make from the evidence before the Court: she hid his passport from him while he was under her care in England to prevent him from returning to Saint Lucia; she brazenly refused to return it even when it was demanded; she wrote a letter to the Vulnerable Adult Protection Unit in England warning against allowing Austin to be discharged into the care of Diane; she refused to allow Diane to speak to Austin when she telephoned for him. I find that Della Jude was nothing if not highly interested in her father's assets and this was what motivated her to attempt to keep him under her care and control. She accuses Vandyke of exercising undue influence but I rather think that, given her actions on the evidence, it is she who seemed capable of and prepared to exercise undue influence over Austin.

[87] Further, I do not believe that Austin dictated any letter of revocation of the power of attorney given to Diane because at a family meeting on 3rd July 2007 Austin confirmed that he wanted the Defendants to continue to acting on his behalf; when he intended to revoke a power of attorney he knew exactly what to do as was demonstrated when he revoked Della's power of attorney.

Was there Presumed Undue Influence?

[88] Sir William Blackburne in Hart v Burbidge[9] gave a clear statement of what constitutes undue influence:

> "In the case of presumed undue influence the court's willingness to intervene to reverse the effect of the influence is triggered by proof on a balance of probabilities of essentially two matters, the burden of proof again lying on the person complaining of the undue influence. The first is that the person at whose expense the impugned transaction was made reposed trust and confidence in the recipient of the benefit conferred by the transaction or that the latter acquired ascendancy or control over the former. The second is that the transaction is of such a size or nature as to call for an explanation as being not readily explicable by the relationship of the parties. Once that stage is reached the burden of proof shifts to the person seeking to uphold the transaction to demonstrate on a balance of probabilities that the transaction was the result of the free exercise by the transferor of an independent will."

[89] Lord Browne-Wilkinson in Barclays Bank PLC **v O'Brien**[10] put it this way:

> "Even if there is no relationship falling within class 2(A), if the complainant proves the *de facto* existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

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9 [2013] EWHC 1628.

10 [1994] 1 AC 180. at pp 189 190.

[90] From the above statements of the law, it will be seen that undue influence is presumed when the parties fall within a recognized class of relationship, e.g. doctor and patient or solicitor and client. For the presumption to arise in such a case it must be shown that one party has ascendency or control over the other. This will typically be the case where one reposes trust and confidence in the other, or is dependent upon the other, or is vulnerable in relation to the other.

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

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

[92] As with actual undue influence, the difficulty for the Claimants in establishing presumed undue influence is that Austin was not the transferor of the disputed lands. Martina Jude, Loretta Lansiquot and Mr. Monplaisir transferred the lands. Even if Austin reposed trust and confidence in Diane and Vandyke, he did not confer any benefits on them as a result of that relationship because the lands were not in his name. How then could undue influence (actual or presumed) have been exercised over Austin to transfer the lands when the lands were not in his name and he did not transfer them?

Undue Influence through Third Party?

[93] This raises the issue of undue influence through third parties. The Defendants rely on the principle stated in **Halsbury's Laws of** England[11] that transactions may be avoided on the basis of undue influence by a third party where the third party acted as agent of a contracting party or where one contracting party was 'put on inquiry' of the undue influence exercised on the other contracting party by a third party.

[94] In the case of the transfers by Martina and Loretta to Diane: Martina and Diane and Loretta and Diane, respectively, were the contracting parties. In neither case did Diane (who is accused of exerting undue influence) act as the agent of a contracting party. Neither is she a third party to the transactions who exercised undue influence on a contracting party.

[95] The same analysis holds for the transfers from Mr. Monplaisir to Vandyke. Vandyke and Mr. Monplaisir were the contracting parties. Vandyke was not an agent of a contracting party nor was he a third party who exercised undue influence on a contracting party. In any event, the Claimants neither pleaded nor attempted to argue at trial that this was the case. This is sufficient to dispose of the allegation of presumed undue influence. Nevertheless, in the event that I am wrong on this, I will go on to consider the evidence of presumed undue influence.

[96] The Claimants rely on Vandyke's letter dated 13th June 2008 written to counsel for the Claimants in which he stated: "*During the phase of his terminal illness my father's primary caregiver was his wife and our mother Sheila Jude. His business affairs were entrusted to Diane and I served as his legal advisor until his death.*" This, they contend, satisfied the first limb of the test for presumed undue influence, namely, that there existed a relationship of trust and confidence between Austin and Vandyke. The Court would have been prepared to come to that conclusion but for the insistence of the Claimants that, notwithstanding their new relationship,

[11] Vol 22 (2012) para 846

Austin and Vandyke still had trust issues. The Claimants cannot have it both ways. First, they contend (for the purpose of showing that Austin would not have asked Diane to transfer the lands to Vandyke) that Vandyke hardly visited his father or asked about him while he was sick in England and that Austin still had trust issues with Vandyke. Then they contend (for the purpose of proving presumed undue influence) that Austin reposed trust and confidence in Vandyke. The weight of the evidence is that there were trust issues between Austin and Vandyke.

[97] The email by Diane of 21st April, 2007 (in evidence) described the relationship between Vandyke and Austin: (1) communication was usually through third parties; (2) Austin's instructions were usually carried out through Diane; (3) meetings were held with third parties present and usually minutes were produced thereafter; (4) the actions of Vandyke Jude were not clandestine; the Claimants knew what was going on and that is evident from the deluge of emails exhibited; (5) on the day (19th July, 2007 in England) Diane said Austin Jude gave instructions for lands to be transferred by Kenneth Monplaisir to Vandyke who was in California USA at that time.

[98] In the Robert Murray case, Sir Vincent Floissac C.J. at page 9 of the judgment stated the evidence required to establish a Class 2B relationship as follows:

> "The evidence required is evidence that before or at the time of the execution of the transaction, the complainant had habitually, frequently or repeatedly expressed or indicated his trust and confidence in the dominant party."

[99] The evidence of the Claimants as well as the Defendants is that, notwithstanding the reconciliation, there were still trust issues between Vandyke and his father. In light of this, it simply cannot be said that Austin reposed trust and confidence in Vandyke. I therefore do not consider it necessary to go on to consider the second limb.

[100] In relation to Diane, the evidence is that Austin reposed trust and confidence in her and gave her power of attorney. But the Claimants must also satisfy the Court that the transfers by virtue of their size or nature or other surrounding features were not readily explicable by the relationship of the parties or could not be explained on the ground of the ordinary motives on which ordinary men act and therefore called for an explanation. Lord Scarman explained the concept of manifest disadvantage in the following manner:

> '"Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

[101] Satisfying this second limb also presents a serious challenge for the Claimants. Austin used the Power of Attorney Martina signed in his favour to transfer parcel 48 to Diane. This transaction is readily explicable by the admitted fact that Diane was Austin's favorite child. The transaction was not of a size to arouse suspicion.

[102] In any event, I find that the transfer of disputed lands to the Defendants was explicable because of the following findings of fact I make on the evidence before me: Austin was terminally in and wanted to dispose of his assets as he saw fit; Diane was his favorite child; Vandyke had worked diligently on the unpartitioned lands and had done a good sorting out the estate; by their own admission the Claimants had shown no interest in Austin's business; the Claimants were not even prepared to pay anything for certain lots when it was offered to them; Beverley had been allotted 2 lots and had built on one but it was Vandyke who negotiated, paid for and built the access, a retaining wall and parking lot for her house; Della admitted that she had her own problems in England and was trying to

hold on to her marriage and paid no interest in her father's business; Vandyke voluntarily stated that he holds the North shore lands on trust for the estate of Austin Jude.

[103] Based on Della, Beverley and Yasmin's lack of interest in sorting out Austin's estate, I find it a credible explanation that Austin, at the very end of his life, would have left everything in the hands of the two children who had demonstrated both interest and ability in his assets. This is hardly an unfamiliar or unusual occurrence in such circumstances.

Abuse of Trust and Confidence?

[104] The Claimants assert that the doctrine of abuse of confidence applies where a fiduciary enters into a transaction with his principal, as where a solicitor buys property from his client. In such a case, if the transaction is challenged by the principal, a presumption arises that the transaction is voidable unless the fiduciary can prove that the transaction is fair. The concern here is not that the transaction was procured by undue influence; it is that the fiduciary might have abused confidence placed in him by acting to his own advantage at the expense of his principal's interests. Relief on this ground is intended to protect against abuse of confidence rather than the exercise of undue influence.

[105] The doctrine of abuse of confidence only applies to fiduciary relationships. A fiduciary relationship is one in which one party, the fiduciary, owes fiduciary duties to the other, the principal. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances that give rise to a relationship of trust and confidence. Since a fiduciary has undertaken to act in the interests of his principal and owes a duty of undivided loyalty to his principal, the law seeks to ensure that the fiduciary does not abuse his position by obtaining an improper advantage for himself to the detriment of his principal.

[106] It is to guard against this danger that transactions between fiduciaries and their principals are those "*to which the jealousy of the court is at all times the most watchfully awake*". The watchful eye of the court is maintained through the principle of abuse of confidence, the object of which is to protect principals by keeping fiduciaries up to their duties (rather than to their interests) in dealing with their principals. The doctrine is therefore based on a general concern to protect principals, as the vulnerable parties in transactions with those who owe them fiduciary duties. In CIBC Mortgages PLC v Pitt[12] Lord Browne-Wilkinson stated that:

> "The abuse of confidence principle is founded on considerations of general public policy, viz. that in order to protect those to whom fiduciaries owe duties as a class from exploitation by fiduciaries as a class, the law imposes a heavy duty on fiduciaries to show the righteousness of transactions they enter into with those to whom they owe such duties".

[107] The principal who challenges a transaction with his fiduciary is only required to prove the existence of a fiduciary relationship at the time of the transaction. Upon such proof, a presumption of invalidity arises which shifts the burden of proof on to the fiduciary to show that the transaction was fair. Proof of existence of a recognized relationship is all that is required of the complainant. He does not have to prove that the fiduciary acted in breach of duty, nor is he required to prove that the transaction was disadvantageous to him.

[108] The Court accepts that both Vandyke and Austin (solicitor/client) and Diane and Austin (principal/agent) were in a fiduciary relationship. A presumption of invalidity therefore arises which shifts the burden of proof on them to show that the transactions were fair. Both Vandyke and Diane, respectively, were in a fiduciary relationship with Austin, at the time of the disputed transfers to them.

[109] Once again, it must be pointed out that Austin was not a party to any of the disputed transfers, except the transfer to Diane which was done by Austin acting under a power of attorney granted to him by Marina in whose name title was

[12] [1994] 1 AC 200.

vested. None of the other disputed lands was in his name therefore there was nothing for him to transfer. I have already found that there was nothing untoward about the transfer of parcel 48 to Diane who was his favorite child. Under these circumstances, I cannot conclude that there was any unfairness that attended the transactions amounting to an abuse of trust and confidence.

Was there Unconscionable Dealing?

[110] The Claimants further base their claim for cancelling the deeds on the doctrine of unconscionable dealing. **Halsbury's**[13] states:

> "A contract may be stigmatized as unfair in one of two (2) ways.
>
> a. by reason of the unfair manner in which it was brought into existence (procedural unfairness) as where it was induced by undue influence or where it came into being through an unconscientious use of power arising out of circumstances and conditions of the contracting parties; in such cases equity may give a remedy;
> b. by reason of the fact that the terms of the contract are more favourable to one party than to the other (contractual imbalance); contractual imbalance or inadequacy of consideration is not however, in itself a ground for relief in equity, but it may be an element in establishing fraud as will avoid the transaction or the transaction may be so unconscionable as to afford in itself evidence of fraud….
>
> A bargain cannot be unfair and unconscionable, however, unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner…."

[111] The learned authors of Chitty on Contracts state:

> "A contract will not be set aside merely because the aggrieved party did not have independent advice and the consideration was inadequate. It must also be shown that the other party engaged in unconscionable conduct or on unconscientious use of power. He must have behaved in a morally reprehensible manner ... which affects his conscience."

[112] The point must be reiterated that the transfers of land were between Kenneth Monplaisir and Vandyke, or Austinsheil and Vandyke. Privity of contract, to the extent that the principle is even applicable, was between these two sets of

[13] 4th Edition (Revised) Vol 16 (2) page 176 at para 429

individuals. Diane as lawful attorney for Austin lifted restrictions or intervened to consent to the transaction. The only parties who were entitled to challenge the transactions were either Kenneth Monplaisir or Austinsheil and neither are parties to this claim.

[113] I am satisfied that there is no evidence that can suggest that Vandyke ever engaged in any reprehensible behaviour as regards Austin nor did he act unconscionably in his actions towards him.

[114] The plethora of emails in evidence demonstrate that the Defendants acted with the authorization and consent of both Austin and Sheila. The meetings held and minuted show that all parties were well aware of what was transpiring and that the Claimants either acquiesced, and approved or had no interest in the happenings because they were pursuing their personal interest. The Claimants both stated that they never showed interest in Marigot lands, never paid for anything because they had their own issues and no money to assist.

Trust

[115] Finally, the Claimants ask the Court to declare a trust in relation to property which Austin had no legal title to and in relation to which there was evidence before this Court that he had denied (to both the High Court and Court of Appeal in other proceedings) having any legal or beneficial interest in. Under such circumstances, the Court cannot declare a trust as prayed by the Claimants.

[116] In light of these findings, I cannot conclude that there was any actionable conflict of interest. The Defendants are not liable to render an account as prayed for by the Claimants.

[117] It is unfortunate that Austin's litigious and contentious spirit continues to haunt the family through these protracted proceedings. It is hoped that the parties might be able to come together, not for a séance, but to amicably resolve their differences.

Especially since Vandyke has openly stated that he holds lands on trust for the family and wishes to get on with the business of distributing them.

Disposition

[118] I make the following Orders:

(1) The claim is dismissed in its entirety.

(2) Prescribed costs are awarded to the Defendants in accordance with Part 65.5 of the CPR 2000.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR