

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2017/0634

BETWEEN:

**1. MONICA VIOLA JOSEPH-CYRIL
representative of the Estate of MAGNUS IGNATIUS DE ROCHE
2. MARY ANNA DE ROCHE
acting by her Attorney MONICA VIOLA JOSEPH-CYRIL**

Claimants

and

**1. LORENZO RUDOLPH FRANCIS
2. CHERYL FRANCIS
3. VANDARPOOL FRANCIS
4. FELICIA WENDY STEPHEN
5. 1ST NATIONAL BANK OF ST. LUCIA LTD.
6. FINANCIAL INVESTMENT AND CONSULTANCY
SERVICES LTD.**

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Claimants in Person

Mr. Stanley Felix of Counsel for the First, Second, Third and Fourth Defendants

2019: April 17;
August 30; (Written submissions)
September 26; (Written submissions)
2020: April 1.

JUDGMENT

Background

[1] **CENAC-PHULGENCE, J:** This claim concerns ownership of a parcel of land located at Lower Morne Road in Castries, previously registered in the Land Register

as Block 0848F Parcel 137 (“the property”). The property is the subject of an agreement between the claimants and the first and second defendants, in respect of which the claimants seek several orders, to wit:

- i. a declaration that the first and second defendants breached the agreement;
- ii. a declaration that the first and second defendants committed fraud against the claimants;
- iii. a declaration that the agreement is invalid because the first defendant did not allow the claimants the opportunity to seek independent legal advice;
- iv. consequently, an order that the agreement be set aside, and the property restored to the claimants;
- v. an order that the first and second defendants return to the claimants the sum of \$60,226.00;
- vi. alternatively, an order compelling the first and second defendants to fulfill the terms of the agreement or pay the claimants the true market value of the property.

[2] The defendants strenuously deny the claim and filed a counterclaim seeking:

- i. an order for the return of a deposit paid to a contractor in the sum of \$10,000.00;
- ii. an order for the return of the original sale price of the land in the sum of \$100,000.00;
- iii. an order for the return of interest at the rate of 13% per annum for the period of a bank loan;
- iv. a declaration that the agreement and the conveyance of the property was valid;
- v. a declaration that the claimants’ attorney is a frivolous and vexatious litigant, or damages for libel and slander; and
- vi. an order for payment of rent by the claimants for the period of their occupation of the property.

- [3] The claim was commenced by the claimants, Mr. and Mrs. De Roche, through their lawfully appointed attorney Ms. Monica Viola Joseph-Cyril ("Ms. Cyril"), pursuant to Power of Attorney dated 4th June 2014 and registered on 17th June 2014. Subsequently, however, Mr. De Roche passed away. As a result, by order dated 12th February 2019, Ms. Cyril was appointed to represent his estate, and his witness statement was struck out. Ms. Cyril continued to represent Mrs. De Roche as her attorney. Additionally, by order dated 26th March 2018, the claim against the fifth defendant, 1st National Bank of St. Lucia Ltd., was dismissed. The 6th defendant, Financial Investment and Consultancy Services Limited has never participated in the proceedings.
- [4] It is undisputed that Mr. and Mrs. De Roche are close family-friends of the parents of the first defendant, Mr. Francis; and by extension, Mr. Francis himself. The families have been close friends and neighbours for some 50 years, the De Roches having initially rented a house spot on land owned by Mr. Francis' parents. Essentially, Mr. Francis grew up around the De Roches. He is an attorney-at-law by profession, and given the relationship between them, has been accustomed to assisting and advising the De Roches over the years.
- [5] It is also undisputed that in 1994, Mr. and Mrs. De Roche purchased the property, which adjoins the land owned by Mr. Francis' parents on which they rented their house spot. However, even after purchasing the property, the De Roches continued to rent their house spot from Mr. Francis' parents. This land, formerly owned by Mr. Francis' parents, is now owned by Mr. Francis. In 2007, however, it was owned by Mr. Francis and his wife jointly, and they constructed a 3-storey office and apartment building on the said land. In respect of what transpired thereafter, the parties' narrative diverges.

The Claimants' Case

- [6] The claimants' evidence was given by Mrs. De Roche, Ms. Cyril, who in addition to being her attorney is also her niece, and Mr. Virgil Cyril ("Mr. Cyril"), her nephew.

On the day of trial however, Ms. Cyril gave evidence in her capacity as representative of the estate of Magnus De Roche as Mrs. De Roche gave evidence in her own right. The claimants' case is that sometime in 2006, Mr. Francis requested Mr. and Mrs. De Roche to relocate their old wooden house from the land where they had rented their house spot. As a result, they had to take possession of the property which they say measures 8,223 sq. ft. and values in excess of \$600,000.00. They allege that Mr. Francis proposed that he would assist them to build a new house on the property for the value of \$100,000.00 in exchange for 2,000 sq. ft. of the property. The effect, therefore, was that Mr. Francis offered to purchase only 2,000 sq. ft. of land for the price of \$100,000.00 to which Mr. and Mrs. De Roche agreed.

- [7] They say that Mr. Francis subsequently drew up an agreement himself which was dated 21st January 2007 ("the agreement"), without allowing or advising the De Roches to seek independent legal advice. He further encouraged them to sign the agreement, indicating that it recorded what they had spoken about, without giving full details of the document. The De Roches signed the agreement at his office, which was apparently witnessed thereafter. However, the claimants allege that Mr. Francis fraudulently changed the terms of their verbal agreement; the written agreement stating instead that Mr. and Mrs. Francis purchased the 8,223 sq. ft. of the property, less 2,000 sq. ft. upon which the house for the De Roches was to be constructed. On 7th April 2009, Mr. Francis also caused the De Roches to sign a Deed of Sale transferring to himself and Mrs. Francis the entire 8,223 sq. ft. of the property. Additionally, they say Mr. Francis fraudulently collected the sums of \$55,000.00 towards construction of the house, \$5,000.00 towards a survey to facilitate partitioning of the land, and \$226.00 for outlets. The claimants aver that nothing in the agreement required them to pay any money to Mr. and Mrs. Francis; the property was never surveyed; and the house has not been completed to the De Roches' satisfaction.

- [8] They further say that despite Mrs. De Roche making several visits to Mr. Francis' office in an effort to obtain the documents relating to the sale, the documents were not forthcoming. It was only when Ms. Cyril intervened in the matter and a search was conducted at the Land Registry in July 2014, that it was discovered that the entire 8,223 sq. ft. of the property was transferred into Mr. and Mrs. Francis' names, and no land had been registered in the De Roches' names.
- [9] It was also discovered that Mr. and Mrs. Francis had executed two mortgages over the property in favour of 1st National Bank St. Lucia Ltd for the aggregate sum of \$139,460.00. Mr. Francis had also subdivided the property and donated 2,152.78 sq. ft. to the third and fourth defendants, his brother and brother's spouse respectively. The claimants allege that the third and fourth defendants also executed a mortgage over the portion of the property donated to them in favour of Financial Investment and Consultancy Services Ltd. in the sum of \$234,133.89.
- [10] They claim therefore that the first to fourth defendants have put the property to their own use and benefit and deprived them of the use and enjoyment of their land, despite communication from lawyers on their behalf requiring them to correct the matter. The claimants allege that Mr. Francis took advantage of the De Roches who were elderly people and required independent legal advice; and of the close relationship between the families.

The Defendant's Case

- [11] The case for the defendants is that in December 2006, after completion of the office and apartment building, the De Roches approached Mr. Francis and requested his advice and assistance in relocating their house to the property. The De Roches requested his assistance in preparing notices to quit to the approximately ten tenants who had rented house spots on the property. After several notices, the involvement of the police, and at Mr. Francis' own expense, he was able to get the tenants to relocate. The De Roches also asked him to assist them in relocating their old dilapidated wooden house to the property, as it was proving to be an 'eye sore'.

Mr. Francis says however, that a contractor advised that the house was too unsound, dilapidated and termite-infested to be relocated.

- [12] He says the De Roches then suggested that he assist them to build a house in exchange for the property. He avers that he is the one who suggested that he get a valuation of the property and construct the house for the value thereof. He says he called the Development Control Authority and the Land & Survey Department and was advised that the value of land in the area was approximately \$8.00 - \$9.00 per sq. ft. On the assumption that the property was approximately 10,000 sq. ft., and his willingness to pay the De Roches \$10.00 per sq. ft., he agreed to have a house constructed for them at the value of \$100,000.00. He says it was further agreed that he would give them the spot of land on which the house was to be situated, approximately 2,000 sq. ft.
- [13] He says the entire transaction was purely out of goodwill and because of the good relationship which existed between the families. Mr. Francis admits that he drew up the agreement, however, denies encouraging or persuading the De Roches to sign it. He says the De Roches saw no need for the agreement since he had acted for them in the past and assisted them gratis and in good faith. However, he drafted the agreement for their protection in the event something unfortunate was to happen to him.
- [14] Mr. Francis says he engaged Jameco Construction Company ("Jameco"), with which he had an excellent relationship, and Jameco submitted a design for a 2-bedroom, 1-bath, kitchen, living and dining area. The design was discussed with the De Roches and they loved the design but requested 3 bedrooms instead and that the kitchen be enlarged. The estimated cost of the new design was \$160,000.00 and the De Roches agreed to meet the additional cost resulting from the expansion.

- [15] Mr. Francis says he and his wife obtained a mortgage loan of \$100,000.00 from 1st National Bank St. Lucia Ltd. at an interest rate of 12%, which was paid directly to Jameco on the De Roches' behalf. Mr. Francis also paid the deposit of \$10,000.00 for ground clearing, preparation and foundation and allowed left-over materials from construction of his home to be utilized. The De Roches made payments of \$30,000.00 and \$25,000.00 directly to Jameco in respect of the expansion as agreed, receipt of which was acknowledged. On completion, the De Roches were very pleased with the construction of the house and the quality of finishings; and he permitted them to connect their water pipes and sewerage lines to his pipes and septic tank. He says the families lived harmoniously for years thereafter during which the De Roches would visit with his parents as usual and Mrs. De Roche even cared for his ailing mother.
- [16] Mr. Francis states that in 2014, when his brother and spouse were contemplating taking a mortgage, a surveyor was engaged and asked to survey the portion of land around the De Roches' home in order to partition it from the property. Present at the survey, were the surveyor Mr. Dunstan Joseph, Mr. Francis, his brother, Mrs. De Roche and Mr. Cyril. Mrs. De Roche requested an extra piece of land to erect a clothesline to which Mr. Francis agreed. After the survey was completed, it was discovered that a portion of his brother's house fell on the property, and as a result, Mr. Francis agreed to transfer 700 sq. ft. to his brother to enable him to register the land and obtain a mortgage. The De Roches were aware of this. The surveyor also informed Mrs. De Roche that she would need to get special approval to register the survey plans for the land on which the house was built since the area was less than the 3,000 sq. ft. required.
- [17] However, Mr. Francis states that in January 2015, Mr. De Roche enquired about the survey plans and instructed him to delay registration because he was retiring soon and had a child outside of his marriage to Mrs. De Roche. He stated that he would further instruct him in whose name to register the property because Mrs. De Roches' family was greedy and cantankerous, and he wanted to avoid problems in the event

of her death. Mr. Francis says this was the sole reason for the delay in registering the survey.

[18] Mr. Francis says that Ms. Cyril, however, began to scandalize and defame his and his wife's character. His brother and spouse, and the neighbours overheard her on many occasions. In January 2015, Ms. Cyril along with Mrs. De Roche and Mr. Cyril attended his office and Ms Cyril apologized for her tirade and defamatory statements, claiming that she was upset. Mrs. De Roche and Mr. Cyril confirmed they were present when the survey was conducted. Mr. Francis says he informed Ms. Cyril that all that was required to have the survey plans registered was to obtain the approvals of the Ministry of Health, St. Lucia Solid Waste Management, WASCO and the Development Control Authority since the land was less than 3000 sq. ft. He further recommended an officer who had done similar applications for approval for him and his brother and charged only \$500.00. She agreed to contact the officer, but never did.

[19] Mr. Francis denies that the defendants were elderly at the time of the agreement. He avers that the De Roches were in their sixties; both actively working full-time. He alleges that it was because of the De Roches lack of trust in Mrs. De Roches' family, and their history of greed and deception that they relied so much on him for assistance and he has always done everything for them like a son. He says he and his wife were the legal owners of the property, yet they have never occupied, used or enjoyed it. The De Roches have been, to date, the sole occupiers benefitting from all the fruits and vegetables produced thereon. He says it is Ms. Cyril who wants the property returned for her own benefit, and not Mrs. De Roche.

[20] He says Ms. Cyril has persisted in misleading, manipulating and exercising undue influence over the De Roches. She has engaged the services of five lawyers all of whom have recused themselves after hearing the facts and witnessing her behaviour. He says he has made every effort to settle this matter amicably, even to his detriment, in order to preserve the good relationship. Three successful

mediations have been held, only for Ms. Cyril to persuade the De Roches not to comply with the agreed settlements and to change their lawyer, resulting in additional cost to them. He says Ms. Cyril is vexatious and angry and has falsely accused and defamed not only the defendants, but her lawyers, and the Registrar and staff of the Land Registry and the High Court.

Issues

- [21] The issues that arise for determination are as follows:
- i. Whether, on a balance of probabilities, the claimants have proven the existence of an oral agreement between the parties that differs from the written agreement?
 - ii. Whether the first defendant's failure to advise the claimants to obtain independent legal advice renders the agreement void?
 - iii. Whether the first and second defendants breached the terms of any valid contract with the claimants?
 - iv. Whether the claimants are entitled to any of the relief sought?
 - v. Whether the first and second defendants are entitled to any of the relief sought on the counterclaim?

Analysis

Issue (i): Whether, on a balance of probabilities, the claimants have proven the existence of an oral agreement between the parties that differs from the written agreement?

- [22] The claimants have failed to prove, on a balance of probabilities, the existence of an oral agreement with Mr. Francis in such terms as they allege, and different from the terms of the written agreement.

- [23] Mrs. De Roche's evidence, as adduced in examination in chief and cross examination at trial, is in stark contradiction with her evidence contained in her witness statement. In examination in chief, Mrs. De Roche recalled that she and her husband signed a document concerning their arrangement with Mr. Francis pertaining to the property and the house. She even says they signed the document

because, at the time, they were on good terms. She admits that she read that document and that Mr. Francis read the document to her, although she suggests on several occasions that her husband was the one at the forefront of the agreement and the transaction. For example, when asked initially if she read the document she was given to sign, she stated “he [Mr. Francis] and my husband were speaking”. Similarly, when she was asked whether she gave monies to Mr. Francis towards building the house, her reply was “that was he [Mr. Francis] and my husband”. Again, when asked whether she asked Mr. Francis to build a house for her, her answer was “he [Mr. Francis] and my husband”.

[24] In any event, she does not appear to harbour any uncertainty as to whether the terms of the document were made known to her. She admitted, without hesitation, both that she read the document she signed, and that Mr. Francis read the document to her. She further admitted that she understood the contents of that document, that she signed that document, and that she would be able to identify her signature. The written agreement was shown to her and she did identify her signature. She was given the opportunity to read the written agreement, and after doing so, she indicated that she understood what she had read; that at the time she signed it she understood what she was signing to; and that she agreed to the contents of the document she signed. This evidence is uncontroverted.

[25] The Court acknowledges that there were a few ambiguities in her evidence. For example, despite the foregoing, when asked whether she agreed to transfer her entire parcel of land to Mr. Francis, she replied “no, I want my land back.” On another occasion, when asked whether she and her husband agreed to give Mr. Francis land in exchange for him building the house, she said yes.

[26] What Mrs. De Roche’s evidence reveals is that she was aware of, understood and agreed to the transaction she now seeks to impugn on the basis of undue influence and fraud. What is glaring is that neither in examination in chief nor in cross examination, did she even so much as hint at any influence, of any kind, upon her

or her husband by Mr. Francis or anyone else. To the contrary, it appears that everything she did was understood by her and voluntary, though she appears to have deferred to her husband in relation to this matter, if not generally. Now, given the evidence, she appears to be deferring to her niece.

[27] Significant weight has to be given to Mrs. De Roche's evidence as adduced at trial. Firstly, the Court notes that Mrs. De Roche is the only witness for the claimants who is in a position to speak first-hand to the agreement/transaction, as she was the only witness present and party to it. Secondly, as both Ms. Cyril and Mr. Cyril admit, much of their evidence is what they were told by either Mr. or Mrs. De Roche. Their evidence is therefore, in large part, hearsay. Mr. Cyril was frank in indicating that he did not know much about the transaction, save what he was told. Ms. Cyril was less forthright. Her witness statement was verbatim Mrs. De Roche's statement, which, as mentioned above, turned out not to hold up under cross examination.

[28] Ms. Cyril's cross examination demonstrates that she did not have any first-hand knowledge of the agreement, yet she was insistent on what she believed the terms to be, in spite of an absence of evidence in support, and Mrs. De Roche's evidence to the contrary. Ms. Cyril insisted that it was not true that Mr. Francis purchased the property for \$100,000.00, even when it was pointed out to her that Mrs. De Roche's evidence was that she read, understood and agreed to the written agreement. Her basis was simply that that is what she was told. Similarly, when asked whether she had evidence of fraud by Mr. Francis, she stated only that the oral agreement between the parties was changed; that is the information relayed to her. On one occasion, she admitted that changes were made to the originally constructed house, and she was aware that monies were paid by the De Roches but could not say whether the monies paid were to effect the changes. On another occasion, she strenuously disagreed that the same monies paid were toward making the changes. She relied on the fact that the receipts do not state that, and there was nothing which required payment of money by the De Roches. She admitted however that the

receipts for the sums paid state that they were paid in respect of construction and that the changes would constitute construction.

[29] When asked about the 10-year delay between the date of the agreement in 2007 and the filing of the claim in 2017, she explained that the claimants were not aware the property was not in their name, as she only became involved in 2013. In the same vein, in relation to Mrs. De Roche's admission that she understood, agreed to and signed the written contract, Ms. Cyril insisted that there was an oral agreement, which subsequently became known to her; she was not aware that the claimants' property was no longer in their name until 2013.

[30] Ms. Cyril's evidence confirms that she has no basis for stating that there existed an oral agreement different from the terms of the written agreement and that the written agreement was obtained by fraud or undue influence. She relies only on what she was told, which is contrary to the unequivocal evidence given by Mrs. De Roche herself at trial. It is also clear that this dispute and these allegations only arose when Ms. Cyril became involved in 2013, when she realized the property was no longer in the claimants' names.

[31] Another factor which fortifies my conclusion that, on a balance of probabilities, the true agreement between the parties is the written agreement and not the alleged oral agreement is the 'common sense' of the transaction. Taking the value of the land as \$10.00 per sq. ft. in 2007 - the date of the agreement, which has not been challenged by the claimants; if Mr. Francis had in fact agreed to purchase 2,000 sq. ft. of land for \$100,000.00, he would have stood to suffer significant loss, given that the value of the 2,000 sq. ft. would have been \$20,000.00. He would therefore have deprived himself of \$80,000.00. One must question why any sensible person would make such an agreement, especially a person hell-bent on taking advantage of the elderly and vulnerable claimants, as alleged.

[32] I contrast this with the value of 8,223 sq. ft. of land at \$10.00 per sq. ft. which would give the sum of \$82,230.00. Even Mr. Francis' agreement to purchase the entire 8,223 sq. ft. of the property for \$100,000.00 would have resulted in a loss to him of \$17,770.00. Further still, it must be remembered that the written agreement required him to donate 2,000 sq. ft. of the 8,223 sq. ft. back to the De Roches. This means that on the written agreement, he really agreed to purchase only 6,223 sq. ft. of the property. At \$10.00 per sq. ft., the value of the 6,223 sq. ft. would have been \$62,230.00, which is far less than the sum he actually paid.

[33] For completeness, I note that the claimants, on 20th May 2019 filed what I describe as a 'stand-alone exhibit' because it is exhibited to no particular document, a valuation report of Mr. Adrian Dolcy, dated 21st June 2018, in respect of the property. That would have been after the completion of the trial during which I had pointed out that the valuation report had not been exhibited to the witness statement of Ms. Cyril. Mr. Dolcy concluded the market value of the property to be \$429,975.00, which includes the land, the house constructed by Mr. Francis, and a timber structure thereon. He provides a break-down of the total market value and indicates that in respect of the land, the value per square foot is \$30.00. Consequently, the land, which he measures as 8,223 sq. ft. is valued at \$246,690.00. I first note that the valuation report does not support the value of \$600,000.00 alleged by the claimants. I also note that the valuation was conducted in 2018 and the value realized in 2018 would be much higher than the value in 2007 at the date of the agreement.

[34] Therefore, taken from any angle, Mr. Francis stood to lose, and the claimants stood to benefit. Taken even from the angle most favourable to the claimant's case, that is, according to the written contract, Mr. Francis stood to lose, and the claimants stood to gain approximately \$38,000.00 in value. I find that the written agreement was not disadvantageous to the claimants as they allege; nor did Mr. Francis stand to benefit at their expense. It would be absolutely illogical and absurd that Mr. Francis would have agreed to purchase 2,000 sq. ft. of land for \$100,000.00. In all

the circumstances, I find on a balance of probabilities that the written agreement represents the true agreement between the parties.

Issue (ii): Whether the first defendant's failure to advise the claimants to obtain independent legal advice renders the agreement void?

- [35] This issue and the allegations herein raise the question whether the De Roches entered into the written agreement as a result of undue influence exerted by Mr. Francis over them. As Sir Vincent Floissac CJ explained in **Murray v Deubery and Another**¹:

“...[T]he doctrine of undue influence comes into play whenever a party, the dominant party to a transaction actually exhorted or is legally presumed to have exhorted influence over another person, the complainant to enter into the transaction. According to the doctrine, if the transaction is the product of 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.”

- [36] The law on undue influence is now well settled. Whether a transaction was brought about by the exercise of undue influence is a question of fact and the burden of proof rests upon the person who claims to have been wronged.² The law recognizes two classes of undue influence: actual and presumed. Sir Vincent Floissac CJ captured the difference thus:

“The modern tendency is to classify undue influence under two heads namely; class one – actual undue influence and class two – presumed undue influence. Class two is further classified under two subheads. The first subhead is: class 2A which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitors and clients, medical advisor and patient, parent and child and clergyman and religious advisor and parishioner or disciple. The second subhead is: class 2B which is descriptive of the legal presumption which arises from a relationship where the complainant generally reposed trust and confidence in a dominant party.”³

¹ (1996) 52 WIR 147 at page 151.

² Royal Bank of Scotland v Etridge (No. 2) [2002] 2 AC 773, at paragraph 13.

³ Murray v Deubery (1996) 52 WIR 147 at page 151.

[37] The claimants, in their submissions, seem to suggest that both classes of undue influence were present. They contend that there was actual undue influence, although no particulars were pleaded in support, and nothing, in the Court's view, arose from the pleadings or the evidence to support such a claim. In **Royal Bank of Scotland plc v Etridge (No. 2)**⁴, Lord Hobhouse of Woodborough defined actual undue influence thus:

"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. **It is typically some express conduct overbearing the other party's will.**"⁵

In **Allcard v Skinner**⁶, it was defined as a case in which:

"there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor."⁷

[38] As stated above, Mrs. De Roche never mentioned anywhere in her evidence any express unfair or improper conduct, coercion or overreaching by Mr. Francis, which could have been said to overpower her or Mr. De Roche's will. Therefore, any claim of actual undue must fail.

[39] Lord Browne-Wilkinson in **Barclays Bank plc v O'Brien**⁸ expounded the doctrine of presumed undue influence thus:

"Class 2: presumed undue influence. In these cases the complainant only has to show, in the first instance, that **there was a relationship of trust and confidence between the complainant and wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship** in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: **once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the**

⁴ [2002] 2 AC 773.

⁵ At paragraph 103.

⁶ (1887) 36 Ch. D. 145.

⁷ At page 181.

⁸ [1993] 4 All ER 417 at page 423.

complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice.

Such a confidential relationship can be established in two ways, viz:

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2B. Even if there is no relationship falling within class 2A, 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 2B 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.”⁹

[40] As to what is required to discharge the burden of proof where presumed undue influence is concerned, Lord Nichols in **Royal Bank of Scotland plc v Etridge (No. 2)**¹⁰ stated the following:

“13... The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, 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, and all the circumstances of the case.

14 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

⁹ At page 423.

¹⁰ [2002] 2 AC 773 at paragraphs 13-14.

is for him to produce evidence to counter the inference which otherwise should be drawn.”

[41] On the question of presumed undue influence, the claimants’ case also patently fails. The claimants have failed to establish even one of the elements required to maintain a claim of presumed undue influence. The claimants have not proven a relationship of trust and confidence between themselves and Mr. Francis; neither a class 2A relationship presumed by law, nor a class 2B relationship ‘in fact’.

[42] The claimants have stated that Mr. Francis, as an attorney-at-law, ought to have acted with circumspection and prudence and protected himself and the claimants by advising them to obtain independent legal advice. However, Mrs. De Roche, in her evidence never actually states that Mr. Francis was their attorney-at-law. There is no evidence of any agreement to provide legal services or payment for legal services over the years, or in relation to this matter specifically. Mr. Francis was asked in cross examination whether he was acting as their attorney and he indicated that he was not. His evidence has consistently been that given the close relationship with the De Roches, he always assisted them gratis and in good faith. This does not appear to have been limited to legal matters but assisting them generally. The evidence does not suggest that in preparing the written agreement he was acting for them in the capacity of their attorney-at-law, but rather as a neighbour and friend. I therefore decline to find the existence of a class 2A presumed relationship of trust and confidence. For the same reasons, I decline to find that Mr. Francis breached any provision of the **Legal Profession Act**¹¹ and the **Code of Ethics**¹² contained therein.

[43] I am also unable to find any evidence that demonstrates that there was ‘in fact’ a relationship of trust and confidence between the De Roches and Mr. Francis of the kind required to establish the class 2B presumption of undue influence. In coming to this conclusion, I have examined the factors to be considered in determining

¹¹ Cap 2.04 of the Revised Laws of Saint Lucia.

¹² Legal Profession Act, Cap 2.04 of the Revised Laws of Saint Lucia, at Schedule 3.

whether the burden of proof has been discharged, laid down in **Royal Bank of Scotland v Etridge (No. 2)**:

- (1). *The nature of the undue influence* – The extent of the allegation is merely that Mr. Francis drew up the written agreement which he encouraged the De Roches to sign, without advising them to obtain independent legal advice. However, since Mr. Francis was not acting as their attorney-at-law, there is nothing inherently wrong in him drafting the agreement. Further, there is no onus on him to advise the De Roches to obtain independent legal advice, unless it can be said that there existed a relationship of trust and confidence such that made it necessary. The obtaining of independent legal advice would then simply be one way of rebutting the presumption that the influence acquired by virtue of that relationship was abused and the transaction procured as a result.¹³
- (2). *The personality of the parties* – Mr. Francis' evidence, which is the only evidence in this regard, is that the De Roches were not elderly persons at the date of the agreement. They would have been in their sixties and both working full time. There is no evidence that they were in any way of unsound mind or memory or in any other way feeble-minded, gullible or easily manipulated so as to be susceptible to influence. They appear to have been sensible people, and Mr. De Roche, who was at the forefront of the agreement, appeared to possess basic business acumen.
- (3). *Their relationship* – Again, the only evidence in this regard comes from Mr. Francis himself when he says that there had developed a relationship of trust between them and that he always acted like a son to the De Roches because of their relationship with his parents. There is, however, no evidence of the extent and nature of his involvement. This evidence, without more, does not, to my mind, rise to the threshold required to raise the presumption that the mere existence of such a relationship made it fair to presume that Mr. Francis would abuse the relationship. The case would have been different if the De Roches

¹³ Barclays Bank plc v O'Brien [1993] 4 All ER 417 at page 423; Hilda Elisabeth Stoutt et al v FirstBank Puerto Rico BVIHCVAP2010/0016 (delivered 13th February 2012, unreported) at paragraph 36 per Mitchell JA [Ag.].

had been entirely dependent upon him in respect of management of their finances, property or other affairs or daily functions.

(4). *The extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship* – This factor is usually of great importance in establishing undue influence as it has been held that “*where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn.*”¹⁴ Given, as concluded above, however, that the transaction was one which benefitted the De Roches and was to the detriment of Mr. Francis, this factor is of no moment. The transaction can only be explained by way of Mr. Francis’ kindness and goodwill.

(5). *All the circumstances of the case* – The position is that proof that the complainant placed trust and confidence in the defendant, coupled with a transaction which calls for explanation, in the absence of a satisfactory explanation, is prima facie evidence that the defendant abused the influence and the transaction could only have been procured by undue influence. In such a case the evidential burden shifts to the defendant to disprove the inference of undue influence. As neither a relationship of trust and confidence, nor a disadvantageous transaction has been proven in the instant claim, the burden does not shift to Mr. Francis to disprove any inference of undue influence. There is therefore no need to show that independent legal advice was obtained and the claim of presumed undue influence fails.

[44] It must also be noted that after the agreement was made between the parties, a Deed of Sale was executed transferring the entire parcel of land to Mr. Francis and his wife. That document was executed before a Notary Royal, Mrs. Veronica Barnard on 7th April 2009 and would no doubt have presented an opportunity for the claimants to have raised any concerns or queries about the transaction, if they had

¹⁴ Hilda Elisabeth Stoutt et al v FirstBank Puerto Rico BVIHCVAP2010/0016 (delivered 13th February 2012, unreported) at paragraph 35 per Mitchell JA [Ag.]. See also National Westminster Bank plc v Morgan [1985] 1 All ER 821 per Lord Scarman.

any. There is no evidence that they did and in any event the claimants have not sought to impugn that Deed of Sale.

Issue (iii): Whether the first and second defendants breached the terms of any valid contract with the claimants?

- [45] This evidence shows, and it is undisputed that the agreement has not, to date, been fulfilled with the only outstanding term being that Mr. Francis transfer to the De Roches the 2,000 sq. ft. of land on which the house is situate. The land has been surveyed but apparently not partitioned as special approvals are required. No evidence has been provided to show that the agreement is incapable of fulfillment or why, given my findings above, it ought not to be completed. In the circumstances, I am of the view that Mr. Francis should be compelled to take the necessary steps to obtain the relevant approvals and have the land partitioned and transferred to Mrs. De Roche in her name.

Issue (iv): Whether the claimants are entitled to any of the relief sought?

- [46] Giving my findings that the claimants failed to prove the existence of the oral agreement they allege; that the written agreement represents the true agreement between the parties and is valid, having not been obtained by fraud or undue influence, I find that the claimants have failed to prove their claim and are not entitled to any of the relief sought.

Issue (v): Whether the first and second defendants are entitled to any of the relief sought on the counterclaim?

- [47] Given the findings as to the validity of the written agreement, the first and second defendants are not entitled to a return of the deposit, the original sale price of the land, the interest paid on the loan, or payment of rent for the period of the claimants' occupation of the property. The sums paid were paid in pursuance of that agreement. In respect of rent, the claimants are entitled to use and enjoyment of the house and the 2,000 sq. ft. on which it is situate in accordance with the agreement. Their occupation of the remainder of the property is at least contributed

to by Mr. Francis' delay in partitioning and transferring to the De Roches their portion. Further, the first and second defendants have pleaded no particulars to support a claim of libel or slander, and therefore are not entitled to a declaration or damages in this regard.

- [48] The first and second defendants are, however, entitled to a declaration as prayed, that the written agreement and the conveyance of the property are valid, and I so declare.

Order

- [49] Based on the foregoing, I hereby order as follows:
- (1) The claim is dismissed and the written agreement for sale between the parties dated 21st January 2007 is declared valid.
 - (2) The first and second defendants shall forthwith, and no later than the expiration of six months from the date of this judgment, complete the written agreement dated 21st January 2007 by taking all necessary steps to obtain the relevant approvals to have at least 2,000 sq. ft. of land on which the claimants' house is situate partitioned and transferred to Mrs. De Roche in her sole name.
 - (3) The first and second defendants are at liberty to file an application to extend the time for complying with this Order for the Court's consideration before the expiration of the six month period, if necessary, given the current state of affairs in Saint Lucia due to the state of emergency imposed by the Governor General and any other measures implemented as a result of the Covid-19 virus.
 - (4) The claimants shall pay prescribed costs to the first and second defendants in accordance with CPR 65.5.
 - (5) The counterclaim is dismissed with no order as to costs.

[50] I wish to state that the Court's order has taken into account the prevailing circumstances in Saint Lucia which may impact on the first and second defendant's ability to fully comply with the said Order.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar