

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2017/0610

BETWEEN:

USELTA JOSEPH

Claimant

and

GABRIEL CLIFTON JOSEPH

Defendant

Appearances:

Wauneen Louis-Harris for the Claimant

Ann Alicia Fagan, Renee St. Rose and Rowana Kay Campbell for the Defendant

2018: October 16th;

2018: October 19th.

JUDGMENT

[1] **SMITH J:** The Claimant and the Defendant were married in 1985. They acknowledge that it was a difficult marriage and sometime in 1998 or 1999 they separated. The Defendant filed a petition for divorce on 30th May 2000 but did not at the time persist with the petition because of their religious beliefs.

[2] On 13th July 2000, the parties signed an agreement ("the Agreement") the material terms of which were that:

- (i) The Defendant gave the sum of EC\$15,000.00 to the Claimant "in partial settlement of their property division pursuant to pending divorce proceedings

between them ...which sum would be the proceeds of a bank loan taken by the [defendant] for the [claimant] to pursue her studies”;

- (ii) The Claimant agreed to accept the said sum in partial settlement of their property division pursuant to the pending divorce;
- (iii) It would be used by her for the purposes of pursuing a three year course of study commencing July 2000 leading to a Bachelor's degree in Education at Atlantic Union College in the USA;
- (iv) If the property division did not materialize, the said sum would remain a debt due and owing to the Defendant.

[3] On the 17th September 2002, the Claimant and the Defendant signed a Separation Agreement “to make provision in respect to their property matters” the terms of which provided that:

- “1. The Husband shall pay to the wife the sum of ONE HUNDRED AND ONE THOUSAND DOLLARS (\$101,000.00) representing her share in the community properties to wit:
 - (a) the matrimonial home situate at Corinth, Gros Islet registered in the Land Registry as Parcel 1052B 526 and
 - (b) lands situate at Ti-colon, Castries registered in the Land Registry as Parcel 0644B 156.
- 2. The husband shall pay the sum of ONE HUNDRED AND ONE THOUSAND DOLLARS (\$101,000.00) to the wife after first deducting the following sums:-
 - (a) FIFTEEN THOUSAND DOLLARS (\$15,000.00) from the said sum which amount is due and owing by the wife as a debt to the husband as per agreement between the wife and the husband signed and dated 13th July 2000 and;
 - (b) SIX THOUSAND DOLLARS (\$6,000.00) from the said sum which amount is also due and owing by the wife as debt to the husband.
- 3. The total amount therefore payable by the husband to the wife as her share in the community property is the sum of EIGHTY THOUSAND DOLLARS (\$80,000.00).
- 4. Upon payment of the sum of EIGHTY THOUSAND DOLLARS (\$80,000.00) to the wife, the wife shall transfer all her rights, title and interest in the aforesaid community properties to the husband and the husband shall be responsible for the mortgage repayments.
- 5.
- 6. Each party hereto shall be at liberty to apply to a Court of competent jurisdiction to embody this Agreement as an Order of the Court and

the husband and the wife will do and hereby give all necessary consents to have all or any of the provisions of this agreement incorporated in an Order of the Court.”

- [4] Above the signatures of the Claimant and the Defendant on the Separation Agreement appeared the following clause in bold letters:

“I DOROTHY USELTA JOSEPH HAVE BEEN INFORMED OF MY RIGHT TO SEEK INDEPENDENT LEGAL ADVICE WITH REGARD TO THIS AGREEMENT BEFORE AFFIXING MY SIGNATURE HERETO. I HAVE SOUGHT INDEPENDENT LEGAL ADVICE WITH REGARD TO THIS AGREEMENT. I AGREE TO THE TERMS HEREIN CONTAINED AND PERSIST IN SIGNING THE SAME.”

- [5] On 4th October 2002, the Defendant filed an application in the high court for an order that the community property acquired between himself and the Claimant during their marriage be judicially separated and the community be dissolved on the grounds that “both parties have agreed and signed their consent to a separation of the community property.”

- [6] On 2nd April 2003, an Order of the court (hereinafter “the Court Order”) was made incorporating the terms of the Separation Agreement. The Order was headed “Order” and not “Consent Order” and appeared on the face of it to have been signed by the Claimant and the Defendant.

- [7] On 13th November 2003, the Claimant and the Defendant executed a Deed of Transfer transferring the properties identified in the Court Order to the Defendant who remained in undisturbed possession for the next fourteen years. The parties were divorced in 2006.

- [8] On 13th October 2017, the Claimant filed a Fixed Date Claim seeking:-
- (i) An Order setting aside the Court Order (which the Claimant described as an Order of Consent) insofar as it referred to the Corinth property;
 - (ii) An Order improbating the Deed of Transfer;
 - (iii) A Declaration that the Deed of Transfer be set aside; and

(iv) Rectification of the land register by inserting the name of the Claimant.

- [9] The grounds advanced by the Claimant in support of the relief she seeks are that:
- (i) The transfer of the property was procured by undue influence of the Defendant over the Claimant;
 - (ii) Alternatively, the Court Order (described by the Claimant as an “Order of Consent”) and the Deed of Transfer were signed by the Claimant under a mistake of fact.
 - (iii) The voluntary separation of the community property by the separation agreement and the Order of Consent is null and void by virtue of the violation of Articles 1229 and 1230 of the **Civil Code of Saint Lucia**.

Issues

- [10] The issues which arise for the determination of the court are:-
- (i) Whether there was actual or presumed undue influence of the Defendant over the Claimant in the execution of the Deed of Transfer;
 - (ii) Whether there was a mistake of fact in the signing of the Court Order and the Deed of Transfer;
 - (iii) Whether the Separation Agreement and Court Order are null and void by virtue of being in breach of Articles 1229 and 1230 of the **Civil Code**.

Was the Order a Consent Order?

- [11] In the course of the trial there was some argument between counsel as to whether the Court Order was a consent order or a non-consensual order. In **Peach Hallpike-Hodge and Eurel Hodge**¹ Lanns J adopted the following statement of law by Lord Diplock in **de Lasala v deLasala**²

“Final agreements that are agreed upon between the parties for the purpose of receiving approval and being made subject of a consent order by the court, once they have been made subject of the court order, no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is from the court order. If

¹ Antigua and Barbuda Claim No. ANUHMT2015/0130

² [1979] 2 All ER 1146

their legal effect is derived from the court, it must follow that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders.”

- [12] I do not think that it really matters whether the Court Order was made with the consent of the parties or was non-consensual. It is an order of the court and, whether consensual or not, can be set aside if fraud is established. As Lord Browne-Wilkinson stated in **CIBC Mortgage Plc v Pitt**,³:-

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

Undue Influence

- [13] In her fixed date claim, the Claimant did not specify whether the allegation of undue influence was based on actual undue influence or presumed undue influence. Having perused the Claimant’s particulars of undue influence, the court notes that in paragraph 5 (5) she alleged that the Defendant “coerced the Claimant to enter into the transaction for the said transfer”. Again at paragraph 5 (41) she alleged that the “Defendant exerted his dominion over the Claimant by coercing her to sign the said documents...” This appears to be the language of actual undue influence. The remainder of the particulars alleges that the Defendant took advantage of the fact that the Claimant was in an emotional and vulnerable state and reposed all trust and confidence in the Defendant. This appears to be the language of presumed undue influence.

- [14] 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**⁴

“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 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

³ [1994] 1 A.C. 200 (H.L.)

⁴ (1996) 52 WIR 147 at 151.

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.”

- [15] I must therefore carefully examine the evidence looking for any acts on the part of the Defendant that, on a balance of probabilities, can be said to amount to the exertion of influence over the Claimant. 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 **Allcard v Skinner**;⁵ or something done “*to twist the mind*” of the Claimant as it was alternatively put by Ward LJ in **Daniel v Drew**;⁶ or some express conduct overbearing the Claimant’s will as it was put by Lord Hobhouse in **Royal Bank of Scotland v Etridge (No 2)**.⁷ Alternatively, if it is presumed undue influence, I must examine the evidence to see if the Claimant generally reposed trust and confidence in the Defendant out of which there materialized “a transaction not readily explicable on the basis of the relationship and therefore calls for an explanation that the influence was not undue”, as it was put in **Egger and Egger**.⁸

- [16] At the trial, the Claimant heavily amplified her witness summary and commented at great length on the witness statements filed by the Defendant. From the totality of her evidence, several different versions as to why she signed the documents

⁵ (1887) 36 Ch D 145.

⁶ [2005] EWCA Civ 507

⁷ [2001] UKHL 44.

⁸ Saint Lucia, Civil Appeal No. 17 of 2002 at para 30.

emerged: (1) she was desperate for cash; (2) she was in a highly emotional state and was not aware of what she was doing; (3) she signed the documents because the Defendant promised her he would not divorce her; (4) the attorney for the Defendant had promised her she would get a parcel of land; (5) she was mistaken as to what she was signing. The court was left with the distinct impression that the Claimant, after swearing to tell the truth, proceeded to spin a web of fantasy that utterly discredited her as witness.

[17] But this is the crucial – and dispositive – point: the Claimant resolutely maintained that she never signed the Deed of Transfer. The Court questioned her on this point more than once. She said she saw her signature on the Deed of Transfer but does not know how it got there. She suggested that it might have been the doing of the Defendant's attorney at that time. Mrs. Louis-Harris, in her oral closing submissions, confirmed to the court that the Claimant's position was indeed that she never signed the Deed of Transfer.

[18] The Claimant is hoisted on her own petard. Her disavowal, under oath, of having signed the Deed of Transfer is plainly self-defeating. If she never signed the Deed of Transfer, then what transaction is she asserting that the Defendant exerted undue influence over her to enter into? Put another way: the Defendant exerted undue influence over her to do what? Undue influence as a ground, either of the actual or presumed variety, is simply untenable. The Claimant admitted to signing the Separation Agreement. She said she did so while in an emotional state and was mistaken as to what she was agreeing to. But this is of no moment since she does not seek any relief in relation to the Separation Agreement.

[19] In **Egger and Egger**,⁹ the Court of Appeal of the Eastern Caribbean relied on **Snell's Equity** thirtieth edition at paragraph 38-22 for the following statement:-

"Proceedings to avoid a transaction may be taken at any time while the influence still persists, however long after the transaction. But after the influence has ceased the donor must commence the proceedings within a

⁹ Saint Lucia, Civil Appeal No. 17 of 2002.

reasonable time or he will be taken to abide by the transaction and confirm it.”

- [20] The Claimant seeks to impugn the transaction fourteen years after its execution. The parties had been separated since 1998 or 1999. The Claimant lived in the United States while the Defendant lived in Saint Lucia. They were divorced in 2006. The Defendant remarried in 2011 while the Claimant remarried in 2012. Given these factual circumstances, I have great difficulty seeing how the influence of the Defendant could have persisted. I do not believe the Defendant ever exercised any influence over the Claimant. Everything she did and said while giving evidence and while sitting during the trial left the court in no doubt that she was the dominant party during the marriage.

Mistake of Fact

- [21] The Claimant, in her fixed date claim, pleaded that she signed the Order of Consent and Deed of Transfer under a mistake of fact. Having maintained at the trial that she never signed either of those two documents, there is nothing for her to have been mistaken about. Mrs. Louis-Harris, in her oral written submissions, contended that the Claimant was mistaken as to what she was signing when she signed the Agreement and the Separation Agreement. But the Claimant does not seek any relief in relation to the Agreement and Separation Agreement. The ground of mistake of fact must also fail.

Civil Code: Articles 1229, 1230

- [22] The Claimant contends that the Order of Consent is null and void by virtue of the violation of Articles 1229 and 1230 of the **Civil Code** which provide that:

“1229 Separation of property can only be obtained judicially, and when the interests of the wife are imperiled or the disordered state of the husband’s affairs gives reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive from it.

All voluntary separations are null.

“1230 Separation of property, although judicially ordered, has no effect, so long as it has not been carried into execution, either by the

actual payment, established by an authentic act, of what the wife has a right to receive, or at least by proceedings instituted for the purpose of obtaining such payment.”

[23] If I understand Mrs. Louis-Harris’s argument correctly, it is this: (1) the separation of property based as it was on a Separation Agreement was voluntary and all voluntary separations are null; (2) alternatively, if the separation of property can be considered as being judicially ordered, it has no effect since it was not carried into execution by the actual payment of what the wife has a right to receive; (3) what the wife (the Claimant) had a right to receive as her share of the community property could only have been discovered if valuations of the properties transferred to the Defendant had been carried out; and (4) since there were no valuations and no evidence of what the mortgage payments were that the Defendant had to assume upon title passing to him under the Deed of Transfer, it could not be said that the Claimant had received what she had a right to receive as envisaged by Article 1230 of the **Civil Code**.

[24] I now consider what is the proper interpretation to be given to Article 1230 of the **Civil Code**.

“Judicially Ordered”

[25] If the Separation Agreement stood alone, any separation of property based on such a voluntary separation agreement would be a nullity based on article 1229. But by application filed on 4th October 2002, the Defendant applied to the court for an order that “the Community Property acquired between himself and his wife during their marriage, be judicially separated”. (underlining supplied). Based on that application, the court made its order dated 2nd April 2003, reciting that “Upon this matter coming up for separation of community property and dissolution of the community...” The court in making the order noted that it had heard counsel for the Applicant (the Defendant herein) and the Respondent in person (the Claimant herein) and then proceeded to make the order. I therefore have no hesitation in viewing the separation of property as being judicially ordered.

“Carried into Execution” “By Actual Payment”

- [26] I also have no hesitation in concluding that the terms of the judicially ordered separation were plainly carried into execution by (a) the actual payment of the sum stipulated in the Court Order by the Defendant to the Claimant and (b) the transfer by the Claimant of her half-share in the properties to the Defendant.

“Authentic Act”

- [27] Was the judicially ordered separation carried into execution by actual payment established by an authentic act? Neither counsel made any submissions to the court as to what “authentic act” means under the **Civil Code**, nor were any materials that could help to elucidate the meaning of that phrase placed before the court.

- [28] The **Civil Code** provides as follows:-

“Article 1139

A Notarial instrument other than a will is authentic if signed by all the parties, though executed before only one notary.

Article 1141

An authentic writing is complete proof between the parties to it and their heirs and legal representatives:

1. Of the obligation expressed in it;
2. Of what was expressed in it by way of recital, if the recital have a direct reference to the obligation or to the subject of the instrument. If the recital be foreign to such obligation and to the subject of the instrument, it can serve only as a commencement of proof.

Article 1142

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

[29] Articles 1139, 1141 and 1142 speak of an “authentic writing” while Article 1230 speaks of an “authentic act”. I appreciate that there is a difference between the two phrases. Nevertheless, I am prepared to hold and do hold that the two acts of (i) payment of the \$80,000 and (ii) the execution of a Deed of Transfer signed by all the parties before a Notary Royal and registered in the Lands Registry are authentic acts in that (a) they were done in furtherance of a court order; (b) there was no fraud; (c) those two acts have not been impugned or set aside as false in any proceedings; (d) though the Claimant seeks improbation in these proceedings, that relief is not available to her since, on the authority of **Desir v Alcide**,¹⁰ in a claim for improbation the executing notary must be joined as a party to the proceedings.

What the Wife has a Right to Receive

[30] In examining Article 1230 I look at the plain meaning of the words. If a separation of property has been judicially ordered, what the wife has the right to receive can only be gleaned from the judicial order, namely, the Court Order. The Court Order at paragraph 2 stated: “*That the Applicant/husband shall pay to the Respondent/Wife the sum of One Hundred and One Thousand Dollars (\$101,000.00) representing her share in the community properties...*” (underlining supplied). That Court order is valid until set aside or otherwise appealed and is dispositive of what the Claimant (wife) has a right to receive. The Claimant’s attempt, through these proceedings to challenge the Court Order by fresh action on the ground of mistake has failed as already found above.

[31] Mrs. Louis-Harris’s submission that what the Claimant has a right to receive could only have been known if a valuation of the properties had been done is to read into the **Civil Code** a meaning not supported by text of the Code. In **Dorina Joseph and Nora St. Louis**¹¹, Gordon J.A. provided this helpful exposition on the approach to interpreting the **Civil Code** of Saint Lucia:-

¹⁰ HCVAP 2011/0030

¹¹ Saint Lucia, HCVAP 2008/025

[27] The Rt. Hon. Sir Vincent Floissac Q.C, former Chief Justice of this court, wrote in *Essays on the Civil Codes* at page 348, “The cardinal rule of interpretation of our Civil Code must be the Vagliano rule – the rule which was expounded in *Bank of England v Vagliano Brothers*. In that case, which dealt with the interpretation of section 7 (3) of the Bills of Exchange Act, a codifying act, Lord Halsbury LC said:

“It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.”

[28] In **Despatie v Tremblay** Lord Moulton said the following when discussing the interpretation of Article 127 of the Civil Code of Quebec:

“The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of the *Bank of England v. Vagliano Bros.* has always been accepted as expressing the object of codification.”

[32] The law must be determined by what is found in the **Civil Code**. The **Civil Code** speaks of judicially ordered separation. In this case the judicially ordered separation clearly set out what the Claimant (wife) had a right to receive.

[33] I therefore make the following orders:

- (i) The Claim is dismissed in its entirety.
- (ii) Prescribed costs are awarded to the Defendant to be paid within twenty-one (21) days of the date of this judgment.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar