

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHVCAP2017/0025

BETWEEN:

[1] **DELLA VALLERY NOLAN née JUDE**
[2] **BEVERLEY JUDE-PORTER**

Appellants

and

[1] **DIANE JUDE**
[2] **VANDYKE JUDE**

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mrs. Maureen John-Xavier for the Appellants
Mr. Dexter Theodore, QC, with him Ms. Sueanna Frederick, for the
First Respondent
Mrs. Edith Petra Jeffrey-Nelson and Mrs. Esther Greene-Ernest for the
Second Respondent

2019: July 3;
2020: September 18.

Civil appeal – Undue influence – Presumed undue influence – Existence of relationship of attorney and client – Whether transfers of land by client to attorney amounted to undue influence or abuse of trust or constituted an unconscionable bargain – Actual undue influence – Whether transfers of land and grant of power of attorney to child from parent amounted to actual undue influence, or abuse of trust and confidence, or constituted unconscionable bargains – Trust – Whether transferred lands were being held on trust for

beneficiaries or heirs at law – Prescription period for claim of undue influence – Article 2103 of the Civil Code of Saint Lucia – Whether claims made by appellants as claimants in the court below were prescribed by virtue of the Civil Code of Saint Lucia – Whether learned judge erred in considering the defence of prescription in circumstances where it was not pleaded and did not fall in exception outlined in Article 2129 of the Civil Code

The appellants, Della Vallery Nolan née Jude (“Della”) and Beverley Jude-Porter (“Beverley”), and the respondents, Diane Jude (“Diane”) and Vandyke Jude (“Vandyke”), are siblings and the children of the deceased, Austin Jude (“Austin”) and his wife, Sheila Jude (“Sheila”). Austin was the owner of several portions of land at Marigot which were held in his name, the name of his company, Austinshiel Properties Limited (“Austinshiel” or “the company”) and in the name of his longstanding business associate, Kenneth Monplaisir (“Kenneth”).

In 2005, Austin became terminally ill, at a time when there were several unresolved issues involving the company and lands held in its name, and with lands which were jointly owned by him and Kenneth, but which were registered in Kenneth’s name only. Austin asked his son, Vandyke, who was an attorney-at-law, but with whom he had a very acrimonious relationship, to represent him in the negotiation and resolution with Kenneth of the partitioning and sharing of their jointly owned lands. Against the background of this acrimonious relationship, Vandyke imposed several preconditions to his acceptance of his father’s request. Among the preconditions was the grant of a power of attorney by Austin to Diane so that he (Vandyke) could communicate with his sister, and not his father, on matters concerning the partitioning and sharing of the Marigot lands and their eventual disposition. Austin accepted Vandyke’s preconditions, including the grant of a power of attorney by him to Diane, which authorised her to sell, convey or dispose of on his behalf, any movable or immovable property in Saint Lucia or elsewhere upon such terms and conditions as she deemed fit.

This was followed by discussions and negotiations between Vandyke and Kenneth and land transfers by Kenneth to Austin and to Vandyke, and land transfers by Austin, by his company, by his sister, Martina Jude (“Martina”), and by his cousin, Loretta Lansiquot (“Loretta”), to Diane and Vandyke, and to Shiela. By the time Austin died in September 2007, most of his remaining property at Marigot, after the conveyance of 10 lots to Sheila, had been transferred to Diane or Vandyke. This included 13 parcels of land totalling almost 208,000 sq. ft. at Marigot to Vandyke by deed of transfer executed on 23rd July 2007 (“the first deed”) and a half share in 3 parcels of land valued at \$2,962,080 to Vandyke by deed of transfer also executed on 23rd July 2007 (“the second deed”) by Kenneth and Austin.

By fixed date claim filed on 6th April 2009 by Della against Diane and Vandyke, Della challenged the power of attorney granted by Austin to Diane and several transfers of land to Diane and Vandyke, as having been procured by undue influence exercised by them over their father, or because the transfers amounted to an unconscionable bargain, or were procured by an abuse of trust and confidence. She also claimed that the lands transferred to Diane and Vandyke were to be held by them on trust for Austin and/or his beneficiaries and/or his heirs at law.

Della alleged that her father left a Will dated 9th May 2007 appointing her, Beverley and Diane as executors and devised and bequeathed all his properties to his children in equal shares, with the exception of certain properties in relation to his son, Cletus Jude. The Will was allegedly executed in England at a time when Austin was under Della's care; both Diane and Vandyke questioned the authenticity of the Will. The trial judge delivered his judgment on 5th July 2017 dismissing the appellants' claim and awarding costs against them.

The appellants, being dissatisfied with the trial judge's decision, appealed on several grounds. The issues identified by the Court for its consideration and determination were narrowed down to the following: (i) whether the court was required to consider the defence of prescription, although it was not pleaded by the respondents (as the defendants in the court below); (ii) whether the claims made by the appellants (as the claimants in the court below) were prescribed by virtue of the Civil Code of Saint Lucia; (iii) whether the power of attorney granted by Austin to Dianne was procured by undue influence or abuse of trust or whether it amounted to an unconscionable bargain; (iv) whether the transfers of land from Austin, or at his behest, to Diane and Vandyke were procured by undue influence, or abuse of trust and confidence, or did they amount to unconscionable bargains; and (v) whether Diane and Vandyke held the lands transferred to them on trust for Austin, his beneficiaries or his heirs at law.

Held: allowing the appeal in part and making the orders set out in paragraph 98 of the judgment, that:

1. Article 2052 of the Civil Code provides that the court cannot, of its own motion, consider the defence of prescription, except where a claim is extinguished by law as provided in Article 2129. The claims brought by the appellants in the court below were not caught within this exception. The respondents were accordingly precluded from relying on the defence of prescription since it was not pleaded, was only introduced in closing submissions, and the appellants had no prior notice or fair opportunity to be heard on or respond to that issue. In the circumstances, the trial judge erred in treating with the issue of prescription as one to be determined by him in the proceedings in the court below.

Articles 2052 and 2129 of the **Civil Code of Saint Lucia**, Cap. 4.01 of the Revised Laws of Saint Lucia 2017 applied.

2. A claim of undue influence is neither a delict within the definition of Article 1:15 of the Civil Code with a prescription period of 3 years under Article 2122, nor is it a claim for fraud with a prescription period of 10 years by virtue of Article 2119 of the Code. It follows then that the prescription period for undue influence (which is not otherwise regulated by law) is 30 years, in accordance with Article 2103 of the Code. This prescription period also applies to actions for a breach of trust. Accordingly, the claims brought by the appellant in the court below in April 2009 were not barred by prescription.

Articles 1:15, 2119, 2103 and 2119 of the **Civil Code of Saint Lucia**, Cap. 4.01 of the Revised Laws of Saint Lucia 2017 applied; **Khardisha Lindy Princess Jawahir v Davis Gawin Jawahir** SLUHCVP2017/0055 (delivered 8th April 2019, unreported) followed.

3. For presumed undue influence to arise, there must be: (i) a relationship between two people from which the law presumes that one party has influence over the other; and (ii) a transaction between the two in which the benefit to the party with the influence is so substantial or of such a nature that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act. Against the backdrop of the lawyer and client relationship between Vandyke and Austin, their acrimonious relationship, the nature of the land transactions which were being questioned, and the absence of independent advice, the lands transferred to Vandyke clearly fall within the category of gifts which are so substantial that they could not, on the face of it, be accounted for on the ground of the ordinary motives on which the ordinary man acts.

Allcard v Skinner [1886-90] All ER Rep 90 considered.

4. Based on the foregoing conclusion and having established that there was a confidential relationship between Austin and Vandyke as lawyer and client, the onus was on Vandyke to prove that Austin received independent advice prior to making the gift to him. In this case, the evidence relied on by Vandyke in support of his assertion that Austin received independent advice was insufficient to discharge the evidential burden placed on him. Accordingly, the learned judge erred in concluding that Vandyke did not, as legal advisor to Austin, exercise undue influence over him in procuring the transfer of lands to him by virtue of the two deeds of transfer dated 23rd July 2007.
5. Actual undue influence is the product of threats, menaces and coercion by the person exercising the influence or of dependence and vulnerability of the person being influenced. On the evidence before the learned judge, it was open to him to conclude that at the time the power of attorney was granted to Diane, there was neither an overpowering of Austin's will by Vandyke so as to enable him to determine his father's actions, nor was Austin incapacitated to withstand Vandyke's dictates. In the circumstances, there is no basis upon which this Court could properly interfere with this factual finding of the trial judge.
6. It is settled law that there is no difference between a case where a person uses undue influence to benefit himself and one in which he uses it to benefit others. However, in the factual circumstances of this case, where parcels 56 and 103 and parcel 48 were transferred by Loretta and Martina respectively to Diane, it was open to the trial judge, on the evidence before him, to conclude that there was no actual undue influence exercised by Diane or Vandyke over

Austin to procure these transfers to Diane. Accordingly, there is no basis upon which this Court could disturb the trial judge's factual finding in this regard.

Allcard v Skinner [1886-90] All ER Rep 90 applied; **Bridgman v Green** (1755) 2 Ves. Sen. 627 applied.

7. The trial judge did not err in concluding that the transfers of land by or at the behest of Austin to Diane and Vandyke, other than the transfers effected by the first deed and the second deed, amounted to either an abuse of trust or an unconscionable bargain.
8. The learned judge also did not err in concluding that the lands gifted to Diane by Austin were not to be held on trust for her father or his beneficiaries or his heirs at law. In relation to the lands gifted to Vandyke, this Court, having already found that the lands gifted to him by virtue of the deeds executed on 23rd July 2007 were procured by undue influence, the gifts would accordingly be set aside, leaving nothing therefore to be held on trust.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against a judgment of the trial judge dated 5th July 2017 wherein he dismissed the claim of the appellants (as claimants in the court below) and awarded prescribed costs to the respondents (as defendants in the court below).

Background

- [2] The appellants, Della Vallery Nolan née Jude and Beverley Jude-Porter, and the respondents, Diane Jude and Vandyke Jude, are siblings and the children of the deceased, Austin Jude, and his wife, Sheila Jude. Austin and Sheila Jude had another child, Yasmin, who was not a party to the suit in the court below, but who was one of the claimants' witnesses. Austin Jude had been the owner of several portions of land at Marigot in the Quarter of Castries, which lands were held in his name, in the name of his company, Austinshiel Properties Limited, and in the name of his longstanding business associate, Kenneth Monplaisir.
- [3] In the interest of brevity and for the avoidance of uncertainty, I shall hereafter refer to the persons named above by their first names, except that Della and Beverley will sometimes be referred to as 'the first appellant' and 'the second appellant'

respectively or collectively as 'the appellants' and Diane and Vandyke will sometimes be referred to as 'the first respondent' and 'the second respondent' respectively and collectively as 'the respondents'. Austinshiel Properties Limited will hereafter be referred to as 'Austinshiel' or 'the company'.

- [4] In 2005, Austin had become terminally ill, at a time when there were several unresolved issues involving the company and lands held in its name, and with lands which were jointly owned by him and Kenneth, but which were registered in the name of Kenneth only. Austin, who was not then in a position to adequately manage his own affairs and, particularly, to resolve the issues which he had with Kenneth concerning their jointly owned lands, asked his son, Vandyke, an attorney-at-law, to represent him in the negotiation and resolution with Kenneth of the partitioning and sharing of the jointly owned lands. Vandyke, who was at the time resident in California, had a very acrimonious relationship with his father which had led on one occasion to a serious fight between them, which had left Austin in an unconscious state. The two men did not speak to each other for nearly eight years after that. Against the background of this unhappy relationship between him and his father, Vandyke decided to impose several preconditions to his acceptance of his father's request to represent him. Among the preconditions was the grant of a power of attorney by Austin to Diane, the supposed favourite child of their father, so that he (Vandyke) could communicate with his sister, instead of with his father, on matters concerning the partitioning and sharing of the Marigot lands and their eventual disposition. Austin accepted Vandyke's preconditions, including the grant of a power of attorney by him to Diane, which authorised her to sell, convey or dispose of on his behalf, any movable or immovable property in Saint Lucia or elsewhere upon such terms and conditions as she deemed fit.

- [5] There followed discussions and negotiations between Vandyke and Kenneth, land transfers by Kenneth to Austin and to Vandyke, and land transfers by Austin, by his company, by his sister, Martina Jude, and by his cousin, Loretta Lansiquot, to

Diane and Vandyke, and to their mother, Sheila Jude. By the time Austin died in September 2007, most of his remaining property at Marigot, after the conveyance of ten lots to Sheila, had been transferred to Diane or Vandyke.

- [6] By fixed date claim brought by Della against Diane and Vandyke on 6th April 2009, Della challenged the power of attorney granted by Austin to Diane and several transfers of land to Diane and Vandyke, as having been procured by undue influence exercised by them over their father, or because the transfers amounted to an unconscionable bargain, or were procured by an abuse of trust and confidence. She also claimed, additionally or alternatively, that the lands transferred to Diane and Vandyke were to be held by them on trust for Austin and/or his beneficiaries and/or his heirs at law.
- [7] It should be noted that in her claim, Della alleged that her father had left a Will dated 9th May 2007 (as his last Will and testament) in which he appointed Della, Beverley and Diane as his executors and devised and bequeathed to all of his children in equal shares, all of his real and personal property whatsoever and wheresoever situate, except that his son, Cletus Jude, should not get a share in properties owned by him (Austin) at Sarrot and Labayee in the Quarter of Castries and that his sister, Martina Jude, should have a right to live in his property at Marigot until her marriage or death. The Will was allegedly executed in England on 9th May 2007, at a time when Austin was under the care of Della. Diane and Vandyke denied the authenticity of the Will which, at least up to the time of the trial, nearly ten years after Austin's death, had not been probated.
- [8] Diane and Vandyke filed a defence to the claim, denying that they had exercised any undue influence over or made any unconscionable bargain with their father, or had perpetrated any abuse of trust and confidence, or that they held any property in trust for their father, his beneficiaries or his heirs.

- [9] The parties' statements of case were amended and further amended, and at some stage Beverley was added as a claimant. After nearly eight years of sparring, between the date of filing the claim and the actual trial, the parties faced each other in court on 17th and 31st March 2017. On 5th July 2017, the trial judge delivered his judgment dismissing the appellants' claim and awarding costs against them. On 19th July 2017, the appellants filed a detailed notice of appeal containing several grounds of appeal, to which one can add the words – "too numerous to mention".
- [10] The appellants filed skeleton arguments in support of their appeal on 19th November 2018, which the first respondent responded to on 8th April 2019 and the second respondent responded to on 12th April 2019. On 30th April 2019, the appellants filed skeleton arguments in reply to the respondents' skeleton arguments. The appeal was heard on 3rd July 2019, whereupon oral submissions were made by Mrs. Maureen John-Xavier for the appellants, Mr. Dexter Theodore, QC for the first respondent and Mrs. Edith Petra Jeffrey-Mendes for the second respondent.
- [11] When one distills the several grounds of appeal and considers the written and oral submissions made by counsel on behalf of the parties, together with the documents forming part of the record, and the judgment of the learned judge, the issues for consideration and determination in this appeal are essentially the following: (1) was the court required to consider the defence of prescription, although it was not pleaded by the respondents (as the defendants in the court below) and was not even foreshadowed in the witness statements or any of the other pretrial documents? (2) Were the claims made by the appellants (as the claimants in the court below) prescribed? (3) Was the power of attorney granted by Austin to Dianne procured by undue influence or abuse of trust or did it amount to an unconscionable bargain? (4) Were the transfers of land from Austin, or at his behest, to Diane and Vandyke procured by undue influence, or abuse of trust and confidence, or did they amount to unconscionable bargains? (5) Did Diane and

Vandyke hold the lands transferred to them on trust for Austin, his beneficiaries or his heirs at law? None of the other issues raised in the several grounds of appeal bear on the actual disposition of the matter and need not be focused on.

Prescription generally

- [12] The first of the issues for consideration is the issue of prescription, which was raised in the appellants' first and second grounds of appeal. In their first ground of appeal, the appellants contended that the learned judge erred when he determined that the claim was prescribed against the appellants for all of the causes of action pleaded, whilst in their second ground of appeal they contended that the judge erred when he considered and ruled on the question of prescription adversely to the appellants when that defence or facts supporting that defence had not been pleaded, was not raised at any point during the proceedings, and the claimants received no notice of and were given no opportunity to respond to the issue.
- [13] In support of their prescription grounds, the appellants submitted that the prescription issue ought to have been pleaded in the defence in accordance with rule 10.5 of the **Civil Procedure Rules 2000** ("CPR") or an application ought to have been made to strike out the claim under rule 9.7 and Part 26 of the CPR. The appellants sought to rely on the cases of **Daphne Alves v The Attorney General of The Virgin Islands**¹ and **Godfrey Aurelien v Johny Chitolie (t/a JC Trucking Bean Field in the Quarter of Vieux-Fort in the State of Saint Lucia)**² where – according to the appellants – the High Courts in The Virgin Islands and in Saint Lucia 'determined the function of pleadings and the need for a litigant to know the case or defence he/she has to meet'. The appellants further submitted that, in any event, none of their claims were prescribed, because undue influence is a species of fraud which, by virtue of Article 2119 of the **Civil Code of Saint Lucia**³ ("the Civil Code"), is prescribed by 10 years; the bulk of the disputed

¹ [2011] ECSCJ No. 234, BVIHCV2007/0306 (delivered 24th October 2011).

² [2011] ECSCJ No. 169, SLUHCV2008/0946 (delivered 21st July 2011).

³ Cap. 4.01 of the Revised Laws of Saint Lucia 2017.

transfers in relation to the second appellant were executed on 23rd July 2007, which is within any of the prescription periods advanced by any of the parties; and prescription begins to run from the date that the appellants had knowledge of the transfers, not from the date of the registration of the transfers.

[14] In her response to the prescription issue, the first respondent submitted that prescription bars the right as well as the remedy and no action can thereafter be maintained; that as long as the evidence discloses that the period of limitation has expired, the judge has no discretion in the matter; that prescription need not be pleaded; and that the point can be taken at any time once the evidence discloses that the period of limitation has expired. The first respondent conceded however that prescription would not have set in in respect of the transfers executed on 23rd July 2007.

[15] In his response to the prescription issue, the second respondent submitted that ‘all deeds which were executed 3 years prior to the day of filing of the suit are prescribed’; that ‘the issue of prescription is a legal issue which can be raised at any time during proceedings’; that ‘the Court of its own volition can raise the issue of prescription as the concept is one unique to Saint Lucia provided for in the **Civil Code** at Articles 2052 and 2129’; that ‘any transactions which occurred 3 years prior to the filing of the claim were prescribed’; and that the ‘case was predicated on breach of trust and undue influence among others all of which constitute delicts and are therefore prescribed by 3 years’.

[16] The second respondent cited the dicta of Gordon JA (as he then was) in the case of **Dorina Joseph et al v Nora St. Louis**⁴ as authority for ‘the categorization of trusts as delicts’ and stated that ‘undue influence, unconscionable bargain, trust and breach of fiduciary relationships are categorized as delicts and [are] prescribed by three years’.

⁴ [2009] ECSCJ No. 99, SLUHCVP2008/025 (delivered 6th July 2009).

- [17] It is of course desirable that all issues likely to be addressed by a party to proceedings before the court, particularly the High Court or Court of Appeal, should be foreshadowed to the other party or parties to the proceedings. It is also of great importance for the tribunal adjudicating on the issues in dispute between the parties to be alerted as to the issues likely to be canvassed before it by the parties. A party who fails to alert the court or the other party or parties should in appropriate cases be denied altogether the opportunity to advance any issue which they did not first bring to the attention of the court and the other party or parties. At the very least, if the defaulting party is permitted to pursue the issue, they should be penalized in costs for that failure.
- [18] There are however issues which, even if a party fails to bring to the attention of the court or to the attention of the other party or parties that they intend to raise them in court, the court is bound to consider them once they come to the attention of the court before its final adjudication of the matter. Prescription of claims enumerated in Article 2129 of the Civil Code comes within this category.
- [19] Article 2047 of the Civil Code defines prescription as 'a means of acquiring property, or of being discharged from an obligation by lapse of time, and subject to conditions established by law'. Article 2047 also provides that '[e]xtinctive or negative prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgement of a right when the creditor has not preferred his or her claim within the time fixed by law'. Article 2052 states that: '[t]he Court cannot of its own motion supply the defence resulting from prescription, except in cases where a claim is extinguished by law as provided in article 2129.' Article 2129 states that: '[i]n all cases mentioned in articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired...'

[20] The conjoint effect of the articles of the Civil Code just referred to and quoted from is that a person (referred to in the Civil Code as 'the debtor') is discharged from an obligation by lapse of time and the party claiming against him (referred to as 'the creditor') is barred or precluded from taking any action against him for the fulfilment of an obligation (with respect to all claims mentioned in the foregoing articles) when the claim has not been instituted within the time fixed by the article. The discharge of the debtor and barring of the creditor do not need to be pleaded by the debtor, but follow as a matter of law once the time fixed by law has elapsed, so that the obligation is extinguished altogether and no action can thereafter be brought for its fulfilment. This applies to all of the claims mentioned in Article 2129.

[21] The question then becomes whether the claims made by the appellants in the court below come within the mentioned articles.

Prescription of claims for undue influence, abuse of trust and unconscionable bargain

[22] The only one of the claims in Articles 2111, 2121, 2122, 2123 and 2124 which any of the parties has linked to the claims made by the appellants in the court below is the claim for delicts, prescription of which is provided for in Article 2122 of the **Civil Code**, and which the respondents contend covers claims for undue influence and breach of trust.

[23] Of note is the fact that no attempt was made by the respondents to classify the claims of unconscionable bargain or abuse of trust and confidence in dealing with the issue of prescription. It appears though that the respondents treated these indeterminate claims as partaking of the nature of claims of undue influence, if not ingredients of them, and therefore delicts prescribed by three years. Indeed, in addressing the issue of prescription in the skeleton arguments filed on his behalf, the second respondent said: '[t]his case was predicated on breach of trust and undue influence among others all of which constitute delicts and are therefore prescribed by 3 years.' Although the submissions of the first respondent made no

such categoric statement, it is clear that the first respondent was contented to 'hitch a ride' with the second respondent on this part of their journey.

[24] It does not appear that the appellants resisted the respondents' treatment of the claims of unconscionable bargain and abuse of trust and confidence as partaking of the nature of claims of undue influence, or ingredients thereof, only that they (the appellants) denied that these claims are delicts prescribed by three years. They contend instead that these claims are species of fraud prescribed by ten years, by virtue of Article 2119 of the Civil Code, or are claims which are not otherwise regulated by law and are prescribed by thirty years.

[25] Undue influence is not a delict. According to Article 1:15 of the **Civil Code**:

“[T]he [term] ‘delict’ ... indicates an injurious act or incident which, in the absence of any contract gives rise to an obligation towards the injured person (the creditor), on the part of another person (the debtor). The act or incident is termed ‘delict’ when there is ... injurious intention or culpable negligence on the part of the debtor.”

[26] It would, to say the least, be very difficult to determine what in a claim of undue influence is the injurious act or incident which gives rise to an obligation towards an injured person or what would constitute injurious intention or culpable negligence.

[27] Consistent with its definition in the Civil Code, the term ‘delict’ has been described as a term in civil law jurisdictions for a civil wrong consisting of an intentional or negligent breach of duty of care that inflicts loss or harm and which triggers legal liability for the wrongdoer. Tort, which is regarded as the common law equivalent of the civil law delict, may be defined as:

“...the infringement, without lawful excuse, of a right vested in some determinate person, either personally or as a member of the community, and available against the world at large, or against some person or body exercising public functions as such, whereby damage is caused to such

determinate person, either intentionally or as a natural consequence of the infringement".⁵

[28] The virtual equivalency between delict in civil law and tort at common law provides further confirmation that undue influence is not a delict, because it is certainly not a tort. The fact that undue influence is not a tort is so trite that it is difficult to find a judicial authority specifically saying so. The closest I came to finding an authoritative pronouncement on this is in the authoritative text of **Bullen & Leake & Jacob's Precedents of Pleadings**, where it is stated that: '[a] claim to avoid a transaction on the ground of undue influence constitutes a cause of action in itself and can also be relied upon as a defence to a claim to enforce the transaction which was so procured'.⁶ But probably the clearest indication that undue influence is not a tort can be derived from the fact that the term 'undue influence' is not even mentioned in **Clerk & Lindsell on Torts**,⁷ where one will find, defined and discussed, every tort known to the common law.

[29] From the foregoing, it is clear that undue influence is not a delict prescribed by three years. I also do not believe that it is prescribed under Article 2119. Article 2119 states that – '[t]he action... in rescission of contracts for error, fraud, violence, or fear, [is] prescribed by ten years.' An action for undue influence is not an action in rescission of contract for fraud. A claim of undue influence may or may not be one seeking rescission of a contract and, indeed, may not even involve a contract at all. In fact, the undue influence alleged in this case centres on allegations that certain documents were executed by Austin, or upon his direction, some at least of which involve no contract at all, for instance, the grant of a power of attorney by Austin to Diane allegedly procured by the undue influence of either or both of Diane and Vandyke over Austin. Undue influence also need not involve any element of fraud; the undue nature of the influence may result from fraudulent action by the party exercising the influence, but it may also be the result of a

⁵ Stroud's Judicial Dictionary of Words and Phrases (4th Edn, Sweet & Maxwell 1974) at p. 2789.

⁶ Bullen & Leake & Jacob's Precedents of Pleadings (19th Edn, Sweet & Maxwell 2019) at para. 18-01.

⁷ Clerk & Lindsell on Torts (20th Edn, Sweet & Maxwell 2010).

relationship between the parties which creates a presumption of undue influence without any inappropriate, far less fraudulent, action by any party.

- [30] Having determined that a claim for undue influence is neither a delict prescribed under Article 2122, nor a claim for fraud prescribed under Article 2119, the question then becomes how a claim for undue influence is to be characterised for the purpose of prescription under the Civil Code. The answer is to be found in Article 2103, which provides that, '[a]ll things, rights, and actions, the prescription of which is not otherwise regulated by law, are prescribed by 30 years...', so that a claim for undue influence is prescribed by thirty years under Article 2103 of the Civil Code.

Prescription of claims for breach of trust

- [31] The other claims made by the appellants (as claimants in the court below) were claims for breach of trusts. The submissions made on behalf of the second respondent which characterised undue influence as a delict, also characterised breach of trust as a delict prescribed by three years under Article 2122. Recall the statement made in the second respondent's skeleton argument about the case being predicated on breach of trust and undue influence which constitute delicts and therefore prescribed by three years. Again, the submissions made on behalf of the first respondent avoided characterisation of the claim for breach of trust, but the first respondent seemed just as willing to 'hitch a ride' with the second respondent on this part of the journey as she did on an earlier part of the journey.
- [32] The second respondent relied on the case of **Dorina Joseph et al v Nora St. Louis et al** in support of his argument that breach of trust is a delict and a claim for breach of trust is therefore prescribed by three years. In giving judgment in the Court of Appeal in **Dorina Joseph**, Gordon JA said:

"...I am, however, of the firm opinion that a breach of trust, or rather conspiracy to cause a breach of trust, such as is alleged in this case against the two appellants, would fall squarely within the realm of a delict or quasi delict (dependent on the finding of fact by a trial court) as defined in the Civil Code. Put another way, the substantive rights (trusts) are

imported by Article 916A; the remedy for the breach of those substantive rights, as in this case, are provided for by the provisions of the Code.”

- [33] In the case of **Khardisha Lindy Princess Jawahir v Davis Garwin Jawahir**,⁸ this Court took the view that a breach of trust is not a delict or quasi-delict. In giving judgment in this Court in the **Jawahir** appeal, I said that the statement made by Gordon JA in **Dorina Joseph** to the effect that a breach of trust is a delict was obiter, because the case in which he was giving judgment was about a conspiracy to cause a breach of trust, which is a tort. At paragraph 22 of the judgment in **Jawahir**, I said:

“By virtue of article 916A of the Civil Code, the law of England on trusts – whether expressed, implied, constructive or resulting, and whether concerning the rights, powers and duties of trustees or of beneficiaries under a trust – is applied wholesale to St Lucia. If one is looking to address any aspect of trust, such as breach of trust, then it is to the law of England that one must turn. In England, breach of trust is not extracted from the general law of trusts and transported into the law of torts, which can be considered to be the common law cousin of the codal delict (or quasi delict); it is treated entirely within the ambit of trust law. Why then should a court in St Lucia treat with a breach of trust not within the scope of a common law breach of trust but within the realm of a delict, there to apply to it the period for prescription applicable to delicts and quasi-delicts?”

- [34] The conclusion of this Court in **Jawahir** was that the period for prescription for breach of trust, which is not otherwise provided for in the **Civil Code**, is thirty years, in accordance with Article 2103 of the Code.

Prescription as a bar

- [35] The claims brought by the appellants against the respondents in the court below are claims which are not otherwise provided for in the **Civil Code** or, in the language of the Code itself, ‘not otherwise regulated by law’ and accordingly fall under Article 2103 of the **Civil Code** and are prescribed by thirty years. The claims, therefore, are not among the claims covered by Article 2129, which are

⁸ SLUHCVP2017/0055 (delivered 8th April 2019, unreported).

mentioned in articles 2111, 2121, 2122, 2123 and 2124, and which become absolutely extinguished after the delay for prescription has expired and so no action can be maintained in respect of them. The consequence of this is that, not only has 'the delay for prescription [not] expired' but, further, the respondents (as the defendants in the court below) are caught by Article 2052 of the **Civil Code**, which states that: '[t]he Court cannot of its own motion supply the defence resulting from prescription, except in cases where a claim is extinguished by law as provided in article 2129.'

[36] The respondents were therefore barred from relying on the defence of prescription, because they had not pleaded it, and their late introduction of this defence in their closing submissions would not avail them, because a court should not exercise a discretion to condone what would be a breach of the rules (rule 10.5 of the CPR) in order to facilitate the party in breach blocking the other party from pursuing their claim.

[37] In the premises, the trial judge did err when he determined that the appellants' claims against the respondents were prescribed for all of the causes of action pleaded. The appellants' first ground of appeal is accordingly allowed, and the second question posed in paragraph 11 hereof is answered in the negative. The trial judge also erred when he considered and ruled on the question of prescription adversely to the appellants when that defence had not been pleaded, was not raised at any point during the proceedings, and for which the appellants received no notice or were not given an opportunity to be heard or to respond on that issue. The appellants' second ground of appeal is also allowed, and the first question posed in paragraph 11 hereof is answered in the negative.

[38] I should add, by way of a postscript on the prescription issue, that – for reasons which will become clear in the course of this judgment – the most apposite claim in this case would not in any event be barred by prescription after three years, even if claims of undue influence are prescribed after three years. I am referring here to

the claim of undue influence of Austin by Vandyke in effecting the transfers of land to him by Instruments No. 6670/2007 and 4224/2008. These instruments of transfer were dated 23rd July 2007 and were registered on 19th November 2007 and on 30th July 2008, and both their dates of execution and registration fall well within three years of the institution of proceedings on 6th April 2009.

Undue influence

- [39] I will now address what is in fact the central issue in this case, that is, whether Diane and Vandyke, separately or together, unduly influenced their father, Austin, to give a power of attorney to Diane and to transfer or cause to be transferred to either or both of them, several parcels of land at Marigot.
- [40] Undue influence may be defined as the influence exercised by one person over another, in circumstances such as would cause a court of equity to determine that a transaction done (directly or indirectly), by the person acting under the influence of the other, was not produced by the exercise of his free and independent will. The doctrine of undue influence applies to transactions where influence is acquired and abused or where confidence is reposed and betrayed at the time of the impugned transaction. In **National Commercial Bank (Jamaica) Ltd v Hew and Ors**,⁹ the Privy Council stated that the doctrine ‘arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them’. The question which the court must ask in determining whether there was undue influence is not whether the party influenced knew what he or she was doing at the time, but how the intention to do it was produced. The touchstone for whether an intention was produced through an exercise of undue influence is whether – in the words of Lord Nicholas in the case of **Royal Bank of Scotland plc v Etridge (No. 2)**¹⁰ – ‘the consent thus procured ought not fairly to be treated as the expression of a person’s free will...’.

⁹ [2003] UKPC 51.

¹⁰ [2002] 2 AC 773.

- [41] Although the wisdom of the longstanding practice of doing a classification of cases of undue influence has been questioned, I take the view that a distinction should be drawn between actual undue influence and presumed undue influence. In the case of actual undue influence, something has to be done to direct the mind of a complainant (like securing his consent to a transaction by abuse of the trust and confidence he has reposed in you), whereas in the case of presumed undue influence it is more a situation of something which has not been done (like ensuring that independent advice is available to the complainant before he enters into the transaction).
- [42] Actual undue influence arises when a person ("A") gains the trust and confidence of another person ("B") and abuses that trust and confidence reposed in him to cause B to enter into a transaction with him, which transaction is so advantageous to A and disadvantageous to B as to call for at least an explanation. There needs be no pre-existing relationship between A and B in order to give rise to a claim of actual undue influence, but the burden of proving the claim of undue influence rests, and remains throughout, on the person making the claim. When oral evidence is given, the issue for the court is whether on the totality of the evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence.
- [43] Presumed undue influence arises where there is a relationship between two people from which the law presumes that one party has influence over the other party and a transaction takes place between the two parties in which the benefit to the party with the influence is so substantial (or otherwise of such a nature) that it cannot *prima facie* be reasonably accounted for on the ground of the ordinary motives on which ordinary men act.
- [44] This formulation, in terms of the nature of the transaction attracting the presumption of undue influence, is derived from the judgment of Lindley LJ in the

English Court of Appeal in the case of **Allcard v Skinner**¹¹ where he spoke of a gift of a small amount made to a person standing in a confidential relationship to the donor not attracting the presumption of undue influence, and then went on to say: 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motive on which ordinary men act, the burden is upon the donee to support the gift...'

[45] The party claiming presumed undue influence need not prove that undue influence was actually exerted, or even that the party influenced actually reposed trust and confidence in the other party; it is sufficient for him to prove that the transaction took place and the existence of the type of relationship from which undue influence can be presumed. The burden of proving that the transaction took place and that the relationship existed at the time rests with the complainant, after which the burden shifts to the party against whom the claim has been made to prove that the complainant obtained independent advice. Relationships to which the doctrine of presumed undue influence has been applied include those between parent and child, lawyer and client,¹² doctor and patient, and trustee and beneficiary; the list though is not exhaustive.

[46] It is to be noted that the presumption applies in one direction only, so that it applies for instance to the influence which a parent has over his child, or a lawyer has over his client, but not to any influence which a child may have over his parent or a client may have over his lawyer.¹³ It is to be noted too that there is some judicial authority that in the case of the relationship of lawyer and client, there is no need for the complaining party to prove that the transaction sought to be impugned was manifestly unfair to him because, whilst the relationship of lawyer and client subsists between the parties, the presumption of undue influence arises in favour of the client, and can only be rebutted by the lawyer upon proof that the

¹¹ [1886-90] All ER Rep 90 at 100.

¹² In the UK, the relationship would be described as 'solicitor and client', because the two professions of barrister and solicitor are not fused in the UK and it is the solicitor and not the barrister who would be advising the client.

¹³ *Paull v Paull* [2018] EWHC 2520 (Ch) at para 8.

client obtained independent advice. There is even dicta by a UK judge, in the case of **Tomson v Judge**¹⁴ that – ‘Gifts inter vivos by a client to a solicitor are always void’ (per Kindersley V.-C). We need not go as far here, however, whether in the case at bar or in the jurisdiction generally and, at the very least, the lawyer should have the opportunity to preserve the gift or otherwise retain the benefit of a transaction advantageous to him if he can prove that the client did obtain independent advice, particularly independent legal advice. We also need not go as far as to ignore the nature of the transaction sought to be impugned. Indeed, in the case of **Macklin and Others v Dowsett**,¹⁵ Auld LJ said that – ‘It would be absurd for the law to presume that every...transaction between a client and his solicitor...was brought about by undue influence unless the contrary is affirmatively proved.’

[47] It is worthy of mention, in relation to the facts of this case, that although the presumption of undue influence has been applied to cases where the gift is made to the lawyer’s wife, it has never been applied to gifts made to the lawyer’s sister. In **Glover v Glover**,¹⁶ it was held that presumed undue influence would not arise from the relationship between brothers. So that there would be no presumption of undue influence of Austin by Vandyke in relation to the gratuitous transfers by Austin, or at his behest, to Diane.

[48] I do not take the view that once a confidential relationship is established, such as that between lawyer and client, undue influence will be presumed without there being a transaction involving a gift so substantial that it could not be reasonably accounted for on the ground of the ordinary motives on which ordinary men act. I also do not take the view that it is immaterial to show that there was an absence of independent advice once there is a relationship of lawyer and client between the donor and the donee. I will accordingly treat the nature of the transactions and the absence of independent advice, as part of the equation in determining the validity of the gifts of land to Vandyke by, or at the behest of, his father.

¹⁴ (1855) 24 L.J. Ch. 787.

¹⁵ [2004] 2 EGLR 75 at para 24.

¹⁶ [1951] 1 D.L.R. 657.

- [49] Of the transactions sought to be impugned by the appellants, the one which on any view of the evidence is a gift so substantial that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act is the deed of transfer dated 23rd July 2007 by Kenneth and Austin to Vandyke of thirteen parcels of land at Marigot. This deed was executed on 23rd July 2007, less than two months before Austin's death, with Dianne signing on behalf of her father, who was by then in the departure lounge waiting to board his flight to eternity, and the deed was registered on 19th November 2007, two months after the flight had departed. Although the deed is not stated to be a deed of gift, it is also not stated to be a deed of sale, and a figure of \$75,000.00 mentioned in the deed is not stated to be either a purchase price for the land or a valuation of the land, and for almost 208,000 square feet of land at Marigot it is obviously neither.
- [50] A second deed, also executed on 23rd July 2007, is also by Kenneth and Austin to Vandyke. This deed transferred to Vandyke a half share in three parcels of land at Marigot. The sizes of the three parcels of land are not mentioned in the deed but, as with the other 23rd July 2007 deed of transfer, the figure of \$75,000.00 is mentioned in the deed, without any indication as to what that figure represents. As with the similarly dated deed, I attach no significance to the figure of \$75,000.00, which clearly represents neither the price nor the value of the gifted land. In fact, in an email by Vandyke to his siblings on 2nd May 2008, he says that parcel 0444B 4 contains approximately 16 acres and that the value per acre is \$370,260.00. This would yield a total value of \$2,962,080 for the half share in one of the three parcels of land conveyed to Vandyke by the second 23rd July 2007 deed.
- [51] The ruling of the trial judge (with which I do not agree) that the deeds sought to be impugned by the appellants could not be set aside on the basis of undue influence of Austin by Diane and Vandyke, because Austin was not the transferor of the lands in question, so that what had to be proved was the exercise of undue influence over Kenneth Monplaisir, Martina Jude, Loretta Lansiquot and Austinsheil Properties Limited, cannot in any event apply to the two deeds of

transfer by Kenneth and Austin to Vandyke. The recitals in these two deeds declare that Kenneth was transferring the lands to Austin, who then (by the same deed) transferred them to Vandyke. So, with respect to these transfers of lands at Marigot by Kenneth and Austin to Vandyke, there can be no issue about the need to establish undue influence over anyone else but Austin in effecting the transfers.

[52] The first question to be asked and answered in determining if these transfers of land to Vandyke were procured by undue influence is whether the transfers constituted gifts to Vandyke that were so substantial that they could not prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act. That the lands transferred by Austin to Vandyke fell within the category earlier described of gifts so substantial, is borne out by the fact that four out of the sixteen parcels of land transferred to Vandyke by the 23rd July 2007 deeds were sold or agreed to be sold by him for over \$3.5 million within less than one year of Austin's death; and with no reason to doubt that there are or were a few million dollars more to be realised from the sale of the other parcels. The explanation offered by Vandyke in his evidence for the substantial gifts of land given to him by his father, with whom it is to be recalled he had an acrimonious relationship for several years, whom he fought and injured eight years prior to their reconciliation, and to whom he did not speak for the eight years following, and only occasionally spoke to between their reconciliation in 2005 and his death in 2007, beggars belief.

[53] Vandyke's evidence was essentially that his father made these very substantial gifts of land to him out of gratitude for the work which he (Vandyke) had done in negotiating with Kenneth the partitioning and sharing of the Marigot lands previously held in the name of Kenneth only; work which Vandyke was paid for by the transfer to him by his father of other land at Marigot. The explanation is even more remarkable when it is realised that the land gifted to him by his father was, in part at least, the very land that his father had paid him to secure the partitioning

and sharing of with Kenneth. Vandyke's explanation therefore stretches credulity to its very limits.

[54] On the evidence which was before the trial judge, this very substantial gift of land by Austin to Vandyke has not been and, in my view, cannot *prima facie* be reasonably accounted for on the ground of the ordinary motives on which ordinary men act.

[55] Next comes the question of whether the relationship between Vandyke and Austin was one in which Austin had such confidence and trust in Vandyke as to place Vandyke in a position to exercise undue influence over him in making such a gift. The answer to be gleaned from all of the cases and literature on undue influence is that the relationship between the two men of lawyer and client was sufficient to establish that Austin had the confidence and trust in Vandyke that would place Vandyke in a position to exercise undue influence over his father in making such a gift to him. Granted that there may have been several reasons which Austin may have had to engage his son in the task of negotiating with Kenneth the partitioning and sharing of the lands at Marigot jointly owned by Kenneth and Austin but registered in the name of Kenneth only. One can count among them Vandyke's familiarity with a lot of his father's dealings, and his apparent confidence and competence in 'combat'. But there is no doubt that there was, at the time of the transfer to Vandyke of a substantial portion of his father's share in the partitioned property, a relationship of lawyer and client existed between them. Vandyke himself put the nature of their relationship beyond doubt when he said, in his letter to the appellants' lawyer on 13th June 2008: 'His business affairs were entrusted to Diane Jude and I served as his legal advisor until his death'. You could hardly want it clearer than that.

[56] In the circumstances, the state of the facts and law which were before the trial judge compelled him to find that there was a presumption of undue influence by Vandyke over his father in procuring these transfers by his father to him of thirteen

parcels of very valuable lands at Marigot and a half share in three other parcels of land at Marigot. Once the relationship of lawyer and client was established, and once it was established too that the transfers of the Marigot lands to Vandyke constituted a gift so substantial that it could not reasonably be accounted for on the ground of the ordinary motives on which ordinary men act, the burden then shifted to Vandyke to prove that Austin had received independent advice prior to the making of the gift to him.

- [57] Vandyke's only attempt to discharge the evidential burden placed on him was to say in his witness statement at paragraph 160, that Mr. Rambally - his first cousin, and also his brother in law, and his former partner in the law firm of Rambally and Jude - had been 'the long suffering, unpaid legal advisor to my father since he graduated from Law School in the 1970s'. From this evidence, the court was to have been satisfied that Austin had received independent advice from Mr. Rambally before making these very substantial gifts of land to Vandyke. It is to be noted that Mr. Rambally had sworn to an affidavit on 3rd June 2009 in which he intimated that he did provide independent legal advice to Austin. But it is also to be noted that this affidavit was given in 2009 in proceedings in which an interim injunction was being sought by the first appellant against the respondents and that Mr. Rambally gave no affidavit, made no witness statement and did not give evidence at the trial in March 2017, and so did not make himself available to be cross-examined on the intimations which he had made in his affidavit eight years prior. Also to be noted is the fact that Mr. Rambally was the executing notary in all of the deeds which transferred land to Vandyke, and that the engagement and remuneration of an executing notary is, in St. Lucia, the prerogative of the transferee. The evidential burden to be discharged by the respondents (as the defendants in the court below) could not have been discharged on this statement by Vandyke or this intimation by Mr. Rambally.

[58] Vandyke did also state in paragraph 136 of his witness statement, where he was seeking to specifically refute the allegation that his father received no independent legal advice with regard to the 23rd July 2017 transfers, that:

“...This is an incorrect statement. My father was an accountant/book keeper who often prepared and filed his own lawsuits. He discussed the July 23, 2007 transfers with both Mr. Monplaisir and Mr. Rambally who each had acted on many occasions as his legal advisor over the years. Moreover, the claimants executed the Will of May 2007 with an attorney present who was evidently discussing and advising my father's intended property distributions. I knew nothing of this arrangement and I knew nothing about the Will which was executed at that time...”.

[59] This of course takes the matter no further. It does not buttress the earlier suggestion (at its highest) that Mr. Rambally had provided independent legal advice to Austin. It is also (to put it mildly) difficult to conceive of how Kenneth, being himself sometimes a protagonist and sometimes an antagonist in this whole affair, and indeed Vandyke was retained primarily to resolve the long-standing differences between Kenneth and Austin over the ownership and separation of the very lands in issue, could somehow become the source of independent legal advice to Austin in relation to the disposition of Austin's share in the disputed lands. It is no less difficult to understand the suggestion that the lawyer in England, who allegedly executed a Will, the validity of which Vandyke disputes, is offered by Vandyke as a possible source of independent legal advice to his father on land transactions in St. Lucia.

[60] Vandyke's several references in his evidence (whether in his witness statement, affidavit or *viva voce* evidence) to his father's several denials in the course of divorce proceedings between his father and mother that he (Austin) had any interest in the disputed lands, really goes nowhere, because even if it had any probative value it would be difficult (speaking euphemistically) to explain how Austin transferred to Vandyke all of this valuable land in which he (Austin) had no interest. The reality is that Austin was the owner of several parcels of land at Marigot, 20 of which were transferred by him or at his behest to Diane or Vandyke in the period between 2005 and 2007 when Vandyke served as his lawyer/legal

advisor and Diane held his power of attorney. Austin owned a half share in three of the twenty parcels of land, whilst his company owned a half share in one of the other seventeen.

[61] In the premises, I find that, on the evidence before him, it was not open to the trial judge to make a finding that the second respondent, Vandyke Jude, did not, as the lawyer/legal advisor to his father, Austin Jude, exercise undue influence over him in bringing about the transfer by his father to him of several thousand square feet of land at Marigot in the Quarter of Castries valued at several millions of dollars, by virtue of two deeds of transfer both dated 23rd July 2007 (two months before his father's death) and registered on 19th November 2007 (two months after his father's death) and 30th July 2008 (ten months after his father's death).

[62] I will accordingly allow the appeal against the judge's order dismissing the appellants' claim that the two deeds of transfer dated 23rd July 2007 were the products of undue influence exercised by the second appellant over his father. I will not however set aside the deeds, which are not wanting in the formalities attendant to the execution of a valid deed. They are also unimpeachable in terms of effecting a transfer by Kenneth Monplaisir to Austin Jude of the latter's share in the Marigot lands which they had jointly acquired, but which remained until then in Kenneth's name only. What is invalid is the onward transfer of the lands by Austin to Vandyke. I will accordingly set aside the gift of the lands to Vandyke as having been procured by the undue influence exercised by him over his father. In the result, title to the lands transferred by Austin to Vandyke by the 23rd July 2007 deeds of transfer will revert to Austin and pass upon his death to the persons entitled under his will, if he left a valid will, or to his heirs at law, if he died intestate.

[63] None of the other transfers of land to Vandyke effected by the instruments of transfer which the appellants sought to impugn were transfers of land by Austin to Vandyke or gifts of land to him by his father. All but one of the other land transfers

to Vandyke reflected purchases of land by Vandyke from Kenneth for considerations stated in the instruments of transfer and are not transactions which may be impugned on the basis of any undue influence which Vandyke may have exercised over Austin. The only other land transfer to Vandyke which was effected by one of the instruments of transfer which the appellants sought to impugn is a deed of sale by Kenneth and Austinsheil which transferred parcel 157 to Vandyke for a stated purchase price of \$67,707.26. Vandyke's evidence is that this deed reflected the purchase by him of Kenneth's half share in parcel 157, paid for in cash, and the transfer of the half share in the name of the company (at the behest of his father) in lieu of payment to him for the legal work which he was engaged by his father to do in negotiating the partitioning and sharing of the lands at Marigot jointly owned by Kenneth and Austin. The trial judge accepted Vandyke's evidence in this regard and I can find no basis to upset his finding.

- [64] This then takes us to gifts or grants to Diane which are alleged to have been the products of undue influence exercised by Vandyke or Diane over Austin.
- [65] The first grant by Austin to Diane which was alleged by the appellants to be the product of undue influence is the power of attorney granted by Austin to Dianne by Instrument No. PA482/2005. The allegation that the grant of the power of attorney was procured by undue influence is justified by the appellants on the basis that Vandyke had exercised undue influence over his father by coercing him to give a power of attorney to Diane as a condition of his agreeing to be engaged by his father to negotiate the partitioning and sharing of the Marigot lands between him (Austin) and Kenneth. The difficulty with this argument is its circularity, in that it essentially alleges that Vandyke exercised undue influence over Austin in causing him to grant the power of attorney to Diane as a condition of his agreeing to be engaged by Austin in the capacity which enabled him to exercise undue influence over Austin.

[66] It could hardly be overlooked that the mere statement of the allegation makes it difficult to fathom. But it is tenable on one basis only, and that is, that Vandyke exercised actual undue influence over Austin so as to put him (Vandyke) in a position in which he could be presumed to have exercised undue influence over him (Austin). There could have been no presumed undue influence by Vandyke over his father, arising out of a lawyer-client relationship, until Vandyke became his father's lawyer, and so a condition precedent to him becoming his father's lawyer could not be the product of presumed undue influence.

[67] In considering whether Vandyke exercised undue influence over his father in causing him to grant the power of attorney to Diane, it would be necessary to take out presumed undue influence from the equation and focus only on actual undue influence. Unlike presumed undue influence, which arises by virtue of the relationship between the party influencing and the party influenced, actual undue influence must be the product of threats, menaces or coercion by the party exercising the influence or of dependence and vulnerability of the party being influenced. Both as a matter of language and law, 'threats', 'menaces' and 'coercion' are virtually synonymous in the present context and essentially convey the overpowering of the will of one person by another such as to enable the latter to determine the actions of the former. Dependence and vulnerability, on the other hand, both convey a virtual incapacity of someone to withstand the will of another, conducing therefore to the will of the former being effectively dictated by the latter.

[68] On the evidence which was before the lower court, it was open to the trial judge to find that, at the time that the power of attorney was granted by Austin to Diane, there was no overpowering of Austin's will by Vandyke such as to enable him to dictate the actions of his father, nor was Austin incapacitated to withstand the dictates of Vandyke. This was a finding that the trial judge was entitled to make; he had the benefit (not available to this Court) of seeing and hearing the witnesses as they gave their evidence at the trial; there was no indication that he misdirected himself on the law in making this finding; there is no basis, therefore, for this Court

to interfere with his factual finding, and his finding that there was no actual undue influence exercised by Vandyke over Austin to have caused Austin to grant a power of attorney to Diane will remain undisturbed.

[69] Since the averment by the appellants and the evidence of the respondents in the court below were that it is Vandyke and not Diane who insisted on the power of attorney being granted to Diane, there was no basis upon which the trial judge could have found that Diane had unduly influenced her father to grant a power of attorney to her. If indeed it was open to the trial judge to make or not make such a finding, his having made a finding that the power of attorney was not the product of undue influence exercised by Diane over Austin is in any event, for the same reason as applied to Vandyke, unimpeachable by this Court.

[70] This leads now to a consideration of whether the land transfers by Loretta Lansiquot and Martina Jude to Diane, by virtue of Instruments No. 2800/2005 and 565/2006 constituted gifts by Austin to Diane procured by undue influence exercised by Vandyke or Diane over Austin. Had these land transfers been to Vandyke and not Diane, the issue of presumed undue influence could have arisen from the relationship of lawyer and client between Vandyke and his father but, the transfers being to Diane, any question of undue influence by Vandyke over Austin in procuring these land transfers could only be addressed in the context of actual undue influence exercised by Vandyke over his father to procure the transfers to Diane.

[71] It is to be noted that there is judicial authority that the presumption of undue influence by a lawyer over his client can extend to transactions between the client and the lawyer's wife;¹⁷ but this has not, to my knowledge, been extended to transactions between the client and the lawyer's siblings, such as would need to be invoked here to give rise to the presumption of undue influence by Vandyke over Austin in procuring the gifts of land by Austin to Diane.

¹⁷ Liles v Terry [1895] 2 QB 679.

- [72] In terms of the allegation of undue influence exercised by Diane over her father in procuring transfers of land being made to her by Loretta Lansiquot and Martina Jude, there would have to have been an exercise of actual undue influence by Diane over Austin because, apart from the father-daughter relationship between the two of them, which the courts have determined does not create a presumption of undue influence by child over parent,¹⁸ there is no legally recognisable relationship between Diane and Austin that would give rise to a presumption of undue influence.
- [73] Another question to be asked and answered is whether land transfers by Loretta Lansiquot and Martina Jude to Diane could in law be the products of undue influence exercised by Diane or Vandyke over Austin. The trial judge answered this question in the negative and held that these transfers could only be impugned upon proof of undue influence exercised by Diane or Vandyke over Loretta Lansiquot and Martina Jude.
- [74] I do not accept this as a proposition of law, because the issue is whether the transactions sought to be impugned were procured by undue influence exercised over Austin, and if it can be proven that undue influence was exercised over Austin to procure the transfers of these lands by Loretta Lansiquot and Martina Jude to Diane, then the transfers may be successfully impugned. This is borne out by the case of **Allcard v Skinner**¹⁹ where the UK Court of Appeal took the position that there is no difference between the case of a person using undue influence to benefit himself and when he uses it to benefit others. This was also the position taken by that court in **Bridgman v Green**,²⁰ where Lord Hardwicke observed that a person should not be able to get out of the reach of the doctrine of undue influence by causing a gift to be given to a third person instead of reserving it to himself.

¹⁸ Paull v Paull [2018] EWHC 2520 (Ch) at para. 8.

¹⁹ (1887) 36 Ch. D. 145.

²⁰ (1755) 2 Ves. Sen. 627.

[75] The transfer of the lands by Loretta Lansiquot to Diane was effected by a Deed of Sale by Loretta Lansiquot to Diane of two parcels of land at Marigot for a consideration of \$106,000, which amount was expressly stated in the Deed to have been paid by Austin to Loretta Lansiquot. The inescapable conclusion is that, by this Deed, Austin effectively purchased the two parcels of land from Loretta and gifted them to Diane. This gift by Austin to Diane of these two parcels of land at Marigot, together comprising approximately 0.35 hectares, and purchased by him for \$106,000, could hardly be considered (in the context of the several parcels of land owned by Austin at Marigot and elsewhere) as a gift so substantial that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act. Indeed, as a gift to his supposed favourite child, it might be considered insubstantial. There is nothing therefore on which to base an allegation of actual undue influence by either Vandyke or Diane over Austin to have procured the gift to Diane of parcels 0443B 56 and 103.

[76] The transfer of the land by Martina Jude to Diane was effected by a Deed of Sale by Martina Jude to Diane of a portion of land comprising 15,932 square feet at Marigot, together with a building erected thereon, for a consideration of \$60,000. The evidence of Martina Jude, in her witness statement and in court, was that her brother, Austin, put the property in her name to hold for him whilst he was going through a divorce from his wife, so that his wife would not get a share of it. She said that her brother's matrimonial home was on the land which he put in her name. She also said that her brother had her give him a power of attorney so that he could do whatever he wanted with the land. She said she never paid for the land when it was transferred to her and she was never paid for the land when it was transferred from her; not \$60,000 or any money whatsoever.

[77] From this narrative, it is clear that Martina Jude merely held the land in trust for her brother whilst he was going through divorce proceedings and that when he was ready to take back the legal title to his land he simply used the power of attorney

which he had caused his sister to give to him and transferred the property to Diane. This then was another gift by Austin to Diane, dressed up as a sale by Martina Jude to Diane of a portion of land on which stood her parents' matrimonial home. None of the parties argued that the land was in fact owned by Martina Jude, or anyone but Austin, until its transfer to Diane. Indeed, the only other person who any of the parties considered might have had any share in parcel 0443B 48 was Sheila Jude, from whom Austin had allegedly sought to hide the property.

[78] Unlike the gift of parcels 56 and 103 to Diane, which the trial judge found, and I agree, was not so substantial that it cannot be reasonably accounted for on the ground of the ordinary motives on which ordinary men act, the gift of parcel 48, with the matrimonial home on it, merits different treatment. Based on Vandyke's evidence, parcel 48 contained the old matrimonial home, plus the new one built by him at a cost of \$700,000, and a cottage built by him at a cost of US\$150,000.00. From Vandyke's evidence, it appears that he was reimbursed in land by his father for the money he spent building the new matrimonial home and the cottage on parcel 48, whilst his mother was compensated for the loss of her share in the property by the award to her of 10 parcels of land at Marigot. So the property (although registered in the name of Martina Jude) was owned in full by Austin at the time that he gifted it to Diane. It is also apparent that, based on Vandyke's estimates of expenditure, the buildings on the property would be valued well in excess of \$1 million, sitting on nearly 16,000 square feet of land in Marigot. All things considered, and even if Diane was in fact Austin's favourite child, the gift to her of parcel 48 and the buildings on it, was a gift so substantial that it could not *pima facie* be reasonably accounted for on the ground of the ordinary motives on which ordinary men act.

[79] The explanation given by Vandyke and Diane is that the transfer by Austin to Martina Jude of the matrimonial home of their parents was an injustice to their mother which needed to be righted, and that it was one of the conditions set by

Vandyke for him to agree to be engaged as his father's legal advisor. The evidence, mainly from Vandyke, is that, after discussions between him and his parents, his father initially decided to transfer the property to his four daughters, but subsequently decided to transfer it to Diane alone. Vandyke also gave evidence that it was agreed that Diane would give both of their parents, lifetime occupation of the property and lifetime entitlement to the rental income from the property.

[80] The trial judge accepted this explanation as sufficiently accounting for the gift of parcel 48 to Diane. At paragraph 109 of the judgment he stated that: 'I have already found that there was nothing untoward about the transfer of parcel 48 to Diane'. There is, in my view, no basis to upset this finding of fact. The trial judge's overall finding on the exercise of actual undue influence, which finding impacts on the gifts of parcels 48, 56 and 103 to Diane, was as follows: '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.'

[81] This is a finding of fact which it was open to the trial judge to make on the evidence before him and I find no basis upon which this Court should disturb it.

[82] This then disposes of the issue of undue influence, whether presumed or actual, impacting on the transfers of land to Diane and Vandyke which were challenged in the appellants' statements of case.

Unconscionable bargain/abuse of trust

[83] Undue influence aside, Della and Beverley also challenged the transfers of land by or at the behest of Austin to Diane and Vandyke as amounting to an unconscionable bargain or as having been procured by abuse of trust and confidence. Although in the main all of the parties treated with unconscionable bargain and abuse of trust and confidence as partaking of the nature of claims of

undue influence or even as ingredients of them, for the sake of completeness, I will briefly address them.

[84] Neither ‘unconscionable bargain’ nor ‘abuse of trust’ is a term of art, and so they will have to be described and not defined.

[85] An unconscionable bargain may be described as a contract which is, or which contains terms and conditions which are, not only harsh and oppressive, but which manifest moral unfairness. In the case of **Multiservice Bookbinding Ltd and Others v Marden**,²¹ Browne-Wilkinson J said:

“In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience.”

[86] The transfers of land to Diane and Vandyke challenged by Della and Beverley were challenged not as contracts of sale by Austin to Vandyke but as gratuitous transfers of land, which most of them were, even when the instruments of transfer were executed and registered as transfers by sale and contained a monetary sum which pretended to be a purchase price. These gratuitous transfers of land include the transfers effected by Instruments Number 6670/2007 and 4224/2008. The transfers effected by Instruments Number 3719/2006, 613/2006, 4731/2008 and 6400/2008 were land transfers by Kenneth to Vandyke which reflected actual sales of land by Kenneth to Vandyke for the stated considerations. This was the evidence of Vandyke, and there was none to the contrary.

[87] The one other transfer of land to Vandyke which was effected by one of the instruments of transfer challenged by the appellants, that is, Instrument No. 3097/2006, is the deed of sale by Kenneth and Austinshiel transferring parcel 157 to Vandyke for a stated purchase price of \$67,707.26. Vandyke’s evidence was that this reflected a purchase by him of Kenneth’s share in parcel 0443B 157 and

²¹ [1978] 2 All ER 489.

the transfer to him of his father's half share (registered in the name of the company) as payment for his engagement as his father's legal advisor. The trial judge found, and I affirmed, that there was no basis to impugn this transaction as being the product of undue influence. So too, I find no basis to impugn it as being an unconscionable bargain. It does not appear to be harsh and oppressive, nor does it appear to manifest moral unfairness.

[88] This then leaves the two transfers of land to Diane – one by Loretta Lansiquot and the other by Martina Jude. I have already found that, notwithstanding the garments in which the land transfers were dressed as transfers by sale to Diane by her cousin and aunt, they were in fact gifts of land to her by her father. They were not, and were never alleged by anyone to be, the subjects of any contract between Austin and Diane and/or Vandyke and could not therefore be the products of any unconscionable bargain between Austin and Diane.

[89] Abuse of trust and confidence – which was another of the grounds used by Della and Beverley to challenge the land transfers to Diane and Vandyke – is also an undefined term. The term connotes an advantage taken by one party over another who has reposed trust and confidence in him. But abuse of trust and confidence is considered to be and treated as the key element in the exercise by one person of actual undue influence over another.

[90] I have already addressed the issue of undue influence exercised by Vandyke over Austin in a relationship in which undue influence is presumed, and found that the relationship between them of legal advisor and client sufficed to create a presumption of undue influence, which presumption was not rebutted, so that – aside from the transfer of Austin's half share in parcel 157 in lieu of the payment by him of legal fees to Vandyke – the transfers of land by Austin, or at his behest, to Vandyke were vitiated by undue influence. I found too that the trial judge was correct in finding as he did that there was no undue influence exercised by Vandyke, presumptively or actually, in procuring the transfer to him of his father's

half share of parcel 157. The issue of abuse of trust and confidence by Vandyke over Austin in procuring land transfers to himself is therefore determined and it is unnecessary therefore to give separate consideration to it, being as it is an element of the already concluded issue of the absence of actual undue influence exercised by Vandyke over Austin.

[91] I have also found that the trial judge was entitled on the evidence to find that there was no actual undue influence exercised by Vandyke or Diane over Austin in procuring either the power of attorney by Austin to Diane or the transfers of land to her by Loretta Lansiquot and Martina Jude. His factual findings in this regard are therefore unimpeachable.

[92] I can now say, in relation to the third issue for consideration, which I identified in paragraph 11 hereof, that the power of attorney granted by Austin to Diane was not procured by undue influence or abuse of trust and confidence or did not amount to an unconscionable bargain.

[93] I can also now say, in relation to the fourth issue, that none of the transfers of land by, or at the behest of, Austin to Diane were procured by undue influence or abuse of trust and confidence or amounted to an unconscionable bargain, but two of the transfers of land to Vandyke, effected by Instruments No. 6670/2007 and 4224/2008 were procured by undue influence exerted by Vandyke over Austin.

Trust

[94] In her claim form and statement of claim, Della also claimed that the lands transferred to Diane and Vandyke were being held by them on trust for Austin and/or his beneficiaries and/or his heirs at law. The trust claim is either conjunctive to or disjunctive with the claims of undue influence, unconscionable bargain and abuse of trust and confidence. Be that as it may, there is no evidential basis for the claim that the two portions of land transferred to Diane at the behest of her father were to be held by her on trust for her father or his

beneficiaries or his heirs. There is also no evidential basis for the claim that the parcels of land transferred to Vandyke by Kenneth by Instruments No. 3719/2006, 613/2006 and 4731/2008, and the parcel of land transferred by Kenneth and Austinshiel to Vandyke by Instrument No. 3097/2006 were to be held by him on trust for Austin, or Austin's beneficiaries and/or his heirs at law. There is, however, an evidential basis for a claim that any land transferred to Vandyke by Instrument No. 6670/2007 and 4224/2008 may have been held by him on trust for his father or his beneficiaries or heirs at law. Evidence to this effect may be found in the content of emails sent by Diane and Vandyke to their siblings on 8th July 2007 and 2nd May 2008 respectively and forming part of the record, both here and in the court below.

[95] I will not, however, delve further into a discussion or analysis on the existence of a trust with respect to the just-mentioned parcels of land, because I have already found that these parcels of land were not validly transferred to Vandyke because the transfers were procured by undue influence exercised by him over his father. The transfers having been invalidated by the exercise of undue influence by Vandyke over his father, no property would have passed to Vandyke which he could have held in trust for his father or the testamentary beneficiaries or heirs at law of his father. I will say, though, that if I had to make a finding on the trust issue, I would find that a constructive trust was created by Austin which obliged Vandyke to distribute the land to his sisters, with the power to determine the mode and manner of distribution. No finding is, however, required to be made and none is made.

[96] In relation to the fifth issue identified in paragraph 11, there is no basis on the evidence which was before the court below, for the trial judge to have found that the lands gifted to Diane by Austin were to be held by her on trust for her father or his beneficiaries or his heirs at law. There is however a basis on which the trial judge could have found that the lands gifted to Vandyke by Austin by virtue of Instruments No. 6670/2007 and 4224/2008 were to be held by Vandyke on trust

for his father or the beneficiaries or heirs at law of his father. This finding is not here justified though, because this Court has already found that the lands thus gifted to Vandyke were procured by undue influence exerted by him over his father, so that the gifts to him will be set aside, leaving nothing to be held on trust.

Costs

- [97] The appellants, having succeeded on a significant part of their appeal, are entitled to a significant part of their costs, which I will assess at 60% of their costs in the High Court, with the usual two-thirds of the High Court costs as costs on the appeal.

Conclusion

- [98] In the premises, I make the following orders:
- (1) The transfer of parcels 0443B 41, 45, 46, 47, 55, 122, 138, 160, 162, 163, 177, 211 and 223 to Vandyke Jude, by Instrument No. 6670/2007, was the product of undue influence exercised by Vandyke Jude over Austin Jude, and the transfers are accordingly set aside.
 - (2) The transfer of Austin Jude's half share in parcels 0443B 51 and 52 and 0444B 4 to Vandyke Jude, by Instrument No. 4224/2008, was the product of undue influence exercised by Vandyke Jude over Austin Jude, and the transfers are accordingly set aside.
 - (3) Vandyke Jude is hereby ordered to account to the beneficiaries of Austin Jude's Will, if there is a valid Will, or to Austin Jude's heirs at law, if there is no valid Will, for all of his dealings with the parcels of land listed in paragraphs 1 and 2 of this order, from 23rd July 2007 to the date of this order.
 - (4) Vandyke Jude is hereby ordered to prepare and present to the beneficiaries of Austin Jude's Will or to Austin Jude's heirs at law, a full and proper account of all of his dealings with the aforesaid parcels of

land, including the proceeds of sale of those of the parcels sold or agreed to be sold by him, on or before the 18th day of November 2020.

- (5) An injunction is hereby issued prohibiting Vandyke Jude from selling, leasing, agreeing to sell or lease, or otherwise alienating or disposing of any or any part of the parcels of land listed in paragraphs 1 and 2 of this order without the approval in writing of the parties to this appeal, or until further order of the High Court or Court of Appeal.
- (6) The appellants are awarded 60% of their costs in the High Court, to be assessed if not agreed within 21 days, and two thirds of the High Court costs as costs on the appeal.

[99] The obvious industry exerted by counsel for the parties to this appeal in their preparations for and presentations at the hearing of the appeal is commended and appreciated.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar