

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

Claim No.CV 2011-02111

BETWEEN

**KAYOUM MOHAMMED**

Claimant

And

**EDNA ARJOON**

Defendant

**Before the Honourable Mr. Justice Ricky Rahim**

**Appearances:**

Mr. P. Lamont and Mr. R. Persad-Maharaj for the Claimant.

Ms. L. Kisto for the Defendant.

## **Judgment**

1. The Claimant claims specific performance of an agreement for sale of land and building thereon situate at 11 Akal Trace, Santa Cruz (“the said premises”).
2. There will be judgment for the Claimant on the claim and the counterclaim shall be dismissed for the following reasons.

## **Background**

3. According to the Claimant the Defendant became the owner of the said premises by deed of conveyance dated 16<sup>th</sup> August 1971 and registered as 9739 of 1991. By virtue of deed of mortgage dated 18<sup>th</sup> June 1998 and registered as 14924 of 1998 made between the Claimant and Starbrand Products Limited of the one part and the Agricultural Development Bank (“ADB”) of the other part, the said premises was mortgaged to ADB for the sum of \$217,000.00.
4. The Claimant avers that between the 30<sup>th</sup> June 1998 and 18<sup>th</sup> June 2001 the Defendant made repayments to the mortgage loan but fell into financial difficulties thereafter owing to the failure of the business Starbrand Products Limited. As such, an agreement dated 9<sup>th</sup> October 2001 was made between the Claimant and the Defendant for the sale of the said premises by the Defendant to the Claimant for the sum of \$300,000.00. The proceeds of the sale were broken down into \$174,250.00 paid to ADB representing the outstanding mortgage loan balance and \$125,750.00 paid to the Defendant personally.
5. The Defendant and Starbrand Products Limited were subsequently released from liability under the mortgage by deed of released registered as DE200302681799D001.

6. The Claimant alleges that upon entering into the agreement he took immediate possession of the said premises and paid the taxes and rates. The Claimant avers that he evicted a tenant from the said premises and has rented same for his own benefit since September 2001.
  
7. According to the Claimant, despite various oral and written requests from him and his attorney, the Defendant has refused to perform her obligation under the agreement and convey the said premises to the Claimant although the Claimant has performed his part of the agreement. The Claimant therefore claimed:
  - a. A declaration that he has performed his part of the agreement dated 9<sup>th</sup> October 2001;
  - b. An order that the Defendant specifically perform her part of the said agreement by conveying the said premises to the Claimant;
  - c. An order that in default of the Defendant conveying the said premises, the Registrar be empowered to do so.
  
8. The Defendant admits to signing the agreement but avers that it was procured by the undue influence of the Claimant.
  
9. The Defendant avers that from about 1985 she and the Claimant became involved in an intimate relationship which she likened to that of husband and wife. However, the Defendant claims that this relationship commenced despite being in a common law relationship at that time with Mr. Wilfred Francis. According to the Defendant although she lived with Mr. Francis, they were estranged but still lived together. The Defendant claims that Mr. Francis suffered a stroke in or about 1985 and she was left to care for him up until his death in April 2000. Accordingly, it was during that period that she and the Claimant grew closer and the Claimant became her trusted friend and confidant.

10. The Defendant claims that in 1995, 1999, 2000 and 2001, she suffered psychiatric problems and was a registered patient at a private hospital owned by Professor Hari D. Maharajh. She claimed she had difficulty thinking, remembering and poor judgment and was as a result put on medication.
11. It was during this time that the Defendant says she encountered financial problems and ran into arrears of her mortgage payment to ADB. Consequently, she asked the Claimant to assist her on the agreement that
  - a. He would make payments directly to ADB;
  - b. He would assist the Defendant with the rental of the property and collect the rent as repayment and pay the rates for the property with the rent;
  - c. After he was repaid in full the Defendant would resume control of the property and collect the rental income there from.
12. The Defendant avers that owing to their trusted relationship and her psychiatric problems, the Claimant took advantage of her and made her believe she was signing an agreement on the terms above. She stated that she signed whatever the Claimant wanted her to sign because of the intimate relationship and she believed that the Claimant was genuinely helping her to clear her debt. It was never the Defendant's intention to give the Claimant any legal right or claim to the property.
13. The Defendant denies that the Claimant paid the sum of \$174,250.00 to ADB and avers he actually paid \$181,951.26. Further, the Defendant denies that she was paid \$125,750.00 by the Claimant.
14. In the alternative, the Defendant claims that if the agreement alleged by the Claimant is found valid, that the Claimant has not paid her the consideration for same.

15. The Defendant further avers that the tenant paid the Claimant the total sum of \$255,600.00 up to May 2011 and accordingly was in excess of what he actually paid to ADB. Thus the Defendant counterclaimed for, *inter alia*

- a. A declaration that the agreement dated 9<sup>th</sup> October 2001 be set aside or rescinded having been procured by undue influence of the Claimant;
- b. A declaration that the agreement as alleged by the Defendant is valid and subsisting;
- c. Repayment of the sum of \$67,710.73 being the difference in the amount paid in rent and the sum paid to ADB;
- d. Damages for breach of contract.

16. In reply and defence to the counterclaim of the Defendant, the Claimant denies that he exercised any undue influence over the Claimant and further denies the existence of an intimate relationship. The Claimant avers that at all times the relationship between him and the Defendant was a business one. Further, the Claimant claims to have met the Defendant in 1998 and does not know of her alleged psychiatric issues.

17. The Claimant alleges that in March 2001, the Defendant had agreed to sell the said premises to Mr. Ken Cupen if he would pay off the loan and pay her \$100,000.00, however when the Defendant offered more she accepted his offer.

18. The Claimant avers that at all times the Defendant was free to take legal advice and executed the agreement of her own free will.

### **Issues**

19. The Defendant pleads that she signed the agreement but says it was procured by undue influence. There is therefore, on the pleadings, no issue as to the existence of the said

agreement. Although at times in cross examination the Defendant appeared to be suggesting that she did not sign the agreement. On her pleadings, the undue influence alleged is that of presumed influence. Thus, the sole issue for consideration is whether there was presumed undue influence by the Claimant over the Defendant to enter into the agreement for sale.

20. Should the court find that there was no undue influence, it is for the Claimant to prove that (1) there was a contract in the terms he alleged and (2) that he performed his obligations under that contract.

## Law

21. Where a party alleges undue influence and proves the existence of such in a transaction, the transaction will be set aside.
22. There are two ways which undue influence may be proven: (1) proof of actual undue influence (2) proof of the existence of a relationship which raises a presumption that undue influence has been exercised and which said presumption has not been rebutted by the other party: **Halsbury's Laws of England. Volume 22 (2012) 5<sup>th</sup> Edition, para 294.**
23. In order to raise the presumption of undue influence B must establish the existence of a relationship between A and B under which B placed trust and confidence in A and that the transaction entered into is one which 'calls for explanation' or 'is not readily explicable by the relationship between the parties: ***Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44 at [21]***
24. The necessary relationship of trust and confidence may be established in one of two ways:
  - (1) Certain relationships as a matter of law raise an irrebuttable presumption of trust and confidence; these have been held to include the following: parent and child, guardian and ward, religious adviser and disciple, doctor and patient, solicitor and client, trustee and cestui que trust and fiancé and fiancée. The

presumption may apply even after the relationship has ceased if the influence continues.

(2) Even if there is no relationship of the type falling within head (1) above, B may *in fact* prove the existence of a relationship under which he generally reposed trust and confidence in A. The most obvious instance will be proof of a relationship in which B has reposed trust and confidence in A in relation to the management of B's financial affairs, but it is enough for B to establish that A has acquired influence over B in relation to some general aspect of (B's) affairs. This category has deliberately been left undefined by the courts; but the necessary relationship of trust and confidence has been proved in the following: between spouses and other cases where there is an emotional relationship between co-habitees, whether heterosexual or homosexual; between a son and his elderly parents; between a bank and its elderly customer; between a manager and a young musician; and between an employer and his employee: **Halsbury's Laws of England. Volume 22 (2012) 5<sup>th</sup> Edition para 296.**

25. In relation to the second category, the presumption arises where **the combination of the relationship and the nature of the transaction** justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party. The law will not therefore reverse the burden of proof with just proof of the existence of a relationship. Something in the transaction must call for an explanation before the burden is reversed. A transaction that is not readily explicable by the relationship of the parties remains one of the two elements necessary to give rise to a rebuttable evidential presumption of undue influence, shifting the evidential burden of proof from the party who is alleging undue influence to the party who is denying it: ***Royal Bank of Scotland plc v Etridge (supra)***. See also the dicta of Their Lordships of the Court of Appeal in ***Baptiste v Scotiabank T&T Ltd*** Civ Appeal No. 37 of 2009.

26. Category (1) does not apply to the present facts. Thus, the Defendant must first prove the existence of a relationship of trust and confidence and further that the transaction is so suspicious as to call for an explanation..

### **Relationship of Trust and Confidence**

27. The evidence material to the alleged relationship between the Defendant and the Claimant was given by the Defendant, and Kamla Mohan the Defendant's daughter.
28. According to the Defendant she met the Claimant in 1985 when he accompanied Mr. Ganess to her home when he came to carpet her bedroom.
29. The Defendant testified that she had been in a common law relationship with Mr. Francis at the time she met the Claimant. Further, at that time, the Claimant was also a married man.
30. The Defendant gave evidence that the relationship between her and Mr. Francis was an abusive one. Thus, when she met the Claimant she grew to like him instantly as he was always very nice to her. She stated that soon after meeting in 1985, they commenced an intimate relationship but kept the affair a secret as they both had other partners in their lives.
31. The Defendant testified that she eventually confided in her daughter Kamla about the relationship and that Kamla would help her sneak around to see the Claimant. Further, she gave evidence that Kamla even accompanied her to Barbados in 1987 as a cover for the trip she and the Claimant wanted to take so that they could spend time together.
32. According to the Defendant, the Claimant would visit her at home. She stated in cross-examination that this would occur even when her common law husband was there and when he went abroad for medical attention.
33. It was the Defendant's evidence that over the years she and the Claimant grew closer and she shared many aspects of her personal life with him and as a result she became emotionally attached to the Claimant.



34. Despite the evidence of the abusive relationship with Mr. Francis and the blossoming relationship with the Claimant, the Defendant stated that when Mr. Francis died in 2000, his death caused her to go into a depression. She testified that she felt hopeless and disoriented because of Mr. Francis' death.
35. Further, she stated that the financial trouble with ADB began soon after the death and that she did not have time to recover. Thus, the Defendant testified that she experienced psychological problems as a result of the events which took place between 2000 and 2002.
36. Accordingly, it was the combination of the alleged long standing intimate relationship and the passing of her common law husband and running into arrears on her mortgage which the Defendant relies on for the existence of the relationship under which she placed trust and confidence in the Claimant.
37. The Defendant gave evidence that at first she had asked her friends Ken Cupen and Molly Cupen to assist her financially. The arrangement, according to the Defendant, would have been that they pay off the mortgage and subsequently retain the rental income from the property as repayment for the sum. An arrangement similar to the one she allegedly entered into with the Claimant. However, the Defendant claims that during discussions with ADB she realized that Ken and Molly would obtain the property if they paid off the mortgage she ended the agreement with them as she did not intend to sell the said premises. Notwithstanding this evidence, in cross-examination the Defendant first testified that she did not ask Ken and Molly and that they had decided to go to ADB themselves. She denied that she went to the bank with them. When probed on the issue the Defendant stated that she could not recall.
38. The Defendant testified that it was then that she turned to the Claimant, whom she trusted. The terms of the agreement between them however, was the same as what she had intended with Molly and Ken. This is noteworthy, as the Defendant claims she ended

the agreement with Ken and Molly because they would have obtained the property, and yet she entered into the same terms with the Claimant.

39. In relation to the signing of the agreement propounded by the Claimant, the Defendant stated that the Claimant would from time to time bring documents for her to sign. It was because she trusted him and likened the relationship to that of husband and wife that she did not question what she was signing and did not feel the need to seek independent legal advice. She stated that when the Claimant brought documents for her to sign he would represent to her that they were tax letters and bank letters relating to the said premises and because of her ill health and the fact of their companionship she signed whatever he gave her believing the documents to be what he had represented to her.

40. However, the court notes that the Defendant's **pleaded case was** that she signed the agreement but that her signing the agreement was procured by the Claimant exercising undue influence over her. She **testifies in her witness statement** that she did not read what she was signing and that she only saw the agreement for the first time when the pleadings were served on her. The court does not believe that the Claimant can properly maintain these averments, for how could she say that the signature on the agreement was procured by undue influence when her evidence is that she did not read the document and allegedly didn't know what she was signing. The two averments cannot be reconciled and are not pleaded in the alternative.

41. Further, her own evidence was that (1) she was misled into signing a document represented to be tax letters and bank letters and (2) that she knew she signed an agreement but thought it was in the terms she alleged at paragraph 5.6. of her statement of case (see paragraph 10 above). These versions of evidence are incompatible. On the one hand the Defendant is saying she signed documents believing them to be tax/bank letters but on the other hand she is saying she signed documents believing it to be an agreement in the terms alleged. Additionally, in cross-examination the Defendant stated that she could not recall the agreement of the 9<sup>th</sup> October 2001 and that she could not recall signing **any** document. Moreover, in her witness statement the Defendant testifies

that the Claimant encouraged her to sign letters **which to her knowledge were ADB letters** but which she later discovered to be letters in connection to the sale of the property, however, notwithstanding this, in **cross-examination** she testified that she never signed any letter and could not recall ever seeing them.

42. What is of note is that throughout the Defendant's cross examination she repeatedly could not recall the circumstances surrounding the signing of the agreement. It became quite apparent to the court by virtue of the variety of versions set out by the Defendant, that her evidence on this issue was completely unreliable. It was equally clear that this reliability stemmed from both an inherent inability to recall, and at times from a concerted attempt to deny everything set out in the Claimant's case, even those matters admitted in her own Defence to the detriment of her own case. In those circumstances, the court cannot and does not believe the Defendant when she testified that she did not know that she was signing an agreement, or that she did not recall signing the agreement, or that she did not sign same.

43. Mrs. Mohan is the Defendant's daughter with Mr. Francis. She gave evidence that that the Defendant and the Claimant met in 1985 when he came to her mother's house with Mr. Ganess. She says that soon after that the Claimant began frequently visiting her mother. It was shortly thereafter, that the Defendant confided in Mrs. Mohan of the affair.

44. Mrs. Mohan testified that while she did not like the idea of the relationship, her father and mother did not have a good relationship and her mother appeared to be happy with the Claimant so she kept the secret. Mrs. Mohan's evidence was that she would often accompany her mother to Port-of-Spain so that her mother could spend time with the Claimant. Further, she gave evidence of the trip to Barbados in 1987 and says she did so to support her mother so that her mother and the Claimant could spend time together. Mrs. Mohan further testified that her mother became ill in 1999 to 2001 and sought medical attention but could not say what was wrong with the Defendant.

45. Ms. Mohan was not cross examined.

46. In relation to the alleged relationship between the Claimant and the Defendant, the court does not believe that the relationship was an intimate one. If the relationship was a secret as the Defendant would have the court believe it is not likely that the Defendant would allow the Claimant to visit her at home when her common law husband was around. Further, had the relationship been such as that alleged by the Defendant, where the Defendant was emotionally attached to the Claimant and the relationship was a source of support and stability, the court believes that this would have been the first avenue for financial help. The Defendant's evidence was that she had turned to Ken and Molly first and not the person in whom she allegedly placed a great deal of trust. It was clear that she was looking for a business solution which is what her friend eventually provided. This is not to say that the Claimant and Defendant were not friends and in fact became friends in the manner set out by the witnesses. The court is of the view however that the Defendant's evidence does not support a conclusion that there existed a relationship indicative of that of husband and wife. The relationship was a friendly one, and the Claimant being a businessman himself appears to have been an option for financial assistance. This is further supported by the Claimant's evidence that he had a good family relationship with the Defendant. He gave evidence that the Defendant told him of her financial difficulties in 2001 and further that he assisted her in evicting a tenant that was in arrears. The court therefore does not believe that these actions are that of a mere business relationship but a friendly one.

47. Despite the existence of the friendship however, it is the court's finding that the Defendant's evidence does not support the conclusion that there was an abuse of influence by the Claimant over her so as to preclude the exercise of free and deliberate judgment. If the court is to believe the evidence of the Defendant that she did not know what she was signing, such evidence might lend to the conclusion of fraud on the part of the Claimant and not that of undue influence because of the nature of the plea of undue influence. The essence of the plea of undue influence is that party B misused trust placed in him by A so as to procure the entering into of a transaction by A. However, A must be

taken to have known that she was entering into the transaction, and her actions should not have been calculated **by reason of the nature of the relationship**. But what is interesting is that fraud does not form part of the counterclaim of the Defendant. The court is therefore left to view the evidence of the Defendant with grave suspicion and unreliability as the Defendant's evidence appears to be highly inconsistent with her pleaded case of undue influence. If that was her version of events all along one would have expected to see pleadings which are consistent with a claim in fraud.

48. The court is therefore of the view, that the nature of the relationship, at least from the Defendant's perspective was such that she felt she could rely on the Claimant to assist her in collecting arrears of rent, and evicting the tenant. Further, she felt it was the type of relationship where she could confide in the Claimant about her financial difficulties. There exists therefore some element of trust and confidence placed in Claimant.

#### **Transaction calls for an explanation**

49. The presumption does not arise unless the nature of the transaction is sufficiently unusual or suspicious to require the Claimant to provide an explanation.

50. It was submitted on behalf of the Defendant that the transaction was sufficiently unusual and suspicious. Counsel for the Defendant submitted that by its very circumstance, that is, the conveyance of all of her interest in the property which, on the evidence, is situated between her residence and that of her daughter, the transaction calls for an explanation.

51. On the contrary, the court is of the view that the circumstances of the sale on its own, as set out above does not render the transaction sufficiently unusual or suspicious.

52. In so concluding, the court had regard to the following:

- a. The Defendant was a woman of some age and a widow.

- b. Her son, who had previously assisted her in the running of the business, migrated. She therefore no longer had help in running the business she began. This is evident by her inability to control and collect on the arrears in rent and the fact that she turned to the Claimant for assistance notwithstanding the fact that her daughter still lived next door to her.
  - c. Her Business was no longer profitable. If she lost the property to ADB she lost the possibility of income.
  - d. It seemed therefore that in the balance, despite the fact that the effect of selling would be to part with property which was situated between her home and that of her daughter, she stood nonetheless to benefit from the sale. Should the bank have foreclosed on the property however, the position would be quite different as the Defendant would get nothing and could in fact, be saddled with an outstanding sum owing to the bank. If the Defendant opted to sell she would have at the least received a lump sum of money representing the balance of the purchase price after the loan was repaid.
53. In the circumstances, the transaction did make good business sense and on that evidence alone does not call for an explanation. However, an important feature of this case, namely the issue of the psychiatric condition of the Defendant at the material time ought to be examined. If the court finds that at the time of the execution of the agreement the Defendant had been suffering from psychiatric problems, which may have affected her ability to enter into the transaction, the circumstances would be sufficiently unusual or suspicious as to require the Claimant to provide an explanation.
54. The Defendant testified that because of her ill health coupled with the Claimant being her companion, she signed whatever he presented to her. She gave evidence that she suffered mental illness between 1999 and 2002.
55. As a result of this mental state, the Defendant visited Dr. Hari Maharajh from 1995 and in 2002 she visited Dr. Iqbal Ghany. According to the Defendant, both doctors told her she

suffered from major Depressive Disorder and as a result was not of testamentary capacity to transact business of the type done with the Claimant.

56. Dr. Ghany testified that the Defendant became a patient of his in February 2002. The Defendant indicated to him that she had previously been seen by his colleague Dr. Maharajh but was getting no relief from his treatment. The Defendant was seen twice by Dr. Ghany, the first on the 15<sup>th</sup> February 2002 and the second on the 21<sup>st</sup> March 2002. Dr. Maharaj is now deceased.

57. Dr. Ghany gave evidence that at the time he treated the Defendant, he found her to be suffering from major depressive disorder which interfered with her concentration, judgment and decision making. In cross examination, Dr. Ghany explained that in that state, it meant that the Defendant was unable to make proper decisions or understand the nature of some things she did. He further explained that in depression, people cannot make proper life decisions because their judgment and cognitive functions are impaired and further, their mood is so low that they cannot understand what they would like to do nor the consequences of what they would do. Dr. Ghany testified that a person with this disorder would be able to make simple decisions and he explained that by simple decisions he meant decisions in respect of normal day to day activities like preparing food, eating and things of the like.

58. Although Dr. Maharajh died on the 14<sup>th</sup> February 2012, Dr. Ghany gave evidence that the Defendant provided him with Dr. Maharajh's medical report and on his perusal was satisfied that the report was in fact that of Dr. Maharajh. According to the medical report of Dr. Maharajh dated the 13<sup>th</sup> July 2011, the Defendant had been a patient of his since 1995 until 2001. During this period she had been attended to by Dr. Maharaj on nine occasions and treated for depression inter alia. She suffered from poor sleep, down mood, changes in appetite, low energy, feelings of hopelessness, loss and guilt and suicidal thoughts. Further, Dr. Maharaj by medical report dated the 15<sup>th</sup> November 2011 opined that the Defendant suffered from a major depressive disorder and set out therein the

medication which he prescribed. Dr. Ghany testified that both he and Dr. Maharajh came to the same conclusion about the Defendant's mental health.

59. Dr. Ghany's evidence was that in October 2001, when the agreement was entered into, the Defendant was not mentally capable of exercising her own judgment so as to enter into the agreement for sale. Notwithstanding this, in cross examination, Dr. Ghany testified that he only treated the Defendant in relation to her depression and never discussed her ability to deal with property. When probed on whether the Defendant would have known she needed to save her property, Dr. Ghany testified that he would think she did but really could not say. Dr. Ghany was unable under cross-examination to say whether the agreement for sale was a simple or complex one.

60. The medical evidence in this case of the mental condition of the Defendant has not been challenged by way of medical evidence to the contrary. Neither has the testimony of Dr. Ghany and by extension the opinions of Dr. Maharaj in relation to the deleterious effect that such traumatic circumstances of major depression would have on a woman who was 77 years old at the time of Dr. Maharaj's last report been refuted. Suffice it to say that the issue of whether the agreement was simple or complex is insufficient in the court's view to be determinative of the Defendants ability to make decisions in relation to her property. The evidence of Dr. Ghany is that the Defendant was able to make simple decisions such as those usually connected to the care of one's personal hygiene by way of example. This is a far cry from saying that the Defendant was in such a state that she was able to make decisions in respect of her property rights. The medical evidence in this case is overwhelming and the court thinks that it would be a serious error of judgment should the court choose to substitute its own view of the mental state of the Defendant at the material time in the light of the absence of medical evidence to the contrary and paucity of other evidence.

61. Additionally, Dr. Ghany is a well known and respected specialist in this field and so was Dr. Maharaj up to the date of his passing.



62. On the evidence therefore, the court is satisfied that it is more likely than not that the Defendant's condition would have been such as to affect the transaction. In relation to the evidence of Kamla Mohan, the Defendant's daughter that she knew that her mother was ill but did not know what was medically wrong. The court accepts this evidence having regard to the very nature of the illness itself. The evidence of Dr. Ghany clearly shows that there may have been limited outward signs of major depression as the Defendant would have continued to care for herself.

63. The presumption of undue influence therefore arises in this case.

#### **Has the Presumption been rebutted**

64. This presumption is a rebuttable one. Ordinarily, A will need to prove that B received independent advice, but in some cases even this may not be enough; conversely, in others it may not be necessary and A can rely on any evidence which establishes that B in fact entered into the transaction as a result of the exercise of his own independent free will: *Halsbury's Laws of England Volume 22 (2012) 5<sup>th</sup> Edition para. 296*. The evidential burden shifts to the Defendant to rebut the presumption.

65. In cross examination, the Claimant testified that for the entire time he has known the Defendant he has never known her to be ill in anyway. This testimony has remained uncontradicted on the evidence.

66. The authorities have shown that where the transaction involves a donor/donee relationship and the issue of undue influence arises, independent legal advice is necessary to rebut the presumption: see *Allcard v Skinner (1887) 36 ChD 145*; *Bullock v Lloyds Bank Ltd [1954] 3 All ER 726*; *Inche Noriah v Shaik Allie bin Omar [1929] AC 127, PC*.

67. In, Trudy Cox v Mark Cox; Joanne Philbert; Cian Brown H.C.4815/2011. CV.2011-04815 Justice Rajkumar at page 30 stated the law as set out in **Snell's Equity 31st Ed** as follows:

*“In the case of gifts, the presumption may be rebutted by affirmative proof that “the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor’s will” Put more shortly, D must establish that the gift was made as a result of “full free and informed thought about it”*

68. However, the absence of independent legal advice may or may not be a relevant matter according to the circumstances. It is not necessarily an unfair exploitation of a relationship for one party to enter into a transaction with the other without ensuring that he has obtained independent legal advice. On the other hand, the transaction may be such as to give rise to an inference of undue influence even if the induced party was advised by an independent lawyer and understood the legal implications of what he was doing: R v Attorney General for England and Wales [2004] 1 LRC 132.

69. The Claimant does not say whether the Defendant obtained independent legal advice, but does say that she was free to do so at all times. The question for the court is whether the Claimant ought to have ensured that the Defendant obtained independent legal advice and whether this made the transaction one in which he had unfairly exploited his influence over the Defendant.

70. There is no evidence that the Claimant knew of the Defendant’s illness. Neither is there evidence that her illness was easily observable or reasonably ascertainable by someone with whom she would interact from time to time. In fact, the evidence shows to the contrary, that even her daughter who lived in close proximity seemed unaware of the

illness or at the least the extent of her illness at the material time. In those peculiar circumstances it reasonable to conclude that her condition would have been apparent.

71. The Claimant's evidence was that the Defendant previously approached Ken and Molly for the sale of the property to them. The Defendant in her own evidence in chief admitted to this, although she stated she could not remember in cross examination. However, from this evidence it is clear to the court that the Defendant understood that she needed to repay her loan whether by way of funds raised through the sale of the property or otherwise, hence her approach to Ken and Molly. In the court's view therefore it is reasonable to conclude that the Claimant, having knowledge of the attempt by the Defendant to first obtain funds from Ken and Molly by way of sale, would not in the circumstances think it necessary to ensure that the Defendant sought independent legal advice as he could then reasonably infer that she knew and understood the nature and consequences of the transaction.

72. The court does not therefore find that in this case, the failure of the Claimant to ensure that the Defendant obtained independent legal advice rendered the transaction one in which he had unfairly exploited his influence over the Defendant, having regard to his knowledge at the material time. The result is that the combination of the relationship and the nature of the transaction do not, in these particular circumstances, justify the conclusion that the transaction was procured by the undue influence.

### **Payment of consideration and variation of terms of agreement**

73. The Defendant further claims that if the agreement alleged by the Claimant is found to be a valid one, that the Claimant has not in any event paid her the sum agreed and consideration has therefore failed.

74. According to the Claimant however, although the agreement was that he liquidate the outstanding mortgage loan and remit the balance of the purchase price in the sum of \$300,000.00 to the Defendant, it was subsequently agreed that he would repay part of the balance by doing renovations to the Defendant's home. Thus the Claimant gave evidence in cross examination that he paid the Defendant some cash and carried out renovations on the Defendant's home. This, he said, was done by October 2010. Further, the very written agreement sets out and the Defendant acknowledges by way of execution that the Claimant had, by the date of the agreement already expended some \$78,000.00. This is in the court's view, potent evidence that the Claimant was in the process of making payments having already paid such a considerable sum. This evidence operates in favour of the credibility of the Claimant in this regard. The evidence of the Defendant is simply that this is incorrect.
75. A determination on the issue enjoins the court to make a finding as to whether there was a valid oral variation of the said written agreement.
76. In that regard, obligations under one contract may be varied by another (oral or written), even if the former contract was made by in writing. The consensual variation must however amount to a contract, that is, possess the characteristics of a valid contract: *Halsbury's Laws of England Volume 22 (2012) 5<sup>th</sup> Edition paras. 583, 585.*
77. To constitute a valid contract: (1) there must be an agreement between separate and existing parties; (2) those parties must intend to create legal relations as a consequence of their agreement; and (3) the promises made by each party must be supported by consideration, or by some other factor which the law considers sufficient: *Halsbury's Laws of England Volume 22 (2012) 5<sup>th</sup> Edition paras. 203.* Consideration is some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility suffered, or undertaken by the other at his request.
78. The Claimant's evidence is that pursuant to the oral agreement, he obtained the services of Mr. Charles Rolle as a contractor to do the renovations on the Defendant's home. Mr.

Rolle testified that he was hired by the Claimant in or around September 2009 to convert a section of the Defendant's home into a two-bedroom apartment. The cost of his labour was \$36,000.00 and he gave evidence that he received payment from the Claimant in weekly increments. According to Mr. Rolle he purchased all materials and gave all receipts to the Defendant. He completed work in January 2010.

79. Further, according to the Claimant, he spent approximately \$100,000.00 on materials and spent a further \$9000.00 on electrical works carried out by one Mr. Carl Ramrattansingh. There are however no receipts evidencing the outlay of these sums.

80. The Claimant proffered into evidence a document purporting to be a receipt signed by the Defendant for the receipt of \$39,200.00 representing part payment of the purchase price. In cross-examination, the Defendant admitted to signing the document but stated that she did not know of its contents. The Claimant thus asserts that this sum in addition to the money expended on the renovations was full and final payment for the purchase of the property.

81. Further, in cross-examination the Defendant admitted that work was done on her house. She stated that she never wanted an apartment attached to the house and that instructions were given to the workmen by the Claimant. Despite saying that she did not want an apartment she testified that both she and the Claimant paid for the renovations. Needless to say, the court finds this evidence on the part of the Defendant to be inconsistent with her other testimony in respect of the same issue, but it is nevertheless consistent with the general tenor of the testimony of the Defendant on all major issues, in that she has been consistently inconsistent. This frequent inconsistency on material issues has gravely affected the credibility of the Defendant on the whole.

82. In light of this evidence the court is of the view that it is more likely than not that there was an arrangement between the Claimant and the Defendant for work to be done on her premises. Owing to the Defendant's own inconsistencies, the court favours the evidence of the Claimant on this issue. The court does not believe that the Defendant was

forthcoming in her evidence, and when the evidence is weighed, it is more likely than not that the original written agreement was varied in the terms alleged by the Claimant. In this regard the court finds that there was an agreement between separate and existing parties who intended to create legal relations as a consequence of their agreement and that their promises have been supported by consideration in the form of money paid to the Defendant both in cash and by way of renovations. The court finds therefore that the agreement was a valid one and will not set it aside. Further, for the reasons set out hereinabove the court finds that the Claimant has fulfilled his obligations under the agreement.

83. The court finds that this case is an appropriate one for the exercise of the discretion to grant the equitable remedy of specific performance having regard to all the circumstances. Damages at this stage may not be an adequate remedy for the Claimant. In any event no argument or challenge has been mounted by the Defendant in relation to the court's exercise of the discretion in the event of a finding in favour of the validity of the agreement. The court would therefore award judgment to the Claimant on the claim and dismiss the counterclaim.

84. By Consent Order dated the 7<sup>th</sup> February 2012, the parties agreed that the prescribed costs in the matter be calculated on the value of the property at the time of filing of this action in the sum of \$1,100,000.00. The Defendant is therefore to pay to the Claimant prescribed costs of the claim in the sum of \$114,000.00. The Defendant is also to pay to the Claimant the prescribed costs of the counterclaim in the sum of \$14,000.00.

Dated this 18<sup>th</sup> day of March, 2014.

Ricky Rahim

Judge