THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P. 109 of 2014

Claim No. CV 2011-02111

Between

EDNA ARJOON

Appellant

And

KAYOUM MOHAMMED

Respondent

Panel: A. Mendonça J.A.

N. Bereaux J.A.

G. Smith J.A.

Date of Delivery: July 5, 2019

APPEARANCES:

Mr. B. Reid appeared on behalf of the Appellant

Mr. P. Lamont appeared on behalf of the Respondent

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the judgment of the Trial Judge (Rahim J) granting specific performance of an agreement between the Appellant and the Respondent dated October 9, 2001 (the subject agreement) for the sale to the Respondent of premises at 11 Akal Trace, Santa Cruz (the subject property). Broadly speaking, there are two issues in this appeal namely, whether the Judge was correct to find that the subject agreement was not procured by the exercise of undue influence and, if so, whether he ought to have made an order for specific performance of the subject agreement.

2. The Respondent's claim in a nutshell was that he entered into the subject agreement with the Appellant for the purchase of the subject property and that he performed all of his obligations under the subject agreement but despite various requests made of the Appellant, she has refused to convey the subject property to him. Accordingly, he sought an order for specific performance.

3. The Appellant resisted the claim of the Respondent, alleging that the subject agreement had been procured by the exercise of undue influence by the Respondent. She counter-claimed for a declaration that the subject agreement be set aside and for a declaration that the true agreement between the parties had nothing to do with the sale of the subject property to the Respondent but provided for him to assist her in the repayment of an outstanding mortgage over the subject property.

4. The Trial Judge, however, found that the Appellant had failed to establish her defence in undue influence, upheld the subject agreement and granted an order for specific performance. The Appellant now appeals and seeks an order setting aside the subject agreement on the ground that it has been procured

by undue influence or alternatively, that the order for specific performance be set aside and for it there be substituted an order for the payment of damages.

5. The Respondent's pleaded case, in more detail, was that the subject property was mortgaged by the Appellant to the Agricultural Development Bank (the ADB) to secure the indebtedness of Starboard Products Limited (a company owned by the Appellant and under which the Appellant conducted her business) to the ADB. The company fell into difficulties with the consequence that the Appellant was unable to properly service the mortgage and fell behind in the payments to the ADB. The Appellant then entered into the subject agreement with the Respondent for the sale of the subject property to him at and for the price of $300,000.00.

6. By the subject agreement, the Respondent agreed to pay off the mortgage to the ADB and to pay the difference to the Appellant making up the total sum of $300,000.00. The Respondent averred that in accordance with the subject agreement he paid to the ADB the sum of $174,250.00 and paid to the Appellant a further sum of $125,750.00. In view of the liquidation of the mortgage, the ADB released the Appellant from all liability under the mortgage and re-conveyed the subject property to her.

7. The Respondent further alleged that upon entering into the subject agreement he took possession of the subject property, paid the outstanding rates and taxes and did repairs to the building. He also evicted a tenant from the subject property and rented out the premises for his own benefit since September 2001.

8. The Respondent said he made several requests to the Appellant to comply with the subject agreement and to convey the subject premises to him but to no avail. Accordingly, he commenced these proceedings in which he sought an order for specific performance.

9. The Appellant filed a defence and counterclaim in which she admitted that she fell behind in her mortgage payments to the ADB and that the ADB threatened recovery action against her if the arrears on the mortgage were not paid.

10. The Appellant admitted signing the subject agreement but said it was procured by the exercise of undue influence upon her by the Respondent. She said she never intended to sell the subject property but intended to give it to her son, Kenneth Arjoon.

11. The Appellant alleged that she and the Respondent had an intimate relationship "akin somewhat to man and wife" which began in 1985 and lasted 26 years until the commencement of these proceedings in 2011. This intimate relationship existed notwithstanding that the Appellant was in a common-law relationship with another man who died in April 2000. During 1985 to 2000 the Appellant averred that she grew closer and closer to the Respondent and he became her "trusted friend and confidant" and she would share all her life's troubles and struggles with him.

12. The Appellant also alleged that during the year 1995 and again in 1999, 2000 and 2001 she suffered with psychiatric problems and was on constant medication. The medication continued for some years beyond 2001. She averred that she had difficulty in thinking, remembering and had poor judgment. The Appellant alleged that it was while she was suffering with her psychiatric problems and was on medication for them that the ADB threatened recovery action in respect of the mortgage. In the view of the ADB's threat, in June 2001 the Appellant says that she asked the Respondent "her trusted friend, confidant and lover of over 16 years" if he would assist her in paying the mortgage. Based on discussions with the Respondent the Appellant averred that she accepted the Respondent's help on the following terms to which they orally agreed:

    1) The Respondent would liquidate the mortgage;

2) With her assistance, the Respondent would rent the subject property and apply the rental income to repay himself all the monies he paid to the ADB as well as defray expenses for land and building taxes; and

3) Once the Respondent had repaid himself, the Appellant would collect the rental income for her own use and benefit.

13. The Appellant alleged that there was never to be a sale of the subject property. She had in fact turned down an offer made by her good friends, the Cupens, because it entailed a sale of the subject property to them – an offer in which the Respondent knew that she was not at all interested because it involved a sale of the subject property.

14. The Appellant averred she signed the subject agreement in October 2001 some months after making the June 2001 agreement without reading it and on the representation of the Respondent that based on their oral agreement, the ADB wanted her to sign this "paper". The Appellant averred that she signed the subject agreement blindly because of the trusted relationship she had with the Respondent and without any independent advice and while still a patient at the psychiatric clinic and to her manifest disadvantage.

15. The Appellant further alleged that all further communication with the ADB was done by the Respondent and from time to time she would sign documents at the request of the Respondent who would represent to her that it was the ADB who wanted the documents. Further, the Appellant admitted signing other documents but said that they were signed in the context of her longstanding relationship with the Respondent who required her to sign them, which she would do in the firm belief that the Respondent was genuinely helping her to rid herself of the financial headache which the mortgage arrears had caused.

16. The Appellant admitted that the Respondent liquidated the mortgage with the ADB but contended that the Respondent had not paid any monies to her as he was not required to do so.

17. The Appellant counterclaimed for a declaration setting aside the agreement and a further declaration that the June 2001 agreement is the valid and subsisting agreement. She also claimed repayment of monies which she said was collected by the Respondent as rental income from the subject property and retained by him contrary to the June 2001 agreement.

18. The Respondent in his reply and defence to counterclaim denied that he had an intimate relationship with the Appellant. He averred that he met the Appellant for the first time in October 1998 and which was a purely business relationship. He denied any knowledge of the psychiatric problems of the Appellant and said that he only became aware of those allegations when he had sight of the defence and counterclaim.

19. He did not admit that the Appellant was taking any medication and said that when he met and dealt with the Appellant she appeared to him to be lucid and coherent and fully capable of handling her affairs. He denied that he was ever the trusting friend, confidant and lover of the Appellant.

20. The Respondent denied the allegations in relation to the June 2001 agreement. He said that before the sale of the subject property to him, the Appellant had sought to sell the subject property in or around March 2001 to Mr. Ken Cupen on the terms that he would pay off the mortgage to the ADB and give her $100,000.00. The Respondent said that the Appellant sent all the papers to Mr. Cupen and when she got a better offer from him (the Respondent) she called off the deal with Mr. Cupen who passed the papers to him.

21. In relation to the subject agreement, the Respondent stated that: (1) the Appellant signed it after reading it; (2) it was the Appellant herself who negotiated the agreement with the Respondent; (3) the agreement reflected what was previously agreed orally between the Appellant and the Respondent and was only put into writing after the Respondent had begun making

payments to the ADB and when the Respondent had taken his son's advice to put their agreement in writing; (4) the Respondent never forced or coerced the Appellant into signing the subject agreement and never told her that the ADB wanted her to sign anything; (5) the Appellant signed the agreement on her own free will and was at all times free to take legal advice; (6) the Appellant did not reveal to him that she was a psychiatric patient and the Appellant did not know nor did he admit this; (7) the agreement was for the Appellant's own benefit and shrewdly negotiated by her for her own profits and purposes.

22. The Respondent denied that he tricked or took advantage of the Appellant or that the agreement was in the terms of the June 2001 agreement as alleged by the Appellant. The Respondent maintained that he paid the Appellant the sum of $125,750.00 (in addition to the monies paid to the ADB in discharge of the mortgage) and that the Appellant had the benefit of the sum of $300,000.00 as contemplated by the subject agreement.

23. At the trial, both the Respondent and the Appellant gave evidence and provided witness statements that supported the averments in their pleadings. They were cross-examined. I will refer to the contents of the witness statements and cross-examination if and when it is necessary to do so to address any issues on this appeal.

24. There were other witnesses for the parties. Mr. Charles Rolle and Mr. Carl Ramrattansingh gave evidence for the Respondent. It was the Respondent's evidence that in fact he paid to the Appellant more than the sum of $300,000.00 as contemplated by the subject agreement. Apart from the sum of $174,250.00 paid to the ADB to liquidate the mortgage, the Respondent said that other sums were paid to the Appellant on her behalf. The sums paid on her behalf included payment of an electricity bill, outstanding rates and taxes on the subject property and the cost of remodelling the property in which the Appellant lived. Mr. Rolle and Mr. Ramrattansingh were called as

witnesses for the Respondent to corroborate his evidence that they were retained by him to do work on the Appellant's home and then they were paid by the Respondent.

25. There were other witnesses who gave evidence on behalf of the Appellant. They provided witness statements. They were Dr. Iqbal Ghany, Mr. Sayeed Reeyad Ali, Ms. Kamla Mohammed, Ms. Savita Arjoon and Mr. Kenneth Arjoon. I will refer to the highlights of their witness statements.

26. Dr. Ghany in his witness statement stated that he is a psychiatrist and the Appellant was a patient of his. He first saw her in February 2002. He found the Appellant to be suffering from major depressive disorder which interfered with her concentration, judgment and decision-making. She was living in a world of gloom and hopelessness and would easily have been manipulated as she needed help. Her mental capacity to do business would have been impaired.

27. Dr. Ghany also stated that the Appellant had shared with him medical reports in relation to her prepared by Professor Maharajh, a specialist in nervous diseases, which he annexed to his witness statement. From a perusal of Professor Maharajh's medical reports, Dr. Ghany observed that he (Professor Maharajh) had seen the Appellant on various dates from 1995 through to December 2001. Dr. Ghany indicated that Professor Maharajh's diagnosis of the Appellant at that time was the same as his diagnosis. Professor Maharajh at the time of the trial was deceased.

28. Dr. Ghany expressed the opinion that the Appellant was not mentally capable of exercising her own judgment to enter into the subject agreement.

29. Kamla Mohammed is the daughter of the Appellant. According to her, the Respondent started visiting the Appellant since 1985 and the Appellant shortly thereafter confided in her that she was having an intimate relationship with the Respondent. She spoke of visits to Port-of-Spain with the Appellant and

would see the Respondent picking up her mother and dropping her back on Frederick Street a few hours after. She also referred to an occasion where she and her children accompanied the Appellant and the Respondent to Barbados and alleged that the Respondent and the Appellant shared a room together. She claimed that she and her children went as a "shield" as it was really a holiday for the Appellant and the Respondent. She also alleged that the Respondent would bring chocolates for the Appellant on Valentine's Day and fruits for Christmas over the years. He would also bring food for the whole family. Kamla Mohammed also said that her mother became ill in 1999, 2000 and 2001 and sought the attention of Dr. Maharajh and Dr. Ghany. She stated that during that period the Appellant became very nervous and disoriented and was in bad condition. Kamla Mohammed also said that the Appellant told her about the arrangement with the Respondent which was consistent with the June 2001 agreement.

30. Savita Arjoon is the granddaughter of the Appellant. In her witness statement she spoke of the Respondent frequently visiting the Appellant at her home and that the Respondent would bring food and drinks to the Appellant's home. He appeared to her to be very comfortable at the home of the Appellant.

31. Kenneth Arjoon is the son of the Appellant. He too spoke of the frequent visits of the Respondent to the Appellant's home. He stated that he used to take his mother to a restaurant owned by the Respondent and would leave her there for a while. The Appellant never told him she was in an intimate relationship with the Respondent but he suspected that they were in such a relationship. He also stated that: (1) throughout the years the Appellant expressed to him her desire to give him the subject property; (2) that she had no intention of selling the subject property; (3) that the Appellant told him that because the Respondent was her trusted friend for over 16 years she asked him to assist her to pay off the mortgage and she would repay him from the rental of the

subject property; (4) the Appellant was in a "mess" when he explained to her what the Respondent had really done.

32. Sayeed Reeyad Ali was a tenant of the subject property. I do not consider his evidence to be of any relevance to the determination of the issues on this appeal.

33. Before I refer to the findings of the Judge, it is convenient at this stage to briefly summarise what the Appellant needed to establish to succeed in her claim that the subject agreement was procured by undue influence as this would help put in proper perspective the findings of the Trial Judge. For this purpose I may refer to the following from the judgment of this court in **Civil Appeal No. T.043 of 2015 Nature Resorts Limited v First Citizens Bank Limited & Others** (at paras 42-46):

> "42. …Undue Influence is one of the grounds developed by courts of equity as a court of conscience. The objective is to ensure that the influence one person has over another is not abused and it "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" (See **National Commercial Bank (Jamaica) Ltd. v Hew &Ors [2003] UKPC 51**, at para 29).
>
> 43. Unlike actual undue influence where the claimant has to establish that his free will was impaired by overt acts of pressure or persuasion, where a claimant relies on presumed undue influence he is relying on circumstances where the law presumes undue influence. In other words, he is relying on a presumption of undue influence.
>
> 44. To raise this presumption what has to be established is that there was a pre-existing relationship between the parties in which the alleged wrongdoer has acquired influence or ascendency over the other and that the transaction is one which calls for an explanation. The burden to establish these two matters is on the claimant or in other words the person alleging undue influence.

45. Where these two matters are established, the burden shifts to the defendant to provide a satisfactory explanation from which the court may conclude that the transaction was not procured by undue influence. It was put this way in **Royal Bank of Scotland Plc v. Etridge (No. 2) [2002] 2 AC 773** at para 14:

> "14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

46. Where the defendant fails to provide a satisfactory explanation, the claimant would then have succeeded in his claim in undue influence."

34. There are certain relationships which the law presumes irrebuttably to be relationships of influence. These relationships include doctor and patient, an attorney-at-law and client, but not husband and wife, or for that matter, a relationship akin to husband and wife as the Appellant contends existed between her and the Respondent. In this case, therefore, there is no relationship in which the law presumes to be a relationship of influence of one party over the other. Where there is no such relationship, the claimant must establish that there was a relationship in which the defendant was in a position that would influence him to effect the transaction of which complaint is made.

As this court noted in **Civil Appeal No. S-197 of 2013 Sumatee Enal v. Shakuntala Singh & Others** (at paras 80 and 81):

> "80. In considering whether there existed such a relationship, where one party had influence over the other, a commonly applied test by the courts is to ask whether one party reposed trust and confidence in the other since it is generally assumed that influence grows out of trust and confidence. In **Etridge (supra)** at para 10 Lord Nicholls for example (whose speech received the support of the majority of the House) noted:
>
> > "Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: See Treitel, The Law of Contract 10th ed (1999), pp 380 – 381."
>
> 81. And in **Goldsworthy v. Brickell and Another [1987] Ch 378, 400** Nourse L.J. stated (at page 400):
>
> > "Undue influence is of two kinds: (1) express or, as it is nowadays more usually known, actual undue influence, and (2) that which in certain circumstances is presumed from a confidential relationship; by which in this context is meant a relationship wherein one party has ceded such a degree of trust and confidence as to require the other, on grounds of public policy, to show that it has not been betrayed or abused."

35. I think it is clear from the above quotations that the trust and confidence reposed by the claimant in the wrongdoer need not be in relation to the management of the claimant's financial affairs. As was said by Nourse LJ in **Goldsworthy v. Brickell and Another [1987] Ch 378** at page 401:

> "But there are many and various relationships lacking a recognisable status to which the presumption has been held to apply. In all of these relationships, whether the first kind or the

> second, the principle is the same. It is that the degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an advisor of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made."

36. The Trial Judge correctly noted that this was not a case of actual undue influence. There was no evidence of overt acts of pressure or persuasion. The Appellant's case was put on the basis of presumed influence. As appears from the above, what the Appellant had to establish to raise the presumption of undue influence, was a pre-existing relationship between her and the Respondent where the Appellant deposed sufficient trust and confidence in the Respondent so that he was in a position to influence her to agree to sell the subject property and that the transaction was one that called for an explanation.

37. With respect to the relationship between the Respondent and the Appellant, the Trial Judge did not accept the Appellant's evidence that there was an intimate relationship between her and the Respondent or one indicative of that of husband and wife. The Trial Judge accepted the evidence of the Respondent in his witness statement that he had a good family relationship with the Appellant. The Trial Judge therefore found that they were friends and that the relationship was not a mere business relationship. He stated at paragraph 46:

> "The court is of the view however that the [Appellant'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 [Respondent] being a businessmen himself appears to have been an option for financial assistance. This is further supported by the [Respondent's] evidence that he had a good family relationship with the Defendant. He gave evidence that the [Appellant] 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."

The Judge further stated that the Appellant felt that the relationship was one where she could confide in the Respondent about her financial difficulties and found that "there exists some element of trust and confidence placed in [the Respondent]".

38. The Judge then considered whether the transaction was one that called for an explanation. He noted at paragraph 52:

> "a. The [Appellant] 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 [Respondent] 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 the 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 [Appellant] would get nothing and could in fact, be saddled with an outstanding sum owing to the bank. If the [Appellant] 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."

and concluded that the transaction made good business sense and was not sufficiently unusual or suspicious. He however accepted the psychiatric evidence relating to the Appellant and formed the view that as the Appellant was suffering from psychiatric problems, which may have affected her ability to enter into the transaction, the transaction was one that called for an explanation.

39. In the circumstances, the Trial Judge found that there was a presumption of undue influence.

40. The Trial Judge then considered whether the presumption was rebutted and he found that it had been. In coming to that conclusion he found: (a) that the Appellant's psychiatric problems would not have been evident to the Respondent and he was unaware of her illness; and (b) that the Appellant had previously approached the Cupens for the sale of the subject property to them. The Judge inferred that showed that the Appellant understood that she needed to repay her loan whether by way of funds raised through the sale of the subject property or otherwise. Further, the Trial Judge found that the Respondent had knowledge of the approach to the Cupens in relation to the sale of the subject property to them. He therefore would not think it necessary that the Appellant seek independent legal advice as he could reasonably infer that the Appellant knew and understood the nature of the transaction.

41. The Trial Judge went on to find that the Respondent had performed his obligations under the subject agreement and granted an order for specific performance.

42. Before this court, Mr. Reid, counsel for the Appellant, challenged the Trial Judge's conclusion that the presumption of undue influence had been rebutted. The Appellant also contended that the Judge was wrong to grant an order for specific performance.

43. In relation to the Trial Judge's conclusion that the presumption of undue influence had been rebutted, Mr. Reid submitted that the Judge made several errors, namely:

    (1) that the Trial Judge erred in failing to find that the parties were in an intimate relationship as contended for by the Appellant;

    (2) the Trial judge was wrong to say that the Appellant's pleaded case was irreconcilable with her evidence;

    (3) the Trial Judge was wrong to place the reliance that he did on the approach by the Appellant to the Cupens for the sale of the subject property (the Cupen transaction);

    (4) the Trial Judge was wrong to find that the Respondent did not know of the Appellant's psychiatric problems.

    (5) the Judge was wrong to hold that the presumption could be rebutted other than by evidence that the Appellant had received independent legal advice.

44. In relation to the grant of specific performance, Mr. Reid acknowledged that if the court accepted that the subject agreement was procured by the exercise of undue influence then the order for specific performance would be set aside. But even if the court did not find that the subject agreement was procured by undue influence the order for specific performance should in any event be set aside as an award of damages would have sufficed as an adequate remedy. Mr. Reid did not take issue with the Trial Judge's findings that the Respondent had performed his obligations under the subject agreement.

45. The Respondent did not counter-appeal from the findings of the Trial Judge that there existed between the parties a relationship of trust and confidence and that the transaction called for an explanation. Nor did the Respondent's counsel, Mr. Lamont, in his oral submissions to the court seek to contend with

any degree of force that the Trial Judge was plainly wrong in concluding that the presumption of undue influence was raised. Mr. Lamont, however, supported the Trial Judge's finding that the parties were not in an intimate relationship and that the presumption of undue influence was rebutted. He contended that the transaction made complete business sense. The Appellant was getting a better deal than she was getting with the Cupens. She was under financial pressure and found a way out.

46. Mr. Lamont also submitted that an order for specific performance was the appropriate remedy in this case.

47. In view of the above the two principal issues in this appeal are whether the Trial Judge was correct to hold that the presumption of undue influence was rebutted and whether he ought to have made an order for specific performance. I will first consider the rebuttal of the presumption. Of course, should I come to the conclusion that the Trial Judge was wrong to find that the presumption of undue influence was rebutted, the transaction should be set aside and there would be no need to consider the submission of the Appellant in relation to the order for specific performance. It would be otherwise if I were to agree with the Trial Judge that the presumption was rebutted.

48. As I have referred to above, the Appellant has challenged the Trial Judge's conclusion that the presumption of undue influence was rebutted on certain specific bases, which I have outlined earlier (see para 43). I will first consider the matters at (1) to (4) together, as Mr. Reid's arguments in relation to them, all appear to me, to relate to the Trial Judge's assessment of the evidence and/or his findings of fact. Essentially what the Appellant is asking this court to do is to interfere with the Trial Judge's findings of fact.

49. It is of course well settled that a court of appeal cannot simply substitute its findings of fact for that of the trial judge only because in its own assessment of the evidence it would have come to different findings. It is often said that

before the appellate court may interfere with the trial judge's findings of fact it must be satisfied that he has gone plainly wrong. What that means was explained by the Privy Council in **Beacon Insurance Company Limited v. Maharaj Bookstore Limited [2014] UKPC 21**. The phrase "plainly wrong" does not refer to the degree of confidence that must be felt by the appellate court that it would not have reached the same conclusions as the trial judge but rather it directs the court to consider whether it was permissible for the trial judge to make the findings of fact that he did in the face of the evidence as a whole. It requires the court to identify a mistake in the trial judge's evaluation of the evidence sufficiently material to undermine his conclusions. Such identifiable mistakes include where the trial judge has misdirected himself on the relevant law, where the finding of fact has no basis in the evidence, where the trial judge has demonstrably misunderstood relevant evidence, where he has failed to consider relevant evidence, where his decision cannot reasonably be explained or justified, or where the trial judge has failed to analyse properly the entirety of his evidence (See also **Henderson v Foxworth Investments Ltd** [2014] 1 WLR 2600).

50. It is clear that the Trial Judge regarded the Respondent as a credible witness and preferred his evidence to that of the Appellant where there was a conflict in the evidence. Mr. Reid submitted that the Trial Judge was wrong to do so. He drew reference to the opinion formed by the Trial Judge in his assessment of the evidence that the Appellant's pleaded case in relation to the circumstances surrounding the signing of the subject agreement was inconsistent with her evidence-in-chief as contained in her witness statement. The Trial Judge stated at para 40:

> "40. However, the court notes that the [Appellant's] **pleaded case was** that she signed the agreement but that her signing the agreement was procured by the [Respondent] 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 [Appellant] 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."

And at para 47 he made a similar comment:

> "47…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 [Appellant]. The court is therefore left to view the evidence of the [Appellant] with grave suspicion and unreliability as the [Appellant'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."

51. Counsel for the Appellant submitted that there was no inconsistency with the Appellant's pleaded case and her evidence-in-chief and it was not necessary to plead fraud. I agree with that submission.

52. The thrust of the Appellant's pleading was that she signed the subject agreement without reading it and after the Respondent had made the June 2001 agreement. According to her pleaded case, she did that because, *inter alia*, she was told by the Respondent that based on their June 2001 agreement ADB wanted her to sign "the paper" and because of the trusted relationship she had with the Respondent she blindly signed it. That averment appears to me to be perfectly consistent with a claim in undue influence. The plea amounts to a claim by the Appellant that the Respondent abused his position of influence in obtaining her signature to the

subject agreement and that it was not an expression of her own free will. There was no necessity for the Appellant to plead a case in fraud.

53. While the Trial Judge's erroneous view as expressed in paragraphs 40 and 47 of his judgment quoted above was a factor he took into account against the Appellant in the assessment of the Appellant's evidence as to the circumstances surrounding the signing of the subject agreement, it was not the only reason that he rejected the Appellant's evidence on that issue. He referred at paragraph 42 to the "completely unreliable" evidence of the Appellant on the issue. He stated:

> "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."

54. From a perusal of the printed evidence of the Appellant's cross-examination, it is clear that her evidence is littered with inconsistencies or a "variety of versions" as the Judge referred to them in the above quoted paragraph of his judgment. Counsel for the Appellant did not disagree with that assessment. So for example, in relation to the subject agreement which the Appellant in her pleading and evidence-in-chief admitted that she signed, in cross-examination she denies having ever seen the document. In relation to the Cupens, the Appellant accepted in her witness statement that she first turned to them for assistance with a way out of her financial difficulties and she stated that she and the Cupens went to the

ADB. In cross-examination, however, the Appellant denied turning to the Cupens for assistance and going to the ADB with them.

55. Later in his judgment (at para 81) the Judge referred again to the inconsistencies in the evidence of the Appellant and its impact on the Appellant's credibility. This time he referred to their impact on the Appellant's evidence as a whole. He stated that the general "tenor of the testimony of the [Appellant] on all major issues is that she has been consistently inconsistent". He said that it is that "frequent inconsistency on material issues" in the Appellant's evidence which has "gravely affected the credibility of the [Appellant] on the whole".

56. The Trial Judge therefore placed significant weight, as I believe he was entitled to do, on the patent inconsistencies in the Appellant's evidence. This, in the Trial Judge's view, gravely affected the credibility of the Appellant. And of course he enjoyed the significant advantage of having seen and heard the witnesses. In the circumstances, I am reluctant to interfere with the Trial Judge's acceptance of the Respondent's evidence and his determination of the lack of credibility of the Appellant. I cannot say that the Judge was plainly wrong to come to that conclusion.

57. A specific finding of the Trial Judge complained of by the Appellant is the finding that the parties were not in an intimate relationship. Mr. Reid acknowledged that even without such relationship the Trial Judge found that there was a relationship of influence between the parties. Mr. Reid however contended that a finding that there existed an intimate relationship would strengthen the Appellant's case. I believe he is correct to say that since if the parties were in an intimate relationship it may provide fertile ground for inferences to be drawn regarding the Respondent's knowledge of the Appellant's mental illness, strengthen the weight of the presumption of undue influence and may also impact on the Trial Judge's assessment of the Appellant's credibility.

58. The core of counsel's submissions on this point is that the Trial Judge did not pay any regard to the evidence of Kamla Mohammed (Kamla) with particular reference to her evidence relating to the trips to Port-of-Spain to take the Appellant to meet the Respondent and the holiday in Barbados where the Appellant and the Respondent shared a room together. Kamla was not cross-examined and it is submitted that the Judge ought to have accepted her evidence and paid regard to it. The contention was that in the face of that evidence, the Trial Judge could not reasonably reject the Appellant's assertion that she had an intimate relationship with the Respondent akin to that of husband and wife.

59. The general rule is that a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence of the opposing party should not be accepted. The effect of counsel's submission is that the general rule should apply in this case so that the Respondent should not be able to say that the Court should reject the evidence of Kamla or pay no regard to it. However, the difficulty with that in this case is that the evidence of Kamla of the visits to Port-of-Spain and the trip to Barbados was not put to the Respondent in the course of his cross-examination.

60. As a general rule a party who wishes to ask that the court not accept the evidence of an opposing witness should put his case to that witness. As Lord Herchell put it in **Browne v. Dunn (1893) 6R 67, 71** "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving any explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted". That may be regarded as a statement of the general rule in **Browne v Dunn**. In this case it was clear that whether there was an intimate relationship was an issue in the case and that was put to the Respondent but the effect of Mr. Reid's submission is that the evidence of the Respondent should be rejected on the grounds identified by Kamla in relation to the visits to Port-of-Spain and the trip to Barbados. In my view it would not be correct to do so as those grounds were not put to the Respondent.

61. In **EPI Environmental Technologies Inc v Symphony Plastics Technologies Plc [2005] 1 WLR 3456** the Judge made this observation in relation to the responsibility of one party to put his case to another:

> "I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a Judge to enable him to assess that witness' response to the other's case, orally, by reference to his or her demeanour and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in the closing speech. This is especially so in an era of pre-prepared witness statements. A judge does not see live in-chief evidence thereby depriving the witness of presenting himself positively in the case."

62. This is apposite here. The failure to put the matters raised by Kamla in my view disentitled the Appellant form raising these matters as grounds on which the Court should reject the evidence of the Respondent.

63. In **Chen v. Ng [2017] UKPC 17** a somewhat similar issue was considered. In that case the trial judge rejected the evidence of Mr. Ng on two grounds that were not put to him on cross-examination. The Privy Council held that the trial judge was wrong to do so and remitted the matter for a retrial. The Board summarised its reasons for that conclusion in these terms:

> "61. In summary, then, (i) the issue concerned was central to the whole proceedings, (ii) neither ground which the Judge gave for disbelieving Mr Ng on that issue was put to Mr Ng, (iii) neither ground was referred to at the hearing at any time, save that the second (less significant) ground had been addressed in Mr Ng's witness statement, (iv) neither ground was obscure or difficult and so each could reasonably be expected to have been raised in cross-examination, (v) it is quite possible that Mr Ng would have given believable evidence which weakened or undermined those grounds, and (vi) there is nothing in the judgment which can reasonably be invoked to say that it is reasonably clear that the judge would have reached the same conclusion without those grounds."

So too here, had the matters relating to the visits to Port of Spain and the Barbados holiday been put to the Respondent it is quite possible that he might have been given believable evidence so as to persuade the court to place no reliance on or significance to them.

64. In the circumstances, this court cannot be asked to place any reliance on the evidence of Kamla even though she was not cross-examined as to do so would be to place reliance on evidence to discredit the Respondent that was not put to him when it should have been. The Trial Judge accordingly cannot be faulted where he placed no reliance on Kamla's evidence and accepted the evidence of the Respondent.

65. Counsel for the Respondent also complained of the reliance placed by the Trial Judge on the Cupen trancaction. As I mentioned, the Trial Judge found that the Cupen transaction showed that the Appellant understood that she had to sell the subject property, that the Respondent had knowledge of the Cupen transaction, and would in those circumstances not think it necessary to ensure that the Appellant had independent legal advice as he could reasonably infer that the Appellant knew and understood the nature and consequences of the transaction. Mr. Reid submitted that the Trial Judge was wrong to draw this inference as it was the Appellant's evidence that she did not close on the Cupen transaction because she was unwilling to sell the property. It was unlikely, he argued, that the Appellant would voluntarily enter into a similar arrangement with the Respondent.

66. The true nature of the Cupen transaction was a matter in dispute between the parties. According to the Appellant, she never intended to sell the subject property to the Cupens. She only sought assistance from them to pay off the loan and it was during the discussions with the ADB that she realised the Cupens would obtain the subject property. She then call it off. The Respondent's evidence was, however, different. According to him, the Appellant told him she had spoken to Mr. Cupen

who was willing to buy the property but she did not like the offer and offered to sell the property to him. The Cupen transaction was one of the circumstances leading to the signing of the subject agreement. The Judge preferred the Respondent's evidence on that issue and indeed generally preferred his evidence to that of the Appellant where there was a conflict. As I have said, in my view the Trial Judge was not plainly wrong to adopt that position.

67. In relation to the complaint that the Trial Judge was wrong to find that the Respondent did not know the Appellant's mental condition, here too in my view, the Trial Judge was not plainly wrong to find that the Respondent did not know of the Appellant's mental illness. According to the Respondent in his evidence, he knew the Appellant to be in good health. It was not suggested to him that he knew or ought to have known that the Appellant was suffering from depression or other mental issues. The Appellant herself gave no evidence that the Respondent knew, or evidence from which it may be inferred that he knew or ought to have known that she was suffering from a mental illness.

68. Counsel for the Appellant, however, submitted that the Trial Judge ought to have inferred the Respondent knew or ought to have known of the Appellant's illness from the evidence of the Appellant's daughter, Kamla, who stated the Appellant showed outward signs of disorientation and decline. But even the daughter did not know the ailment from which the Appellant may have been suffering and her evidence was not put to the Respondent. Further, according to the evidence of Dr. Ghany, the Appellant could conduct normal day to day activities. This does not suggest that her illness would have been readily apparent or that someone in the position of the Respondent would have known or ought to have known that she was suffering from a mental illness.

69. The last issue raised by Mr. Reid for the Appellant is whether the presumption of undue influence in this case could only have been rebutted by evidence that the Appellant had received independent advice.

70. In order to rebut the presumption, the Respondent must establish that the Appellant entered into the transaction only after free and informed thought about it. There are two elements to this namely, that the Appellant understood the nature and effect of the transaction and that she was free to enter into the transaction, or in other words, the transaction was a voluntary act of the Appellant.

71. The most obvious means of rebutting the presumption is evidence that the complainant received competent independent advice. There was no evidence that the Appellant received such advice in this case. But such evidence is not the only way the presumption may be rebutted. As was remarked in **Re Brocklehurst (deceased); Hall and another v. Roberts [1978] 1 All ER 767** the presumption is not so powerful that it can only be rebutted by evidence of competent independent advice. In **Duress, Undue Influence and Unconscionable Dealing**, Nelson Enonchong (2nd edition, 2012) at paragraph 12-013 it was noted that a wide range of circumstances may serve to rebut the presumption. As was said in **Etridge (supra)** the evidence required to rebut the presumption "depends on the nature of the alleged undue influence, the personality of the parties, the relationship, the extent to which the transaction cannot be readily accounted for by the ordinary motives of ordinary persons in the relationship, and all the circumstances of the case".

72. The submission of Mr. Reid rested largely on this Court accepting his submissions that the Trial Judge erred in coming to the findings of fact as discussed above. I, however, have not agreed with him. Counsel however also seemed to suggest that the mental condition of the Appellant, even if unknown to the Respondent, should have necessitated independent advice to rebut the presumption. I, however, do not agree with that submission. As I mentioned earlier, undue influence is one of the grounds developed by courts of equity as a court of conscience. Its objective is to ensure that the influence one person has over another is not abused and it arises where one party has acted unconscionably by exploiting that influence to

direct the conduct of the other. Counsel's argument seems to be premised on the basis that the Appellant's mental condition would have made her more pliable or more open to the influence of the Respondent. This may be so but what must be shown is that the Respondent acted unconscionably. However, where the Appellant's condition is unknown to the Respondent, it cannot reasonably be argued that the Appellant's condition provides any basis for contending that the Respondent acted unconscionably or in a way that affects his conscience.

73. In **Hart v O'Connor [1985] 2 All ER 880** the issue was whether a contract entered into by a person of unsound mind but whose affliction was not known by the other side could be set aside on the application by the person of unsound mind or his representative on the basis that the contract was unfair to him. It was held that the validity of the contract entered into by a person of unsound mind but who is ostensibly sane is to be judged by the same standard as a contract by a person of sound mind and is not voidable by the person of unsound mind or his representative by reason his unfairness unless such unfairness amounts to equitable fraud which would enable the complaining party to avoid the contract if he had been sane. That applies where the issue is whether the contract with the ostensibly sane person is to be set aside on the basis that it has been procured by the exercise of undue influence. The issue is to be determined on the same basis as if the complainant was sane where the other party was unaware of the complainant's condition.

74. In so far as counsel suggested that the mental condition of the Appellant necessitated evidence of independent advice to rebut the presumption, I therefore do not agree.

75. Indeed I agree with the Trial Judge that evidence of independent advice was not necessary to rebut the presumption of undue influence. There was ample evidence from which the Trial Judge could properly have concluded that the Appellant knew what she was doing and entered into the subject matter on her

own free will. The Appellant's business had failed. She had fallen behind in her mortgage payments and the mortgagee was threatening enforcement proceedings. She first approached her friends, the Cupens, for assistance. Despite the Appellant's attempt to suggest that she did not approach the Cupens with a view to them buying the property there was evidence to the contrary which the Trial Judge was entitled to accept. There was no suggestion of undue influence in relation to the Cupen transaction. As the Trial Judge found, the Cupen transaction suggested that the Appellant understood that she needed to repay her mortgage loan and one way to accomplish this was by a sale of the subject property. The Appellant however did not like the offer she received from the Cupens and approached the Respondent who was another of her friends. According to the Respondent, he was told by the Appellant that if he made a better offer she would sell him the property. The Respondent's offer was better than the Cupen's and the Appellant accepted it and signed the subject agreement. A sale of the subject property to the Respondent could be readily accounted for by the ordinary motive of persons in the position of the Appellant and her relationship with the Respondent. That previous transaction with the Cupens suggested that the Appellant would have known and understood the nature and consequences of the subject agreement, that she acted freely and that independent legal advice was not necessary.

76. The total agreed consideration for the subject property was $300,000.00. The evidence is that the Respondent paid more than that sum but what is relevant is the contract price. The premises at the time of the subject agreement was in poor condition but there is no evidence of the value of the subject property at the time of the subject agreement. There is evidence of the value of the subject property at the time of the commencement of these proceedings which is considerably higher than the value of the subject property at the time of the subject agreement. However, given the general upward trend of property prices in this jurisdiction, that is no indication that the agreed price for the subject property was an under-

value. There is therefore no evidence to suggest the consideration was not appropriate for the subject premises. In my view, given the circumstances in this case, I agree that the transaction made good business sense and was not unusual or suspicious.

77. In the circumstances the Trial Judge was correct to hold that the presumption of undue influence was rebutted.

78. The second issue in this appeal is whether the Court should have made an order for specific performance of the subject agreement.

79. Counsel for the Appellant submitted that the Trial Judge in exercising his discretion to order specific performance did not consider that an award of damages could have adequately compensated the Respondent in the circumstances of this case. He argued that on the evidence the Respondent received the sum of $225,000.00 from the rental of the premises. The total he paid in respect of the property was $342,000.00. In those circumstances Mr. Reid contended that an order for repayment of the sum of approximately $117,000.00 being the difference between the rent received and the money paid by the Respondent in respect of the subject property could easily have met the justice of the case. The question raised by this submission is whether the Respondent should be left to his remedy in damages.

80. The submission that an award of approximately $117,000.00 could meet the justice of the case overlooks the fact that the subject property had appreciated in value over the years so that by the time of the trial of this claim in 2011 it was valued at over one million dollars. The payment by the Appellant of approximately $117,000.00 in those circumstances clearly would not meet the justice of the case.

81. Further, where the subject matter of the contract is land, the court, in a claim by the purchaser, almost invariably takes the position that an award of damages is not appropriate and will grant specific performance. As was said in **Chitty on Contracts** Volume 1 (33rd edition) at para 27-017, “the law takes the view that the

purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to the purchaser". In **Mungalsingh v. Juman [2015] UKPC 38** Lord Neuberger put it this way (at paragraph 33), "[i]n the context of a contract for the sale of land, damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique". I see no basis to distinguish that general position in this matter and order that the Respondent should be left to his remedy in damages. I believe the order for specific performance was properly made.

82. In view of the above, I would dismiss the appeal and hear the parties on costs.

A. Mendonça J.A.

Delivered by Bereaux J.A.

Introduction

83. This is an appeal from the High Court. The judge found for the respondent ("the claimant") and directed the appellant to perform her part of a contract formed on 9th October, 2001. In her defence and counterclaim, the appellant has alleged that the contract should be set aside for undue influence because the claimant abused the trust and confidence she placed in him by tricking her into signing the contract. She alleges that the breach of trust and confidence arose out of a relationship between the parties equivalent to that of husband and wife.

The claimant's case

84. The claimant sought, inter alia, an order for the specific performance by the appellant of her part of an agreement dated 9th October, 2001, to wit: the conveying to him of the fee simple in premises located at 11 Akal Trace in Santa Cruz free from encumbrances. It is not disputed that the parcel of land and buildings thereon ("the property") had been mortgaged by the appellant to the Agricultural Development Bank (ADB) for the sum of two hundred and seventeen thousand dollars ($217,000.00).

85. It is also not disputed that the appellant made payments on the mortgage to the ADB, that the appellant's family business, Starbrand Products Limited, fell into difficulty and that the mortgage fell into arrears. The claimant contends, and this is hotly disputed by the appellant, that by the agreement of 9th October, 2001, the appellant agreed to sell the property to him for three hundred thousand dollars ($300,000.00).

86. He alleges that by agreement with the appellant he paid off the mortgage by paying to the ADB the sum of one hundred and seventy-four thousand, two hundred and fifty dollars ($174,250.00). He then paid the appellant the sum of one hundred and twenty-five thousand, seven hundred and fifty dollars ($125,750.00) being the balance of the purchase price. On 1st July, 2003 the ADB, by deed of release registered as DE2003 026817 99D001 released the appellant and Starbrand Products Limited from liability under the mortgage and re-conveyed the lands to her.

87. The claimant contends that upon entering into the agreement, he took immediate possession of the property. He paid the taxes and the utility rates, including the arrears in the sum of two thousand and eighteen dollars and fifty cents ($2,018.50). He contends that he has remained in possession since that time and has done repairs to the building. He evicted one tenant from the premises and has rented the lands for his own benefit since September 2001. He has made various oral requests of the appellant to comply with the terms of the agreement and convey the lands to him but she has refused.

The appellant's case

88. The appellant admitted to signing the agreement but contended that her signature was procured by undue influence. She has never intended to sell the property because she wishes to give it to her son. In her particulars of undue influence she states that:
    (i) She and the claimant were involved in an intimate relationship for some twenty-six years, akin somewhat to that of husband and wife. The relationship ended when this action was served on her on or about the 6th day of June 2011.
    (ii) When the relationship began, she was *"somewhat estranged"* from her then

common law husband although they lived in the same house. From about 1996 – 1997 until his death in April 2000 her common law husband was bedridden and during that period, she had to care for him.

(iii) Between 1985 and 2000, the appellant grew *"closer and closer"* to the claimant. He became her trusted friend and confidant. She shared all her life's troubles and struggles with him.

(iv) In 1995 and from 1999 to 2001 the appellant suffered psychiatric problems. She would suffer from sleeplessness, a *"funny feeling in the head"*, anxiety and general nervousness. She became a registered patient at a private psychiatric clinic operated by Professor Hari D. Maharajh, a psychiatrist.

(v) She was on constant medication and had difficulty in thinking and remembering. She suffered poor judgment.

(vi) In or about June 2001, with the threat of foreclosure by the ADB, she asked the claimant, her trusted friend, confidant and lover of over sixteen years, if he would assist her in paying the mortgage and free her from the stress of potential litigation given her emotional state at the time. She orally accepted the claimant's offer to help to pay the mortgage. The oral agreement was in the following terms:

(a) The claimant would make payments directly to the ADB and liquidate the mortgage and pay for a release of the security.

(b) The appellant, with the assistance of the claimant, would rent the property. The claimant would be free to take the rental proceeds and apply those funds towards repaying himself all monies which he would have paid to ADB on behalf of the appellant and to defray expenses for the land and building taxes and water rates on the property.

(c) After the claimant had been repaid, the appellant would then collect the rental income for her own use and benefit and resume paying the land and building taxes and water rates from such rental collection. There would be no sale of the property.

(d) In or about March 2001, or April 2001, the appellant had refused an offer made by her good friends, Molly Cupen and Ken Cupen who had proposed the purchase of the property. The claimant knew that the appellant was not at all interested in selling the property to anyone.

(vii) She was tricked by the claimant into signing what she thought represented the oral agreement. The claimant gave the agreement to her (which he has now sought to enforce) *"some months"* after the oral agreement was made, representing to her that the ADB wanted her to sign it as a written reproduction of their oral agreement. She blindly signed the agreement because of their trusted relationship *"and without any independent legal advice on same and whilst still a patient at the psychiatric clinic and also to her manifest disadvantage"*.

89. In so far as the claimant alleged that he took possession and control of the premises the appellant stated that:

(i) While the claimant was free to go into the property to look after same for her, she never intended to give him any legal right or claim in the property.

(ii) The claimant did pay the land and building taxes and some of the rates for water and sewage but would have done so on her behalf.

(iii) The claimant did not conduct repairs to the building in the amount he claimed.

(iv) From April 2008, a tenant paid rent for the property to the claimant but that was in accordance with the original oral agreement. It is only after the filing of this action that she, or her son Kenneth Arjoon, instructed the tenant to pay the rent directly to her and the tenant has done and continues to do so.

90. The appellant alleged that, in the alternative, if the agreement is deemed to be valid and subsisting, the claimant breached the agreement because he did not pay to her the sum of three hundred thousand dollars ($300,000.00) as required by

the agreement. She counterclaimed, inter alia, for:

(a) a declaration setting aside or rescinding the agreement dated 9th October 2001 it having been procured by the undue influence;

(b) A declaration that the original oral agreement made in or about June 2001 is the valid and subsisting agreement;

(c) The re-payment of the sum of sixty-seven thousand seven hundred and ten dollars and seventy-three cents ($67,710.73) representing the difference between the amount collected by the claimant up to May 2011 in the form of rental income and the amounts expended by the claimant under the original oral agreement.

The judge's findings

91. I understand the judge's findings to be as follows:

(i) The relationship between the parties was a friendly one but not an intimate one. The claimant, being a businessman, appears to have been an option for financial assistance.

(ii) There existed some element of trust and confidence placed in the claimant by the appellant, such that she felt she could rely on him to collect rent, to evict the tenant and to be able to confide in him about her financial difficulties.

(iii) The appellant's evidence did not support the conclusion that there was an abuse of influence such as to preclude the exercise by the appellant of free and deliberate judgment.

(iv) The circumstances of the sale on their own did not render the transaction sufficiently unusual or suspicious to require an explanation. The transaction made good business sense.

(v) However, the medical evidence overwhelmingly showed that the appellant was not mentally capable of exercising her own judgment so as to enter into

the agreement for sale. The presumption of undue influence therefore arose.

(vi) The appellant's evidence was that she had approached Ken and Molly Cupen to assist her financially. It was clear therefore that she understood that she needed to repay the loan from funds raised through the sale of the property. The claimant, from his knowledge of this attempt to obtain funds from Ken and Molly, would not in the circumstances have thought it necessary to ensure that she sought independent legal advice because he could then reasonably infer that she knew and understood the nature of the consequences of the transaction.

92. It is to be noted that the judge in holding that the appellant's evidence did not support undue influence found that her evidence was inconsistent with her pleaded case and this was one of the reasons why he rejected her evidence as being unreliable.

Issue

93. The broad question in this appeal is whether the judge was right in his assessment of the facts and in his application of the law.

Summary of decision

94. The judge made errors of law in his interpretation of the appellant's pleaded case and in his application of the law to the facts, which entitle the Court of Appeal to look at the matter afresh. However, despite those errors, he came to the right conclusion. Therefore the appeal must be dismissed.

Appellate review

95. It is now trite that an appellate court will not reverse findings of fact of a trial judge unless it is satisfied that the judge has wasted the advantage he or she enjoys of having seen and heard the witnesses and, that the conclusion to which he came cannot be justified, having regard to the evidence as a whole. See **Beacon Insurance Co. Ltd. v. Maharaj Bookstore Ltd. [2014] UKPC 21, [2015] 1 LRC 232**. In such a case the appellate court must identify the mistake in the judge's evaluation of the evidence which is sufficiently material to undermine his conclusions. The appellate court will also intervene where the trial judge has made errors of law. Of course a judge's misapprehension of the evidence is itself an error of law. But errors of law also extend to a judge's misapprehension of a party's pleaded case and a misapprehension or misapplication of the law itself.

Legal Principles

96. The claimant's claim is founded in contract. The appellant's defence and counterclaim is that the contract should be set aside because the claimant abused the trust and confidence she placed in him by misrepresenting to her what the contract entailed and she blindly signed the contract.

97. The law of undue influence is founded in equity. It is primarily directed at setting aside gifts, the donors of which were later alleged to have been overwhelmed by the donee's influence and dominance. Cotton L.J's dictum in **Allcard v. Skinner (1887) 36 Ch D 145** has come to be regarded as the touchstone of the case law governing undue influence. Dealing with the issues in that case he said at page 171:

> ***"The question is - Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary***

gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes - first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact 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."

98. The leading decision in this area is the decision of the House of Lords in **Royal Bank of Scotland v. Etridge (No. 2) [2002] 2 A.C. 773**. Lord Nicholls gave the main judgment. Lords Clyde, Hobhouse and Scott gave concurring judgments. Lord Bingham also concurred.

99. The principles of law governing undue influence were explained by Lord Nicholls in his judgment. I shall summarise them in the following sub-paragraphs. When taken from the other judgments in **Etridge**, or other decisions or legal sources, I shall identify them:

    (i) Whether the transaction was brought about by the exerting of undue influence is a question of fact. The general rule is that the burden of proving undue influence rests upon the person making the allegation.

    (ii) The evidence required to discharge the burden depends on the nature of the alleged undue influence, the personalities of the parties, their

relationship, the extent to which the transaction cannot be readily accounted for by the motives of ordinary persons in that relationship and all the circumstances of the case.

(iii) (a) Proof that the complainant placed trust and confidence in the other party in the management of the complainant's affairs **coupled with** a transaction that calls for an explanation will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.

(b) Proof of these two facts is *prima facie* evidence of abuse of the influence acquired by the defendant in the relationship. The court can then infer that, in the absence of an explanation, the transaction can only have been procured by undue influence. The evidential burden then shifts to the defendant to produce evidence to counter the inference which would otherwise be drawn.

(c) The mere existence of the influence is not enough. It must also be shown that the transaction is one which cannot be readily accounted for by the *"ordinary motives on which ordinary [people] act"* (per Lindley LJ in **Allcard** at 185). In this regard it is not necessary to show that the donor was *"disadvantaged"* in the transaction.

(iv) The shift in the evidential burden of proof should not obscure the overall position i.e. that the burden of proof lies with the plaintiff and any evidential shift to the defendant raises a rebuttable evidential presumption of undue influence. The plaintiff ultimately succeeds by this route because the court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of trial in which the burden of proof lay on the plaintiff.

(v) This type of case (in which a rebuttable presumption of undue influence

arises by inference) has been labelled *presumed undue influence*, in contrast with cases (in which actual pressure *"or the like"* is affirmatively proven) which are labelled *"actual undue influence"*.

(vi) Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. As Lord Hobhouse noted in **Etridge** at paragraph 103 of his speech, actual undue influence *"is typically some express conduct overbearing the other party's will"*. It is capable of including conduct which might give rise to a defence in law, for example, duress and misrepresentation. Many of the cases relating to wives who have given guarantees and charges for their husbands' debts involve allegations of misrepresentation. Chitty on Contracts 33rd Ed. paragraph 8-070 citing Lord Nicholls at paragraph 32 states that *"[t]here may also be actual proof of undue influence in the form of misrepresentation or non-disclosure"*. Further, in **CIBC Mortgages Plc v Pitt [1994] 1 AC 200, 209** Lord Browne-Wilkinson noted that actual undue influence is a species of fraud and the victim is entitled to have the transaction set aside as of right. Lord Nicholls at paragraph 32 of his judgment in **Etridge** noted however that ***"[s]tatements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may only be natural. Courts should not too readily treat such exaggerations as misstatements."***

(vii) In order to rebut the presumption which arises in what has been labelled presumed undue influence, it must be shown that the complainant was allowed to exercise an independent and informed judgment.

(viii) Proof that the complainant received independent advice can rebut the presumption but it does not follow that unless the independent legal advice is acted upon, the presumption will not be rebutted. See **Inche Noriah v Shaik Allie Bin Omar [1929] AC 127** at 135 per Lord Hailsham L.C.:

> ***"(3) … their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."***

In my judgment, it follows from that dictum, that the independent advice does not necessarily have to be legal advice, that is to say, from an attorney-at-law, once it comes from *"some independent and qualified person"* competent to give it.

(ix) But a plaintiff can also succeed in proving that the defendant abused the influence he acquired in a relationship of trust and confidence without recourse to the rebuttable evidential presumption. This may occur where the impugned transaction is not one which called for an explanation. In cases of this nature, there must be proof of actual undue influence. See Chitty on Contracts 33rd Edition page 796, paragraph 8-067, citing Slade LJ in **Bank of Credit and Commerce International SA v. Aboody [1990] 1 Q.B. 923, 967**. Such proof can be inferred on the totality of the evidence and in all the circumstances of the case, even though there is no direct evidence of actual undue influence or actual pressure being exerted (see **In re Craig, Decd. Meneces and Another v. Middleton and Others [1971] Ch. 95** at page 121 [E] to [F] per Ungoed-Thomas J).

(x) The evidential presumption referred to at (iii), (iv) and (v) above, is sharply distinguishable from the presumption which arises in certain special types of relationships in which one party acquires influence over a person who is vulnerable and dependent and in which substantial gifts by the vulnerable and dependent individual are not normally to be expected. In such cases (where the relationship exists and substantial gifts are given) the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other. It is enough for him to prove the existence of the relationship. See Lord Nicholls at paragraph 18. However, despite the alleged *"irrebuttablilty"* of this kind of presumption, Chitty **(supra)** at paragraph 8 – 084 notes that

"… it does not follow that any transaction between parties in such a relationship will be set aside, even if it is not 'readily explicable by the relationship between the parties'. The ascendant party may be able to rebut the presumption that he or she used undue influence." Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client and medical adviser and patient.

(xi) The relationship of husband and wife does not fall into this category of special relationships. See Lord Nicholls at paragraph 19:

> ***"It is now well established that husband and wife is not one of the relationships to which this latter principle applies. In Yerkey v Jones (1939) 63 CLR 649, 675 Dixon J explained the reason. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over a wife which a husband often possesses. But there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, "it is not difficult for the wife to establish her title to relief": see In re Lloyds Bank Ltd; Bomze and Lederman v Bomze [1931] 1 Ch 289, 302, per Maugham J."***

100. I say that as to these comments by Lord Nicholls, the same will apply to

Trinidad and Tobago. A Trinidad and Tobago court will have regard to the sociological dynamics relevant to such relationships in Trinidad and Tobago. This will be inclusive of common law relationships which are themselves a function of historical and sociological factors.

Errors of the judge

101. The judge's finding that there was no undue influence is, of course, a finding of fact and for that reason ought not to be lightly disturbed. However, where errors of law occur which are material to the outcome, the Court of Appeal can intervene. Although I agree with the judge's conclusion I am satisfied that the judge did make material errors which the Court of Appeal is required to correct.

102. First he misunderstood the appellant's pleaded case. Her claim was based on actual undue influence brought about by misrepresentation. The appellant's particulars at paragraph 5 of the defence and counterclaim make it plain that her case is that the claimant used his position in their relationship to trick her into signing the agreement he has now sought to enforce, by making her believe that what she was signing was the oral agreement.

103. While the appellant has never used the word *"misrepresentation"* the pleading is clear that the appellant was alleging undue influence by the claimant through deceit and misrepresentation. Paragraphs 5.7 and 6 of the defence and counterclaim are relevant:

Paragraph 5.7 states:

> **It was in those circumstances as stated in paragraph 5.6 above that the defendant executed agreement C without reading same as the claimant brought that agreement C some months after the making the original oral agreement with the defendant and gave it to the**

defendant telling her to sign same and representing to her that based on their original oral agreement, the ADB wanted her to sign this 'paper' stating same and the defendant blindly did so because of the trusted relationship she had with the claimant and without any independent legal advice on same and whilst still a patient at the psychiatric clinic and also to her manifest disadvantage.

(The written agreement had been annexed to the statement of case and marked "C")

Paragraph 6 states:

By reason of the matters stated in paragraph 5 above, the defendant contends that based on their trusted relationship together with her psychiatric problems the claimant took advantage of her and tricked her into believing that she was signing an agreement in terms of the original oral agreement.

104. The judge, at paragraph 47 of his judgment, stated as follows:

"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."

The judge's comments as to the relationship between fraud and undue influence do not accord with the authorities cited at paragraph 99(vi).

105. Further, the appellant's statement in her witness statement that she did not read what she was signing, was consistent with her pleading that she *"blindly"* signed the agreement. The appellant is saying in effect the claimant *"misused trust she placed in him"* (to use the judge's words) to procure her entry into the contract. To the extent that the judge considered that statement inconsistent with the pleading, he was wrong.

106. Consistent with the legal principles set out at paragraph 99(vi) above, the appellant, in effect, was alleging actual undue influence (by misrepresentation). As Lord Browne-Wilkinson noted in **CIBC Mortgages Plc v. Pitt [1994] 1 A.C. 200 supra**, actual undue influence is a species of fraud entitling the victim to set aside the transaction.

107. The judge did not consider whether there was actual undue influence exercised by the appellant because he proceeded solely on the basis of presumed undue influence. To the extent that it now falls to the Court of Appeal, the appellant still cannot succeed. It is a question of evidence. The claimant's evidence on the printed record is more credible. Like the trial judge, I consider the appellant's evidence to have been inconsistent under cross-examination, as an examination of the transcript reveals. Her allegation that the claimant abused

her trust by tricking her into signing the agreement is not credible.

Particular examples of inconsistency

108. At page 43, line 37 of the transcript (dated 12th November, 2013), she claimed not to remember signing the agreement, even though her signature appears on it. At paragraph 5.7 of her witness statement she claims to have signed *"blindly"* (as opposed to not remembering). She claims not to know or recall anything about the agreement at page 44 (line 35), 45 (line 25) and again at page 46 line 30. She later claims not to understand paragraph 5 of her witness statement where she states that the signing of the agreement was procured by the claimant's undue influence. At page 63, line 7, she stated that she did not agree that the claimant had paid the sum of $181,951.26 to the ADB because she did not deal with this. When it was put to her that this was what was in her defence (see paragraph 8), signed by her lawyer, under her authority, she responded that she did not *"know nothing about it"* (see page 63, lines 14 – 15).

109. At page 71, line 26 and also page 72, lines 2-3, she denied asking Mr. Cupen for any help even though this is what she says in her witness statement (see paragraph 16). In her witness statement, she said she had gone to the ADB with the Cupens ("we all entered"), but in cross-examination she stated that "they went themselves" (page 72, line 24) and that she could not recall what was stated in the witness statement with regard to that visit.

110. On the printed evidence therefore the appellant's evidence was unpersuasive and unreliable and did not reach the level of credibility to sustain a claim of actual undue influence. Given that the appellant's pleaded case is in effect one of actual undue influence by misrepresentation, this alone is sufficient to dispose of this appeal. However the judge proceeded to decide the case on

presumed undue influence, I shall examine his findings in the event that I am wrong.

Finding of presumed undue influence

111. In this regard, the judge's second error was that he misapplied the law, as it relates to presumed undue influence, to the facts of this case.

112. He found that there was a friendly relationship by which the appellant reposed trust and confidence in the claimant but that the circumstances did not render the transaction sufficiently unusual to require an explanation. That should also have been sufficient to dispose of the entire matter. The law requires that there must be a relationship of trust and confidence *"coupled with"* a transaction that calls for an explanation in order to raise the rebuttable presumption of undue influence. The judge having found that the transaction did not call for an explanation, the presumption of undue influence did not arise, and the appellant's case did not get off the ground.

113. Thirdly, the judge wrongly considered that the medical evidence of the appellant's psychiatric condition at the time of the execution of the agreement raised the presumption of undue influence because she was mentally incapable of exercising her own judgment. This finding was arrived at even after the judge had held that the transaction did not call for an explanation and indeed had made good business sense.

114. This business decision, he had noted, was made by the appellant against the backdrop of her realisation that:

(I) she was an aged widow.

(II) she no longer had help running the business she began (because her son

had migrated).

(III) the business was no longer profitable.

115. Those were cogent findings which belie any suggestion of mental incompetence or inability to exercise her own judgment. The transaction is demonstrative of a clear thinking, level headed business woman prepared to cut her losses. The cogency of those findings also belie the judge's error in proceeding along this line. If the appellant was incapable of exercising her own judgment, that went to mental capacity to enter the contract itself. My general impression on the printed evidence is that her allegation of mental incapacity was nothing but a charade as her evasiveness in cross-examination demonstrated.

116. It is strange that the claimant appeared not to know of the appellant's depression. The appellant alleges that she grew *"closer and closer"* to the claimant. She pleaded that *"she shared all her life's troubles and struggles with him"*. But she never categorically stated that she confided her depression to the claimant or that the claimant knew of her depression or of her treatment by Dr. Maharajh. If they shared a close relationship and she confided her *"life's troubles"* to him, surely she ought to have made him aware of her depression and of the fact that she was being treated by Dr. Maharajh. Such knowledge would have gone a long way in establishing that he manipulated her into signing the agreement. Further, the judge himself found that her condition was not readily apparent, even to her daughter, so that the claimant, whose relationship with the appellant the judge found not to be intimate, would independently not have known of her condition.

117. Dr. Ghany, who gave evidence of her mental state, in cross-examination could not (or would not) say whether she was capable of making her own business decisions. But the transaction speaks for itself.

118. But even if the appellant had pleaded mental incapacity, such a defence would not have succeeded. A person lacking mental capacity is still bound by his or her contract unless he or she can show that she did not understand what she was doing *and* that the other party was aware of her incapacity or ought to have been aware of it. See **Josife v Summertrot Holdings Ltd. [2014] EWCA CIV 1483** at paragraphs 6 to 8 applying **Dunhill v. Burgin [2014] UKSC 18**. See also **Imperial Loan Co. Ltd. v. Stone [1892] 1 QB 599**. (I note however that the constructive knowledge aspect of the test was described as *"not entirely uncontroversial"* in **Josife** (paragraph 8).) In this case the judge's finding was that her incapacity was not apparent as such the claimant could not have been aware of her condition.

Order

119. For these reasons the appeal is dismissed. Like the trial judge, I consider that the claimant proved his case and is entitled to specific performance of the contract. Damages are not an adequate remedy. The decision and orders of the trial judge are affirmed.

Nolan Bereaux
Justice of Appeal

Delivered by Smith J.A.

120. I too agree that this appeal should be dismissed and I affirm the orders of the trial judge. However, I do so for slightly different reasons than Bereaux and Mendonça JJA.

121. I agree with the law on undue influence as set out in paragraphs 96 to 100 of the judgment of Bereaux J.A.

Specifically, as stated in paragraph 99 (iii) of the reasons of Bereaux J.A., there are two necessary requirements to raise a case based on presumed undue influence. Firstly, that a complainant placed trust and confidence in the other party's management of the complainant's affairs and secondly, that the impugned transaction is one that calls for an explanation[1] in the sense that it is not readily explicable by the relationship between the parties.

122. The trial judge found that this was a relationship where the appellant placed trust and confidence in the respondent's management of her affairs (the first requirement). However, he also found that (a) "**the circumstances of the sale does** (sic) **not render the transaction sufficiently unusual or suspicious**"[2]; and further that, "**the transaction did make good business sense and on that evidence alone does not call for an explanation."**[3]

On these findings, the appellant, as a matter of law failed to satisfy the second requirement necessary to raise the presumption of undue influence. In this regard, I agree with the conclusion of Bereaux J.A. at paragraphs 111 and 112 of his reasons, namely, "...**the presumption of undue influence did not arise and the appellant's case did not get off the ground.**" I also agree with the analysis of Bereaux J.A. at paragraphs 113 to 118 of his reasons where he suggests that the

[1] See **Royal Bank of Scotland plc v Etridge (No. 2) [2002] 2 AC 773** at paragraphs 14, 21 and 158.
[2] See paragraph 51 of the judgment of Rahim J. in **CV2011-02111**
[3] See paragraph 53 of the judgment of Rahim J. in **CV2011-02111**

trial judge may have attached undue weight to the appellant's medical condition in coming to a finding that the presumption of undue influence had arisen.

123. The trial judge fell into error in that he was prepared to state that "**the presumption of undue influence therefore arises in this case**"[4] even though he had previously found on the facts that the second requirement referred to above was not satisfied.

124. At paragraphs 102 to 107 of his reasons, Bereaux J.A. opined that the appellant's pleaded case was based on actual undue influence brought about by misrepresentation and that the trial judge erred in not recognising and analysing the case on this basis.

I am unable to agree with Bereaux J.A.'s conclusion that the trial judge erred in not considering actual undue influence brought about by misrepresentation.

125. While I accept that paragraph 5.7 of the Defence contains rolled-up allegations of misrepresentation and undue influence, I am of the opinion that the total context of the pleaded Defence, (specifically, at paragraphs 6 and the rest of paragraph 5,) there was no doubt that the appellant was in fact relying on a case of presumed undue influence arising from a relationship of trust and confidence. Further, the appellant's submissions both in the Court of Appeal and before the trial judge, make it clear that her case was based on this presumed undue influence. There was never any suggestion of a separate case based on actual undue influence as a result of misrepresentation.

Further, the allegation of undue influence very often includes elements of misrepresentation without necessarily bringing the principles of misrepresentation into play. As Lord Hobhouse aptly stated in the lead case of

[4] See paragraph 63 of the judgment of Rahim J. in **CV2011-02111**

Royal Bank of Scotland plc v Etridge (No. 2) [2002] 2 AC 773, 820 at paragraph 103:

> "**It** (undue influence) **is capable of including conduct which might give a defence at law, for example, duress and misrepresentation. Indeed many of the cases relating to wives who have given guarantees and charges for their husband's debts involve allegations of misrepresentation. (*O'Brien* was such a case.)**"[5]

126. Therefore, the trial judge did not err in not analysing this case on the basis of actual undue influence by misrepresentation as Bereaux J.A. suggests.

127. Mendonça J.A. analysed this appeal on the assumption that the appellant had validly raised the presumption of undue influence. Further, he went on to analyse the facts and the law and concluded, like the trial judge, that the presumption of undue influence had been rebutted.

128. As stated before, I, like Bereaux J.A., am of the opinion that the appellant failed to raise the presumption of undue influence. There was no need to consider whether the presumption had been rebutted. However, as an alternative to my opinion, even if the presumption had been raised, I agree with the analysis and conclusion of Mendonça J.A. that the same had been rebutted (as the trial judge also held). This is an alternative ground to dismiss this appeal and to affirm the orders of the trial judge.

129. We will hear the parties on the issue of costs.

G. Smith J.A.

[5] And see **Matthew Baptiste and Karen Mohammed-Baptiste v Scotiabank Trinidad and Tobago Limited Civ. App. No. 37 of 2009** at paragraph 40.