Trinity Term
[2024] UKPC 22
Privy Council Appeal No 0100 of 2022

JUDGMENT

Della Vallery Nolan nee Jude and another (Respondents) *v* Vandyke Jude (Appellant) (St Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (St Lucia)

before

Lord Hodge
Lord Briggs
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
25 July 2024

Heard on 11 June 2024

Appellant
Robert Strang
(Instructed by BDB Pitmans LLP (London))

Respondent
Maureen John-Xavier
(Instructed by Parker Harrison Solicitors (London))

LORD BURROWS:

1. Introduction

1. Between 1977 and his death in September 2007, Austin Jude and his company Austinsheil Properties Ltd ("Austinsheil") owned or part-owned numerous parcels of land in the Marigot Bay area of St Lucia. Prior to, and especially since, his death, several of his children (and, without intending any disrespect, I shall refer to all the members of the Jude family by their first names) have been engaged in acrimonious disputes as to their respective entitlements to those parcels of land. On the one side in this appeal stands the appellant, Vandyke, who primarily resides in California where he practices as a lawyer. He is supported by his sister, Diane, who was given a power of attorney by Austin on 7 June 2005. Both Vandyke and Diane were the defendants at the trial in this case. On the other side are the respondents (and claimants), Della and Beverley, who are sisters of Vandyke and Diane. There is another sister, Yasmin, and a half-brother, Cletus, who are not parties to these proceedings. Austin's widow, Sheila, is also not a party.

2. In the years before he died, and largely acting through Diane exercising the power of attorney he had given her, Austin transferred various parcels of land to members of the family, especially Vandyke. The claimants have sought to impugn the transfers to Vandyke and, in particular, have submitted that they were obtained by undue influence exercised by Vandyke and Diane over Austin.

3. Their various challenges, including the claim based on undue influence, were all dismissed by the trial judge, Godfrey Smith J. He was impressed by Vandyke and Diane as witnesses describing Vandyke as honest, direct, and very credible and Diane as honest, credible, open and candid. However, his decision was overturned in part by the Eastern Caribbean Court of Appeal: that is, it overturned the trial judge's dismissal of the undue influence claims against Vandyke in respect of transfers effected by two deeds executed on 23 July 2007 (the "July 2007 deeds"). Vandyke now appeals to the Board against the Court of Appeal's decision regarding those July 2007 deeds.

4. It should be made clear at the outset, and the parties were agreed on this, that the law of St Lucia on undue influence is the same as in England and Wales. See, eg, *Murray v Deubery* (1996) 52 WIR 147.

2. The facts

(1) The general factual background

5. On this appeal, the Board is concerned only with the transfers of parcels of land effected by the July 2007 deeds and not with other land transfers by Austin to Vandyke and other family members. Nevertheless, in order to understand the July 2007 deeds, it is necessary to provide a brief summary of the general factual background.

6. The story starts when Austin and his long-time business associate and lawyer, Kenneth Monplaisir ("Monplaisir") acquired lands on both the South Shore and the North Shore of Marigot Bay in 1977. Monplaisir acquired the sole legal title to the lands but he and Austin agreed that they shared the beneficial ownership equally because Austin contributed towards the purchases. In 1984, they partitioned some of the lands on the South Shore between themselves, each taking title to 23 parcels of land (ie Monplaisir transferred legal title to 23 parcels to Austin). Austin set up a company, Austinsheil, to which he transferred the legal title to those 23 parcels of land. Even after that partition, Monplaisir continued to retain legal title to a large number of parcels of land in which Austin had a share of the beneficial ownership. Austin's interest in the remainder of the unpartitioned lands was protected by a registered restriction requiring the consent of Austin to all dealings by Monplaisir with the unpartitioned lands.

7. In 1997 Austin and Sheila went through a bitter divorce. Austin was legally represented by Monplaisir in the divorce proceedings. Those proceedings were eventually determined by the Court of Appeal on 30 October 2002. Sheila was declared to be beneficially entitled to 10 parcels of her choosing among the land on the South Shore owned by Austinsheil; and Austin and Sheila were each held entitled to a 25% share of land jointly owned by Monplaisir and Austin on the North Shore (block number 0444B parcel 4). So after the divorce, Austin and Sheila each had a 25% share in that North Shore land (ie approximately 4 acres each of the approximately 16 acres that comprised parcel 4).

8. In 2005, Austin, who had become ill, and Sheila overcame their differences and remarried. This was all at a time when there remained unresolved issues as regards Austinsheil, and lands held in its name, and as regards lands jointly owned by Austin and Monplaisir but registered in the sole name of Monplaisir. As a result of his illness, Austin considered that he needed help to manage his affairs and, in particular, to resolve disputes that had arisen between him and Monplaisir.

9. Up until this time, Vandyke and Austin had had a hostile relationship. In 1997, during the crisis which resulted in Austin and Sheila's divorce, Vandyke had taken his mother's side. Father and son even came to physical blows leaving both requiring medical treatment. Austin and Vandyke did not speak to each other for nearly eight years from 1997 to early 2005.

10. In 2005, at Sheila's request, Vandyke came to St Lucia from California to see Austin. Austin asked Vandyke to negotiate with Monplaisir on his behalf, in order to partition and share out the remainder of lands that he owned jointly with Monplaisir. Vandyke imposed certain conditions before he would help Austin, to which Austin agreed. They were:

(i) That Austin grant a power of attorney to Diane.

(ii) That Austin's interest in parcels 48, 56 and 103 be transferred to Sheila or one of Austin's daughters. After some discussion Austin proposed their transfer to Diane and Sheila and Vandyke agreed. Parcel 48 is the plot of land containing the matrimonial home of Austin and Sheila and is where Sheila continues to live.

(iii) That Austin comply with the Court of Appeal's orders in the divorce ie that he should transfer to Sheila 10 parcels of the South Shore lands (from Austinshiel), and 4 acres of the North Shore land.

(iv) That Austin cease blocking Vandyke's purchase of parcels 147 and 148 from Monplaisir, who regarded those parcels as his sole property.

(v) That Austin's share in parcel 157 be given to Vandyke in lieu of payment for acting on Austin's behalf in the negotiations with Monplaisir.

11. Austin complied with those conditions including executing a power of attorney in favour of Diane (on 7 June 2005). As a consequence, Vandyke went ahead with the negotiations with Monplaisir. These extended over several months but were concluded in February 2006. On 23 August 2006, Monplaisir, Vandyke and Diane (acting under the power of attorney given her by Austin) signed the two July 2007 deeds of transfer. They were finally executed by a notary, Clarence Rambally, on 23 July 2007. The first was registered on 19 November 2007 and the second on 30 July 2008.

12. In March 2007, Austin travelled from St Lucia to London for medical treatment. On 20 April 2007 Della sent by email to her siblings a letter, dated 18 April 2007, which was said to have been dictated to her by Austin, while he was under her care in

London, in which, among other things, Austin purported to revoke Diane's power of attorney. Diane replied by a letter dated 21 April 2007 disputing the accuracy of Della's letter and implying that Della had concocted its contents. According to Diane's witness statement, when Austin was later confronted with the idea (which Della had told hospital staff) that he had given Della a power of attorney, he very clearly denied it; and Della had tried to stop Austin returning to St Lucia and had taken away his passport which was only returned the day before he was due to fly back. On 20 July 2007 Austin returned from London to St Lucia with Sheila. The two deeds that lie at the heart of this appeal were then executed on 23 July 2007. According to the notary, Clarence Rambally, their contents had been confirmed by Austin on his return from London. Austin died on 27 September 2007.

(2) The July 2007 deeds

13. Each of the two July 2007 deeds transferred various parcels of land, or an undivided half share in various parcels of land, from Monplaisir to Austin who in turn transferred them to Vandyke. Each deed recorded that Austin was represented by Diane exercising her power of attorney.

14. Under the first of the July 2007 deeds, registered as 6670/2007, the following 13 parcels (all on the South Shore in block 0443B) were transferred to Vandyke: 41, 45, 46, 47, 55, 122, 138, 160, 162, 163, 177, 211 and 223.

15. Under the second of the July 2007 deeds, registered as 4224/2008, an undivided half share in parcels 51 and 52 (on the South Shore) and in parcel 4 in block 0444B (on the North Shore) was transferred to Vandyke.

16. Although each of the two deeds specified that the parcels were being transferred from Austin to Vandyke "in the sum of Seventy-Five Thousand Dollars ($75,000)" it was not in dispute that that sum did not represent the value of the lands and it was not envisaged that, in practice, any payment was to be made by Vandyke to Austin for the transfers. At the appeal before us it was suggested by counsel that a possible explanation for the inclusion of that sum might have been to satisfy stamp duty requirements.

17. It is difficult to pin down the extent to which the different parcels of land in the July 2007 deeds were simply gifts from Austin to Vandyke or were, rather, either purchases by Vandyke from Monplaisir or were intended to reimburse Vandyke for expenses he had incurred for Austin or were intended to be held on trust for other family members by Vandyke.

18. At the hearing, Robert Strang, counsel for Vandyke, valiantly and painstakingly provided the Board with a guide to the evidence on many of the central details regarding the relevant parcels of land (and, at the Board's request, he followed this up with a helpful written note). In so doing, he relied particularly on the detailed witness statements of Vandyke and, to a lesser extent, Diane, who the trial judge had regarded as reliable witnesses. Mr Strang submitted orally that, in respect of the first of the July 2007 deeds (registered on 19 November 2007), only four out of the 13 parcels of land transferred (parcels 46, 47, 122 and 177) were gifts to Vandyke from Austin. But, as we shall now explain, the witness statements of Vandyke and Diane do not support that submission (and nor did Mr Strang's subsequent written note). Neither the trial judge nor the Court of Appeal proceeded on that factual basis and we consider that they were entitled not to do so.

19. It is tolerably clear that the position as regards the different parcels of land in the first July 2007 deed, as gleaned particularly from the witness statement of Vandyke, was as follows:

(i) Parcels 160 and 211 were given by Austin to Vandyke as reimbursement for the expenses Vandyke had incurred in building a new matrimonial house for his parents next to the existing matrimonial house (all on parcel 48).

(ii) Vandyke had already bought Monplaisir's half shares in parcels 41, 55, 138, 162 and 223. But Austin still had a half share in those parcels, so that the deed was transferring Austin's half share in those parcels to Vandyke. It would appear that Austin also owned all of parcel 163 and, under the first deed, he transferred that parcel to Vandyke.

(iii) Parcels 46, 47, 122 and 177 were acknowledged by Vandyke to be gifts. He had been waiting until July 2007 to see who his father wanted to receive those parcels of land. He was surprised when his father instructed that they should be transferred to himself (ie to Vandyke). Diane's evidence (see the trial judge at paras 23 and 97) was that on the day in question (19 July 2007) when the instructions were given to Diane to transfer the parcels of land to Vandyke, Austin was still in England after medical treatment (it was the night before he flew back) and Vandyke was in California. But there is a peculiarity here because parcels 45, 46 and 47 (which were close to the matrimonial home on parcel 48) had previously been bought by Vandyke from Monplaisir for $(EC)123,000 in order to protect the privacy and security of the matrimonial home. If Vandyke already owned 45, 46 and 47, there would be nothing to be gained by Austin transferring 46 and 47 to him as gifts. It would appear, therefore, that Austin must have retained a half share in 45, 46 and 47 and it was that half share that was being transferred to Vandyke. As regards parcels 122 and 177 it appears that

Austin owned those parcels outright and was therefore transferring full title (rather than a half share) to Vandyke.

(iv) The conclusion to be reached is that the first deed transferred as gifts to Vandyke from Austin, Austin's share (whether 100% or a half share) in 11 parcels of land. The only two parcels of land which were clearly not given as gifts were parcels 160 and 211.

20. Turning to the second deed, an undivided half share in parcels 51 and 52 (on the South Shore) was transferred to Vandyke. There is no further information about these parcels in any of the witness statements although in his oral evidence at trial Vandyke said that there was a plan to develop the two parcels jointly with Monplaisir. There is therefore nothing to cast any doubt on these being gifts from Austin to Vandyke and this was accepted by Mr Strang before the Board. The deed also transferred an undivided half share in the North Shore parcel 0444B 4. But Vandyke accepts that this half share was transferred by Austin to Vandyke to be held on trust equally for Austin's daughters. In fact, as explained in para 7 above, Austin only had a 25% share in this parcel of land as Sheila had the other 25%. Sheila had subsequently told Vandyke orally that she wanted her 25% share to be divided equally between Della, Beverly and Yasmin and, as to one quarter of the 25%, her poorer relatives in Vandyke's discretion. Although the claimants have expressed concern that Vandyke had indicated that he did not consider himself to be a trustee in respect of the North Shore lands, Mr Strang put that concern to rest by making it clear that Vandyke accepted that he is a trustee for the daughters, and has no beneficial interest himself, in respect of those lands. Indeed at the Board's request, Mr Strang, on behalf of Vandyke, gave an assurance to the Board in open court that Vandyke accepted that that was the position.

21. To summarise, therefore, although the factual position is not wholly clear – and nothing in the decisions of the lower courts precisely deals with the areas of uncertainty outlined above – the Board will proceed on the factual basis that, under the first deed, there were 11 gifts of parcels of land (whether 100% or a half share) from Austin to Vandyke and that, under the second deed, there were 2 gifts of parcels of land (half shares) from Austin to Vandyke. Those are the transfers that the claimants wish to have set aside on the ground of undue influence. The Board puts to one side the North Shore lands because it is accepted by Vandyke that what was Austin's share is held on trust by Vandyke for the daughters in equal shares.

3. The law on undue influence

22. The law on undue influence was rigorously and helpfully analysed by the House of Lords in the leading modern case of *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 ("*Etridge*"). In *Nature Resorts Ltd v First Citizens*

Bank Ltd [2022] UKPC 10, [2022] 1 WLR 2788 ("*Nature Resorts*"), on an appeal from Trinidad and Tobago, the Board (Lords Briggs and Burrows giving the judgment) recently summarised the modern law as laid down in *Etridge*. The Board therefore makes no excuse for citing what was said in *Nature Resorts* at paras 10 -13:

> "10. Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress: see *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2021] 3 WLR 727, paras 8-9 and 89-90) undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C).
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> 11. Ever since *Allcard v Skinner* (1887) 36 Ch D 145, it has been commonplace to divide undue influence into two categories: actual and presumed. But in *Etridge* the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different ways of *proving* undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct … which led to B not exercising a free and independent judgment).
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> 12. As *Etridge* also made clear, there are two requirements for establishing the (rebuttable) presumption of undue influence. First, there must be a relationship of influence. This may be established on the facts. But in respect of some relationships there is what is commonly referred to as an irrebuttable legal presumption (but is more appropriately referred to as a legal rule) that the relationship is one of influence (but note not *undue* influence). Examples of such relationships are doctor and patient (*Mitchell v Homfray* (1881) 8 QBD 587), spiritual adviser and follower *(Allcard v Skinner*), parent and young child (*Lancashire Loans Ltd v Black* [1934] 1 KB 380) and, of direct relevance to the facts of this case, solicitor and client (*Wright v Carter* [1903] 1 Ch 27). The second requirement is that the transaction must not be readily explicable on ordinary motives. The House of Lords preferred this test, which uses

> the words of Lindley LJ in *Allcard v Skinner*, to a test of whether the transaction was manifestly disadvantageous which had been put forward by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 703-707. The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. …
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> 13. If those two requirements are satisfied, so that there is a presumption of undue influence, the burden of proof shifts and it is for the party seeking to uphold the transaction to rebut the presumption by showing that A was not acting under undue influence (ie that A exercised free and independent judgment) when entering into the transaction. Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: see *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*."

4. The decisions below

(1) Godfrey Smith J

23. Della, later joined by Beverley, commenced proceedings against Vandyke and Diane on 6 April 2009 claiming, amongst other things, that the July 2007 deeds should be set aside (ie rescinded) because they were obtained by undue influence exercised by Vandyke over Austin.

24. Godfrey Smith J in a judgment dated 5 July 2017 (Claim no: SLUHCV2009/0338) dismissed all the claims brought against Vandyke and Diane. Confining ourselves to matters that are relevant to this appeal, his judgment can be summarised as follows:

(i) He found Vandyke and Diane to be impressive witnesses. At para 52, he said:

> "I found Vandyke to be honest, direct and very forthright as a witness. There was no attempt at prevaricating. Quite the opposite in fact. He seemed completely candid and open about

> all that had happened in his family. I found him to be truthful and very credible as a witness."

At para 77, he said:

> "I found Diane to be an honest and credible witness who made no attempt to avoid answering questions directly. She too was straightforward, open and candid. There was no attempt to obfuscate or cloud issues."

In contrast, he did not believe some of Della's and Beverley's evidence (paras 76 and 85). For example, he did not believe Della's evidence that Austin had dictated a letter revoking Diane's power of attorney. His evaluation of Della as a witness was that "she was not lacking in guile" (para 85).

(ii) On the totality of the evidence, he was satisfied that Austin was "not a man with whom it was easy to get on" (para 52). He was an accountant and businessman and might even have been considered to be a "crafty businessman" (para 47). Diane was his favourite child. Although Austin gave Diane a power of attorney, "he made her sign an agreement executed by a lawyer that she would consult him on everything" (para 53). The judge went on at para 54:

> "Requiring his favourite child (to whom he had already given a power of attorney) to sign an agreement to consult him on everything, is not the action of a man who is openly trusting and whose will is easily dominated. He recognized that owing to the state of his health he could no longer manage his affairs on his own and needed his children's help but he still wanted to call the shots."

(iii) Godfrey Smith J explained – and on the appeal to the Board all parties accepted that this was an error of law – that one reason why there could be no finding of relevant actual or presumed undue influence exercised over Austin, in respect of the transfers made by the July 2007 deeds, was that the transfers were being made by Monplaisir and not by Austin (paras 92 and 95). That is, the trial judge incorrectly treated the deeds as being transfers from Monplaisir to Vandyke whereas they were ultimately transfers from Austin to Vandyke (even if they also effected, initially, transfers from Monplaisir to Austin).

(iv) There was no actual undue influence exercised by Vandyke or Diane over Austin when he gave a power of attorney to Diane. Although the validity of that

power of attorney was the specific issue being addressed, Godfrey Smith J's findings on there being no actual undue influence can be regarded (as Mr Strang submitted) as equally applicable to Austin's agreement to the transfers embodied in the July 2007 deeds. That is because his approach to the specific power of attorney issue involved him in making general observations as to the dealings between Vandyke, Diane and Austin including that he regarded Vandyke and Diane as reliable witnesses. Moreover, he expressed his conclusion in that section of his judgment in general terms: "I therefore conclude that the evidence, on a balance of probabilities, does not support a finding that there was any actual undue influence exerted on Austin by the defendants." (para 82).

(v) There was no presumed undue influence, as between Vandyke (or Diane) and Austin, because there was no relationship of influence. In any event, even if there were such a relationship, the transfers to Vandyke were readily explicable on ordinary motives. This was for a number of reasons which the judge set out at paras 102-103:

> "In any event, I find that the transfer of disputed lands to the defendants was explicable because of the following findings of fact I make on the evidence before me: Austin was terminally ill and wanted to dispose of his assets as he saw fit; Diane was his favourite child; Vandyke had worked diligently on the unpartitioned lands and had done a good [job] sorting out the estate; by their own admission the claimants had shown no interest in Austin's business; the claimants were not even prepared to pay anything for certain lots when … offered to them; Beverley had been allotted 2 lots and had built on one but it was Vandyke who negotiated, paid for and built the access, a retaining wall and parking lot for her house; Della admitted that she had her own problems in England and was trying to hold on to her marriage and paid no interest in her father's business; Vandyke voluntarily stated that he holds the North shore lands on trust for the estate of Austin Jude.
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> Based on Della, Beverley and Yasmin's lack of interest in sorting out Austin's estate, I find it a credible explanation that Austin, at the very end of his life, would have left everything in the hands of the two children who had demonstrated both interest and ability in his assets. This is hardly an unfamiliar or unusual occurrence in such circumstances."

(vi) It followed that neither of the two requirements for a presumption of undue influence to arise were satisfied. Therefore the judge did not need to go on

to consider whether, in any event, a presumption of undue influence would have been rebutted. However, and this is an important point that will be returned to below, it may be that the judge's general findings on there being no actual undue influence indicated, as Mr Strang submitted, that, had there been a presumption of undue influence, it would have been rebutted.

(2) The Court of Appeal

25. While dismissing the claimants' appeals on all other issues decided by Godfrey Smith J, the Court of Appeal, in a judgment handed down on 18 September 2020 (SLUHVCAP2017/0025), allowed the claimants' appeals in respect of the July 2007 deeds transferring lands to Vandyke. The leading judgment was given by Michel JA, with whom Baptiste JA and Blenman JA agreed. Michel JA's central reasoning on the matters relevant to this appeal was as follows:

(i) The distinction between actual and presumed undue influence was explained in this way at para 41:

> "In the case of actual undue influence, something has to be done to direct the mind of a complainant (like securing his consent to a transaction by abuse of the trust and confidence he has reposed in you), whereas in the case of presumed undue influence it is more a situation of something which has not been done (like ensuring that independent advice is available to the complainant before he enters into the transaction)."

(ii) Once the presumption of undue influence is established by the complainant, by showing the necessary relationship of influence and that the gift or gifts cannot be accounted for by the ordinary motives on which ordinary people act, the burden switches to the defendant to rebut the presumption. To rebut the presumption, the defendant must prove that the complainant obtained independent advice (paras 45, 46, 48 and 56).

(iii) The trial judge made an error of law in reasoning that the July 2007 deeds did not effect transfers by Austin to Vandyke so that any undue influence exercised over Austin was irrelevant. (As has been pointed out in para 24 (iii) above, all parties accept that the Court of Appeal was correct on this point.)

(iv) There was a rebuttable presumption of undue influence by Vandyke over Austin in respect of the July 2007 deeds. This was because (although Michel JA

looked at these in reverse order) first, Vandyke was acting as lawyer for his father so that the relevant relationship of influence was established; and secondly, the gifts made under those deeds were so substantial that they could not be accounted for by the ordinary motives on which ordinary people act. According to Michel JA, the explanation for the gifts given by Vandyke, which Michel JA described as being essentially gratitude for the work done by Vandyke in negotiating with Monplaisir, "beggar[ed] belief" (para 52) and "stretche[d] credulity to its very limits" (para 53). Earlier in para 52, Michel JA elaborated on this point when he said the following:

> "That the lands transferred by Austin to Vandyke fell within the category earlier described of gifts so substantial [that they could not prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act] is borne out by the fact that four out of the sixteen parcels of land transferred to Vandyke by the 23rd July 2007 deeds were sold or agreed to be sold by him for over $3.5 million within less than one year of Austin's death; and with no reason to doubt that there are or were a few million dollars more to be realised from the sale of the other parcels."

(v) That presumption of undue influence had not been rebutted by Vandyke because he had not proved that Austin had taken independent advice.

(vi) Michel JA's conclusion was that it was not open to the trial judge to have found that there was no undue influence by Vandyke over Austin in respect of the July 2007 deeds. The transfers of land under those deeds from Austin to Vandyke would therefore be set aside so that title to those lands would revert to Austin's estate.

5. Errors made by the Court of Appeal

26. In the Board's view, the Court of Appeal made several significant errors of law in its understanding of the law on undue influence. The explanation Michel JA gave of the distinction between actual and presumed undue influence, set out at para 25(i) above, was inaccurate; and he failed to make clear anywhere one of the central points to be gleaned from *Etridge*, namely that undue influence is a single concept and that actual and presumed undue influence are best understood as being two different ways of *proving* undue influence. He also took the view that the only way of rebutting the presumption of undue influence was for Vandyke to establish that Austin had taken independent advice. That is incorrect. The correct legal position is that the taking of independent advice is neither necessary nor conclusive in rebutting the presumption.

What Vandyke would have had to establish to rebut a presumption of undue influence was that, in entering into the July 2007 deeds, Austin was exercising free and independent judgment. While establishing that independent advice was taken and acted on is often the easiest way of rebutting the presumption, it is not the only way.

27. The Court of Appeal was also not entitled to dismiss, without even mentioning, the trial judge's assessment of Vandyke and Diane as impressive witnesses. It was for the trial judge, who saw and heard the evidence being given live, to assess the credibility of the witnesses. Michel JA was not entitled to reject Vandyke's account, of why the gifts were made, as beggaring belief and stretching credulity to its limits, without clearly explaining why he was departing from the trial judge's assessment of Vandyke as honest and credible.

28. Given those errors by the Court of Appeal, the role of the Board on this appeal is to apply the correct law on undue influence to the findings of fact made by the trial judge which, in the Board's view, he was entitled to make.

29. Furthermore, although less significant, there is a complex factual matter that, arguably, the Court of Appeal failed properly to appreciate. We have explained at para 19 above that, of the 13 gifts in the first July 2007 deed, two were not gifts at all. And in relation to the second July 2007 deed, it is now clear (see para 20 above) that Vandyke holds Austin's share of the North Shore lands on trust for the daughters. Moreover, even under the first July 2007 deed, some of the transfers were of Austin's half share because he did not have a 100% share in them all; and in relation to some of the parcels, Vandyke had already bought a half share from Monplaisir. The Court of Appeal did not advert to this complexity. That may have affected its consideration of Vandyke's explanation for the gifts. The Board has set out, at para 25(iv) above, the passage from Michel JA's judgment, at para 52, in which he referred to four out of the sixteen parcels of land, transferred to Vandyke by the July 2007 deeds, having been sold, or agreed to be sold, by him for over $3.5 million within a year of Austin's death. The Board was shown a chart of the sales of the land transferred under the first deed. That confirmed that, within a year, parcels 138, 160, 163 and 211 had been sold by Vandyke for over EC$3.5 million. But there was no mention by the Court of Appeal of the fact that parcels 160 and 211 were not gifts at all but were given as reimbursement to Vandyke for the expenses Vandyke had incurred in building a new matrimonial house for his parents (see para 19(i) above); and that, in relation to 138, Vandyke had already bought a half share from Monplaisir (see para 19(ii) above). The Board takes the view that, while perhaps not crucial, this tends to indicate that the Court of Appeal failed to appreciate the full factual picture; and that failure may have affected its assessment of the explanation for the transfers given by Vandyke and accepted by the trial judge.

6. Applying the law of undue influence to the facts

(1) No actual undue influence

30. The claimants rely on both actual and presumed undue influence. As was said in *Nature Resorts,* they are different methods of proving undue influence, rather than being different types of undue influence. See also *Goff and Jones on The Law of Unjust Enrichment,* 10th ed (2022), para 11-06.

31. The trial judge found that the claimants had failed to prove actual undue influence by Vandyke (or Diane) over Austin in relation to Diane being given a power of attorney. But on the correct interpretation of what the trial judge said, his finding that actual undue influence had not been proved extended beyond Diane's power of attorney and covered the July 2007 deeds (see para 24(iv) above). Although not directly adverted to by the Court of Appeal, the trial judge was entitled to reach that wider decision on there being no proof of actual undue influence by Vandyke in respect of the July 2007 deeds.

(2) Presumed undue influence?

32. It follows that this appeal turns on whether there was undue influence by reason of there being a presumption of undue influence. The evidential rebuttable presumption of undue influence depends on the claimants establishing first, that there was a relationship of influence between Vandyke and Austin; and secondly, that the transfers effected by the July 2007 deeds were not readily explicable by ordinary motives. If those two elements are satisfied by the claimants, there is a presumption of undue influence which Vandyke would need to rebut by proving that, in entering into the July 2007 deeds, Austin was exercising free and independent judgment.

33. First, was there a relationship of influence between Vandyke and Austin? The Court of Appeal held that there was because Vandyke was acting as Austin's lawyer in relation to the negotiations with Monplaisir and in making the relevant transfers of land to Vandyke. The trial judge did not specifically deal with this lawyer-client point in relation to undue influence. In contrast, it is helpful to set out in full what Michel JA said on this at para 55:

> "Next comes the question of whether the relationship between Vandyke and Austin was one in which Austin had such confidence and trust in Vandyke as to place Vandyke in a position to exercise undue influence over him in making such a gift. The answer to be gleaned from all of the cases and

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

34. This is in line with the law as traditionally understood, which is that a lawyer-client relationship gives rise to an irrebuttable legal presumption (ie a legal rule) that the relationship is one of influence. Mr Strang pointed to an article by Sir Kim Lewison, "Under the Influence" [2011] Restitution Law Review 1, 9-10 in which that irrebuttable presumption was criticised: see also the reference to that article in para 29 of *Nature Resorts.* We understand the force of that criticism but Mr Strang accepted that it appeared to be unnecessary in this case to consider departing from the rule that the lawyer-client relationship is irrebuttably presumed to be a relationship of influence. We agree that this is not the case to reconsider that legal rule and we heard no submissions on it. But we reject Mr Strang's principal submission on this point which was that, assuming the legal rule applies, it was inapplicable to the July 2007 transfers because they were outside the scope of that lawyer-client relationship. We disagree with that as a matter of fact but, in any event, it would be a recipe for confusion and uncertainty if one tried to divide up the influence of the lawyer-client relationship in this way.

35. Assuming then, that there was a relationship of influence, by reason of Vandyke acting as Austin's lawyer in relation to the July 2007 deeds, we move onto the second requirement for the presumption of undue influence. Were the gifts to Vandyke readily explicable on ordinary motives? The trial judge answered this in the affirmative and gave his reasons for so doing in paras 102-103 which have been set out in full in para 24(v) above. The Board accepts that a different evaluation might have been reached by the trial judge on this question not least because of the previous terrible relationship between Austin and Vandyke (see para 9 above) and because there were still trust issues between them (see para 37 below). Nevertheless, on balance, we consider that he was

entitled to make that finding; and the Court of Appeal was not entitled to reject that finding, on the basis that Vandyke's evidence on this could not be believed, given the trial judge's assessment of Vandyke and Diane as credible witnesses (see para 24(i) above). As we have also explained, the Court of Appeal may have misunderstood the full factual picture which may have affected its assessment of the explanation for the transfers given by Vandyke and accepted by the trial judge (see para 29 above). In support of the trial judge's findings on this issue, we would add that Vandyke was not only Austin's lawyer but was, of course, his son; and the transfers of parcels 46, 47, 122 and 177 were at a time when Austin had had a dispute with Della who had taken away his passport (see para 12 above).

36. It follows that there was no presumption of undue influence. That is a sufficient reason to allow this appeal.

37. However, even if there were a presumption of undue influence, the Board considers that, at the third stage in the inquiry, such a presumption had been rebutted by Vandyke. This was because, applying the trial judge's findings, Vandyke had proved that there was no undue influence ie that Austin had exercised free and independent judgment in relation to the July 2007 deeds. The trial judge had found, on the facts, that Austin had continued to make his own decisions on the transfers of land. Diane was constrained in the exercise of her power of attorney because Austin had insisted on a formal letter by which she agreed to consult with him. Despite his failing health and periods of confusion and forgetfulness, he still wanted to "call the shots". While Vandyke was advising him, and acting as his lawyer, Austin did not give up making his own decisions as reflected in the finding of the trial judge that "there were still trust issues between Vandyke and his father [and, in] light of this, it simply cannot be said that Austin reposed trust and confidence in Vandyke" (para 99).

38. Mr Strang also submitted (see para 24(vi) above) that this rebuttal of the presumption followed from the general findings of the trial judge that there was no actual undue influence by Vandyke. That is, he submitted that, although framed in terms of there being no actual undue influence, the trial judge was going further and was making a finding that there was no undue influence. Such a finding undermined, because inconsistent with, the Court of Appeal's decision that there was presumed undue influence: as explained in *Etridge* and *Nature Resorts,* undue influence is a single concept so that one cannot logically find that there is presumed undue influence while at the same time finding that that there was no undue influence.

39. That submission, which we accept, ties up with the Court of Appeal's error identified at para 26 above concerning how one rebuts the presumption of undue influence. The Court of Appeal considered that the only way to rebut the presumption of undue influence was for Vandyke to prove that Austin took independent advice. But that is incorrect. The presumption of undue influence can be rebutted in any way that proves

that the person in question exercised free and independent judgment in relation to the transactions in question. Vandyke had here proved that by establishing, as the trial judge found, that Austin was not acting under Vandyke's undue influence when deciding on the July 2007 deeds.

40. The Board's conclusion is that there was no presumed undue influence in respect of the July 2007 deeds. The presumption of undue influence did not arise because the July 2007 deeds were readily explicable on ordinary motives and, in any event, any such presumption had been rebutted by Vandyke.

(3) Conclusion on undue influence

41. It follows that, contrary to the Court of Appeal's decision, the undue influence claims against Vandyke in respect of the July 2007 deeds, whether relying on proof of actual undue influence or on the evidential presumption of undue influence, should have failed. Godfrey Smith J's dismissal of the undue influence claims against Vandyke in relation to the July 2007 deeds should be restored.

7. One loose end

42. There is one final matter that has not so far been mentioned. Although it did not feature at all in the oral submissions before the Board, it was briefly referred to in the parties' written submissions. Towards the end of his judgment in the Court of Appeal, Michel JA said, at para 95, that, had he not found that the July 2007 deeds were procured by undue influence exercised by Vandyke over his father, he would have found "that a constructive trust was created by Austin which obliged Vandyke to distribute the lands to his sisters, with the power to determine the mode and manner of distribution."

43. If we put to one side the express trust of the North Shore Lands that has been accepted by Vandyke (see para 20 above), there is no explanation that has been given, and in our view no possible explanation that could be given, for there being a constructive trust of the lands transferred under the July 2007 deed. We therefore find that there was no such trust and that Michel JA's obiter dicta to the contrary should be rejected.

8. Overall conclusion

44. For all the reasons given, the July 2007 deeds were not obtained by undue influence exercised by Vandyke over Austin. The Board will therefore humbly advise His Majesty that the appeal should be allowed.