



Easter Term

[2015] UKPC 24

Privy Council Appeal Nos 0042 and 0044 of 2013

JUDGMENT

Desir and another (Appellants) v Alcide (Respondent) (Saint Lucia)

Alcide (Appellant) v Desir and another (Respondents) (Saint Lucia)

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

before

Lord Mance

Lord Clarke

Lord Wilson

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

21 May 2015

Heard on 16 February 2015

Appellants

Peter I Foster QC

Diana M Thomas

(Instructed by Simons Muirhead & Burton Solicitors)

Respondent

Dexter Theodore QC

(Instructed by Michel & Co)

LORD CLARKE:

The facts

1.

The parties prepared a précis of the appeals as an annex to the agreed statement of facts and issues. The two documents are broadly in these terms and give a flavour of the case. Mrs Bella Butcher's husband Epiphane died on 1 November 2005 in Venezuela. Three weeks later, on 22 November 2005, Mrs Butcher made a will before two Notaries Royal, Leandra Verneuil and Mary Charles. In her will she named Mrs Sabina Alcide and Mrs Marguerite Desir as sole residuary legatees and devisees of her property. Mrs Alcide is her niece. She named Mrs Desir as sole executrix of her will. She also devised her share of her matrimonial home to Mrs Alcide and made other specific bequests to several

persons. She had no children. On the same day, 22 November 2005, Mrs Butcher executed a general power of attorney in favour of Mrs Desir. She also opened two joint accounts with Mrs Desir, who, like Mrs Butcher, lived in Saint Lucia. The period during which Mrs Butcher knew Mrs Desir is in dispute but Mrs Desir maintained that she was close to both Mrs Butcher and her husband for several years before she died.

2.

Mrs Butcher was the owner of a valuable property with commercial warehouses on it ("the property") situated at Massade Gros Islet on Saint Lucia and registered at the Land Registry - Saint Lucia as Parcel No 1257B6. The market value was assessed in September 2007 by the Inland Revenue Department for the income year 2006 in the sum of EC\$7,442,726. There was evidence from a valuer that the market value in 2008 was EC\$7,836,216. On 8 January 2007 a company was incorporated called Commercial Warehouse Limited ("CWL"), whereafter the property was sold by Mrs Butcher to CWL for EC\$644,000. Four shares in CWL were issued, of which two were owned by Mrs Butcher and the other two were owned by Mrs Desir (having been granted to Mrs Desir by Mrs Butcher). The Deed of Sale ("the Deed of Sale") was executed on behalf of Mrs Butcher in the presence of Leandra Verneuil on 10 April 2007. It was not in dispute that the sale was at a considerable undervalue.

3.

The medical evidence showed that Mrs Butcher suffered from diabetes and motor neurone disease, which eventually caused some physical incapacity. By January 2007 her speech was slurred and she was unable to carry out her everyday living tasks on her own. She died of a heart attack on 13 April 2007 aged 61. The will was admitted to probate on 28 June 2007.

The history

4.

Mrs Butcher was Mrs Alcide's aunt. She raised her in her household for approximately the first seven years of her life. Mrs Butcher then moved to Texas with her husband and returned to Saint Lucia in about 1994. During the time Mrs Butcher lived in Texas, Mrs Alcide travelled to Texas and stayed with her for a period of about six months. Mrs Alcide herself migrated to the United States in or about 2002 and remained there. Mrs Butcher went to the United States for Mrs Alcide's wedding in 2003 and again in 2004 after she had her first child.

5.

Mrs Desir said that she met Mrs Butcher at the Gros Islet Health Centre when she was about 12 years old and that she later became reacquainted with her in about 1994 when Mr and Mrs Butcher came back to Saint Lucia and Mrs Desir had left school and was working with the Bank of Saint Lucia, then called National Commercial Bank. She said that she became close first to Mr Butcher, whom she assisted with his banking business, and then to Mrs Butcher. She also said that she was friends with them and assisted them with their businesses before Mr Butcher died. Mrs Alcide disputed these assertions and maintained that Mrs Desir was a stranger to the Butcher family until after Mr Butcher died. Mrs Alcide said that Mrs Desir had been an employee of the bank or banks where Mrs Butcher and her late husband (or their companies) had their principal bank accounts and Mrs Desir thus became familiar with Mr and Mrs Butcher and their finances.

The proceedings

6.

On 6 June 2007 Mrs Alcide filed a claim against Mrs Desir in her personal capacity. She sought the following orders: (1) an injunction restraining Mrs Desir from dealing with funds in bank accounts in the name of Mrs Butcher or in the name of any company under her control; (2) an order for an account; (3) an order that Mrs Desir restore monies to the bank accounts; (4) further and necessary consequential accounts; (5) damages; (6) further and other relief; and (7) costs.

7.

The thrust of Mrs Alcide's case as stated by her in the pre-trial memorandum was that Mrs Desir "got her name unto (sic) [Mrs Butcher's] bank accounts and got [Mrs Butcher] to transfer title to her property by actual or constructive fraud, by undue influence or by taking advantage of [Mrs Butcher's] vulnerability, weakness or incapacity". That appears to the Board to be a succinct summary of the substance of Mrs Alcide's case then and now. In short, she challenged the transfer of property to CWL but not the will.

8.

Mrs Desir filed a defence on 29 June 2007 and on 22 November 2007 Mrs Alcide filed an amended statement of claim in which Mrs Desir was sued, not just in her personal capacity, but also in her capacity as executrix of Mrs Butcher's will. Mrs Alcide specifically sought the improbation of the Deed of Sale dated 10 April 2007. Thereafter an amended defence was filed on 12 December 2007 and the matter came on for trial on 16 December 2008 before Georges J (Ag) ("the judge"). It lasted seven days between 16 December 2008 and 24 January 2009. Judgment was not given until 22 August 2011.

9.

In his judgment the judge summarised his conclusions in paras 114 and 115 and his orders in paras 116 to 119. He said in para 114 that on the evidence he entertained no doubt that Mrs Desir exerted undue influence to procure her own name on the personal bank accounts or the accounts of companies in the name of or under the control of Mrs Butcher at the Bank of Saint Lucia, the Royal Bank of Trinidad and Tobago and the Bank of Nova Scotia. In para 115 he said that he was equally satisfied and convinced that the Deed of Sale, which was registered at the Land Registry on 22 May 2007 and purportedly executed by Mrs Butcher as vendor, was executed by her, if at all, without legal advice and for that reason ought to be improbated. The judge accordingly ordered that Mrs Desir, in both her capacities, render appropriate accounts and that the Deed of Sale be improbated.

10.

Mrs Desir appealed to the Court of Appeal. She applied for a stay of the orders pending appeal but her application was refused. The Court of Appeal (Mitchell JA, Baptiste JA(Ag) and Thon JA(Ag)) delivered judgment on 18 September 2012. The only substantive judgment was delivered by Mitchell JA, with whom the other members of the court agreed. The court dismissed the appeal on the underlying merits but allowed the appeal on the improbation point. It set aside the improbation order but affirmed the other orders in favour of Mrs Alcide and awarded Mrs Alcide half her costs. Both parties filed applications for conditional leave to appeal to the Board. They were both granted conditional leave on 10 December 2012 and the Board granted final leave to both parties in March 2013.

The appeals before the Board

11.

There are two appeals before the Board. The first, Appeal No 0042, is Mrs Desir's appeal against the Court of Appeal's dismissal of her appeal on the undue influence point (and related issues). The second appeal is Appeal No 0044, which is Mrs Alcide's appeal against the decision of the Court of

Appeal allowing Mrs Desir's appeal on the improbation point. It is convenient to consider the two appeals separately, although in considering Appeal No 0042 it is necessary to have some regard to the events surrounding the Deed of Sale.

Appeal No 0042: undue influence and related issues

12.

The first two issues identified in the agreed statement of facts and issues are these: (a) whether the laws of England, in relation to the burden of proof of undue influence, apply to St Lucia in so far as article 927 of the Civil Code Cap 4.01 provides that fraud can never be presumed and must be proved, and article 2066 provides that good faith is always presumed so that he who alleges bad faith must prove it; and (b) whether the Court of Appeal and the High Court misdirected themselves in applying the laws of England in relation to the application of the doctrine of presumed undue influence to Saint Lucia and the present circumstances.

13.

As stated above, the judge treated Mrs Alcide's claim as a claim based on undue influence. It was not, as the Board sees it, part of Mrs Desir's case before the judge that the English law of undue influence was irrelevant and that the relevant law was that of Lower Canada. Before the Board, Mrs Desir says that the question raised by the first two issues can be summarised in this way: (1) Do the laws of England in relation to the burden of proof of undue influence apply to Saint Lucia in so far as article 927 of the Civil Code Cap 4.01 provides that fraud can never be presumed but must be proved? (2) Does article 2066 provide that good faith is always presumed and that he who alleges bad faith must prove it? (3) Did the Court of Appeal and the judge misdirect themselves in applying the laws of England in relation to the application of the doctrine of presumed undue influence to Saint Lucia and the circumstances of this case? The case was not put in that way before the judge. In so far as some reliance may have been put on the law of Lower Canada or elsewhere before the Court of Appeal, it was rejected.

14.

Article 917A of the Civil Code in Saint Lucia provides, so far as relevant:

"(1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to Saint Lucia, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the 'Coutume de Paris';

Provided, however, as follows:-

(a) the English doctrine of consideration shall not apply to contracts governed by the law of Saint Lucia and the term 'consideration' shall have the meaning herein assigned to it;

(b) the term 'consideration' when used with respect to contracts shall continue as heretofore to mean the cause or reason of entering into a contract or of incurring an obligation; and consideration may be either onerous or gratuitous;

(c) third persons shall continue to have and exercise such rights with respect to contracts as they heretofore had and enjoyed under article 962 or any other statute.

(2) Paragraph (1) of this article shall not be construed as affecting the provisions of the Ninth Chapter of this Book (which relate to Proof of Obligations), or as affecting the provisions of the Fifth to Sixteenth Books of this Part or of any other statute relating to specific contracts save in so far as the general rules relating to contracts are applicable to such contracts.

(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail." (Added by Act 34 of 1956)

15.

As the Board sees it, the essential thrust of article 917(A)(1) is that issues of unjust enrichment must be determined under English law. It is not persuaded that any of the exceptions contained in the proviso to paragraph (1) or in paragraphs (2) and (3) apply to this case. In any event none of the submissions summarised above assists Mrs Desir. Although the judge does refer to actual or presumed fraud or undue influence, it is quite clear that he held that Mrs Desir was guilty of actual fraud or undue influence. The question whether presumed fraud or undue influence was relevant would only arise if the Board were to allow the appeal against his finding of actual wrongdoing.

16.

In deciding whether Mrs Desir was guilty of actual wrongdoing, the judge was of course entitled to draw appropriate inferences from the evidence before him, as indeed he did. For the reasons given below, the Board concludes that the judge was entitled to reach the conclusion that Mrs Desir was guilty of actual wrongdoing. It follows that the questions raised by the first two issues (however precisely formulated) do not arise.

17.

The third issue raised in the agreed statement of facts and issues (issue (c)) relates to the Deed of Sale which is discussed below. The fourth issue (issue (d)) raises at least two different questions, namely: (1) whether the causes of action of undue influence, fraud, lack of capacity or resulting trust were properly pleaded and (2) whether the Court of Appeal properly considered and analysed the evidence in order to arrive at the conclusion that the facts necessary to raise the issues were pleaded or set out in a combination of the claim form, statement of claim and witness statements. The fifth issue (issue (e)) is whether the judge and the Court of Appeal failed properly to weigh and consider the evidence in relation to the issue of undue influence for both the Deed of Sale and the joint account. The sixth issue (issue (f)) is whether the judge unduly intervened and made comments which showed apparent bias leading to a miscarriage of justice.

18.

It is convenient to consider the issues in this order. (1) Was Mrs Alcide's case on undue influence was sufficiently pleaded? (2) What is the correct approach of the Board to concurrent findings of fact in the courts below? (3) Subject to (4) below, should the judge's conclusions of fact should be upheld in respect of the joint account and the Deed of Sale? (4) Did the judge exhibit apparent bias?

(1) Undue influence: the pleadings

19.

It is sufficient to say that the Board has no doubt that the claim in undue influence is sufficiently pleaded, both in the amended statement of claim and in the pre-trial memorandum referred to above. Although in his judgment the judge did not always distinguish clearly between the passages in which he was setting out the parties' cases and his conclusions of fact and law, having essentially set out the

cases of both sides in some detail between his paras 10 and 48, he identified the issues in para 49 as follows:

“49. From the facts outlined the central issue which falls to be determined in this case is whether the first defendant by fraud (actual or presumed) or by taking advantage of the vulnerability weakness or incapacity of the deceased Albertha Bella Butcher as a result of her failing health, medical condition and the recent loss of her husband and business partner caused Mrs Butcher to do various things to the benefit of herself [ie Mrs Desir] including:

- (1) Naming her as the sole executrix and a principal beneficiary of her Will;
- (2) Opening a joint account or accounts with her and transferring to that account or those accounts almost all of the monies which she and her late husband had;
- (3) Giving her a Power of Attorney; and
- (4) Transferring to a company controlled by herself Mrs Butcher’s property at Rodney Bay Industrial Estate valued at \$7,836,216 for a consideration of \$644,000”

20.

That summary is, as the Board sees it, reflective of the way the case was pleaded in the amended statement of claim, which alleged in para 8 that Mrs Desir got her name on to Mrs Butcher’s bank accounts by actual or constructive fraud and then sought to convert the proceeds to her own use. Paragraph 8(3) alleged as follows:

“[Mrs Desir] took advantage of [Mrs Butcher’s] vulnerability and manipulated [Mrs Butcher], causing her to sign documents, including a Power of Attorney dated the 22nd day of November 2005, which documents [Mrs Desir] used to get her name onto [Mrs Butcher’s] bank accounts and/or to transfer funds from [Mrs Butcher’s] bank accounts or bank accounts in the names of companies under the control of [Mrs Butcher] to bank accounts in the joint names of the [Mrs Butcher] and [Mrs Desir].”

21.

Paras 9 and 10 of the amended statement of claim were in these terms:

“9. Further or alternatively, the consent of [Mrs Butcher] to appending her signature to the documents referred to in para 8(3) was obtained by the undue influence of the [Mrs Desir] over [Mrs Butcher].

NATURE OF CASE

[Mrs Butcher] was at the material time seriously ill and recently widowed and [Mrs Desir], knowing of [Mrs Butcher’s] consequential vulnerability and knowing too of her financial worth, worked her way into [Mrs Butcher’s] confidence.

[Mrs Desir] so took advantage of [Mrs Butcher’s] vulnerability as to assume complete domination over her and cause her to sign documents, including a Power of Attorney, which were used to get [Mrs Desir’s] name on to [Mrs Butcher’s] bank accounts and/or to transfer funds from [Mrs Butcher’s] bank accounts or bank accounts in the names of companies under the control of [Mrs Butcher] to bank accounts in the joint names of Mrs Butcher and Mrs Desir.

10. Further or alternatively, at the time of [Mrs Butcher’s] signing of the documents referred to in para 8(3), [Mrs Butcher] did not know and/or approve what she was signing.

NATURE OF CASE

(1) At the time of the signing of the documents, [Mrs Butcher] was hypertensive and diabetic, had suffered from strokes and heart attacks, and also had other debilitating medical conditions, and was not then capable of understanding and appreciating the nature and consequences of her actions.”

22.

The allegations in paras 9 and 10 were further particularised in paras 12 and 13, where it was respectively alleged that the entry of the name of Mrs Desir on the relevant bank accounts was obtained by undue influence and that Mrs Butcher lacked capacity to execute the documents which were used to get Mrs Desir’s name on the accounts. Further, paras 15 to 18 pleaded the case based on the Deed of Sale which is further discussed below.

23.

In these circumstances the Board concludes that the case of actual undue influence was sufficiently pleaded on behalf of Mrs Alcide. The Court of Appeal so held and was entitled to do so. In his judgment in the Court of Appeal, having set out in para 46 a number of complaints made on behalf of Mrs Desir to the effect that undue influence was not sufficiently pleaded, Mitchell JA continued:

“If Mr Foster [counsel for Mrs Desir] is correct in this analysis, then I would only observe that it was a pity that Mrs Desir's attorney at the trial did not point it out to the learned trial judge. The parties and the trial judge appear to have proceeded with the trial on the basis that the pleadings were adequate to deal with the issues raised. This court has regularly ruled that it would not be proper for a court of appeal to decide on a point questioning the sufficiency of the pleadings when that point had not been raised in the court below and ruled on by the trial judge. In any event, as Mr Theodore [counsel for Mrs Alcide] responds, Mr Foster's submissions seem to suggest a need for a claimant to plead law, which is not a procedure to be encouraged. The modern rule is that a party is required only to plead sufficient facts which go to show the existence of a cause of action. You are required to plead the facts, not the law applicable to those facts. In this case, I am satisfied that all the facts necessary to raise the issue of undue influence were pleaded in the total of the Claim Form, the Statement of Claim, and the Witness Statements.”

The Board agrees with those conclusions, both as to the general approach and as to the sufficiency of the pleadings and other documents referred to.

(2) The correct approach of the Board to concurrent findings of fact made by the courts below

24.

In the very recent decision of the Board in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, Lord Mance, giving the judgment of the Board, summarised the relevant principles under this head between paras 4 and 9. In that case the Board was considering a case in which it was being asked to hold that the respondents were guilty of a lack of probity in circumstances in which the courts below had rejected that case. In the instant case, the Board is being asked to hold that the courts below were wrong to hold that Mrs Desir was guilty of wrongdoing. As Lord Mance showed, the principles in the two classes of case are not identical but they are based on a similar approach.

25.

At paras 4 and 5-6 Lord Mance stressed two particular points which are important here. First, the Board will as matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains as stated in *Devi v Roy* [1946] AC

508. Second, quite apart from the settled rule relating to concurrent findings, any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ.

26.

Although, as Lord Mance explained in paras 8 and 9, there are circumstances in which an appellate court may be justified in intervening or even required to do so, the appellant has an uphill struggle especially where, as in this case, there are concurrent findings of fact in the courts below.

(3) Undue influence: subject to (4) below, whether the judge's conclusions of fact should be upheld in respect of the joint account and the Deed of Sale.

27.

As stated above, although the judge referred to the fact that the alleged undue influence was actual or presumed, he decided the case on the basis that actual undue influence was established. The judge correctly focused on two particular aspects of the evidence. Taken chronologically, the first was the power of attorney and the opening of a joint account or accounts and the second was the sale of the property at a substantial undervalue. The Board will consider them in turn.

28.

Mr Butcher died on 1 November 2005. Three weeks later, on 22 November 2005, Mrs Butcher executed a power of attorney in favour of Mrs Desir. She also signed what the judge called bank signature cards which Mrs Desir used to get her name on Mrs Butcher's bank accounts and to transfer funds from those accounts or from accounts under Mrs Butcher's control to bank accounts in the joint names of Mrs Butcher and Mrs Desir. It was on the same day, 22 November 2005, that Mrs Butcher made her will appointing Mrs Desir sole executrix and a principal beneficiary and universal residuary legatee and devisee equally with Mrs Alcide. Mrs Alcide's case was that at that time Mrs Butcher was seriously ill and recently widowed and that Mrs Desir, knowing of that vulnerability and her financial worth, worked her way into Mrs Butcher's confidence and induced her to sign the documents referred to above. It was Mrs Alcide's case that Mrs Butcher did not know what she was signing. These allegations are summarised in paras 10 to 15 of the judge's judgment. As the Board reads the judgment, the judge essentially accepted them.

29.

The judge directed himself in para 18 that the crux of the case was that the evidence clearly showed that within a matter of 18 months of the death of Mr Butcher on 1 November 2005, a substantial portion of the properties, cash assets and possessions of Mrs Butcher, who herself died on 13 April 2007 (after a prolonged debilitating illness), fell into the hands of Mrs Desir in her personal capacity as well as in her capacity as a principal beneficiary and sole executrix of Mrs Butcher's will. The judge noted in particular that, in addition to the claims in the statement of claim, Mrs Alcide sought improbation of the Deed of Sale, which was made on 10 April 2007, only three days before Mrs Butcher died.

30.

The judge also noted in para 26 that Mrs Desir was named and constituted with Mrs Alcide as equal universal residuary legatee and devisee of the “rest, remainder and residue” of Mrs Butcher’s properties wherever situated of which she stood possessed at the date of her death. In para 29 the judge focused on the wide terms of the power of attorney (dated the same date as the will)

“to do and to perform on her behalf the following acts matters and things to include but not limited to taking charge of managing transacting and administering all and singular the Constituent’s (Bella Butcher’s) affairs business and property in Saint Lucia in such manner as she shall think fit.”

He added at para 30 that Mrs Desir was evidently a person in whom Mrs Butcher reposed a great deal of trust and confidence and Mrs Butcher would have relied on her to act in her best interests.

31.

There followed a passage in the judgment between paras 31 and 33 in which the judge considered the question whether Mrs Desir was a stranger to the Butchers. He summarised the evidence of Mrs Alcide to the effect that she first heard the name Marguerite Desir on 9 November 2005 (which was just over a week after Mr Butcher’s death) when she received a telephone call in the USA from Saint Lucia from someone who identified herself as Mrs Desir and said that she was handling some matters for Mrs Butcher. By way of contrast, the judge summarised Mrs Desir’s evidence to the effect that she and Mrs Butcher had had known each other for over 20 years. It is plain from an overall reading of the judge’s judgment that he did not accept that evidence and preferred the evidence of Mrs Alcide on this point.

32.

The judge then briefly considered the opening of the joint accounts between paras 34 and 39. He summarised the evidence of Mrs Alcide shortly in this way. Mrs Desir again telephoned Mrs Alcide in December 2005. Mrs Desir told Mrs Alcide that her aunt, Mrs Butcher, needed someone to handle her accounts and her affairs and that she (Mrs Desir) had asked Mrs Butcher to consider whether Mrs Alcide’s mother (who was still alive) might perform that role but that Mrs Butcher did not agree. Mrs Desir then asked Mrs Alcide whether she would be willing to take up the responsibility and she told her that she would and that the relevant documentation merely needed to be sent to her for signature. In January 2006, Mrs Desir telephoned her and told her that her aunt had done her will. Mrs Alcide told Mrs Desir that she wanted a copy of the will. Mrs Desir said that she would ask the lawyer for one and get back to her.

33.

According to Mrs Alcide, she spoke to Mrs Desir about a week later and again asked her about the copy of the will. Mrs Desir told her that she had forgotten to ask the lawyer about it. That conversation was emphatically denied by Mrs Desir. A few weeks later, according to Mrs Alcide, she again spoke to Mrs Desir, who told her that the lawyer had said that copies of the will could not be made available until Mrs Butcher died.

34.

Mrs Alcide said that she spoke to Mrs Desir with increased frequency in the course of 2006 during which time Mrs Butcher was becoming seriously ill. She became wheelchair bound. Mrs Alcide further said that Mrs Desir revealed that she was now a signatory on Mrs Butcher’s bank account so that she could handle her affairs for her but never told her anything about joint accounts. The judge emphasised the words the Board has put in italics, from which the Board infers that the judge accepted Mrs Alcide’s evidence to that effect and thought that it was significant that Mrs Desir did not keep Mrs Alcide fully in the picture.

35.

Under the heading "The Defence", at paras 44 and 45 the judge considered what he called one of the main thrusts of Mrs Desir's defence. It was that, contrary to Mrs Alcide's assertion that she had been raised by Mrs Butcher (her lawful aunt) as one of her own daughters and that she had previously told her and others that everything she owned would upon her death be passed on to her, the truth was that she was just one of several persons for whom Mrs Butcher had cared at times as her own children. The judge said that no evidence was, however, adduced as to exactly who any of the several persons that were allegedly cared for by Mrs Butcher were. The judge held that, on the contrary, Mrs Alcide, who was variously called Sabina or Sabby, featured prominently in Mrs Butcher's life and that the evidence was replete with letters of love and affection from her to Mrs Alcide from 2002, when the latter migrated to the USA to further her studies, which Mr and Mrs Butcher in fact sponsored to the tune of US\$30,000. Throughout her residence in the USA she and Mrs Butcher continued to communicate regularly by telephone and Mrs Butcher visited Mrs Alcide in 2003 for her wedding and the following year after the birth of her first child. The next visit in January 2007 was frustrated. The judge added that, significantly, there was an undated handwritten tribute by Mrs Alcide to Mrs Butcher on her death in April 2007, which was to have been read at the funeral since she could not travel to Saint Lucia at that time because of immigration constraints. The judge said that the tribute spoke for itself and then asked: why then did the tide of filial love between them wane from 2005? The evidence showed that Mrs Butcher loved all her family. She had sent her mother on a pilgrimage to Lourdes with all expenses paid and had paid for radiation therapy for her sister Monica (Mrs Alcide's mother) in Barbados and for Mrs Alcide's sister Glenda to visit Texas. Why then, the judge asked in para 45, the radical 'turn around' depicted by Mrs Desir in the year or so preceding her aunt's death in April 2007 and following her aunt's husband's death in November 2005?

36.

It is plain from the way the judge expressed those questions that he rejected Mrs Desir's account and accepted that of Mrs Alcide. In the opinion of the Board he was entitled to do so.

37.

The Board can pass over paras 46 and 47, but at para 48 the judge returned to the joint accounts. He said this:

"Regarding funds held in joint accounts with [Mrs Butcher] which since the death of [Mrs Butcher] [Mrs Desir] had moved to bank accounts in her own name, [Mrs Desir] states that she did so pursuant to legal advice (by Leandra Verneuil) on the basis that she was now solely entitled to the money by virtue of the right of survivorship and denies that she got her name on [Mrs Butcher's] bank accounts by constructive or actual fraud and now sought to convert the proceeds to her own use. The court notes that all the funds in the joint accounts were derived and/or originated from Mrs Butcher who was then almost 60 years old and had been recently widowed and was in failing health having suffered from strokes and heart attacks and also had other debilitating medical conditions. Mrs Desir aged 30 years was then Regional Human Resource Manager at Harris Paints with over 12 years banking experience up to management level and was a highly qualified business executive. One such account Mrs Desir disclosed in cross-examination stood at \$662,000 and at [Mrs Butcher's] death was over \$500,000. Vis à vis [Mrs Butcher] she was obviously a person of superior intellect as well as business and financial acumen. Small wonder that Mr Butcher frequently consulted and sought her advice and assistance at the bank."

38.

The Board has set out the judge's summary of the issues in para 19 above. Of those issues, the judge plainly considered that the most striking was that identified in his para 49 as the fourth of the benefits conferred on Mrs Desir, namely transferring to CWL Mrs Butcher's property at Rodney Bay Industrial Estate valued at EC\$7,836,216 for a consideration of EC\$644,000.

39.

In paras 50 to 53 the judge set out some aspects of the facts which particularly struck him. First, the commercial entity/enterprise Bella Warehouse Holdings Limited ("Bella") whose warehouses were "sold" at such a gross undervalue to CWL (of which Mrs Desir was and remained a 50% shareholder) was in fact the largest revenue earner of Mrs Butcher's estate, yielding (according to Mrs Desir) approximately EC\$65,000 per month with a single debtor owing over EC\$100,000 amongst others. Second, the reasons advanced by Mrs Desir under cross-examination for the sale of the property to CWL at such a gross undervalue (actually 9% of the market value) were in the judge's view "absolutely preposterous" and bordered on the ludicrous. He identified three reasons which Mrs Desir gave as to why Mrs Butcher sold the property as follows: (1) for the purpose of paying her debts, which in respect of Bella allegedly stood at EC\$881,000, whereas the evidence showed that at the time Mrs Butcher had substantial bank balances as well as debtors and lucrative income-bearing assets; (2) so that she would have died with peace of mind, in circumstances in which Mrs Desir said that her business creditors had been pressing her; and (3) in order to mitigate the incidence of stamp duty and land tax, which he thought would be an attempt to defraud the revenue. The judge concluded in para 52 that the only person who profited from what he described as a "monstrous transaction" was Mrs Desir as a 50% shareholder in CWL and its managing director and controller.

40.

The judge put his general conclusion thus at the end of para 52:

"Having regard to the obvious degree of trust and confidence reposed by Mrs Butcher in Mrs Desir in the management of her personal business and financial affairs as well as the paramount domination which she exerted over her as a result of her vulnerability, failing health and general medical and physical condition Mrs Desir was clearly able to take and indeed took unfair advantage of Mrs Butcher by use of her dominant influence over her. And I so find. This was without doubt an unconscionable transaction."

41.

The judge was also struck by the events surrounding the Deed of Sale. He noted at para 19 that the Deed of Sale was purportedly executed by Mrs Butcher on 10 April 2007, three days before her death, and that it was signed on her behalf by a Notary Royal, Shawn Innocent, because her motor skills were impaired and her handwriting was allegedly illegible. It was signed in the presence of Leandra Verneuil, who was acting for CWL, the purchaser, of which Mrs Desir was director and a 50% shareholder. The contract price was EC\$644,000, which the judge said (at para 20) was a fraction of the estimated market value.

42.

Not unnaturally the judge considered the dates to be of some significance. This can be seen from paras 21 to 24 of the judgment as follows:

"[21] Further [Mrs Butcher] who died on 13 April 2007 after multiple strokes and heart attacks as well as other debilitating medical conditions was at the date of the purported execution of the Deed of Sale at a stage near death and was then under the complete domination of [Mrs Desir] and was incapable of alienating her property it is contended.

[22] Alternatively it is pleaded that if [Mrs Butcher] did alienate her property by the said Deed of Sale she did so under the presumed or actual undue influence of [Mrs Desir] who had by then become her confidante.

[23] [CWL] was incidentally incorporated on 8 January 2007 and the Deed of Sale states in the WHEREOF RECORD that:

‘the parties thereto had set their hands after due reading thereof as follows: THE PURCHASER and the VENDOR by one of the said notaries SHAWN INNOCENT at Castries on the 26th day of January 2007 in the presence of the said notaries THE VENDOR having declared her inability to sign her name on account of illness her signature being hereunto required by law.’

Marguerite Desir the first defendant and Executrix of the Will of Albertha Bella Butcher deceased (the Vendor) maintained under cross examination that the Deed of Sale was in actual fact signed on 26 January 2007 in Castries and not on 10 April 2007 as stated in the first line of the deed.

[24] Those glaring discrepancies in the date and place of the purported execution of the Deed of Sale casts grave doubt in my mind on the authenticity of the document which recited that the parties thereto had hereunto set their hands **after due reading over** etc. And this is all the more important where the vendor Bella Butcher did not actually sign her name. As stated earlier the said deed was in fact only registered at the Land Registry weeks after its alleged execution and after the death of the vendor.” [The judge’s emphasis]

43.

In para 25 the judge recorded that Mr Innocent had said in his witness statement that this was his one and only interaction with Mrs Butcher, which he said in cross-examination may have lasted between 45 minutes and an hour, yet (the judge added) he went on to attest that despite her slurred speech and shaky hands Mrs Butcher appeared to him to be sound in mind and memory. The judge then set out a short passage from the cross-examination of Mr Innocent on this point, as follows:

“And having admitted that the deceased was a stranger to him his ensuing cross-examination reads thus:

‘BY MR MICHEL:

Q - And from that single interaction with this perfect stranger, you feel able to give evidence about the soundness of her mind -

A - I am not in a position -

Q - and her memory?

A - to give evidence as to the soundness of her mind -

THE COURT: Uh?

THE WITNESS: Or her memory.

BY MR MICHEL:

Q - You are not in a position?

A - I’m not in a position to give that evidence, My Lord.

MR MICHEL: He says he is not in a position to give evidence as to the soundness of her mind and memory.

THE WITNESS: I can only speak of how she appeared at the time.

Q. You have answered my question, - - -"

The judge added that no cogent reasons were given for his earlier assertion and that he also agreed that he had no idea what influences had prevailed over Mrs Butcher prior to her signing of the Deed of Sale which rendered his evidence about Mrs Butcher understanding the purport, content and effect of the Deed and her voluntarily agreeing to it as for her own free will and accord perplexing to say the least.

44.

In para 26 the judge briefly discussed the signing of the Deed of Sale. He noted that Mr Innocent said in his witness statement:

"I gave her to touch the pen then I signed. Ms Verneuil signed. Bella continued to practice her signature ... "

The judge added that one might well wonder what was the purpose of Mrs Butcher being given the pen to touch. The Board was told that the judge was wrong to be perplexed because it is an age-old tradition in Saint Lucia to cause the illiterate or the incapable to touch the pen, rather than make a mark. Nonetheless, the judge concluded that on the whole Mr Innocent impressed as being confused and ambivalent and, as he put it, in fact cut a sorry figure at the witness-stand for a person of professional standing.

45.

In para 27 the judge said that it was still more intriguing that in her will Mrs Butcher bequeathed to Mrs Alcide and Mrs Desir equally her shares in Bella. Thus the purported sale of Bella's warehouses by Mrs Butcher to CWL three days before her death resulted in the transfer of a substantial commercial property to the new company. Mrs Desir ended up with an additional half share of the deceased's shares by virtue of the residuary clause of the will and Mrs Alcide ended up with only one quarter of the shares in CWL as the owner of the property rather than a half share if the property had passed under the will. Thus, Mrs Desir owned half the shares in CWL from its incorporation on 7 January 2007 and three-quarters of the shares after Mrs Butcher's death. It was not quite accurate for the judge to say, as he did for example in para 50 of his judgment, that Mrs Desir was the majority shareholder as at the time of the sale. Paragraph 50 must be read in the light of para 27, where he said that she first held half the shares and then later three-quarters of them, which was the true position.

46.

The judge was critical of a good deal of the evidence given on behalf of Mrs Desir. He was critical, not only of Mrs Desir's evidence, but also of that of Mrs Verneuil, whom he described as an acknowledged friend, lawyer and adviser of Mrs Desir. He set out in his judgment a long passage from the cross-examination of Mrs Verneuil in which she admitted that she did not change Mrs Butcher's will as she had been asked to do. The judge expressed the view in the course of that cross-examination that, as he put it in the passage quoted at para 59 of his judgment,

“the clear, unequivocal testimony of the witness is that, at some stage after the will had been executed, the testator expressed a desire and wish to change her will, gave her certain instructions, and her own evidence here in this court is that, she refused to carry out those instructions.”

47.

In the opinion of the Board the judge was entitled to reach that conclusion, even though, as the judge recognised, Mrs Verneuil’s evidence was that it was a matter for the testatrix, who did not ultimately want to change her will. The Board further observes that the instructions for the new will on which Mrs Verneuil refused to act were in fact to cut Mrs Alcide out altogether. Nevertheless, the judge was entitled to be struck by a number of important factors, which he described in para 60ff as follows:

“[60] ... [Mrs Butcher] also left to [Mrs Alcide] and Marguerite Desir equally her shares in Bella ... but by the date of her death the company owned nothing as it had been sold to [CWL]. That valuable commercial entity which was owned by Mrs Butcher was transferred to a company under the control of Marguerite Desir who held the majority shares. In all of this Mrs Leandra Verneuil played a significant role and featured prominently and Marguerite Desir benefitted handsomely. I am fully satisfied that Mrs Desir’s dominant influence over the seriously ill and vulnerable Bella Butcher in all of those transactions was pervasive throughout assisted without doubt by her friend lawyer confidante and advisor Leandra Gabrielle Verneuil.

[61] Judging from the nature value and implications of these transactions including the operation of the joint accounts Mrs Butcher clearly needed **independent** legal advice which she did not get. It is my considered view that she was at a great disadvantage bereft of her lifelong husband and business partner and extremely vulnerable on account of her failing physical and medical condition. She was plainly incapable of competently engaging or giving her true consent to the matters which she was called on to deal with without independent legal advice.

[62] For example the largest single revenue earner of her estate - Bella ... was literally sold for a song to Marguerite Desir ostensibly to pay off Bella’s ... outstanding debts notwithstanding that Bella’s ... bank balances were substantial/adequate and other cash earning assets were available for that purpose. Besides she held sufficient collateral to justify a loan from the bank for that purpose.

[63] ... On Mrs Butcher’s death Marguerite Desir promptly transferred all funds standing in the accounts in the joint names of Mrs Butcher and herself to her personal account. That Mrs Verneuil advised was Mrs Butcher’s intention adding that she Mrs Desir was free to do whatever she chose with the money as it was all hers. The total amount so transferred after all the joint accounts had been closed has not been disclosed but would certainly have been substantial.

[64] That to say the least is in my view mind-boggling since as I perceive from the evidence that the avowed object and purpose of Mrs Butcher opening the initial joint account(s) was for Marguerite to assist her with her banking business which she could no longer carry out personally because of her failing health and physical incapacity. Besides that it had been proving increasingly inconvenient for Marguerite to procure cheques signed by Mrs Butcher every time she did her banking business for her. That indeed commends itself as being eminently reasonable and practical and the balances standing in the various joint accounts were clearly not to my mind intended to devolve as a gift to Marguerite by virtue of the doctrine of jus accrescendi on the death of Mrs Butcher as Mrs Verneuil had advised. After all on her own admission she (Marguerite) was being paid a monthly salary for personal care given to Mrs Butcher and for services rendered by way of advice and help in running Mrs Butcher’s businesses to which she was a signatory and in which she had a free hand. I do not in the circumstances believe or accept and I am certainly not by any means convinced that Mrs Butcher

intended that Marguerite should have the benefit of the substantial balances standing in all the joint accounts as a reward or token of her affection and gratitude for all that she had done for her in her final years. And if Marguerite herself is to be believed - and the evidence certainly does point that way - she herself certainly did not expect it as whatever help and services she rendered to the ailing and distressed widow was done as a friend without any expectation of reward but she nevertheless received a monthly salary averaging \$5,000.00 monthly for services rendered. And without more any notion or assertion that all such monies/balances devolved to Marguerite on Mrs Butcher's death would clearly be erroneous and altogether wrong in my view."

48.

It appears to the Board that what the judge is saying in para 64 can be summarised in this way. The purpose of the arrangements made between Mrs Desir and Mrs Butcher was simply to enable Mrs Desir to manage Mrs Butcher's affairs, not to entitle her to a property interest in the bank account monies on Mrs Butcher's death. On that footing there is no necessary incongruity between the absence of any challenge by Mrs Alcide to the will made in November 2005 and the challenge to the taking of the joint account monies after the death in 2007. These are matters which can be dealt with on the taking of an account as described further below.

49.

From para 69 the judge summarised his conclusions thus. In essence he accepted the evidence of Mrs Alcide and, for the most part, rejected that of Mrs Desir. In particular he accepted the evidence that there was a close relationship between Mrs Butcher and Mrs Alcide and that Mrs Butcher had said that on her death everything she had would be hers. He also accepted the evidence that the first time there was any contact between Mrs Alcide and Mrs Desir was in November 2005 and not much earlier, as Mrs Desir said.

50.

When Mr Butcher died, Mrs Desir had known Mrs Butcher for some time but, as the judge held at paras 74 and 76, she was a relative stranger to the wider circle of the Butcher family friends and acquaintances. However, some time before Mr Butcher's death on 1 November 2005 and in the ensuing months Mrs Desir assumed a predominant role in the personal business and financial affairs of Mrs Butcher. Mrs Butcher reposed a great deal of trust and confidence in Mrs Desir and relied upon her to act in her best interests, both personally and in connection with her businesses. The judge then, in paras 77 and 78, summarised the position as he found it to be in this way. Bereft of her husband and faced with increasing failing health and growing physical incapacity, on 22 November 2005, accompanied by Marguerite Desir, Mrs Butcher proceeded to the Bank of Saint Lucia and there opened a joint account in their names in order to facilitate her banking business. She afterwards on that very day executed her will at the offices of Gordon Gordon and Co before Leandra Verneuil executing notary and Mary Charles in which Marguerite Desir was appointed sole executrix as well as residuary legatee and devisee equally with Mrs Alcide and also a principal beneficiary. A power of attorney was also executed in favour of Mrs Desir. Thereafter Marguerite Desir soon became a signatory to all the businesses including the accounts controlled in the name of Mrs Butcher. In truth and in fact she was in complete control of all of the personal business and financial affairs of Mrs Butcher and had also by then completely supplanted Mrs Alcide as the object of Mrs Butcher's affection as well as the principal recipient of her substantial wealth. As the judge expressed it, Sabina was no longer Bella's little girl which she had always wished for but never had. Marguerite had taken her place.

51.

The judge then asked the question how this came about and expressed his conclusions in para 79. Shortly before and following upon Mr Butcher's death Mrs Desir developed a close relationship with Mrs Butcher, whom he described as a seriously ailing vulnerable and physically dependent widow. She had five paid helpers three of whom had been hired by Mrs Desir and were beholden to her. She later hired three of them at Harris Paints after Mrs Butcher's death. The judge added that one of them, Lisa Charles, had no scruples in telling the court in cross-examination that she knew that the case was about who gets Mrs Butcher's money and property and that she wanted her cousin Mrs Desir to keep Mrs Butcher's money and property. She also admitted that her evidence was designed to enable Mrs Desir to keep Mrs Butcher's money and property for herself.

52.

At para 80, the judge noted that the evidence of Mrs Desir and Mrs Verneuil was replete with accounts of Mrs Butcher expressing her disappointment with Mrs Alcide's lack of care and affection for her when she needed her most and her strong dislike and disdain for her own family (including her sister and mother) whom she constantly lamented only wanted her money. The judge added that the evidence also showed that the self-same Mrs Butcher had in the past been generous towards them and that the family appeared to be close. The judge concluded that one was left to wonder how the sudden "turn around" had come about. In paras 82 and 83 the judge expressed his conclusions on the evidence of Mrs Desir and Mrs Verneuil in strong terms as follows:

"[82] Having however seen and heard and carefully observed the demeanour of these witnesses at the witness stand, I am fully satisfied and convinced from the evidence which has thus far unfolded and will continue to unfold that they are witnesses whose testimony must be treated with the utmost reserve for they plainly had an interest of their own to serve.

[83] For it is pellucidly clear in my view that Marguerite Desir ably assisted by her friend confidante and legal adviser Leandra Verneuil took advantage of her dominant position and influence over the vulnerable and seriously ailing Albertha Bella Butcher following the death of her husband to so contrive and manipulate her personal business and financial affairs that in short order nearly all of the deceased's money and the bulk of her estate and possessions fell into her hands and in so doing she had the also contrived to supplant the claimant Sabina Alcide James which up to Mr Butcher's death on 1st November 2005 had been 'Bella's little girl' whom she had repeatedly declared during her lifetime would have inherited everything which she owned."

53.

The judge's analysis of the evidence shows that he preferred the evidence of Mrs Alcide, whom he described in para 90 as a truthful and sincere witness on the whole, by contrast with the evidence of Mrs Desir and Mrs Verneuil. In the opinion of the Board the judge was entitled to reach the conclusions on the reliability of the evidence that he did.

54.

Having reached those conclusions, the judge considered the two classes of undue influence, namely actual and presumed undue influence. As the Board reads the judgment, the judge identified two definitions of actual undue influence. In para 102 he noted that in *Allcard v Skinner* (1887) 36 ChD 145 Lindley LJ said that actual undue influence requires proof by the person seeking to set aside the transaction of:

"Some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor."

In para 105 the judge said that in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 Lord Hobhouse of Woodborough defined actual undue influence in this way at para 103:

“Actual undue influence is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other’s will ... he who alleges actual undue influence must prove it.”

55.

The judge held at para 103 that actual undue influence was established on the evidence, which demonstrated that Mrs Desir by her conduct acted unfairly and improperly, used coercion on the mind of Mrs Butcher, and “overreached, cheated, and gained for herself in dubious circumstances personal advantage which resulted in her enriching herself in short order with the fruits of Mrs Butcher’s hard earned wealth”.

56.

The Board concludes that the judge was entitled to reach that conclusion, both in relation to the joint account and to the Deed of Sale. It follows that it is not necessary for the Board to consider a case based on presumed undue influence or indeed a case based on other forms of actual wrongdoing. Appeal No 0042 must be dismissed unless the judge showed apparent bias, to which the Board now turns.

(4) Apparent bias

57.

It is settled law that the test of apparent bias is that stated by Lord Hope in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at para 105, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Moreover, it was recently accepted by the Board in *Mitchell v Georges* [2014] UKPC 43 at paras 10-11 that, applying *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, the court must have regard to context.

58.

Complaint is made of interventions made by the judge in the course of the trial. It is true that the judge did intervene from time to time. It is also true that he took a strongly adverse view of Mrs Desir’s case. This is, however, a very different case from *Mitchell v Georges*. The question is whether the fair-minded observer would have concluded from the part played by the judge in the course of the trial that there was a real possibility that he was biased against Mrs Desir. Complaint is made about comments on two occasions, namely 16 December 2008 and 23 January 2009.

59.

On 16 December 2008, the exchange took place at about 4 pm after a full day of trial. The transcript contains a reference to the judge summarising the evidence of Mrs St Rose in her voice by saying “I am not ... making any allegations against any of the liars – lawyers who executed documents on behalf of my aunt that ...”. The Board can see nothing in that exchange to suggest that the judge might be biased. It appears that the word ‘liars’ is sometimes used as referable to ‘lawyers’ as a slang expression. This same expression was used on 23 January in the course of the following exchanges at the close of the day’s evidence which are relied upon on behalf of Mrs Desir.

“MRS ST ROSE: My Lord, this takes us to 4 o'clock as you had indicated.

MR MICHEL: Well said, because you have no other witnesses.

THE COURT: Well, I don't think there are any other witnesses waiting outside.

MRS ST ROSE: No, as, as a matter of fact, I discussed with my colleague exactly whom I was calling on what day, so, he's not surprised at that.

MR MICHEL: No, I'm not. We did agree on something though, that didn't happen.

THE COURT: So, we've had eleven witnesses so far. There appears to be three more to go, four more really, but three -- my brother somehow, some -- I heard -- I can't subscribe to that but people often said he used, when he used the word lawyer, he said liar, liar. There are three liars to come tomorrow. Liars, lawyers.

MR MICHEL: And, plus, apart from the three liars, we have one honest witness, who will come to -- what's his name, Elias.

THE COURT: Well, he was one of them. Hopefully, if we get ready to take the three of them tomorrow it would be good.

MRS ST ROSE: Yes, three or four.

THE COURT: I can see there being, at least three being lengthy, so if we make an early start --

MRS ST ROSE: There are in fact four witnesses tomorrow and Dorothy Francis.

THE COURT: Huh.

MRS ST ROSE: There are four witnesses --

THE COURT: Ms Francis is a lawyer.

MRS ST ROSE: Three lawyers and one --

THE COURT: One civilian, I know. The civilian witness is very short too. Very short, very short. So, we could, with some luck, conclude the defence --

MRS ST ROSE: Yes, I, I would think we can conclude tomorrow.

THE COURT: Based on luck we would still have Wednesday, in case.

MRS ST ROSE: That is all up to my friend. I am very short at this stage.

THE COURT: Yes, you'll send the batsmen in and we'll see how long they last at the crease. Yes, we'll adjourn to tomorrow morning 9:00.

MR MICHEL: May I just give an indication to the court, that the witness Mr Elias, who --

THE COURT: Huh.

MR MICHEL: -- the witness, Mr Elias, who spent the morning out there, I did say to him that he would need to come back tomorrow, because we would need to complete the case of the Defence before we can call him.

THE COURT: Oh, yes, Elias.

MR MICHEL: So, I did say to him, My Lord, that I will see what happens during the course of the afternoon - -

THE COURT: Yes, how it, how it, how it pans out

MR MICHEL: - - and then I will call him - -

THE COURT: Yes, what his position is, yes, fair enough.

MR MICHEL: -- and let him know what time he can reasonably be, he's reasonably be expected.

THE COURT: Rather the come, come and languish - -

MR MICHEL: Yes, My Lord, because I was very embarrassed about having him stand there from 9 o'clock to 1 o'clock for no apparent purpose. So, based on where we are now, I can probably give Mr Elias an indication of about maybe 10:30 tomorrow.

MRS ST ROSE: Do you think you will finish four 13 witnesses by 10:30?

MR MICHEL: No, no,

MRS ST ROSE: I would think - -

MR MICHEL: Sorry.

MRS ST ROSE: -- I mean, I don't know if my friend was thinking of winding up by, by midday tomorrow, but because of the pace at which we were going, I would think its more likely he would be called in the afternoon if at all, but, but my friend dictates the pace at this stage, so.

THE COURT: We'll see how it goes.

MR MICHEL: Okay, I will probably advise the witness to be here for 11 o'clock, My Lord.

THE CLERK: Court! This Honourable Court is adjourned until tomorrow at 9 am."

60.

The Board has set out those exchanges at some length in order to put them into context. So viewed, the Board concludes that there is no arguable case that a fair-minded and informed observer might conclude that the judge was biased. As Mitchell JA(Ag) put it in the Court of Appeal at para 47, it is evident that what the judge was doing was to repeat a common West Indian joke that plays on the similarity in the pronunciation of the words 'lawyers' and 'liars'. While the Board is disappointed that a judge would repeat such a casual analogy between lawyers and liars in court, there is no warrant whatever for the conclusion that the judge considered these lawyers who were to give evidence as liars merely because they were lawyers or on any other basis. The whole exchange was part of a sensible discussion about the witnesses left to give evidence and how long their evidence might take. There is no support for a conclusion that the judge may have been biased against any of the lawyers before they gave evidence. A number of other rulings made by the judge in the course of the trial are complained of. However, in the opinion of the Board none of them has any substance. This case is a far cry from the kind of problem which faced the Board in *Mitchell v Georges*.

Conclusion in Appeal No 0042

61.

There is no proper basis upon which the findings of undue influence made by the judge against Mrs Desir could properly be reversed. The judge was entitled to reach the conclusions that he did and the Court of Appeal was entitled to dismiss the appeal on this part of the case. It follows that Appeal No 0042 must be dismissed.

Appeal No 0044

62.

Article 1142 of the Code of Civil Procedure in Saint Lucia provides:

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

Before the judge Mrs Alcide sought improbation of the Deed of Sale. In para 115 the judge held that the Deed of Sale was purportedly executed by Mrs Butcher as vendor and was executed by her (if at all) without independent legal advice and for that reason ought to be improbated.

63.

Mrs Desir appealed against that part of the decision to the Court of Appeal. The Court of Appeal considered this part of the appeal between paras 37 and 44 of its judgment. It concluded in para 44 that a deed may not be improbated unless the notaries who made it are named as parties to the litigation, which they were not. It observed that it was a pity that this law was not shown to the judge instead of being raised for the first time on appeal. The Court of Appeal accordingly set aside the part of the order of the judge which improbated the deed. As was accepted on behalf of Mrs Alcide, it was right to do so. However, it was also right to uphold the decisions of the judge on the remainder of the case. It was entitled to uphold his conclusions on undue influence and it was correct to reject the submission that he was guilty of apparent bias.

Conclusion and remedies

64.

Although Appeal No 0044 brought by Mrs Alcide must be dismissed, more importantly, Appeal No 0042 brought by Mrs Desir must also be dismissed. The precise remedies which flow or ought flow from these decisions give rise to possible difficulty.

65.

As to improbation, it follows from the dismissal of Mrs Alcide’s Appeal No 0044 that the order of the judge directed in para 117 of his judgment that the Deed of Sale be improbated must be set aside. The deed was valid as a deed. But it does not follow that no relief is available to Mrs Alcide arising out of the Deed of Sale. Some consideration must be given to the position of the Bank of Saint Lucia which lent EC\$881,000 to CWL under a mortgage dated 10 April 2007 (the same day as the Deed of Sale to CWL). This mortgage evidently funded the payment of EC\$644,000 made by CWL to the deceased for the property. What happened to that money and the rest of the EC\$881,000 is a matter for further investigation.

66.

As matters stand, it is the present view of the Board that there are three possible approaches so far as CWL is concerned as follows. The first is joining CWL with a view to making an order setting aside the Deed of Sale for undue influence. This would have to be subject to the preservation of all and any rights which the mortgagee bank has, and is entitled to exercise as against Mrs Butcher’s estate under the mortgage dated 10 April 2007. The second is ordering Mrs Desir as controlling shareholder

of CWL to procure the setting aside of the Deed of Sale as between the estate of which she is also executrix and CWL, subject again to preservation of all and any such rights as the bank may have and be entitled to exercise as against the estate. The third is requiring Mrs Desir to hold on behalf of the estate the half share interest in CWL which she was given when it was formed.

67.

While there was some limited discussion in the course of the argument as to the position of CWL and remedies more widely, the Board recognises that the argument was very limited and will not make a final order until the parties have had an opportunity of considering the judgment and making such submissions as they think appropriate.

68.

The Board's preliminary view is that there is much to be said for the third possibility, although (so far as the Board can recall) it was not discussed at the hearing. On the basis of the findings of the judge, it appears to the Board that the formation of CWL and the execution of the Deed of Sale were almost certainly part and parcel of one operation. The Board recognises that, according to Mrs Desir's witness statement at paras 37-39, the formation of CWL was all Mrs Butcher's initiative, but it is the Board's present view that that cannot be given much credence in the light of the judge's findings generally and the evident purpose and obvious intended use for the Deed of Sale. On the basis of the judge's findings and the Board's conclusions at paras 39 to 52 above, it seems clear that CWL was formed and the Deed of Sale executed in anticipation of Mrs Butcher's death, which, because of the will, would make Mrs Desir the controlling shareholder of CWL. It seems clear that Mrs Butcher paid for the formation of CWL and, as part of a single process, in effect gave Mrs Desir, under her influence, a half share in CWL (in addition to that which she would get under the will). On that basis, the relief for undue influence could extend to setting aside the gift of the half share to Mrs Desir, which would make the estate a half owner with Mrs Desir of the company, and avoid any need expressly to preserve the Bank's interest.

69.

The overall effect of the conclusions of the Board is that, as the judge ordered at paras 116, Mrs Desir (in her two capacities) must render an account of her dealings with the bank accounts and other property of Mrs Butcher and of the companies under her control and of income and funds from the same which have come into her hands.

70.

The Board will consider written submissions on the position relating to CWL, to the points identified in paras 65 to 69 above and to the appropriate relief. Accordingly, the Board directs that, within 21 days of the promulgation of this judgment, Mrs Alcide give notice to Mrs Desir of the precise form of order and/or declarations she seeks and of her submissions on the points identified above and on costs. The Board directs that Mrs Desir respond within 21 days thereafter on each of those points and on costs, together with reasons.

Interim relief

71.

In the light of the above, the Board concludes that Mrs Desir should not be permitted to act in relation to any of the assets or affairs in any of the ways identified below pending the Board's final decisions on the issues identified above. The Board hereby orders that, until further order, Mrs Desir do not (a) dispose of or deal in any way with her interest in CWL or with any of CWL's assets or affairs, and/or (b) cause or permit CWL to dispose of or deal in any way with its assets or affairs, save in each case so

far as may be necessary to fulfil its obligations under the mortgage or other obligations in the ordinary course of its business of letting out commercial properties, provided that there be liberty to apply to the Board to vary or discharge this order on notice to Mrs Alcide.

Postscript

72.

Although not the direct subject of any issue before it, the Board cannot leave this matter without reference to the obvious conflicts of interest presented by Mrs Desir's current position as executor representing Mrs Butcher's estate and party in her personal capacity to disputes concerning her dealings with Mrs Butcher as well as her conduct as executor. She and the legal advisers involved in this litigation will no doubt consider the implications of this.