JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 54/94

COR:	**THE HON MR JUSTICE DOWNER JA** **THE HON MR JUSTICE BINGHAM JA** **THE HON MR JUSTICE WALKER JA (AG.)**	
BETWEEN	**CYNTHIA NUNES**	**APPELLANT**
A N D	**IRIS ROBINSON** **(Executrix of the estate of Moses Robinson)**	**RESPONDENT**

Donald Scharschmidt QC & Hector Robinson for the appellant instructed by Patterson, Phillipson & Graham

Dennis Daly QC & Paulette Warren for the respondent instructed by Daly, Thwaites & Campbell

May 13, 14, 15, 16, 19 & July 31,1997

DOWNER JA

In the court below Langrin J ordered that the land transfer registered in the name of the appellant Cynthia Nunes be set aside and that the property in dispute be transferred to the respondent, Moses Robinson. Cynthia is his daughter. Cynthia was also ordered to refund $36,000 rental to her father. Further she was restrained from interfering with the property or its tenants. She was aggrieved by that order so she has appealed to this Court. In the meantime her father has died. So his executrix Iris Robinson has taken his place as plaintiff/respondent pursuant to section 101 of the Civil Procedure Code.

How did Moses Robinson transfer his property to his daughter Cynthia?

In recounting the evidence it must be borne in mind, that Mr. Scharschmidt QC for Cynthia has challenged the evaluation by Langrin J so it is appropriate in assessing the rival versions to bear in mind the first ground of appeal. It reads as follows:

> 1. "The learned trial judge erred in finding that the Defendant/Appellant procured the Plaintiff/Respondent's agreement to sign a transfer by inducing him to sign a loan document since:
>
> (a) such a finding is unreasonable having regard to the evidence and is unsupported by the evidence;
>
> (b) such a finding is inconsistent with other findings of fact by the learned trial judge;
>
> (c) the learned trial judge in coming to such a finding failed to take sufficiently into account or fully to evaluate the evidence of the witness, Marcia HoLyn.

Mrs. Marcia HoLyn an experienced Attorney-at-Law prepared the transfer of the property in dispute. Her evidence is of vital importance and the complaint is that Langrin J failed to evaluate it, in coming to an adverse finding against the appellant Cynthia Nunes. She told the court that in October 1988 the appellant Cynthia and her father Moses Robinson came to her office. She had not known them before. It was Robinson who gave her instructions and it is best to refer to the note of her evidence on this aspect:

> " Mr Robinson requested that he wanted to transfer his land at Mount Salem, MoBay. He had a registered title

with him. He wanted to transfer it in his daughter's name because she took him to Doctor, fed him and clothed him and of all his children she was the one who took care of him.

He told me a bit of his family history of how Cynthia was kind to him. He told me of a son who worked at the Bank - named Adolphus - and he didn't want to do anything with him and if he died nothing should be left for him. He said he know of my father who was murdered in 1986. (February 19). I thought that he wanted to transfer the entire property to Cynthia Nunes. I told him that I would prepare the document and he would have to come back to sign because I don't normally prepare document in a day. He said he had cancer and could not come back so he asked me if I could prepare it and have it signed. He said Cynthia had given him $15,000 cash and she was instrumental in fixing it up from Hurricane Gilbert and he didn't have the money. She was also paying the Doctor bills and feeding him. He said he did not want his wife to know about the matter."

Then she continued thus:

" I instructed my Secretary to prepare a transfer in usual form when transferor cannot write. My Secretary brought in the transfer and I painstakingly read the document to Mr. Robinson. Some of the words in the transfer he didn't understand and I explained everything and I asked him if he agreed and understood what was there and he said Yes.

He put an X on the document after I told him where he should put the X. I witnessed his signature.

If I see document again I would be able to identify it. This is a photocopy of

> the instrument of transfer. It is dated 12th October, 1988 and is the date when they came to my office. There is a consideration of $15,000.00."

Robinson's health and appearance were important so it is helpful to have Mrs. HoLyn's account:

> " Physically his belly was distended and Cynthia was holding on to him. She was acting like a doting daughter than anything else. He told me that he was terminally ill. He had Cancer which caused his belly to swell up and because of this he would die soon so he wanted to transfer the property to Cynthia while he still had time. He wanted to do it quickly so that his wife would not know about it. He seems to be afraid of his wife."

The value of the property was made an issue so here is how Mrs. HoLyn assessed it:

> " I was not aware of the value of the property. I did not question Mr. Robinson and when I looked at title and saw the area where property is located. It is a very depressed and crime ridden area and to my mind it could be worth $15000 or even more but I did not question it."

There are two other aspects of her evidence which are important at this stage. She said that Cynthia paid her fees. Here is how it emerged:

> " I told Mr. Robinson, how much it could cost for, stamp duty, Registration fee and Attorney's fee. He said Cynthia his daughter would take care of that. The fees were paid but not on the same day since she didn't know how much money it was."

Further there was this important denial:

> " I did not tell Mr. Robinson that the documents he signed was from Mr. Leslie Hew."

Mr. Robinson lived longer than everyone anticipated so it is not surprising that his wife eventually discovered the transaction which took place at Mrs. HoLyn's office. It was an explosive situation. Here is Mrs. HoLyn's account:

> "... I saw Mr. Robinson after that day on one occasion after 1991. He came to my office accompanied by a woman claiming to be his wife and a son who was drunk. Mr. Robinson told me that he wanted back his title. I told him it was not possible since he had already transferred it to his daughter Cynthia Nunes from 1988. His wife then took over and she said she know nothing about the transfer until recently and that when she confronted Mr. Robinson he said that I was the Lawyer who had taken the title from him. She made investigations and found out where I was.
>
> I explained the entire transaction to Mr. & Mrs. Robinson and brother who was drunk and told him that the only person who could transfer it back to him was his daughter Cynthia Nunes.
>
> No one held Mr. Robinson's hand when he was signing the document."

Mrs. HoLyn did not take an attendance note. She relied on her memory. But it must be recalled that she had to rehearse the matter on this second occasion. Further, she had her file with her in court. On the vital issue that Mr. Robinson said that he wanted to conceal the transaction from his wife, she was never challenged. Nor was it ever put to her that she did not explain the transfer. The following response under cross-examination was important:

> " I am sure he was the one who told me that he had cancer and might soon

> die. I am not sure if he was the one, he told me of the cancer. My impression of what he said is that he would soon die and he wanted to tie up loose ends - wanted to give his daughter this particular property.
>
> I did not think the question of how much money for repairs concerned me. I don't think the transaction was unfair. He told me that because of natural love and affection he wanted to transfer the property. He said he got consideration of $15000. I followed his instructions.
>
> Suggest - & Answer: This document was read over to Mr. Robinson and explained and he agreed to it."

There is another area that must be mentioned. Nowhere in the cross-examination was Mrs. HoLyn challenged that Robinson had his title with him when the transfer was effected. This omission is odd in the light of the statement of claim which averred that Robinson was tricked into believing he was signing a loan agreement.

How did Langrin J evaluate Mrs. HoLyn's evidence?

In reviewing Mrs. HoLyn's evidence Langrin J said:

> " Marcia HoLyn, Attorney-at-Law is in private practice for over 15 years. In October of 1988 when both plaintiff and defendant came to her office she was seeing them for the first time. She described the plaintiff as an impatient no-nonsense person who was anxious to transfer his property to his daughter because of his impending death due to cancer and as a recompense for her support of him concerning his medical bills as well as the repairs to his house, the cost of which he could ill-afford. Not perceiving the request to be abnormal, she followed his instructions, prepared the

> transfer of his property, read the instrument over to him as well as explaining it before the plaintiff affixed his mark to the document, after which she witnessed the mark. She admitted that the relationship between herself and the defendant was a fiduciary one since she was acting on his behalf."

From this narrative the learned judge then made the following findings:

> " Findings of Fact
>
> ... There was a lack of adequate understanding by the plaintiff of the nature and effect of the transfer of his title as well as the nature of the document of transfer.
>
> The Attorney-at-Law had no sufficient knowledge of the relevant facts to enable her to give an informed and competent advice to the plaintiff.
>
> All the legal fees were paid solely by the defendant and that being so she must be taken to have represented the plaintiff.
>
> The Attorney-at-Law failed to take reasonable steps to ensure that the plaintiff had independent legal advice in light of the apparent conflict of interest.
>
> The consideration of $15,000 was not paid over to the plaintiff in respect of the transfer."

There is another important finding in respect of Mrs. HoLyn towards the end of the judgment. Here it is:

> " Mrs. HoLyn, the Attorney, who purported to act for the plaintiff was nevertheless paid solely by the defendant. The conclusion appears to be inescapable, that she was the agent of the defendant.

> Independent advice must be given with a knowledge of all the relevant circumstances and must be of a nature that any competent and honest adviser would give if acting solely in the interest of the transferor.
>
> In the present case I have no doubt that Mrs. HoLyn acted in good faith. However, she was not made aware of the material fact that the property which was being transferred for a paltry sum constituted a commercial enterprise far in excess of the consideration placed in the transfer. In the haste in which the transaction was completed she failed to consider the very important fact that the plaintiff could more prudently and equally effectively have benefited the defendant without undue risk to himself by advising him to retain the property during his life and bestowing it upon his daughter by will. She apparently did not address her mind to the possibility of fraud, undue influence, non est factum or manifest disadvantage but rather to the plaintiff's capacity to make the transfer." [Emphasis supplied]

Were these findings unreasonable having regard to the evidence?

Mrs. HoLyn is an officer of the court. It is difficult to understand how the learned judge could find that Robinson misunderstood the nature of the transaction since he expressly found that Mrs. HoLyn acted in good faith. Since he found that she acted in good faith, the inference was that she carried out her professional duties in accordance with her instructions and that she gave reliable evidence in that regard. The gist of the learned judge's complaint was that she did not address her mind to the relevant aspects of law. Because of this approach the learned judge was bound to fall into error.

Her evidence was that she explained the transaction and she carried out his instructions. It is not easy to understand the finding that Mrs. HoLyn was instructed by the appellant Cynthia because she paid the fees. The reasonable finding as regards who Mrs. HoLyn represented was to be determined from her account as to who gave her instructions and Mr. Daly QC never challenged Mrs. HoLyn that she acted on Robinson's instructions.

Here is her answer to him in cross-examination:

> " I agree that the relationship would produce a fiduciary relationship between the parties. I was acting for Mr. Robinson, and I was carrying out his instructions. I don't think it was my duty to tell him to leave it in his will if he wanted to give it to her while he was alive."

When the law is analysed it will be found that it supports this aspect of Mrs. HoLyn's conduct. To my mind the appellant Cynthia has succeeded on the first ground of her appeal that the learned trial judge erred in finding that she had induced her father to sign the transfer on the basis that it was a loan document. This analysis also covers the particulars in ground 1 which was cited earlier. When properly evaluated, Mrs. HoLyn's evidence also demonstrated that the appellant Cynthia has also been successful in grounds 2 and 3 of her appeal. Those grounds read:

> 2. "The learned trial judge's finding that there was a lack of understanding by the Plaintiff/Respondent of the nature and effect of the transfer of his title as well as the nature of the document of transfer is unsupported by the evidence.
>
> 3. The learned trial judge's finding that the Plaintiff/Respondent had no independent legal advice and in

> particular that Mrs. Marcia HoLyn acted for the Defendant/Appellant is contrary to the evidence."

I am fortified in making these adverse conclusions on the findings made below because there is evidence from the respondent Robinson which supports Mrs. HoLyn. Robinson told the court that Cynthia was his daughter and they:

> "live loving because she build me up, she work and help me."

Another aspect of Robinson's conduct which supports Mrs. HoLyn's stance emerged in these circumstances. Mrs. HoLyn's evidence was that Robinson told her that he did not want his wife to know of the transfer. In 1991 three years after the transfer he went with his wife to Mrs. HoLyn to have the title re-transferred to him. This visit was instigated by his wife and the unchallenged evidence is so important that it must be recounted:

> "...I saw Mr. Robinson after that day on one occasion after 1991. He came to my office accompanied by a woman claiming to be his wife and a son who was drunk. Mr. Robinson told me that he wanted back his title. I told him it was not possible since he had already transferred it to his daughter Cynthia Nunes from 1988. His wife then took over and she said she know nothing about the transfer until recently and that when she confronted Mr. Robinson he said that I was the Lawyer who had taken the title from him. She made investigations and found out where I was."

Bearing in mind that Langrin J found that Mrs. HoLyn acted in good faith, and that this important evidence was not challenged, any evaluation of the evidence, would have taken this aspect of the case into account.

Was there a presumption of undue influence in the circumstances of this case?

The analysis in this section attempts to answer grounds of appeal 4 and 5 which read:

> "**4.** The learned trial judge erred in finding that there was a presumption of undue influence on the part of the Plaintiff/Respondent over the Defendant/Appellant as:
>
> (a) such a finding is not supported by the evidence;
>
> (b) There did not exist the set of circumstances that could give rise to such a presumption in favour of the Plaintiff/Respondent;
>
> **5.** The learned trial judge erred in law in holding that any presumption of undue influence which arose on the part of the Defendant/Appellant over the Plaintiff/Respondent was not rebutted by the Defendant/Appellant."

Mr. Daly QC for Robinson relied on **Inche Noriah v Shaik Allie Bin Omar** [1929] AC 127. He referred to a passage at p135 to demonstrate that there was a presumption of undue influence against Cynthia and that she was obliged to rebut it. The principle as stated by Lord Hailsham was as follows:

> The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard v. Skinner* 36 Ch.D. 145, 171. But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so

> completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."

The factual circumstances were stated thus at p. 132:

> " The appellant's evidence at the trial was disregarded, because it was recognized by both sides that her mind was then in such a state as to render her evidence quite valueless."

It is in that context that the headnote is to be understood. It reads in part:

> " A Malay woman, who was of great age and wholly illiterate, executed a deed of gift of landed property in Singapore in favour of her nephew, who had the management of all her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the donor's property, and did not bring home to her mind that she could more prudently, and equally effectively, benefit the donee by bestowing the property upon him by will:

> *Held,* that the gift should be set aside, as the presumption which arose was not rebutted."

Langrin J found that the principle of undue influence was established in the circumstances of this case. Here are his conclusions:

> " My conclusion on the evidence is that the defendant fails to remove the onus arising from the presumption of undue influence. I am satisfied on the evidence that she exercised a dominating influence over her father and particularly since he took unto himself a new wife. She wanted to ensure that his wife would not benefit from the property. Her evidence in relation to the sum she paid the contractor for the repairs lacked credence. Indeed she has failed to produce any supporting evidence. I do not accept that she paid more than $30,000 for the repairs and I so find."

In reviewing Langrin's J findings, it must first be acknowledged that the relationship in this case was a father making gift to his daughter for love and affection. This was not the relationship in **Inche Noriah**(supra). Further, the father was not having a good relationship with his wife or his other children. It is therefore necessary to examine other cases on undue influence to ascertain whether Langrin J was right in imposing the onus to rebut the presumption of undue influence against Cynthia.

In **Beanland v Bradley** Vol. LXV English Reports 427 at p. 428 the Vice Chancellor [Sir John Stuart] said:

> " It is said that the lessor being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit as to throw upon them the onus of proving the absence of undue influence. It is a new doctrine that a parent

> cannot by a deed, only a few days before his death, benefit a child or grandchild."

Then the judgment continued thus:

> "... There is, however, no rule of this Court which prohibits a man by a voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and, where a father discharges that duty, this Court will not presume a fraud."

Then **Coomber v Coomber** [1911] 1 Ch. 723 was cited by Mr. Scharschmidt QC as being appropriate to the circumstances of this case. The headnote is useful. It states:

> " It is not every fiduciary relation between a donor and donee which will induce a Court of Equity to set aside a gift, but only those special relations which from their nature raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it."

Then Cozens-Hardy MR said at p. 727:

> "... There is no evidence of misrepresentation, circumvention, or of any improper conduct leading Mrs. Coomber to make this gift; it was the spontaneous fruit of her own generosity. It was not made after weighing the value of the consideration; it was simply an out and out gift by this lady in favour of her son after having been carefully and properly advised by the solicitor as to what was the effect of what she was doing."

Fletcher Moulton LJ had similar views. He said at 729:

> "... But in this case the gift was not based on value in any way at all. The mother knew the house, she had lived in it for twenty years,

> and knew the son was managing it. She meant it to go to the son whatever its value was; and that wish of hers if not shewn to be brought about in any way by any - I will not say improper conduct of the son, but any - conduct which put any responsibility upon him in the matter. For these reasons I think that no objection whatever to this transaction can be based on the fact that the son managed the business."

Then the learned judge used words which support Mrs. HoLyn's stance. Here it is:

> " There is one other point I wish to deal with. Again and again we have had it said, the lady did not have competent and independent advice; and it seems to be based on the fact that the solicitor did not say to her, I advise you to do it, or I would not advise you to do it. In my opinion that is not by any means necessary for the purpose of advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequences of that act. He is not bound to say 'I will advise you to do it'; or 'if I were you I would do it'; or 'if I were you I would not do it.' Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing."

When the principle expounded by these authorities is applied to the facts of this case, it is clear that the relationship of a father who makes a gift to his daughter is not a relationship where undue influence is to be presumed. Langrin's judgment was based on a presumption of undue influence and to that extent he seems to have been in error.

How did Mr. Daly QC support the judgment?

Mr. Dennis Daly QC supported the order of the court below on two bases. The first relied on the case of **Inche Noriah** (supra). That submission was dealt with and it was shown that on the facts, the instant case was distinguishable as there the appellant was very old and useless as a witness. The relationship was not that of father and daughter as in this case. Further the appellant had entrusted all her business to her nephew, the defendant. This was not so in this case. All that Cynthia was asked to do was to collect a portion of the rent. The alternative ground was advanced based on the principles expounded in **Barclays Bank plc v O'Brien and another** [1993] 4 All ER 417 at p. 423. Here is how Lord Browne-Wilkinson in approving of the classification in **Bank of Credit and Commerce International SA v Aboody** (1988) [1992] 4 All ER 955 at 964; [1990] 1 QB 923 at 953 stated it:

> *"Class 1: actual undue influence.* In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> *Class 2 : presumed undue influence.* In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the

> wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned : once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:"

Then His Lordship continued thus:

> *"Class 2A :* Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> *Class 2B :* Even if there is no relationship falling in class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in such relation to the particular transaction impugned."

The difficulty which is evident in Mr. Daly's submission is that there was no evidence that Robinson entrusted his general financial or property affairs to his daughter Cynthia. There is evidence that he entrusted the repairs of his

house to her and gave her permission to collect part of the rent to repay a loan.

Here is the relevant evidence :

> " I told Cynthia I was going to give her 3 rooms to collect rent and pay the contractor. She rented 3 rooms for $1000 per month and she never gave me one cent."

It is true that for at least one month Moses Robinson lived with Cynthia but there was no hint even then that he entrusted his financial affairs to her. The evidence was :

> " When I was sick I lived for one month at Cynthia's house. It was not 6 months. She took me to Dr. Coley and then she took me to her house against my will.
>
> I was sick then. She cooked for me and washed my clothes and bathe me.
>
> I was not messing up myself, I could go to the toilet. It was not because my wife didn't want to take care of me why I went to Cynthia's. It was for a change."

Be it noted it emerged from this cross-examination that at one stage Robinson claims he went to Cynthia's home against his will. At a later stage he says it was for a change. These two examples were incidents that would be expected between a father and a daughter, the collection of rent was to repay a specific loan. As the relationship with his wife was not always cordial it was natural to stay with his daughter with whom he "live loving because she build me up, she work and help me".

Cynthia's evidence tallies with that of her father in one vital aspect. Here it is:

> " Apart from looking about repairing of house I never did any business for my father."

Mr. Scharschmidt QC, basing his submission on **Barclays Bank plc** (supra), objected to this line of defence on the ground that a respondent's notice was not filed. We overruled the objection because it was permissible in the light of paragraph 18(4) of the Court of Appeal Rules 1962. The conclusion after this examination of the evidence is that there was nothing to suggest that Moses Robinson left his financial or property matters to his daughter's management so as to raise a presumption of undue influence. So the onus was never shifted to Cynthia, to set the transaction aside.

Sixth ground of appeal

This ground reads:

> 6. "The learned trial judge erred in law in refusing on the basis of privilege to admit into the evidence the testimony of Hazel Burkhardt as to the contents of a Will made by the Plaintiff/Respondent in 1987."

This ground must be read in conjunction with paragraph 12A in the Further Amended Defence which reads:

> "12. The Defendant says further that prior to the execution of the said Transfer the Plaintiff had evinced an intention to give the said land to the Defendant by executing a will wherein the Plaintiff devised the said land to the Defendant."

The evidence discloses that Miss E. Williams was Moses Robinson's Attorney-at-Law. Hazel Bukhurdt her manager and secretary was called as a witness to produce a will made by Moses Robinson. The will would presumably have disclosed that Moses Robinson had bestowed the property by will to Cynthia before the property was transferred to her. The purpose would have been to

demonstrate that the transfer effected in Mrs. HoLyn's office was carrying out a previous intention exposed in a will. Mr. Daly QC objected. Here is how the objection arose:

> " I took instructions from Mr. Robinson. He was with his daughter Cynthia Nunes and a witness. As a result of instructions I took from him I made up a will. I wrote it first and someone else typed it.
>
> After he told me what he wanted to read it over to him in front of everyone else and I asked him if it was O.K. and he said, Yes Miss Tony - this is how I wanted it.
>
> I know Mr. Robinson before. I asked him to sign it. He said he could not write so I made him put an X - I signed, then the other witness signed. It was dated 30th March 1987.
>
> After everybody signed I wrote his name in. I saw him when he made the X - then witnesses signed. Then I wrote his name in. Halsbury - 3rd ed. Vol. 36 p. 51.
>
> Ruling - that document is not admitted in these proceedings on ground of privilege."

Calcraft v Guest [1895-9] All E.R. Rep. 346 at 349 was cited by counsel to establish that Langrin's ruling was wrong as this evidence ought to have been admitted. Here is the relevant portion of the judgment of the Court of Appeal delivered by Sir Nathaniel Lindsay MR. He cited a passage from **Phillipps on Evidence** where Bayley J in **Fisher v. Hemming** 1809 **Phillips & Arnold on Law of Evidence** 10th Edition Vol 1 page 116; 22 Digest (Rept) 412, 4426 states:

> "... 'He said, the attorney could not give parol evidence of the contents of the deed, which had been intrusted to him; so neither could he furnish a copy. He ought not to have

> communicated to others what was deposited with him in confidence, whether it was written or verbal communication. It is the privilege of his client, and continues from first to last.'

Lindley M.R. continued:

> In ***Lloyd v. Mostyn*** (1842), 10 M. & W. 478; 2 Dowl. N.S. 476; 12 L.J. Ex. 1; 6 Jur. 974; 152 E.R. 558; 22 Digest (Repl.) 238, 2329, Parke, B., said (10 M. & W. at pp. 481, 482):
>
> > ' I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?'

Lord Abinger, C.B., said (ibid. at p. 482):

> 'It is impossible to say this copy was not evidence.' The matter dropped there, but the court consisted of Lord Abinger, Parke, Gurney, and Rolfe, BB., and they all concurred in that which I take to be a distinct authority that you can give secondary evidence in a case of this kind."

So the copy of the Will ought to have been admitted.

What ought to have been done?

Mr. Hector Robinson who appeared below ought to have asked the court to mark the document for identity so that it would have been forwarded to this court as part of the Record. Then this court would be entitled to admit it. The enabling power is to be found in section 10 of the Judicature (Appellate Jurisdiction Act). It reads:

> "**10.** Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals

> from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

This section is in contrast to section 9 which entrusts this court with the powers of the former Court of Appeal. The principle of construction applicable is important so I reiterate what I said concerning section 9 in **Charles Stewart v Glennis Rose** unreported RMCA Plaint No: 477/89 motion No. 15 of 97 page 10 delivered June 17, 1997.

> "Section 9 (a) is a classic instance of retrospective legislation reviving sections of repealed legislation Such an effect is in conformity with section 4 (1) of the First Schedule of the Constitution pertaining to existing Laws, section 24 of the Interpretation Act and **Lemm v. Mitchell** [1912] AC 400."

The legislative reference to the former Supreme Court was to ensure that this court has all the powers of that court and by necessary implication all the powers of the present Supreme Court which is its successor.

Sections 41 and 44 are the specific sections of the Judicature (Supreme Court) Law which recognised the power of the former Supreme Court to hear evidence by way of deposition and affidavit in special cases and oral evidence in ordinary cases. I say recognised because this power was exercised as part of the inherent jurisdiction of the former superior courts of record which preceded the Supreme Court. Section 5 of this law explains it. It reads:

> The Supreme Court of Judicature,
> The High Court of Chancery,
> The Incumbered Estates' Court,
> The Court of Ordinary,
> The Court for Divorce and Matrimonial Causes,
> The Chief Court of Bankruptcy, and
> The Circuit Courts,
>
> shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of 'the Supreme Court of Judicature of Jamaica,' hereinafter called 'the Supreme Court.' "

The Supreme Court then was a superior Court of Record. It still is. Section 24 explains it:

> "**24.** The Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Law was vested in any of the following Courts and Judges in this Island, that is to say:-
>
> The Supreme Court of Judicature,
> The High Court of Chancery,
> The Incumbered Estates Court,
> The Court of Ordinary,
> The Court for Divorce and Matrimonial Causes,
> The Chief Court of Bankruptcy, and
> The Circuit Courts, or
> Any of the Judges of the above Courts, or
> The Governor as Chancellor or Ordinary acting in any judicial capacity, and
> All ministerial powers, duties, and authorities, incident to any part of such jurisdiction, power and authority."

Such a court can receive evidence in any of the modes stipulated in section 41 and 44 of the Judicature (Supreme Court) Law. Section 41 is the general section so I will now cite it as it demonstrates that the law was not creating the power, it recognised its existence. It reads:

> " **41.** Nothing in this Law or in rules made under this Law, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence."

So if the will had been marked for identity it could have been admitted in evidence by this court.

Alternatively, the will could have been accepted either by oral or affidavit evidence on special grounds by this court. This aspect calls for an explanation. Because of the expressed statutory powers analysed above the Rules Committee was empowered to make and did make the following provisions in section 18 of the Court of Appeal Rules, 1962:

> "**18.** (1) In relation to an appeal the court shall have all the powers and duties as to amendment and otherwise of the Supreme Court.
>
> (2) The court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner:
>
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.
>
> (3) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. [Emphasis supplied].

Additionally, Langrin J could have relied on section 41 of the Judicature (Supreme Court) Act so as to have a ruling on the matter. It could have been

reserved either during the course of the hearing or at its conclusion. Then this court would have acted at the instance of the court below instead of deciding the issue on the basis of a ground of appeal. Then again the will would be made part of the record available to the court. That little used section reads in part:

> " **41.** A Judge of the Supreme Court sitting in the exercise of the civil jurisdiction of the Court may reserve any case, or any point in a case, for the consideration of the Court of Appeal, or may direct any case or point in a case to be argued before the Court of Appeal, and the Court of Appeal shall have power to hear and determine any such case or point:..."

If the will had been admitted either in the court below or in this court, it could have demonstrated the intention of Moses Robinson to bestow the property on Cynthia from 1987 a year before he transferred it to her during his lifetime.

Conclusion

The appellant Cynthia Nunes has made out a clear and compelling case that the orders of Langrin J in favour of Moses Robinson were wrong and must be set aside. The appeal is allowed. Judgment must be entered for the appellant. The agreed or taxed costs both here and below must go to her.

BINGHAM, J.A.:

This appeal is against a judgment of Langrin, J. delivered on April 22, 1994, in which he set aside a transfer No. 475270 registered on October 31, 1988, and executed by the respondent (now deceased) in favour of the appellant who is his daughter. The learned judge ordered that the appellant re-transfer the land comprised in the Certificate of Title registered at Volume 1042, Folio 467 to the respondent. He also made certain ancillary orders which relate to the conduct of the parties following the transfer.

The facts out of which the hearing below and before us arose are fully set out in the judgment of Downer, J.A. and do not, therefore, call for a full repetition on my part. They will be rehearsed only where this becomes necessary in this judgment.

The pleadings had alleged in the statement of claim on the part of the appellant:

1. Actual fraud
2. Misrepresentation
3. Undue influence.

The evidence adduced in support of the allegation in the claim is best recited by referring to the written judgment of the learned judge.

The Respondent's Account

Moses Robinson, the plaintiff/respondent, is described as being "disabled, blind, illiterate, sick, of great age over eighty years and the father of the defendant/appellant. His recollection of events was not always clear. He lived lovingly with his wife in a three-storey house at Mount Salem, Montego Bay. He had three surgical operations and was suffering from cancer. In 1988, Hurricane Gilbert destroyed the roof of the three-storey house. The appellant offered to help him. Of the seven children he had with his first wife (then deceased), the appellant was the only one with whom he was on good terms. He had taken the title to his holdings at Mount Salem and handed it to the appellant's daughter. The appellant took possession of it and told him that she was going to take his name off the title. When he needed a loan to fix his roof he went to her for the title. She told him he could not get a loan without paying mortgage interest so he would have to sign for the loan.

She took him to Mrs. HoLyn's office while his wife was at home. At the office he was told that he had to sign for the money. Someone held his hand while he made an X on the document. He denied that the document was read over and explained to him by Mrs. HoLyn. He did not know what the document was about.

The appellant's account

She was described as being a middle-aged businesswoman and the daughter of the respondent. She appeared to be of a strong personality, but on good terms with her father. During her father's illness she took him to a doctor

on several occasions and for a considerable time while he stayed at home after he left the hospital. He did not want to return home as his wife did not take proper care of him. It was Arnold Robinson, a grandnephew, and not the appellant's daughter who had brought the title to her house and handed it to her.

The respondent summoned her one morning and "invited her to attend the attorney's office with him so that he could put things right and not leave anything for people to fight over."

At the attorney's office, he gave the attorney instructions and she prepared the transfer which was read over to him and he made his mark.

Mrs. Marcia HoLyn, the attorney who prepared and processed the transfer of the property, in her evidence, supported the account of the appellant as to the circumstances relating to the manner in which the transfer document came to be prepared and executed. As her evidence can be seen as crucial to the determination of this appeal, it will be referred to in greater detail later on in the judgment.

At the conclusion of summarising the respondent's evidence, and before reviewing the appellant's account, the learned judge had referred to the fact that "there were conflicts with his evidence and that of the defendant's but I have no hesitation in preferring his evidence." In this regard, he prefaced his conclusions on the evidence in the following manner:

> "My conclusion on the evidence is that the defendant fails to remove the onus arising from the presumption of undue influence. I am satisfied on the evidence that she exercised a dominating

> influence over her father and particularly since he took unto himself a new wife. She wanted to ensure that his wife would not benefit from the property."

This later led the learned judge to find that:

> "The plaintiff being illiterate was duped by the defendant to attend at the Attorney's office to sign a loan document. That in so signing the plaintiff was not guilty of any negligence or even carelessness in not obtaining independent legal advice before signing the documents since the defendant could not rely upon her own trickery and deceit to gain an advantage. The defendant knew that the plaintiff was unaware of the nature of the document which he signed.
>
> Notwithstanding the evidence of Marcia HoLyn, Attorney-at-Law, the defendant had earlier misrepresented to the plaintiff the true state of affairs by telling him he was going to sign a loan document which caused him to transfer his entire real estate."

Of the witnesses who testified before the learned judge, as to the circumstances relating to the manner in which the transfer was executed, Mrs. HoLyn was without doubt an impartial and independent witness, and the learned judge, in his judgment, acknowledged this fact. She said, inter alia:

> "I know Moses Robinson and Cynthia Nunes. Sometime in second week of October, 1988 that Moses Robinson accompanied by his daughter Cynthia Nunes came to my office. I never seen them before in my life. Mr. Robinson spoke to me while I was in my office. Cynthia Nunes was present at the time.
>
> Mr. Robinson requested that he wanted to transfer his land at Mount Salem, MoBay. He had a registered title with him. He wanted to transfer it in his daughter's name because she took him to Doctor, fed him and clothed him and of all his children she was the one who took care of him.

...He told me of a son who worked at the Bank - named Adolphus - and he didn't want to do anything with him and if he died nothing should be left for him. He said he know of my father who was murdered in 1986. (February 19). I thought that he wanted to transfer the entire property to Cynthia Nunes. I told him that I would prepare the document and he would have to come back to sign because I don't normally prepare document in a day. He said he had cancer and could not come back so he asked me if I could prepare it and have it signed. He said Cynthia had given him $15,000 cash and she was instrumental in fixing it up from Hurricane Gilbert and he didn't have the money. She was also paying the doctor bills and feeding him. He said he did not want his wife to know about the matter.

I told him that because his vision was impaired I had to prepare the transfer different from the normal way. He couldn't read and write - so he had to make an X.

I never found the request of giving the property to his daughter to be abnormal. He said the children didn't care about him. He was berating the son who worked at bank and another daughter. They didn't give him anything and Cynthia was the one who took care of him.

I instructed my Secretary to prepare a transfer in usual form when transferror cannot write. My Secretary brought in the transfer and I painstakingly read the document to Mr. Robinson. Some of the words in the transfer he didn't understand and I explained everything and I asked him if he agreed and understood what was there and he said Yes.

He put an X on the document after I told him where he should put the X. I witnessed his signature."
[Emphasis supplied]

In assessing Mrs. HoLyn's evidence, the learned judge said:

"In the present case I have no doubt that Mrs. HoLyn acted in good faith. However, she was not made aware of the material fact that the property which was being transferred for a paltry sum constituted a

> commercial enterprise far in excess of the consideration placed in the transfer. In the haste in which the transaction was completed she failed to consider the very important fact that the plaintiff could more prudently and equally effectively have benefitted the defendant without undue risk to himself by advising him to retain the property during his life and bestowing it upon his daughter by will. She apparently did not address her mind to the possibility of fraud, undue influence, non est factum or manifest disadvantage but rather to the plaintiff's capacity to make the transfer." [Emphasis supplied]

Before us, Mr. Daly, Q.C. for the respondent (deceased) did not seek to support the findings of the learned judge that actual fraud or misrepresentation had been established in favour of the respondent.

While conceding that the relationship of the parties would have ruled out any presumption of undue influence arising from the transfer of the property, he submitted that there was evidence supportive of the learned judge's finding that the appellant had exercised a dominating influence over the respondent sufficient to cause the taint of undue influence to arise in his favour thereby resulting in him being able to set aside the transfer. This submission is untenable as it clearly overlooked the fact that it was the uncontroverted evidence of the daughter Cynthia (the appellant) that the request made by the respondent (deceased) of the appellant following the damage to the roof of his house by Hurricane Gilbert marked the first and only occasion in which the appellant had undertaken any particular task on behalf of the respondent.

In arriving at this finding, the learned judge apparently had in the forefront of his mind the factual situation which was before the Board of the Privy

Council in ***Inche Noriah v. Shaik Allie Bin Omar*** [1929] A.C. 127. The headnote reads:

> "A Malay woman who was of great age and wholly illiterate, executed a deed of gift of landed property in Singapore in favour of her nephew who had the management of all her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the donor's property and did not bring home to her mind that she could more prudently, and equally effectively, benefit the donee by bestowing the property upon him by will.
>
> **Held**, that the gift should be set aside as the presumption which arose was not rebutted." [Emphasis supplied]

This case is clearly distinguishable from the instant case as no such presumption of undue influence arises from a gift where the relationship is that of a father making a disposition to his daughter. Moreover, there the nephew had management of all the donor's affairs, whereas in this case there was no such evidence as the undertaking for the repairs to the roof marked the only occasion in which the appellant transacted any business for her father. As to fraud and misrepresentation, the evidence of Mrs. HoLyn, which was not rejected, clearly removed any factual basis for the findings reached by the learned judge, that the appellant duped her father into signing a transfer document which he believed was a loan document from a Mr. Leslie Hew. Her evidence in this regard was clear. She said:

> "I did not tell Mr. Robinson that the documents he signed was from Mr. Leslie Hew. I never heard his daughter Cynthia tell him that. Cynthia kept quiet during the exercise while Mr. Robinson spoke."

Mrs. HoLyn's evidence, which the learned judge accepted, also made his finding as to her being the daughter's agent untenable. In this regard Mr. Robinson impressed her as someone who:

> "...appeared to me to be of sound mind and he had made up his mind to transfer to Cynthia. I am here to do it and want it done. He was an impatient - no nonsense, man."

The learned judge's findings

It is clear from an examination of the findings of the learned judge that he was most impressed with the respondent (deceased), a factor which he made known in preferring "without hesitation" his evidence to that of his daughter. Had the outcome of the case been dependent upon the evidence of these two persons, one could hardly, at this stage, challenge the judgment as, if believed, the testimony of the respondent (deceased) would have established the allegations of fraud and misrepresentation as set out in the Amended Statement of Claim. In this event, the question of undue influence would not fall for consideration.

Given the relationship of the parties, however, in the absence of any evidence supporting fraud or misrepresentation, the inadequacy of the consideration for the transfer was immaterial and would not invalidate the gift as one being done for natural love and affection. A transfer as in this case by a father to his daughter has been from time immemorial being looked upon by a Court of Equity with good favour, vide ***Beanland v. Bradley*** 65 English Reports 427. No presumption of undue influence accordingly would arise, having

regard to the nature of the transfer. When the testimony of Mrs. HoLyn is examined, therefore, it placed the evidence of the respondent (deceased) in a most unfavourable state as to his credibility. Moreover, the learned judge's assessment of the appellant's testimony in the light of Mrs. HoLyn's testimony, which was not rejected and is supportive of her evidence, made the learned judge's findings and conclusion, stamping her as someone guilty of deception and trickery, untenable.

It is for these reasons why Grounds 1-5, in so far as they challenged the learned judge's findings on material issues in the case, had merit and, in my view, ought to be sustained.

The authorities cited by counsel have been fully examined and dealt with in the judgments of Downer, J.A. and Walker, J.A. (Ag.). Once the evidence of Mrs. HoLyn, the attorney-at-law who had conduct of the preparation and execution of the transfer document, and whose testimony was not rejected by the learned judge, is examined, a judgment in favour of the appellant ought inexorably to follow as a matter of course.

I would regard the facts in this case as not too dissimilar to that in ***Re Coomber, Coomber v. Coomber (on appeal)*** [1911] 1 Ch. 723 at 729, Fletcher Moulton, L.J. remarked:

> "Again and again we have had it said, the lady did not have competent and independent advice; and it seems to be based on the fact that the solicitor did not say to her, I advise you to do it, or I would not advise you to do it. In my opinion that is not by any means necessary for the purpose of advice. I think that a solicitor best gives advice when he takes care that his client understands fully the nature of the act

> and the consequences of that act. He is not bound to say 'I will advise you to do it', or 'If I were you I would do it', or 'If I were you I would not do it.'
>
> Nothing of the kind is necessary for competent and independent advice. All that is necessary is some independent person free from the taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and consequences of the act." [Emphasis supplied]

Having regard to the manner in which Mrs. HoLyn understood the respondent's (deceased) instructions, the underlined words saw her as fulfilling this role and function in carrying into effect the respondent's (deceased) stated instructions. She certainly was not under any obligation, as Langrin, J. believed, to "address her mind to the possibility of fraud, undue influence, non est factum or manifest disadvantage", but to the respondent's (deceased) capacity to make the transfer. This was so as, in her judgment, the respondent (deceased), although illiterate, impressed her as possessing the necessary competence to instruct her as to the course he wished her to adopt in relation to the document he wanted prepared, thus ruling out any question of fraud or misrepresentation by the appellant.

Conclusion

It was some three years after the respondent's (deceased) first visit to Mrs. HoLyn's office that he was led to return there in 1991 in an attempt to undo what he had done in October 1988. On this second visit, his wife, of whom he had expressed to Mrs. HoLyn certain fears, accompanied him. The question which ought naturally to follow, therefore, is what prompted him to adopt this

changed position? Given the reasons he gave Mrs. HoLyn in 1988 for wanting to transfer the property to the appellant, his health by now must have deteriorated and, in all probability, he was now acceding to the wishes of his wife and the other family members who had by then found out about the transfer of the property, on going to the respondent's attorney concerning the possible "gift" of a life interest in the property to the wife. By then it was now too late as, having divested himself of the entire property, such a gift was no longer his to make.

Once the learned trial judge assessed the evidence of Mrs. HoLyn in a favourable light and did not reject her evidence as to the events as they unfolded at her office on 10th October, 1988, the entire substratum upon which the respondent's claim rested was gone and one was left with a factual situation in which a father, grateful for the assistance rendered to him by his "doting" daughter and wishing to put matters right, sought to benefit that daughter to the detriment of the other family members including his wife. Mrs. HoLyn's testimony had the effect of removing any possible taint which, having regard to the findings of the learned judge, could have been applied to the circumstances in which the transfer was effected.

I would accordingly allow the appeal, set aside the judgment entered below and enter judgment for the defendant/appellant with costs to be agreed or taxed here and in the court below.

WALKER JA

The facts of this case are fully set out in the first judgment of Downer, JA, so I will not repeat them except insofar as that is necessary to make comprehensible these few observations which, I might say, I am minded to add only because we find ourselves in disagreement with the judgment of the learned trial judge.

Moses Robinson (now deceased) and Cynthia Nunes were father and daughter.

On April 22, 1994 after a hearing in the Supreme Court Langrin J., delivered a judgment whereby he ordered a re-transfer from Miss Nunes to Mr. Robinson's estate (Mr. Robinson had by then died) certain real property, the subject-matter of these proceedings. The property had previously been transferred inter vivos from father to daughter. On the same date the learned judge also granted other ancillary relief including an injunction to restrain Miss Nunes from interfering with the premises and/or inter-meddling with any of the tenants thereon. It is from this judgment that Miss Nunes now appeals.

No Respondent's Notice has been filed in this appeal, and it is a fact that notwithstanding the expansive terms of the judgment of Langrin J., Mr. Daly QC for the respondent has not sought to sustain this judgment on any ground other than that the learned judge was correct in his finding of undue influence exerted by Miss Nunes over her father in the transfer of the property.

The various circumstances in the context of which a plea of undue influence may arise for consideration were helpfully classified by the English Court of Appeal in the recent case of **Bank of Credit and Commerce International SA v Aboody** [1992] 4 All ER 955. The classification adopted by that court was as follows:

> "*Class 1: actual undue influence.* In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted

undue influence on the complainant to enter into the particular transaction which is impugned.

Class 2: presumed undue influence. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

Mr. Daly submitted that the present case falls squarely under Class 2B in the above classification. He said that this was a case in which the parties stood in a fiduciary relationship where Mr. Robinson reposed trust and confidence in his daughter, Miss Nunes. Mr. Daly submitted further that the judgment of the learned judge rested on a finding of undue influence flowing not from a special relationship of father and daughter but, independently of such a relationship, out of such a fiduciary relationship between the parties. Furthermore, implicit in this judgment, argued Mr. Daly, was a finding by the judge that such undue influence as arose in this way was not successfully rebutted by Miss Nunes. I do not agree with these submissions.

From as early as the middle of the 19th century the plea of undue influence was considered by the court, and the beginnings of the principles of law applicable thereto were formulated in **Beanland v Bradley** [1854] 2 Sm & G 339. During that century the Courts of Chancery regarded with approval gifts from a parent to a child on the assumption that such gifts were prompted by the natural love and affection which existed between the two. But the reverse was not true and gifts from a child to a parent were viewed suspiciously. Such gifts were presumed to have resulted from an abuse of parental authority. The present case, of course, concerns a conveyance from a parent to a child.

So to the findings of the learned judge. At different stages of his judgment these findings were expressed as follows:

> " My conclusion on the evidence is that the defendant fails to remove the onus arising from the presumption of undue influence. I am satisfied on the evidence that she exercised a dominating influence over her father and particularly since he took unto himself a new wife. She wanted to ensure that his wife would not benefit from the property."

Later on he said:

> "Given that the plaintiff reposed trust in the defendant during his illness and while his house was in disrepair, I hold that the presumption of undue influence arises from the evidence of the relationship between the parties. Further the transaction leading to the transfer itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary was explicable only on the basis that undue influence had been exercised to procure it.
>
> The evidence makes it abundantly clear that the daughter exerted a dominating influence over her elderly ailing impecunious father right up to the time when the property was transferred. Both father and daughter stood in a fiduciary relationship with each other and accordingly the property of the plaintiff was procured by the undue influence of the defendant. I conclude that the plaintiff had been induced to transfer his title in the property to his daughter by her falsely representing to him that he would be signing a loan document."

Still later on he said:

> " In my judgment the plaintiff has established misrepresentations made to him by his defendant daughter and that she had exercised fraud and actual undue influence on her father to procure the transfer. The Attorney-at-Law had not acted on behalf of the plaintiff and due to the lack of independent legal advice the transaction was manifestly disadvantageous to the plaintiff."

With great respect to the learned judge the language of his judgment is at best confusing. Interpreted literally it betrays a finding which is based on a mis-application of the principle of law governing a plea of undue influence in circumstances where, as

here, the parties stand in a relationship of father and daughter. In such circumstances a presumption of undue influence does not arise as a matter of law as the learned judge seems to have thought. In coming to his judgment on such a basis the judge fell into error and wrongly placed upon Miss Nunes the burden of disproving the assertion of undue influence made against her. For this reason, therefore, the judgment is untenable.

But, what if Mr. Daly is right as to his interpretation of the findings of the judge? Even assuming that on the facts a fiduciary relationship existed between Moses Robinson and Cynthia Nunes, and I am inclined to the view that no such relationship did exist, a consequential finding of undue influence was a non-sequitur. This appears to have been the thinking of the learned judge when he recorded a finding that:

> "Both father and daughter stood in a fiduciary relationship with each other and accordingly the property of the plaintiff was procured by the undue influence of the defendant."

In **Re Coomber, Coomber v. Coomber** (1911) 1 Ch 723 Fletcher Moulton, L.J. considered the types of fiduciary relations which warrant judicial interference. In that case the question arose as to whether an assignment of a lease and a licence by a mother to her son was void on the ground that the latter stood in a fiduciary relationship to his mother who had had no independent advice in making the assignment. At p. 728 of his judgment Fletcher Moulton, L.J. said:

> "...It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and

> another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them."

In the present case the evidence adduced on behalf of Moses Robinson was in every material particular diametrically opposed to that adduced on behalf of Miss Nunes. It was, therefore, incumbent on the judge to assess the witnesses on an individual basis, and none more so than the witness, Marcia HoLyn, who testified on behalf of Miss Nunes. The evidence of Mrs. HoLyn, an attorney-at-law, was crucial to a determination of the issues in this case. It is instructive to quote Mrs. HoLyn's evidence in part. At various times during her testimony she said:

> " I know Moses Robinson and Cynthia Nunes. Sometime in second week of October, 1988 that Moses Robinson accompanied by his daughter Cynthia Nunes came to my office. I never seen them before in my life. Mr. Robinson spoke to me while I was in my office. Cynthia Nunes was present at the time.
>
> Mr. Robinson requested that he wanted to transfer his land at Mount Salem, MoBay. He had a registered title with him. He wanted

to transfer it in his daughter's name because she took him to Doctor, fed him and clothed him and of all his children she was the one who took care of him.

He told me a bit of his family history of how Cynthia was kind to him. He told me of a son who worked at the Bank - named Adolphus - and he didn't want to do anything with him and if he died nothing should be left for him. He said he know of my father who was murdered in 1986. (February 19). I thought that he wanted to transfer the entire property to Cynthia Nunes. I told him that I would prepare the document and he would have to come back to sign because I don't normally prepare document in a day. He said he had cancer and could not come back so he asked me if I could prepare it and have it signed. He said Cynthia had given him $15,000 cash and she was instrumental in fixing it up from Hurricane Gilbert and he didn't have the money. She was also paying the Doctor bills and feeding him. He said he did not want his wife to know about the matter.

I told him that because his vision was impaired I had to prepare the transfer different from the normal way. He couldn't read and write so he had to make an X. ... I instructed my Secretary to prepare a transfer in usual form when transferor cannot write. My Secretary brought in the transfer and I painstakingly read the document to Mr. Robinson. Some of the words in the transfer he didn't understand and I explained everything and I asked him if he agreed and understood what was there and he said Yes.

He put an X on the document after I told him where he should put the X. I witnessed his signature. ... He wanted to do it quickly so that his wife would not know about it. He seems to be afraid of his wife. ...

Mr. Robinson appeared to me to be of sound mind and he had make up his mind to transfer to Cynthia. I am here to do it and

> want it done. He was an impatient - no nonsense, man. ... My impression of what he said is that he would soon die and he wanted to tie up loose ends - wanted to give his daughter this particular property. ... I don't think the transaction was unfair. He told me that because of natural love and affection he wanted to transfer the property. He said he got consideration of $15000. I followed his instructions."

If believed, this evidence negatived absolutely Mr. Robinson's plea of undue influence. In the result, the learned judge did not expressly reject Mrs. HoLyn's evidence as he might have done. On the contrary he found that Mrs. HoLyn was a credible witness who acted "in good faith" in all her dealings with the parties. In addressing this aspect of the matter the judge said:

> "In the present case I have no doubt that Mrs. HoLyn acted in good faith. However, she was not made aware of the material fact that the property which was being transferred for a paltry sum constituted a commercial enterprise far in excess of the consideration placed in the transfer. In the haste in which the transaction was completed she failed to consider the very important fact that the plaintiff could more prudently and equally effectively have benefited the defendant without undue risk to himself by advising him to retain the property during his life and bestowing it upon his daughter by will. She apparently did not address her mind to the possibility of fraud, undue influence, non est factum or manifest disadvantage but rather to the plaintiff's capacity to make the transfer."

Nor can the judge's strictures in relation to Mrs. HoLyn in the passage quoted above be justified on the facts of this case. In this regard the observations of Fletcher Moulton, L.J. in **Re Coomber, Coomber v Coomber** (supra) are apposite. There at p. 729 the learned Lord Justice said:

> " There is one other point I wish to deal with. Again and again we have had it said, the lady did not have competent and independent advice; and it seems to be based on the fact that the solicitor did not say to her, I advise you to do it, or I would not advise you to do it. In my opinion that is not by any means necessary for the purpose of advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequences of that act. He is not bound to say 'I will advise you to do it'; or 'if I were you I would do it'; or 'if I were you I would not do it.' Nothing of that kind is necessary for competent and independent advice. All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing. Of course when I say this I am referring only to adults who are competent to form an opinion. When a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs in the broadest sense of the word, other conditions may arise; but in this case I am quite satisfied that if it had been necessary to shew that the mother had competent and independent advice the evidence of the lawyer shews that she had."

It seems to me that this statement of the law, which I accept as correct, when applied to the facts of the present case, especially the facts as disclosed in the unrejected evidence of Mrs. HoLyn, renders Langrin's J. findings of undue influence unreasonable

and, therefore, untenable. For the same reason, the judge's findings of misrepresentations made by Miss Nunes and of fraud practised by her upon her father cannot be sustained.

In the result, I would allow this appeal with costs here and below to the appellant, such costs to be agreed or taxed.

Order

Appeal allowed. Order of Langrin, J. set aside.

Judgment entered for Cynthia Nunes the appellant. The agreed or taxed costs both here and below to the appellant.