1979 February 28

[STAVRINIDES, L. LOIZOU AND HADJIANASTASSIOU, JJ.]

IFIGENIA PATSALIDOU,

Appellant-Plaintiff.

v.

ANDREAS COSTA KYRIAKIDES,

Respondent-Defendant.

(*Civil Appeal No.* 5522).

Undue influence—Principles of equity—Brother and sister—Gift by sister to brother of all her property, by virtue of power of attorney executed whilst she was affected by ill health—Gift so large and relations between donor and donee such as to raise the presumption of undue influence—Transaction in the face of it unconscionable—It cannot stand in the absence of evidence that it was entered into with the benefit of independent advice—Sections 14, 16 *and* 20 *of the Contract Law, Cap.* 149.

Undue influence—Presumption of—Is not only confined to fiduciary relationships but it extends to relationships which involve confidentiality.

On April 4, 1971 the appellant-plaintiff signed a power of attorney by virtue of which she appointed the respondent-defendant, who is her brother, as her general representative. Acting under the said power of attorney the respondent registered in his own name as a gift the house of the appellant valued at £10,000 and, also, collected from the Bank of Cyprus an amount of £950 which was standing in her name. No other property was left to the appellant as the above were her only property.

At the time of signing the power of attorney the appellant was suffering from depression and her volitional powers were affected adversely by her depressive state. She had, since February 1971, left her husband and her house and was living at the house of the respondent fearing that her husband wanted to kill her.

The appellant sued the respondent for the return of all the property that had come in his possession by virtue of the said power of attorney, alleging that it was signed by her whilst she was seriously ill and after a moral coercion or undue influence by the respondent.

The trial Court found that the power of attorney was not signed under conditions amounting to undue influence and was, therefore, valid.

Upon appeal by the plaintiff:

Held, allowing the appeal, (1) that the occasions of interference by the Courts are not only confined to fiduciary relationships but they extend to relationships which involve confidentiality (*Lloyds Bank* v. *Bundy* [1974] 3 W.L.R. 501 adopted).

(2) That in this case there was such a special relationship between the donor and the donee, to whom the donor was looking for help and advice, as to call for independent advice.

(3) That as the appellant gave away everything she had and was reduced to a state of poverty, this was a classic case where the relations between the donor and the donee, her brother, have at, or shortly before the execution of the gifts been such, as to raise the presumption that the donee had exercised undue influence over the donor and dominated her will.

(4) That the circumstances were such as to put an onus on the respondent donee of proving that the transaction was completed by the appellant donor only after full, free and informed thought about it.

(5) That as a matter of public policy, the Courts have always looked with caution at gifts or improvident bargains which are made by a person whose motives or judgment are impaired by reason of age or ignorance or infirmity or even by a failure to know or appreciate the circumstances; and that equity will, as a matter of course, interfere when the recipient of the gift or the exactor of the bargain has brought undue influence or undue pressure to bear so as to induce the transaction.

(6) That the gifts in question were so unreasonable and the donor was so affected by ill health that the transaction cannot stand in the absence of evidence that it was entered into between

the donor and the donee with the benefit of independent advice or at any rate that its effect had been properly explained to the donor so that she had full appreciation of what is involved.

(7) That those gifts were so large as not to be reasonably accounted for on the ground of relationship or other ordinary motives on which ordinary men act; that in a case like this when the respondent was fully aware that the mental capacity of his sister was affected, one would have expected the Court to reach the conclusion that such a transaction was, on the face of it, unconscionable, and that the burden was upon the donee to support the gifts; that the trial Court failed to give due effect to the provisions of the Contract Law, Cap. 149 (see sections 14, 16 and 20 at pp. 96–97 *post*) and the principles of equity; and that, accordingly the appeal must be allowed, the judgment of the Court below be set aside, judgment be entered for the appellant on the claim, and the power of attorney be set aside and be delivered up for cancellation.

Appeal allowed.

Cases referred to:

Baudains v. *Richardson* [1906] A.C. 169;

Noriah v. *Omar* [1929] A.C. 127;

Billage v. *Southee* [1852] 9 Hare 534 at p. 540;

Lloyds Bank Ltd. v. *Bundy* [1974] 3 W.L.R. 501 at pp. 507–509;

Allcard v. *Skinner* [1887] 36 Ch. D. 145, at pp. 181, 182–185;

Re Brocklehurst (*deceased*) [1978] 1 All E.R. 767 at p. 783;

In re Craig (*deceased*) [1971] Ch. 95;

Zamet v. *Hyman* [1961] 3 All E.R. 933 at p. 938;

Tate v. *Williamson* [1866] 2 Ch. App. 55 at p. 61;

Tufton v. *Sperni* [1952] 2 T.L.R. 516 at pp. 522, 523.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Chr. Ioannides, P.D.C. and A. Ioannides, D.J.) dated the 4th December, 1975, (Action No. 5930/71 whereby she was awarded the sum of £1027.150 mils, as money received by defendant by virtue of a power of attorney, and her claim for the return by the defendant of all the property that came

into his possession by virtue of the same power of attorney, was dismissed.

L. Papaphilippou, for the appellant.

L. N. Clerides, for the respondent.

Cur. adv. vult.

STAVRINIDES J.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: The principal question we have to decide in this appeal is whether the Full District Court of Nicosia was right in holding that the defendant, in transferring and registering into his name the house of the plaintiff, was acting properly under the provisions of the power-of-attorney signed by the plaintiff without legal advice.

In this action, the plaintiff, Ifigenia Patsalidou, claimed (a) an order against the defendant ordering him to produce accounts in connection with the administration of the plaintiff's property; (b) an order ordering the defendant to return to her all property which went into his possession by virtue of the power-of-attorney; (c) an order for the transfer and registration to the name of the plaintiff of the house situated at Strovolos, registration No. B 482, plot 112, sheet/plan No. XXI/61.62U; and (d) judgment for the sum of money which the defendant received by virtue of the power-of-attorney and did not return to the plaintiff.

In the statement of claim, it was alleged that the plaintiff is the sister of the defendant Andreas Costa Kyriakides, and she signed a power-of-attorney on April 8, 1971, by virtue of which she appointed the defendant as her general representative. That power-of-attorney as alleged, was signed whilst the plaintiff was seriously ill and after a moral coercion or undue influence by the defendant.

On the contrary, the defendant repudiated the averments of the plaintiff that the said power-of-attorney was signed whilst she was seriously ill, and because of moral coercion or undue influence. It was further alleged by the defendant that the said power-of-attorney was signed by the plaintiff on her own free will, being in good health. She was well aware and understood the contents of that power-of-attorney, and signed it because

she wanted to transfer and register her house as a gift by virtue of love and affection to her brother.

Regarding the amount of £950, the defendant further claimed in his defence that he collected that amount from the Bank of Cyprus by virtue of that power-of-attorney; and that he kept it because there was no provision in the said power-of-attorney to return it to the plaintiff; and because she never asked him to return that sum of money.

The facts are these: On May 7, 1974, Dr. Mikellides, a specialist neuropsychiatrist, told the Court that he examined the plaintiff, Ifigenia Patsalidou of Strovolos on January 1, 1970. Dr. Mikellides found the plaintiff to have the symptoms of insomnia, anorexia, depression, thoughtfulness, mourning indisposition, psychomotor retardation, fears and persecutory ideas. These symptoms, together with the fact that the patient had two previous attacks, one in 1952 after the death of her brother and the second in 1962 during the climacteric period, left no doubt in the mind of the psychiatrist that the patient was going through another attack of depression. Appropriate treatment was prescribed, and the case was followed up, twice in April, once in May, and once in October, 1970. The psychiatrist saw the patient again on February 25, 1971, but on October 5, 1970, he found the patient developing some dysarthria and her depressive condition was aggravated by developing akathisia and agitation. Because he thought that the patient had a cerebral vascular episode, he referred the case to Dr. Meleagros who undertook the physical part of the treatment required. It appears further that the patient at the time had an elevated blood sugar content which in effect was that she had diabetes melitous as well.

In February, 1971, the patient underwent a total hysterectomy which was followed up by cobalt therapy. In fact, he added that the patient thought that her husband wanted to kill her, and judging the severity of the case from the symptomatology point of view, and the dosage of medication prescribed of her, he would say that at the time her depressive condition was a serious one.

Questioned further, he said that he did not have any detailed notes regarding the symptomatology of February 25, 1971, but he added, presumably she must have been depressed at the time

as the anti-depressant regime was continuing. He also added that he could not remember very well who escorted the patient on the last examination, but he thought that on one of the visits she was accompanied by the defendant, who was present during the examination and he knew the condition of the plaintiff.

The psychiatrist, in explaining the patient's volitional powers and whether they were affected, said that they were affected adversely by depressive states; he added, the lesser degree of this adverse affection of the volitional power is manifested by indecisiveness, postponement of things that have to be done, certain degree of inactivity and inertia, and the severe form of this adverse affection is that the patient becomes absolutely motionless like a statute. This condition he added, is called stuporous.

In explaining further the condition of the plaintiff, he said that the first element of her psychological condition on which the answer should be based is the affection of the patient, in other words, the feeling of the patient, and in this case, on the first examination, the patient was severely depressed. The second element is the psychomotor retardation, i.e. the fact that all mental and physical functions of the organism were retarded, i.e. were moving very showly. These are the main items, the psychiatrist went on to add, that one has to take into consideration, the whole symptomatology and not isolate any symptoms on which to base a hypothesis.

Then the psychiatrist was questioned in these terms:-

"*Q*. The question that her allegations about her husband' s evil intentions was nourishing this feeling, was making her susceptible to interference?

A. The answer is yes if one takes into consideration the concrete action of the patient.

Q. Can you say that in view of this frame of mind the plaintiff had, would have been an easy victim even to any unscrupulous propositions?

A. If these unscrupulous propositions are in line with the frame of mind of the patient, I would say yes. They are easy victims.

Q. If I give you the following picture of the plaintiff, I

quote: 'My relatives, among which is my brother, were telling me that my husband wanted to do me harm in order to take my property, and the wife of Andreas told me many times that my husband would have killed me' can this woman be the subject of undue influence and moral coercion?

A. Considering the psychological condition of the patient at the time, I would say that any such statements would have undermined the patient's residual feeling of security and would have rendered her an easy victim."

In cross-examination, the psychiatrist said that other factors may interfere apart from those he mentioned such as poverty of the patient, inability to meet the expenses involved, unwillingness of the relatives to help the patient to visit the doctor, and because the patient himself may not have the requisite volition to act on her own initiative, and therefore she had to depend on the attitude of her close relatives and the refusal of the patient to visit her doctor as she may consider that she is beyond any help and nothing can be done to restore her health.

Questioned further about the ability of the patient to sign a cheque in 1970, or anything without knowing what she was doing, he said that she knew that she was signing a cheque, but he was positive that she did not know the consequences of this act, or if she knew the consequences of her act, the sense of justice of this patient might have been perverted, in view of not being able to care, or if she cared, she would think that she was doing the right thing.

Costas Patsalides, the husband of the plaintiff, said that his wife was a school teacher by profession and that she retired and got her pension in 1965. When his wife became ill, they visited a number of doctors. It appears further that the defendant (the brother of the plaintiff) and his wife came and stayed at the witness's house. The defendant stayed there to keep the plaintiff company whilst he (the witness) was at work, because the defendant had no work to do—having been discharged from prison. It was during that time, that the plaintiff told him that whilst he was at work, the wife of the defendant told her that she must transfer the house into the name of the defen-

dant because she was ill, and she might die or he might kill her or poison her; and/or might sell the house by means of a false declaration. With this in his mind, the witness added, some time towards the end of December, 1970, he insisted that the defendant and his wife should leave his house or he would call the police to send them away. In fact, the defendant's wife filed an action against the witness, and the plaintiff, for services rendered, but the action was dismissed.

It appears further that the condition of his wife did not improve, and on February 15, 1971, she left their house and went and stayed at the defendant's house at Psimolophou. He tried on a number of occasions to persuade her to return to their home, but she did not want to return. On April 21, 1971, he received a registered letter from counsel acting on behalf of the defendant, and a few days later on, he was served with a writ to evict their house. Finally, he said that the defendant became the plaintiff's attorney and he registered in his name her house and took also all the money which belonged to her and was deposited at the Bank of Cyprus. Later, the plaintiff came back home on September 8, 1971, but she was still having the same phobias and the same neurotic reactions.

The plaintiff, in giving evidence, said that she was 65 years of age, and that from 1960–1970, her health deteriorated. She had phobias, a nervous breakdown, and a nervous derangement. The reason, she added, was that her husband would poison her and in general she was in a state of complete distress, because she had had a major operation at Dr. Angelis' clinic.

On February 15, 1971, because of her condition, she left her house and went to live with her brother, the defendant, at his house. She took a bus and went to the office where her brother was working in Nicosia. She met him there and he took her to his own house at Psimolophou. She explained that the reason for leaving her own house was that with her brother she would be safe and because she trusted him. She believed that he would protect her and would look after all her property.

Having looked at the power-of-attorney, she explained that she signed it at a time when she was feeling very ill and did not even think of the contents of that power-of-attorney. She said that she read only the first few lines; she felt sick, but she

signed it. She further added that her brother told her that he was trying to find means to protect her house from her husband. She explained that her only property at the time was the house in question, and £1,150 deposited with the Bank of Cyprus.

When her brother asked for the title deed, she said that he told her that he needed it to transfer it into his name in order to save it from being sold by her husband. She told him "But I want it back when I will be well", and his reply was "Whenever you want it you will get it back". In fact, she asked him to transfer her house back to her, and his reply was "I shall register it back to you whenever you want it", but he never did.

With regard to the money she had had in the bank, she said that her brother took her to the bank in order to renew the fixed deposit in September, but she denied that the power-of-attorney was read over to her. Questioned further about her house, she said "I would not transfer my only house to my brother and live out in the streets."

With regard to the certification of the power-of-attorney, Mr. Thalis Ioannides, a certifying officer, told the Court that the plaintiff said that she knew him because she had gone to him for the purpose of a mortgage on another occasion, and that he had read over to her the power-of-attorney. She also took it in her hands and read it herself, and signed it. After that he certified her signature by his own signature. She went there with her brother, the defendant, whom he knew very well.

Questioned by the Court, he said "I am sure I remember very well that I read it over to her, but whether she herself read all of it or not I am not certain. She read a great part of it". To a further question whether she was reading it loudly, the witness answered "No".

On the other hand, the defendant said that the plaintiff visited him at the Central Prisons and complained to him about her husband. When he was released from prison, the plaintiff, her husband, his wife and himself went to the plaintiff's house at Strovolos and stayed there.

In February, 1971, when they left the house of the plaintiff, she visited him at the office of Mr. Mavronicolas where he was

working at the time. She complained to him that her life with her husband was intolerable and requested him to have her as his guest at his house at Psimolophou. The plaintiff remained at his house from the middle of February, 1971, to September, 1971, and during that time she never had any medical treatment.

One day, he said, the plaintiff said to him: "The war tactics of my husband have exceeded the limits. He is trying to destroy me and to put me in the asylum, and I have decided to give you all my property". Then she added: "You know how to do these things". Upon that statement, he prepared the power-of-attorney at the law office of Mr. Mavronicolas, where he was working. Then they went together to a certifying officer, who certified it. The plaintiff signed it voluntarily on April 8, 1971, knowing what she was doing. This was at the office of the certifying officer, who also attested the document. By virtue of that power-of-attorney, he transferred the plaintiff's house in his name; since she had given it to him as a gift.

Pausing here for a moment, we would add that it is very strange that the plaintiff was not having medical treatment at that time, in view of the evidence of Dr. Mikellides. Furthermore, it is clear from the letter of the defendant addressed to the plaintiff in July, 1970, from prison, that he knew that his sister was suffering from her nerves and was suggesting treatment by a psychiatrist. (See *exhibit* 4).

The trial Court, having considered the facts before it, and the law as to whether the contract was induced by the undue influence of the defendant, expressed the view that undue influence applies both to acts of pure bounty by way of gifts and to transactions in the form of contracts. With that in mind, the trial Court had this to say:-

> " We come now to examine whether in the present case undue influence was proved. In the particulars of undue influence referred to in paragraph 3(a) of the statement of claim, it is stated that defendant persuaded the plaintiff to stay in his house by suggesting to her that her life was in danger with her husband. But the plaintiff in her evidence did not say that it was the defendant who persuaded her to come and live in his house, and that it was

not the defendant who suggested to her that her life was in danger with her husband, and she explained that she went to defendant's house because she had phobias that her husband would kill her, and as she trusted the defendant, her brother, she went to stay with him in order to protect her.

Further, in paragraph 3(b) of the statement of claim, it is stated that the plaintiff was so ill that she had no free will and as a result of that, she gave in to the suggestion of the defendant and went and lived at his house. This is again not supported by the evidence of the plaintiff. It is no doubt supported by evidence that the plaintiff was during that period ill, but there is no evidence before us that she gave in to the defendant's suggestion and went to live in defendant's house.

Further, in paragraph 3(c) of the statement of claim, it is stated that whilst she was living at the defendant's house she became a victim of his pressures and that the defendant was telling her that her death was near and because of that she should have signed a power-of-attorney so that he would be in a position to administer her property. This is again not supported by evidence of the plaintiff herself. The plaintiff did not say that the defendant was telling her that her death was near and because of that she ought to have signed a power-of-attorney in order that he would administer her property, but she said that the reason that she signed the power-of-attorney was because the defendant told her "nambi meson na prostatefti to spiti tis apo *ton andran tis.*"

With that in mind, the Court added:

"It is clear that the particulars referred to in the statement of claim are not supported by the plaintiff herself or her witnesses."

Then the Court went on to examine the power-of-attorney and had this to say:-

"....It is the allegation of the plaintiff that the defendant used fraud or may be breach of trust in persuading her to sign it by allegedly telling her 'na mbi meson na prostatefti

to spiti tis apo ton andran tis', but this not only is not alleged in the statement of claim, but does not even amount to undue influence. Furthermore, in the statement of claim another allegation is stated there, and no amendment of the particulars of undue influence or any allegation of fraud or breach of trust are referred to in the statement of claim. No amendment was asked, and no amendment was ordered by the Court. Therefore, in my opinion, we cannot now proceed and examine the new allegations of the plaintiff which are not plainly raised in the statement of claim, in order to decide whether the plaintiff is entitled to the relief asked for or not."

Finally, the Court said:-

"Furthermore, we are of the opinion that the allegations of the plaintiff which were given in evidence do not amount to undue influence. As we have said, they may amount to fraud or breach of trust which were not raised or properly argued before us. In the result, we find that the power-of-attorney was not signed under conditions amounting to undue influence and it is, therefore, valid."

There is no disagreement that undue influence must always be specially pleaded, if the plaintiff or the defendant intends to rely upon it at the trial. It is a defence quite distinct from fraud, duress or illegality, though such matters are often adduced as evidence of the existence of undue influence. So may inadequacy of consideration, secrecy, absence of independent advice, the mental weakness of the person influenced and the unnatural or unreasonable nature of that which he contracts to do. And, indeed, it is open to the defendant or to the plaintiff to go into the whole of the relations between the parties and/or the surrounding circumstances of the case. Whenever a contract is procured by such unconscientious use of power, it is voidable at the option of the parties so influenced. Undue influence need not amount to positive coercion, it is enough if it improperly induces one of the parties to do that which he would otherwise have been unwilling to do. (See *Baudains* v. *Richardson* [1906] A.C. 169; and *Noriah* v. *Omar*, [1929] A.C. 127). The jurisdiction in relation to the exercise of undue influence is founded on the principle of correcting abuses of confidence and ought to be applied whatever may be the nature of the confi-

dence reposed or the relation of the parties between whom it has subsisted. (See Per Turner V.C. in *Billage* v. *Southee* [1852] 9 Hare 534 at p. 540; and *Lloyds Bank Ltd.* v. *Bundy*, [1974] 3 W.L.R. 501).

It appears that undue influence as such has never been judicially defined but wherein it consists in those cases where it is proved by express evidence is well understood. What must be shown is 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. (See Lindley L.J. in *Allcard* v. *Skinner*, [1887] 36 Ch. D. 145 at p. 181). There are two well-established classes of undue influence. The first is where the donee stands in such a fiduciary relation to the donor that a presumption of undue influence arises which prevails unless rebutted by the donee, and secondly where undue influence is established independently of such presumption.

In *Allcard* v. *Skinner*, (*supra*), Lindley L.J., explained the common principle underlying cases of both express and presumed undue influence. He said at pp. 182-185:-

> "The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley*[1] is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of

1. 14 Ves 273.

the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud...

The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non–exercise, and, failing that proof, have set aside gifts otherwise unimpeachable...

The case is brought within the principle so forcibly expressed by the late Lord Justice Knight Bruce in *Wright* v. *Vanderplank* (8 D.M. & G. 136), in which a gift by a daughter to her father was sought to be set aside...

Where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift if of a small amount simply on the ground that the donor had no independent advice. In such a case, some proof of the exercise of the influence of the donee must be given. The mere existence of such influence is not enough in such a case; see the observations of Lord Justice Turner in *Rhodes* v. *Bate* (Law Rep. 1 Ch. 258). But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift. So, in a case like this, a distinction might well be made between gifts of capital and gifts

of income, and between gifts of moderate amount and gifts of large sums, which a person unfettered by vows and oppressive rules would not be likely to wish to make. In this case the Plaintiff gave away practically all she could, although, having a life interest in other property, she did not reduce herself to a state of poverty...

But her gifts were in fact made under a pressure which, whilst it lasted, the Plaintiff could not resist, and were not, in my opinion, past recall when that pressure was removed. When the Plaintiff emancipated herself from the spell by which she was bound, she was entitled to invoke the aid of the Court in order to obtain the restitution from the Defendant of so much of the Plaintiff's property as had not been spent in accordance with the wishes of the Plaintiff, but remained in the hands of the Defendant. The Plaintiff now demands no more."

Cotton, L.J. said at p. 171:-

"The question is—Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes—First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to

prevent the relations which existed between the parties and the influence arising therefrom being abused."

In *Re Brocklehurst (deceased)* [1978] 1 All E.R. 767, Bridge L.J., speaking about the principle formulated from the judgment of Cotton L.J., said at p. 783:-

"I do not read this passage as implying as counsel for the plaintiffs seemed to suggest, that the Courts may find undue influence even in a case where there is nothing whatever in the conduct of the donee which is open to criticism. Cotton, L.J., as I understand it, was contrasting cases in which positive wrongful conduct is proved affirmatively by evidence with those in which an abuse, which may no doubt consist either of a positive act or an omission to act, is presumed unless the donee proves affirmatively that he has acted with propriety throughout."

In *Re Craig, (Deceased)* [1971] Ch. 95, the Court, dealing with the question of presumption of undue influence, Held:

"(1) that since none of the gifts to M. could be accounted for on the ground of the ordinary motives on which ordinary men acted and as there was a relation-ship of confidence between M. and C. such that she was in a position to exercise undue influence, there was a presumption of undue influence on the part of the donee which she had failed to rebut by showing that the gifts made by C. had been made to her after full, free and informed discussion resulting in the removal of her influence over him. (2) That, although there was no direct evidence of M.' s having exercised undue influence over C, and although the plaintiffs' onus of establishing undue influence was a heavy one, the evidence was such that it established that the gifts would not have been made unless there had been such influence."

Ungoed-Thomas J., having dealt with the authorities at length and having applied the principle laid down in *Zamet* v. *Hyman*, [1961] 3 All E.R. 933, said at p. 121:-

"My conclusion, therefore, is that Mrs. Middleton fails to remove the onus arising from the presumption of undue influence.

There is no direct evidence of pressure being specifically

brought to bear directly by Mrs. Middleton to produce any particular gift to her by Mr. Craig. There is no evidence, for example, to the effect that 'If you do not make me the gift I will leave you'. But there is the evidence of Mrs. Polly of direct pressure being exercised by Mrs. Middleton to get her own way in other respects, as I have described in detail, and, as I have said, I accept that evidence. Nor is there any requirement that evidence of a gift being obtained by undue influence has to be established by some special species of evidence which distinguishes it from the ordinary evidential methods of discharging burdens of proof. The onus of establishing such behaviour as the exercise of undue influence is heavy, because the more objectionable the behaviour the more unlikely normally is it to occur, and, therefore, the heavier the onus of establishing it. But at the end of the day the finder of fact, whether jury or Judge, has to review the evidence as a whole and conclude whether undue influence, unlikely though it normally be, is established. The absence of direct evidence of a gift being obtained by undue influence in circumstances such as those in this case is far from indicating that it did not occur. For my part, the amount of the gifts, the circumstances in which they were made, the vulnerability of Mr. Craig to pressure by Mrs. Middleton, the evidence of the direct exercise of that pressure on other occasions and for other purposes, the knowledge of Mr. Craig and Mrs. Middleton of his utter dependence on her, and the whole history of the relationship of Mr. Craig and Mrs. Middleton persuade me that were it not for undue influence by Mrs. Middleton the gifts would never have been made. This is my conclusion even if, contrary to my view, this case does not fall within those of relations of trust and confidence in which the presumption of undue influence arises as established by the authorities to which I have referred."

In *Zamet* v. *Hyman* (*supra*), Lord Evershed, M.R., dealing with the question of undue influence, said at p. 938:-

"It may well be in some cases that the Court would rightly draw the inference of a fiduciary relationship existing not in the man towards the woman, but in the woman towards the man. But taking, I hope, a sensible view of the position of women in modern society, I cannot be persuaded that

this Court ought now to say that these principles, illustrated in the cases which I have mentioned, have ceased altogether to be part of our law. I say only that in modern conditions, at any rate, the existence of such influence should not necessarily be assumed in every case. I would put it somewhat thus—that in any transaction of the kind of a deed of arrangement or settlement (and I make that qualification bearing in mind what counsel for the appellants put to us of the case of a young man who may be persuaded to give an extravagant engagement ring to his fiancee) made between an engaged couple which on its face appears much more favourable to one party than the other, then in the circumstances of the case the Court may find a fiduciary relationship of the nature that I have mentioned, so as to cast an onus on the party benefited of proving that the transaction was completed by the other party only after full, free and informed thought about it. I take that to be the general proposition of law which should be applied in this case. I do not attempt any further statement of the law, but where the circumstances justify it, then I think that it does follow that we have to ask the classic question (or a question analogous to it) which, in *Huguenin* v. *Baseley* (1807) 14 Ves. at p. 300, Lord Eldon, L.C., did ask:

'The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.' "

In *Lloyds Bank Ltd.* v. *Bundy*, [1974] 3 W.L.R. 501, Lord Denning, M.R., dealing with the question of undue influence due to fiduciary relationship, applied the dicta of Lord Chelmsford L.C. in *Tate* v. *Williamson*, [1866] 2 Ch. App. 55, 61; Cotton L.J. in *Allcard* v. *Skinner* [1887] 36 Ch. D. 145, 171, C.A.; and Sir Raymond Evershed M.R. in *Tufton* v. *Sperni* [1952] 2 T.L.R. 516, 522, 523.

In delivering the first Judgment, Lord Denning had this to say at pp. 507–509:–

"The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by

Cotton L.J. in *Allcard* v. *Skinner* [1887] 36 Ch. 145, 171. The first are those where the stronger has been guilty of some fraud or wrongful act—expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes, the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist...

The General Principles.

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases...

These considerations seem to me to bring this case within the principles I have stated. But in case that principle is wrong, I would also say that the case falls within the category of undue influence of the second class stated

by Cotton L.J. in *Allcard* v. *Skinner*, 36 Ch. D. 145, 171. I have no doubt that the assistant bank manager acted in the utmost good faith and was straightforward and genuine. Indeed the father said so. But beyond doubt he was acting in the interests of the bank—to get further security for a bad debt. There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands—for nothing—without his having independent advice. I would, therefore, allow this appeal."

Cairns, L.J. delivering the second judgment, had this to say at p. 510:-

" Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances as between purchaser and vendor, as between great uncle and adult nephew, and in other widely differing sets of circumstances. Moreover, it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does (cf. Ungoed-Thomas J. in In re Craig, decd. [1971] Ch. 95, 104).

In *Tate* v. *Williamson*, [1866] Ch. App. 55, 61, Lord Chelmsford, L.C. dealing with the general principle obtaining in cases of undue influence, said at p. 61:-

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

In *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516, Sir Raymond Evershed, M.R. held that "undue influence as a matter of law includes both undue influence in the sense of domination of the party charged over the other, and also abuse of the duties of care and confidence which may be imposed on one to the other

as a result of the particular relationship which emerges from the special circumstances of their association."

Sir Raymond Evershed M.R. in delivering the first Judgment, and having referred to a number of cases, said at pp. 525–526:–

> "In this matter I have reached a different conclusion from that of the Judge; but it is, I think, plain, that the case was put to him somewhat differently from the way it has been put to us. Before the Judge not only the emphasis but the case was, aye or no, a case of complete domination or control. Thus, in rejecting the claim based on fiduciary relationship, the Judge, in his reasons relies on the fact that such domination was not proved; and though I understand *Tate* v. *Williamson* (2 Ch. App. 55) was read to him, it is not mentioned in his judgment. In my judgment, the question is not of domination but of influence, well short, no doubt, of domination, based on and arising out of a particular association and an advisory capacity.
>
> I conclude this part of my judgment by a reference to the language (which I respectfully adopt) of Sir George Turner in *Billage* v. *Southee* [1852] 9 Hare 534, at p. 540:
>
> > 'No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion, this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and cestui que trust—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle.'
>
> It remains only to determine whether, if the influence was there, it was abused; and this matter I can deal with

shortly for it is, I apprehend, hardly if at all in dispute. There were letters of September 3 and 5, 1946, in which Sperni represented that the price he had exacted for his house was a concession on his part in view of the time allowed to him to remain in possession, and represented also that there had been other offers available to him which he had rejected in consequence. On this matter the Judge said that Sperni's evidence was evasive and uncandid, and Mr. Richmount has not sought to justify his client's conduct. In fact it cannot be open to any doubt that there was no justification whatever for Sperni's representations. (His Lordship then further considered the facts in this respect, and continued:)

The result of the whole matter is, in my judgment, that the plaintiff has established his case for relief and is entitled to have the transaction of sale set aside."

In a very recent case, in *Re Brocklehurst* (deceased) (*supra*), it was held (Lord Denning M.R. dissenting) that

"The nature of the relationship between the deceased and the defendant was not one of confidence and trust such as would give rise to a presumption of undue influence on the part of the defendant, for the evidence established that the relationship was one of friendship and did not indicate that it was such that the defendant had been under a duty to advise the deceased or had been in a position of dominance over him; on the contrary, it was the deceased who had tended to dominate the defendant. But even if the relationship had been one that gave rise to a presumption of undue influence, the defendant had rebutted the presumption for in the circumstances the presumption was rebuttable not only by proof that the deceased had been independently advised about the leases, but also by proof that the gift of the leases had been the spontaneous and independent act of the deceased. The appeal would therefore be allowed and the leases upheld (see p. 779 to p. 780 f, p. 781 h, p. 789 d to g and p. 790 d, *post*); *Huguenin* v. *Baseley* [1803–13] All E.R. Rep. 1, *Allcard* v. *Skinner* [1886–90] All E.R. Rep. 90 and *Re Craig* (*deceased*), *Meneces* v. *Middleton* [1970] 2 All E.R. 390 distinguished; *Inche Noriah* v. *Shaik Allie Bin Omar* [1928] All E.R. Rep. 189 explained.

Per Bridge LJ. Where an apparently spontaneous gift is sought to be set aside on the ground of presumed undue influence, the nature of the gift and the nature of the relationship are matters to which the Court will have primary regard. But the Court should not adopt a rigid formulation of rules derived exclusively from a consideration of those matters regardless of the other circumstances of the case. The Court should take full account of all that is known of the donor's character and attitudes. There is no warrant for the adoption of an objective test of motivation by putting a hypothetical ordinary man in place of the donor and asking how he would have been expected to act (see p. 782 f and j to p. 783 a, *post*); dictum of Lindley L.J. in *Allcard* v. *Skinner* [1886–90] All E.R. Rep. at 100, 101 explained."

Lord Denning M.R., delivering the first judgment, said at pp. 774–776:–

"The Judge said that John Roberts was a trusted confidant and was in a position, if he wished, to influence Sir Philip to give him the shooting rights. But he found that John Roberts did not do anything that was consciously improper. He did a great deal for Sir Philip in his last two years. He only accepted from him benefits which he genuinely thought that Sir Philip intended him to have. So it would seem that 'undue influence', as it is usually spoken of, was not proved.

On the other hand, the Judge set aside the shooting leases. He held that they were so exceptional and so disastrous for the estate that the Court should not uphold them unless every effort had been made to explain the consequences to Sir Philip. No such effort was made. He felt that the circumstances were such as to put an onus on Mr. Roberts of proving that the transaction was completed by Sir Philip 'only after full, free and informed thought about it'. Those were the words of Lord Evershed M.R. in *Zamet* v. *Hyman* [1961] 3 All E.R. 933 at p. 938, which were adopted and applied by Ungoed-Thomas J. in *Re Craig* (*deceased*), *Meneces* v. *Middleton* [1970] 2 All E.R. 390....

Such being the facts, what is the law? It was submitted that, provided that Mr. Roberts exerted no undue influence,

Sir Philip Brocklehurst was entitled to do what he liked with his own. The estate was his."

Finally, in dismissing the appeal he said:-

"I cannot agree with that line of approach. As a matter of public policy, the Courts have always looked with care at gifts or improvident bargains which are made by a person whose motives or judgment are impaired by reason of age or ignorance, eccentricity or infirmity, or even by a failure to know or appreciate the consequences. Equity will, as a matter of course, interfere when the recipient of the gift or the exactor of the bargain has brought undue influence or undue pressure to bear so as to induce the transaction. But, even when those elements are absent, as they are here, there are occasions when the Courts will say that the transaction is so exceptional and so unreasonable that it cannot stand."

Lawton, L.J., in dismissing the appeal, said at p. 777:-

"In the Courts of equity it has been the practice to say that such situations raise a presumption of undue influence which a defendant recipient has to rebut. What I found a difficult concept was the notion that such a presumption could only be rebutted by one kind of evidence.

In my judgment the issues in this case are these: did the plaintiffs prove that there existed between Sir Philip and the defendant such a confidence as to enable the defendant to exercise influence over him? If yes, did the defendant prove that the granting of the lease by Sir Philip came about by a free and independent exercise of his will?"

Having referred to the facts, His Lordship continued at pp. 779-780:-

"In my judgment the evidence did not establish that there existed between Sir Philip and the defendant such a relationship of confidence and trust as to raise a rebuttable presumption that the defendant had exerted undue influence over Sir Philip. I would adjudge that to the very end of his life Sir Philip was a strong willed, autocratic and generous man, whom the defendant liked, respected and looked up to as a social superior. Relationships of this kind are

still to be found in England. When they result, as in this case, in a wealthy man making his friend of lower social and financial status a gift which others, nearer in social ties to the donor than the donee, think has been over-generous, it would be unfortunate and, in my judgment, unfair if the law required the recipient to justify the gift and, if he failed to do so, to adjudge that he should suffer the smear of having exerted undue influence on the donor. The relationship proved in this case is wholly different in nature from those proved to have existed in such 19th century classic cases as *Huguenin* v. *Baseley* [1803-13] All E.R. Rep. 1, *Allcard* v. *Skinner* [1886-90] All E.R. Rep. 90 and in the fairly recent case of in *Re Craig (deceased)*, *Meneces* v. *Middleton* [1970] 2 All ER 390. For me, this decides the appeal.

Even if a relationship of confidence and trust had existed such as would have raised a presumption that undue influence had been exerted, I would have adjudged that the defendant had proved that he did not exert any.

A donee on whom the evidential burden of proof rests has to establish that:-

> '...the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor' s will.'

See *Allcard* v. *Skinner* [1886-90] All E.R. Rep. 90 at 93 per Cotton L.J. and Inche *Noriah* v. *Shaik Allie Bin Omar* [1928] All E.R. Rep. 189 at 192 per Lord Hailsham L.C. The best way of proving this will probably be by calling a solicitor to say that he was fully instructed about the facts and circumstances of the proposed gift and that he advised the donor about the consequences of what he was doing. This is not, however, the only way of proving that the gift was the spontaneous act of the donor. In the *Inche Noriah* case ([1928] All E.R. Rep. 189), the Privy Council said so: see the opinion of Lord Hailsham L.C."

Having reviewed the authorities at length on the question

that there are two well-established classes of undue influence, *viz.*, where the donee stands in such a fiduciary relation to the donor that a presumption of undue influence arises which prevails unless rebutted by the donee; and secondly where undue influence is established independently of such presumption, I turn to consider our own law.

As a general rule of construction, our Contract Law, Cap. 149 s.2(1) "shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith."

With that in mind, we would add that the principles of equity formulated by the Courts in England have been adopted and applied in our own law.

It is said that all agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and for a lawful object, but two or more persons are said to consent when they agree upon the same thing in the same sense. According to s. 14 of Cap. 149:

"Consent is said to be free when it is not caused by –

(a) coercion, as defined in section 15; or

(b) undue influence, as defined in section 16; or

(c) fraud, as defined in section 17; or

(d) misrepresentation, as defined in section 18; or

(e) mistake subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud misrepresentation or mistake."

Section 16(1) says that:

"A contract is said to be induced by 'undue influence'

where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

Section 20 gives power to the Courts to set aside contracts induced by undue influence and is in these terms:-

" 20(1) When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just."

As we have said earlier, the Court has accepted that when the plaintiff executed the power-of-attorney, her mental capacity was temporarily at least affected by reason of her age and of mental distress. Furthermore, it is equally clear that the transaction appeared on the face of it to be unconscionable, especially as when the plaintiff was making a gift of her only house and the only sum of money of £1,000 which she had deposited in the bank of Cyprus. Those gifts, with respect to the trial Court, were so large as not to be reasonably accounted for on the ground of relationship or other ordinary motives on which ordinary men act, so in a case like this, when the defendant was fully aware that the mental capacity of his sister was affected and had expressed his concern in his letter referred to earlier in this judgment, one would have expected the Court to reach the conclusion that such a transaction was on the face of it, unconscionable, and that the burden was upon the donee to support the gifts. In our view, the trial Court failed to give due effect to the provisions of our Contract Law and the principles of equity.

We would reiterate this: The plaintiff gave away everything she had, she had no other property, and was reduced to a state of poverty. In our view, this is a classic case where the relations between the donor and the donee, her brother, have at, or shortly before the execution of the gifts been such, as to

raise the presumption that the donee had exercised undue influence over the donor and dominated her will.

Furthermore, it is clear, in our opinion, that the circumstances were such as to put an onus on the respondent donee of proving that the transaction was completed by the appellant donor only after full, free and informed thought about it. See Lord Evershed M.R.'s dicta in *Zamet* v. *Hyman* (*supra*) at p. 938, which were adopted and applied by Ungoed-Thomas, J., in re *Craig* (*deceased*) (*supra*).

In spite of the fact that there is no evidence that the power-of-attorney was prepared by counsel but by the defendant, nevertheless, we consider it our duty, for the guidance of the profession, to draw their attention to what Lord Evershed M.R. said in *Zamet* v. *Hyman* (*supra*) about solicitors, at p. 940:-

> " I wish not to say unfair or unkind things about (the solicitor) but it seems to me extraordinary that a solicitor, a member of that learned and honourable profession, apparently took no steps really to satisfy himself that this strange bargain was, and had been, fully understood."

It is, indeed, a pity that the donee who was working in a lawyer's office did not insist on the donor being independently advised before signing the power-of-attorney, giving away all her property. On the facts of this case, we would reiterate that we cannot agree with the line of approach taken by the trial Court. As a matter of public policy, the Courts have always looked with caution at gifts or improvident bargains which are made by a person whose motives or judgment are impaired by reason of age or ignorance or infirmity or even by a failure to know or appreciate the circumstances. Equity will, as a matter of course, interfere when the recipient of the gift or the exactor of the bargain has brought undue influence or undue pressure to bear so as to induce the transaction.

In the present case, it seems to us that the gifts in question were so unreasonable and the donor was so affected by ill health that the transaction cannot stand in the absence of evidence that it was entered into between the donor and the donee with the benefit of independent advice, or at any rate that its effect had been properly explained to the donor so that

she had full appreciation of what is involved. We are aware, of course, that the occasions for interference by the Courts were at one time thought to be confined to fiduciary relationships, such as the doctor and patient, solicitor and client and so forth. But since *Zamet* v. *Hyman* (*supra*), *re Craig* (deceased) (*supra*) and *Lloyds Bank Limited v. Bundy* (*supra*), it is clear they are not so confined. They extend as Sir Eric Sachs said in *Lloyds Bank* v. *Bundy* (*supra*), at p. 511, to relationships which involve confidentiality. In the present case, we repeat, there was such a special relationship between the donor and the donee, to whom the donor was looking for help and advice, as to call for independent advice.

Speaking about the second class of cases, Sir Eric Sachs in *Lloyds Bank* v. *Bundy* (*supra*) had this to say at p. 511:-

> " It is thus to be emphasised that as regards the second class the exercise of the Court's jurisdiction to set aside the relevant transaction does not depend on proof of one party being 'able to dominate the other as though a puppet' (to use the words again adopted by the learned county Court Judge when testing whether the defence was established) nor any wrongful intention on the part of the person who gains a benefit from it; but on the concept that once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled. To this second class, however, the Judge never averted and plainly never directed his mind.
>
> It is also to be noted that what constitutes fulfilment of that duty (the second issue in the case now under consideration) depends again on the facts before the Court. It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment... As to the difficulties in which a person may be placed and as to what he should do when there is a conflict of interest between him and the person

asked to execute a document, see *Bank of Montreal* v. *Stuart*, ([1911] A.C. 120 at 139)."

For the reasons we have given at length, we would allow the appeal and order that the judgment below be set aside. Judgment for the plaintiff on the claim. Cross-appeal dismissed. The power-of-attorney is set aside and the document in question to be delivered up for cancellation.

Costs of the appeal in favour of the appellant.

Appeal allowed. Order for costs as above.