

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Family Division**

[Unreported]

Suit No: 336 of 1999

**BETWEEN**

**STEVEN KIM PARKER - APPLICANT/HUSBAND**

**AND**

**LYNN FRANCES PARKER - RESPONDENT/WIFE**

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.  
Judge of the High Court  
[In Chambers]*

**2008: November 28,  
December 2, 3 4, 5**

**Mrs. Paula Lett in association with Mr. Kwame Rawlins for the  
Applicant/Wife**

**Mrs. Zarina Khan in association with Mr. Ivan Alert for the  
Respondent/Husband**

**RULING ON INTERLOCUTORY APPLICATION**

- [1] **Crane-Scott J:** On the 10<sup>th</sup> day of December, 1999 *Inniss J. (now retired)* ordered by consent that a Separation Agreement dated the 1<sup>st</sup> day of December, 1999 (hereinafter called “the Agreement”) entered into by Steven Parker (hereinafter called “the Husband”) and Lynn Parker (hereinafter called “the Wife”) be made an order of the Court. The Court being satisfied that arrangements for the children of the marriage had been made, granted a further order under section 42 of the *Family Law Act, Cap. 214* dissolving the marriage.
- [2] On July 20, 2007 the Wife filed an Amended Application seeking various orders, and in particular, orders under s. 66(3) of the *Family Law Act, Cap. 214* either setting aside, or alternatively, varying the said Agreement on the ground that the concurrence of the Wife to the Agreement was obtained by fraud or undue influence.
- [3] On January 29, 2008, with a view to readying the application for substantive hearing, the Court gave certain directions for the filing of additional affidavits by both parties and gave leave for all witnesses to be cross-examined on their affidavits.
- [4] When the matter came on for hearing on November 28, 2008, Counsel for the Wife sought leave of the Court to have a hitherto unknown witness, Trevor Whiffen, give *viva voce* evidence on behalf of the Wife. Leave was denied as no affidavit had yet been filed by the proposed witness, Trevor Whiffen. The Court then ordered, Counsel for the Wife, Mrs. Paula Lett to file the necessary affidavit by Trevor Whiffen setting out the evidence intended to be adduced by the intended witness in support of the Wife’s application.

- [5] An affidavit deposed to by Trevor Scott Whiffen was subsequently filed in the proceedings on December 2, 2008.
- [6] **The interlocutory application:** Following the Wife's oral testimony on December 4, 2008, Counsel for the Husband, Mrs. Zarina Khan applied pursuant to **O. 18 r. 19(1)** of the **Rules of the Supreme Court** to strike out all, or alternatively, significant portions of the affidavit of Trevor Whiffen (hereinafter called "the Whiffen affidavit") on the ground that several paragraphs thereof were either scandalous, frivolous or vexatious [**O.18 r. 19(1)(b)**]; may prejudice, embarrass or delay the fair trial of the action [**O.18 r. 19(1)(c)**] and/or were an abuse of the process of the Court [**O.18 r. 19(1)(d)**].
- [7] After receiving confirmation from Mrs. Lett that the witness, Trevor Whiffen was not being tendered by the Wife as an expert witness, Mrs. Khan proceeded to systematically challenge paragraphs 7 to 28 inclusive of the Whiffen affidavit.
- [8] Mrs. Khan also submitted that in his affidavit, Mr. Whiffen had given opinion evidence on many things. She submitted further that as he was not being tendered as an expert witness for the Wife, Mr. Whiffen as a lay person could only give evidence of what he had seen and heard. Furthermore, she contended, Mr. Whiffen's evidence had to be relevant to the negotiations leading up to the finalization of the Separation Agreement in 1999 having regard to the Wife's claim that her concurrence to the Agreement had been obtained by fraud or undue influence.
- [9] During her submissions, Mrs. Khan repeatedly attacked matters deposed to in the Whiffen affidavit on the ground that they either constituted hearsay, and/or opinion evidence, and/or were not relevant

- to the issues of fraud or undue influence which were in dispute in the substantive proceedings.
- [10] Mrs. Khan also drew attention to the *1999 Annual Practice para 18/19/15* and to the test for what is “scandalous” within the meaning of **O. 18 r.19**. She relied on the dictum of Selborne L.C. in *Christie v. Christie (1873) L.R. 8 Ch. App. 499 @ 503* and submitted that the test to be applied was “whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed.” She identified several paragraphs of the Whiffen affidavit which in her view, were scandalous, of no evidential value and could not take the matters in dispute any further. She invited the Court to strike out the pleadings under **O. 18 r. 19(1)(b)**.
- [11] Following Mrs. Khan’s submissions, Counsel for the Wife, Mrs. Lett submitted that as the proceedings were civil proceedings, the Court only had to be satisfied whether on a balance of probabilities fraud exists or not. She contended that the Husband’s character had been called into question in the proceedings and the Court would have to look at the Husband’s character and to consider whether the Husband was the type of man who could commit fraud. She reiterated that Mr. Whiffen was being called as a witness of the Husband’s character.
- [12] At the request of the Court, both parties made submissions as to the nature of the Wife’s proceedings and as to what had to be proved to establish fraud or undue influence.
- [13] Mrs. Lett produced extracts discussing Fraud and Undue Influence under the Australian Family law Act from the 2001 Volume of the

*Australian Family Law & Practice Reporter paras 34-150, 34-155, 34-160, 34-370, 34-372 and 34-374.*

- [14] Mr. Ivan Alert made submissions on behalf of the Husband on the meaning of the expression “fraud or undue influence” as used in section 66(3) of the Barbados Family Law Act which according to him has seldom been judicially considered in this jurisdiction. Mr. Alert submitted that the term “fraud” in s. 66(3) should be construed disjunctively and produced the case of *Derry v. Peak (1889) 14 A.C 337* in support of the definition of fraud.
- [15] He submitted that to establish fraud, the Wife had to plead that she was induced to sign the agreement and that she had acted to her detriment and that if an applicant’s pleadings fell short on this critical element the application could not be sustained.
- [16] Turning to the expression “undue influence”, Mr. Alert submitted that the expression was a concept which had been developed by courts of equity. Citing dicta of Lord Denning in *Lloyd’s Bank v. Bundy 1974 3 All. E.R. 757* where the concept of “constructive fraud” was first developed, Mr. Alert submitted that the term was one and the same or at least co-extensive with “undue influence.”
- [17] Mr. Alert submitted that the doctrine of undue influence had been shown to arise in two distinct situations, namely i) where a special relationship existed between the parties and ii) where, by reason of external circumstances one party is placed in a position of power over the other. He cited the 1980 case of *In the Marriage of Dupont* where the Australian Family Court had held that the relationship of husband and wife did not constitute a special relationship from which undue influence may be inferred.

[18] Mr. Alert also submitted that wherever a presumption of undue influence arises, it may be rebutted where the claimant had independent legal advice. He cited as his authority the case of *Inche Moria v. Sheik Ali bin Omar (1929) A.C. 127*.

[19] After giving due consideration a) to the Husband's interlocutory application to strike out the Whiffen affidavit, b) to the submissions of Counsel for and against the application; c) to the Wife's testimony and d) to the substantive application of the Wife and the matters which the Wife must establish to sustain her application under section 66(3) of the Barbados Family Law Act for the discharge or variation of the Separation Agreement on the grounds of fraud or undue influence, the Court is satisfied as to the following:

(i) in order to sustain her application under section 66(3) of the Act, the Wife must establish by the evidence that in the relevant period in 1999 during which the negotiations which culminated in the signing of the Separation Agreement took place, either:

- a) that she was induced by fraud to sign the Agreement and acted to her detriment or prejudice by reason of a false representation or representations by the Husband made knowingly or without belief in its truth, or recklessly, careless as to whether it was true or false; or alternatively
- b) that the Husband exerted undue influence upon her as a result of which she signed the said Agreement;

- (ii) that the Separation Agreement was negotiated in Barbados in 1999 between the Husband and the Wife both of whom had obtained separate legal representation and advice in relation thereto;
- (iii) that Mr. Trevor Whiffen was not the Wife's legal representative in 1999 during the said negotiations. Nor was he present in Barbados during the negotiations which led to the signing of the said Agreement by the Wife and its subsequent approval by the Barbados High Court;
- (iv) that according to the Wife's evidence-in-chief in the substantive proceedings which the Court has accepted, the Wife first sought legal advice on the Separation Agreement from Mr. Trevor Whiffen in Canada in the Spring of 2004, some 4 years or more following the date of execution of the Agreement and its approval by the Court;
- (v) in the circumstances, Mr. Whiffen is unable, from his own personal knowledge and independent observations at the relevant time, to give evidence which would be relevant to the allegations of fraud or undue influence which the Wife claims resulted in her being induced or pressured into signing the Separation Agreement in Barbados in 1999;
- (vi) several paragraphs of the Whiffen affidavit are replete with hearsay and opinions of Mr. Whiffen which are clearly based on information which he received from the

Wife as his client well after the Separation Agreement was finalized in 1999;

- (vii) Mr. Whiffen's views and opinions are not relevant to the facts in dispute and cannot assist the Court in independently evaluating whether in truth the Wife was induced by fraud or undue influence into signing the Separation Agreement in 1999;
- (viii) the Whiffen affidavit is also "scandalous" within the meaning of **O.18 r.19(1)(b)** in that the matters deposed to by Trevor Scott Whiffen at paragraphs 7 to 28 are not admissible in evidence to show the truth of the Wife's allegations of fraud and undue influence as set out in her affidavit and as stated in her oral testimony;
- (ix) contrary to Mrs. Lett's submissions, Mr. Whiffen is not permitted to give opinion evidence as to the Husband's character. In particular, he may not give evidence of conversations which the Husband may have had with him or with others about the Husband's views on his brother's divorce proceedings in order to establish that the Husband approved in principle of the concept of hiding assets and was therefore capable of committing a fraud or exerting undue influence on his Wife. Paragraphs 14, 24 and 25 are particularly "scandalous", are more prejudicial than probative in nature and irrelevant to the substantive proceedings and should be struck out;
- (x) there is nothing in the Whiffen affidavit which assists the Wife in establishing as a fact that in 1999 the Husband

made false or fraudulent representations to the Wife regarding the true state of his earnings or their matrimonial assets during the negotiations leading up the signing of the Separation Agreement. Nor can he assist her in establishing that undue influence was exerted on her before she signed the Agreement. The matters deposed to by Mr. Whiffen are mere opinions and speculation and are inadmissible as evidence of truth of the matters in dispute. Paragraphs 21, 22, 23, 24 and 25 are scandalous within the meaning of **O. 18 r. 19(1)(b)** and should be struck out;

- (xi) that the matters deposed to by Trevor Scott Whiffen and contained between paragraphs 7 to 28 of his affidavit are irrelevant to the substantive proceedings, scandalous, prejudicial to the fair trial of the substantive proceedings and an abuse of the process of the Court and accordingly, the entire affidavit should be struck out under **O. 18 r. 19(1) (b), (c) and (d)** of the Rules.

[20] **Disposal:** In the result, it is ordered that the affidavit of the intended witness, Trevor Scott Whiffen filed on December 2, 2008 in these proceedings should be struck out in its entirety.

[21] Hearing of the substantive application may now proceed.

**Maureen Crane-Scott,  
Judge of the High Court**