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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. R.108 OF 1991

BETWEEN MOSES ROBINSON PLAINTIFF
A N D CYNTHIA NUNES DEFENDANT

Dennis Daly Q.C., Donald Gittens and Paulett^e Warren instructed by Messrs Daly, Thwaites, and Campbell for Plaintiff.

John Graham and Hector Robinson instructed by Broderick and Graham for Defendant.

Heard: December 7, 1993, January 17, 18, 19, 20, 21 & April 22, 1994.

LANGRIN, J.

I hope that the delay in handing down this judgment has not caused the parties too much inconvenience.

This is an action to set aside a transfer of land on the ground that the transfer was obtained by fraud or under influence.

The gravamen of the plaintiff's claim is that the plaintiff was prior to the 21st October, 1988 registered as proprietor of a parcel of land part of Mount Salem, St. James containing by survey 4,442 square feet comprised in Certificate of Title registered at Volume 1042 Folio 467. In 1988 the defendant fraudulently procured and/or tricked the plaintiff to execute in her favour an instrument of transfer dated the 12th day of October 1988 with which the defendant caused herself to be registered as the proprietor of the premises.

The particulars of fraud are stated as follows:

The defendant knowing it to be false and intending the plaintiff to act thereon, told the plaintiff that it was necessary for him and her to sign a document whereby if either of them predeceased the other, the survivor would be liable to repay the sum of or about \$10,000.00 borrowed by the defendant on the plaintiff's behalf from one Leslie Hew, baker of Barnett Street, Montego Bay, which sum was borrowed to repair damage caused by Hurricane Gilbert to the property.

The defendant knowingly and intentionally, and her attorney-at-law who witnessed the transfer, failed to advise him of the true nature of the document he was being asked to execute; failed to read same to him and failed to ascertain whether he agreed with the contents thereof, contrary to the attestation clause of the transfer.

I come now to the facts in the case. The principal witness for the plaintiff was the plaintiff himself, Moses Robinson. He was described as blind, illiterate, sick of great age over 80 and the father of the defendant. Inevitably, after the passage of years his recollection was not always clear. He was forthright, reliable and helpful. I now deal with his evidence in some detail. He was previously married with seven children, one of whom is the defendant. The present wife has no children for him and he lives lovingly with her. Up to 1988 he was the owner of land at Mount Salem with houses on the land. He lives in a three storey house and there are two cottages which are rented out. He was ailing and had three surgical operations. In 1988 hurricane Gilbert destroyed the roof of the three storey house.

The defendant offered him help with the house and brought a contractor who charged \$30,000 to do the repairs. While the plaintiff was ill he heard that his wife was walking around with his title and so he took it from her and gave it to his grand-daughter, Kathleen, who happens to be the defendant's daughter. It was the defendant who took the title from Kathleen. The defendant had told him that she was going to take his name off the title and when he objected she said she had done it already. When he wanted to get a loan he went to her for the title but she said she could get \$10,000 from Mr. Leslie Hew without paying any mortgage interest but he would have to sign for the loan. She took him to the Lawyer's office while his wife was at home.

The Lawyer told the defendant that he had to sign for the money. One of the clerks held his hand while he made an x on the document. The document was not read over to him and he was not told what the document was about. His daughter, took him to Mr. Hew

who told him that his property was sold to his daughter for \$15,000. (There were conflicts with his evidence and the defendant's but I have no hesitation in preferring his evidence).

Subsequently, he went to an Attorney to make a will in order to give his wife a life interest and the remainder to his grandson when he was told by the lawyer that the title had changed and it was no longer in his name.

The principal witnesses for the defence were Cynthia Nunes, and Marcia HoLyn. Cynthia Nunes, the defendant is a middle age businesswoman and the daughter of the plaintiff. She appears to have a strong personality but a good relationship with her father. She is the only one of the seven children who gets along with her father. She deponed that during the period of his illness she took him to doctors on several occasions and for a considerable time he stayed at her house after he left the hospital. He was reluctant to go to his own house because his wife did not take proper care of him. She recounted an incident when Arnold Robinson his grandson, took him home in a car where he fetched his title returned with it to her house and handed it over to her. Subsequently, her father came to her house 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 the instructions and she prepared the transfer which was read over to him and he made his mark. The \$15,000 stated in the transfer is the cost of the doctors' fee. The title was left with Miss HoLyn, the Attorney and the defendant paid all the legal fees.

The parties have put in evidence a valuation report of the premises. The current market value being (\$2.1M) Two million, one hundred thousand dollars while the value as at January 1988 was (\$300,000.00) Three hundred thousand dollars.

According to the defendant, she paid \$149,745 to the contractor for repairs to the premises. The plaintiff deponed that the total cost of repairs was \$30,000 including the \$10,000 borrowed from Mr. Leslie Hew. The plaintiff gave the defendant three rooms from which to collect rental at \$1000 per month in order to pay the debt.

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. However, she did not think it was her duty to tell him to leave the property in his will, neither did she advise him to have the property valued. She was not aware that he had tenants on the property. Had this been known to her she would have treated the matter differently. The plaintiff had told her that (\$15,000) fifteen thousand dollars had been paid to him by the defendant in respect of medical bills and cost of repairs to his house.

Hazel Burkhardt testified that she was a Security Manager employed to Mrs. E. Williams, Attorney-at-Law in 1987 when the plaintiff came to the office along with his daughter, the defendant and a witness. She took instructions from the plaintiff and she prepared a will.

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.

Submissions by Counsel

Mr. Dennis Daley Q.C. made the following submissions on behalf of the plaintiff. The plaintiff signed a document purporting to be a repayment of loan, consequently the transfer would not be his document.

Plaintiff had reposed his trust in his daughter at a time when he lost his roof and was seriously ill therefore there was a presumption of undue influence. There was a lack of independent advice coming from the Attorney-at-Law since the transfer of the property was to the manifest disadvantage of the plaintiff.

Mr. Hector Robinson made the following submissions on behalf of the Defendant. There is no evidence that the defendant is in a dominant position in relation to plaintiff. Further she is not capable of exercising dominating influence.

Where there is no evidence of actual fraud then the Court ought not to set aside registered title on basis of undue influence. In proving undue influence the Court must be satisfied that there is fraud. A number of authorities were cited.

The plaintiff cannot rely on principle of non est factum since he cannot show that he signed a document radically and fundamentally different from the one he intended to sign.

Plaintiff knew what he was doing because he always had the intention of giving property to his daughter by will.

Findings of Fact

The defendant's daughter had procured her father's agreement by inducing him to sign a loan document.

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

"Fraud is infinite in its variety, and must involve a deliberate or conscious act of dishonesty on the part of the registered proprietor."

I turn now to examine the fundamental propositions of law relating to this transaction.

Non est factum

Non est factum can only apply if the document actually signed is fundamentally different from that which the person intended to sign. See Saunders v. Anglin Building Society 1970 3 AER 961. 'This defence is asserted against a party to the transaction who is aware of the circumstances in which it came to be executed and who knows (because the document was signed on his representation) of a reason to suspect that it was executed under some mis-apprehension as to its character. In such a case the court must give effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind for there is no conflicting or countervailing consideration to be accommodated - no innocent person has placed reliance on the signature without reason to doubt its validity. Such a person was therefore misled in signing a document which was fundamentally different from that which he intended to sign.'

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.

Undue Influence and Misrepresentation

The learned author of Canadian Torrens System 2nd Edition at p.236 in dealing with the topic of Duress and Undue Influence

the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. This present case fits well into the principle which Lord Denning MR. stated in the case of Lloyds Bank v. Bundy 1974 3 ALL ER 757 at p.765 on inequality of bargaining power:

"By virtue of it, the English law gives relief to one who without independent advice, enters into a contract on 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."

In National Westminster Bank v. Morgan (1985) 1 AER 821 it was decided that a transaction could not be set aside on the ground of undue influence unless it was shown that the transaction was to the disadvantage of the person subjected to the dominating influence. Lord Scarman in his judgment at p.829 put the matter thus:-

"The wrongfulness of the transaction must therefore be shown: it must be one in which an unfair advantage had been taken of another. The doctrine is not limited to transaction of gift. A relationship can become a relationship in which one party assumes a role of dominating influence over the other. In Pcosathurari case, the Board recognised that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by undue influence."

In the instant case the consideration of (\$15,000) fifteen thousand dollars was never paid to the plaintiff. The correct market value was \$300,000.00. The terms of the transfer were in fact highly disadvantageous to the plaintiff, having regard to the market value of the premises which is now stated as \$2.1M.

Independent Legal Advice

Where an apparent disadvantaged party receives independent legal advice the presumption of undue influence may be rebutted. The advice which is given must be well informed having regard to all the relevant circumstances of the case and the adviser must act solely

in the interest of that party.

The Privy Council Appeal in Inche Noriah v. Shaik Allie Bin Omar 1928 AC 127 is instructive.

"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 donors property, and did not bring home to her mind that she could more prudently and equally, 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."

Lord Hallsham L.C. in delivering the judgment of the Court made reference at p.134 to a passage in the case of Rhodes v. Bate in the judgment of Turner L.J. which I think is apposite:

"I take it to be a well established principle of this Court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

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 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.

Conclusion

I have carefully considered the very able and exhaustive arguments of the learned counsel on both sides for which I am grateful.

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.

In the result I would give judgment to the plaintiff and order that transfer No. 475270 registered 21st October 1988 be set aside and the defendant ordered to re-transfer the land to the plaintiff. In the event of failure by the defendant to effect the transfer to the plaintiff, the Registrar of the Supreme Court be empowered to sign the necessary transfer.

Based on the admission of the defendant a total sum of \$66,000 was paid to her for rental of the premises from September, 1988 to March 1994. I find that \$30,000 was paid to the contractor for repairs hence I order that the amount of \$36,000 be refunded.

An Injunction restraining the defendant from interfering with premises and or from intermeddling with any of the tenants thereon is ordered. There will be Costs to the plaintiff to be agreed or taxed.

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.

Before dealing with the law relied upon for the purpose of establishing these contentions it will be convenient to examine the relevant provision of the statute dealing with a registered certificate of Title.

Sec. 161 Registration of Titles Act

No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act except in any of the following cases that is to say -

(a) - (c)

(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud.

(e) - (f)

And in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estopped to any such action against the person named in such document as the proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding."

Turning to question of fraud, the section appears to show that fraud means actual fraud, i.e. dishonesty of some sort and not what is called constructive or equitable fraud. See Assets Company Limited v. Mere Roihe and Ors. (1905) AC. 176.

In Alele v. Honiball etal C.A. 111/89 (unreported) 14/3/91 Carey J A. delivering the judgment of the Court said at p.24.

had this to say:-

"Duress and Undue influence are species of the actual fraud required under the Acts to invalidate a certificate of Title."

In the House of Lords judgment of Barclays Bank v. O'Brien (1993) 4 ALL ER 417 Lord Browne-Wilkinson in dealing with the principle of undue influence had this to say at p.431:-

"In addition to the cases of cohabitees, the decision of the Court of Appeal in Avon Finance Company Limited v. Bridger (1985) 2 AER 281 shows (rightly in my view) that other relationships can give rise to a similar result. In that case a son, by means of a misrepresentation, persuaded his elderly parents to stand surety for his debts. The surety obligation was held to be unenforceable by the creditor inter alia because to the bank's knowledge the parents trusted the son in their financial dealings. In my judgment that case was rightly decided....."

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 of his daughter by her falsely representing to him that he would be signing a loan document.

Manifest Disadvantage

The authorities clearly show that the transaction constituted a disadvantage sufficiently serious to require evidence to rebut