SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1986

BETWEEN:

FREDERICK N. BALLANTYNE
(Executor of the Will of
Samuel N. Ballantyne deceased) - Appellant/Defendant

and

ROBERT O'GARRO
(Administrator of the Estate
of Nathan Gerald John) - Respondent/Plaintiff

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable mr. Justice Moe

Appearances: B. Lake, Q.C., and S. John for the Appellant
C. Dougan and H. Williams for the Respondent

1987: March 30, 31,
July 20.

JUDGMENT

MOE, J.A.

This appeal is from a judgment of the High Court in which the trial Judge made an order in favour of the Estate of the beneficiaries entitled to the estate of one James Nathaniel John deceased.

James Nathaniel John owned a parcel of land situated at Villa in the parish of Saint George in St. Vincent containing 4 acres 3 roods 3 poles the subject matter of the action out of which this appeal arises. He died intestate on 23rd March, 1973 leaving surviving him a widow, Christina John, and a brother of the whole blood, Nathan Gerald John but no issue. Later that year Christina John and one Samuel Ballantyne entered into an agreement for the sale of the land. On the same day Christina gave Ballantyne a general power of Attorney which contained a power to obtain in her name letters of Administration in the Estate of her late husband. Ballantyne applied for the Letters in October, 1973 and obtained them on 7th April, 1976. By indenture dated 15th April, 1976 Christina conveyed the land concerned to Ballantyne for $12,000. This conveyance was registered on the 6th May, 1976, Ballantyne sub-divided the land into 17 lots which he sold to various third parties.

Nathan Gerald John died on 2nd December, 1978, intestate. Nothing was heard from anyone in connection with Nathan's Estate until a letter dated 26th March, 1983 was sent on behalf of his beneficaries to Ballantyne claiming Nathan's share and interest in James' Estate. As Attorney on Record for the children of Nathan John the respondent/plaintiff obtained Letters of

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Administration in the Estate of Nathan John on the 17th June, 1983, and by letter dated 16th September, 1983 the respondent/plaintiff through his attorney-at-law demanded that Samuel Ballantyne , as attorney on record for Christina John vest in the respondent as administrator of the Estate of Nathan Gerald John the undivided one half share in the land concerned.

By an originating summons dated 22nd September, 1983, the respondent sought the following declarations and orders:-

1. A declaration that prior to his death on the 2nd day of December 1979, Nathan Gerald John was entitled to an undivided half-share in the estate of James Nathaniel John.

2. A declaration that the estate of Nathan Gerald John deceased is entitled to an undivided half-share in the estate of James Nathaniel John.

3. A declaration that a Deed of Conveyance dated April 15, 1976 and bearing registration number 759 of 1976 is null and void and that it be set aside.

4. That the defendant be ordered to execute a vesting deed to the plaintiff for an undivided half-share in all that lot piece or parcel of land situate at Villa in the parish of Saint George in the State of Saint Vincent containing four acres three roods three poles and numbered 17 on a plan drawn by G.E.B. Daisley licensed land surveyor dated the 3rd day of November, 1958 and registered in the Land and Surveys Office of Saint Vincent and the Grenadines bearing registration number GX-1 and abutted and abounded on or towards the North-West by Lots 9,12 and 14 and or towards the North-East by Lot 8 and or towards the South-East by Lots 18 and 19 and on or towards the South-West by the Windward Highway G7/42 or howsoever otherwise the same may be butted and bounded known or described.

In the judgment the learned trial Judge made some specific findings of which it is both convenient and useful to set out the following:-

1. Christina John and Nathan Gerald John were entitled to undivided half-shares in the estate of James Nathaniel John.

2. Christina John as personal representative of the estate of James John held the estate on trust for herself and Nathan John and as trustee had a right to sell the land

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concerned. About these two findings there was no complaint.

3. The agreement for the sale of the land was made in secret and the consideration of $12,000 was unconscionable.

4. The evidence of Samuel Ballantyne in his dealing with Christina John concerning the sale of the land showed his conduct to be wrongful even to the extent of being fraudulent.

5. Samuel Ballantyne had constructive notice of the beneficial interest of Nathan John and he was fore not a bona fide purchaser for value without notice of the land.

6. Nathan John was in a position on 6th May, 1976 to complain about the infringement of his right to a share in the Estate of James John.

7. The demand of the beneficiaries of Nathan John in 1983 was not too late and the laches did not apply.

Judgment was entered for the plaintiff/respondent in the following terms:-

1. Nathan Gerald John a.k.a. Harold John was entitled prior to his death to an undivided half-share in the estate of James Nathaniel John, deceased.

2. The estate of Nathan Gerald John a.k.a. Harold John, deceased is entitled to an undivided half-share in the estate of James Nathaniel John, deceased.

3. That accounts be taken by the Registrar of the High Court to ascertain the amount realised from the purchase of lots in the trust property without delay.

4. That the total sum realised from the sale of such lots be paid into Court by the defendant Samuel Ballantyne within seven days of the conclusion of the taking of such accounts.

5. That the Registrar of the High Court do pay to the defendant Samuel Ballantyne all expenses properly incurred by him in the administration of the estate of James Nathaniel John, deceased including the

/payment....

payment of estate duty in the said estate, after the sum realised from the said sale be paid into Court.

6. After payment of expenses as is mentioned in paragraph 5 above the remainder to be held by the Registrar on trust as to one half for the estate of Nathan Gerald John a.k.a. Harold John, deceased and the other half going to the Estate of Christine John, deceased.

7. Immediate payment of the shares of the Estate of Nathan Gerald John a.k.a. Harold John deceased be made to the said estate after payment into Court of the said sum so paid into Court, without reserving any part of those shares to meet subsequent costs of ascertaining those persons entitled under the estate of Christina John, deceased.

8. The plaintiff to have his costs to be taxed.

Thirteen grounds of appeal against the judgment were filed but were argued under four main heads. The first head of complaint dealt with the trial Judge's finding that the contract for the sale and purchase of the land was an unconscionable bargain. The second head raised the question of the applicability of constructive notice to Samuel Ballantyne of any interest of Nathan John in the Estate of James John. Under the third it was contended that any claim on or on behalf of or through Nathan John was defeated by laches and under head four the order of the learned Judge was challenged as including unjust enrichment to the estate of Christina John.

Unconscionability of the Transaction

It was the submission of appellant's Counsel that in order to set aside a transaction on the basis that it was an unconscionable bargain it must be expressly shown that the conduct of one party was oppressive or coercive towards the other party in circumstances that the mind of the other party was overborne and by reason of those circumstances and the conduct of the other party acting aggressively or assertively, that party gained an unfair advantage over the other. It was stressed that in each situation it must be established that the conduct of one party was so heinous and oppressive and also the circumstances of the other party so straitened that by reason of those two things the transaction came into being and gave the party demonstrating the oppressive conduct an advantage over the other party. In support of the propositions reference was made to the following:

/Aylesford.....

Aylesford (Earl) v Morris (1873) L.R. 8 Ch. App. 484,

Alec Lobb (Garages) Ltd. & others v Total Oil G.B. Ltd. (1985) 1 All E.R. 303

McKay v Clow (1941) 4 D.L.R. 217

Morrison v Coast Finance Ltd. 55 D.L.R.710

Kruff v Bell 58 D.L.R. 466

Harry v Kreutziger 95 D.L.R. 231

Lott v Angelucci (1982) B 36 B.C.L.R. 273.

Councel for the respondent had no quarrel with the propositions stated but submitted that each case had to be decided on its own peculiar facts, stressing that the same factors do not predominate in each case. He referred us to Re Fry, Fry v Lane (1888) 40 Ch.D. 312

Clark v Malpas (1862) 45 E.R. 1238

Lloyds Bank v Bundy (1974) 3 All E.R. 757.

In Fry v Lane (1888) 40 Ch. D 312 Kay J. clearly stated the scope and application of the principle on which a Court will interfere with a transaction and nullify it on the ground that it is unconscionable. At page 322 he said: "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction..... The circumstances of poverty and ignorance of the vendor and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving in Lord Selborne's words that the purchase was 'fair, just, and reasonable'." This was referred to by Lord Denning M.R. in Lloyds Bank Ltd. v Bundy (1974) 3 All E.R. 757 when he considered the second of the five categories of cases he analysed as those in which the Courts will set aside a contract or transfer of property on the principle of inequality of bargaining power between the parties. Lord Denning stated the general principle applicable to the five categories in the following terms:

> "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 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 pressure brought to bear on him or for the benefit of the other....."

These statements of the principles have the approval of the British Columbia Court of Appeal in Harry v Kreutziger 95 D.L.R. 231 in which

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McIntyre J.A. restated the rule thus -

> "Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show in order to preserve his bargain that it was fair and reasonable."

I am however in agreement with the views of McIntyre and Lambert JJ.A. expressed in the said Harry v Kreutziger (supra) that the statement of principle can only be of the most general assistance in reaching a decision on the facts of a particular case. Before the above principles are applied some more reference to the evidence is necessary.

Samuel Ballantyne was a businessman and lived next to the land concerned. He was so living in 1973 and up to the date of the hearing of the summons in 1984. It is thus reasonable to infer that he would have had a fair idea of the value of the land. Christina John lived in the U.S.A. since 1946 and there is no evidence that she knew the land.

The Power of Attorney from Christina John to Samuel Ballantyne was drawn up by a Barrister-at-Law in St. Vincent and it was signed on the 17th September 1973 the same day on which Ballantyne made the deposit of $2,000 in pursuance of the agreement for the sale and purchase of the land. It is therefore reasonable to infer that when Ballantyne left St. Vincent to go to New York he had with him the Power of Attorney already prepared. Paragraph 5 of the Power of Attorney which Ballantyne carried to New York stated that he would have power "to act on my (Christina John's) behalf and as my fully constituted Attorney in making.....an application to the High Court of Justice for a Grant of Letters of Administration in the State of Saint Vincent in the Estate of my husband James John who died in St. Vincent on the 23rd March, 1973. There is the further clear inference that Ballantyne knew before he got to New York that he was going to be appointed to act as set out in paragraph 5.

The circumstances surrounding the Power of Attorney must be considered alongside Ballantyne's evidence under oath. Under cross-examination he said "Bwfore I paid the first money I did not seek legal advice. When I paid the first deposit I did not know James John had died." It was also odd that in an affidavit dated 30th September, 1983, he swore that following the grant of Letters of Administration to Christina John, she agreed to sell and he agreed to buy the land concerned; then in an affidavit dated 13th December, 1984, he said the agreement for the sale was concluded prior to and before Christina John appointed him her agent to apply for administration of the

/Estate.....

Estate of James John. It is therefore not surprising that the learned Judge came to the conclusions which she reached about the agreement for the sale and the manner of Ballantyne's dealing with Christina John.

Christina John at the time was 72 years old and under the doctor's care. There was evidence that she was in financial difficulties. According to the trial Judge the evidence portrays her as being in dire straits, wanting money very badly. There is no evidence that she had any legal advice or was aware of the value of the land. The land was valued in October 1973 by the Deputy Commissioner of Valuations at $108,900 and in 1976 Ballantyne and the authorities agreed on a valuation of $70,000. It was the submission of Counsel for the appellant that all that can be said of the consideration of $12,000 is that it is inadequate. In light of the evidence I have no hesitation in saying that the consideration was grossly inadequate. At this point it may be appropriate to restate a general observation about such a factor in matters of this nature. Fullagar J in Blomley v Ryan 99 C.L.R. 362 at page 405 said ".....The circumstances adversely affecting a party, which may induce a Court of equity either to refuse its aid or to set aside a transaction, are of great variety and can hardly be satisfactorily classified..... But inadequacy of consideration while never of itself a ground for resisting enforcement will often be a specially important element in cases of this type. It may be important in either or both of two ways - firstly as supporting the inference that a position of disadvantage existed and secondly as tending to show that an unfair use was made of the occasion..... It will almost always I think be..... an important ingredient in considering whether a person did exercise any degree of judgment in making a contract, or whether there is a degree of unfairness in accepting the contract..... (per page Wood V.C. in Wiltshire v Marshall (1866) 14 L.T. 396 at page 397."

The learned Judge therefore had for consideration the following matters:-

a) A contract for the transfer of property;
b) at a price grossly inadequate;
c) concluded between (i9 a vendor old, sick, in dire straits and without independent advice and (ii) a purchaser who had the assistance of a lawyer and who acted
d) in circumstances found to be secretive

All of these ingredients having been established, for the transaction to be sustained it was for the appellant (i.e. in the place of Samuel Ballantyne) to prove that the bargain was fair, just and reasonable. In my opinion the evidence sustains a finding that Samuel Ballantyne took advantage of the circumstances of Christina John and that the bargain between them was substantially unfair. The conclusion of the trial Judge that the bargain was unconscioinable was eminently justifiable and must be supported.

/Consequences.....

Consequences of Transaction

The transaction having been found to be unconscionable, is one which the Court would nullify. It is therefore unnecessary to consider the second head of appeal and I go to the question whether the claim of the beneficiaries of the Estate of Nathan John to an undivided share in the land is defeated by laches. Counsel for the appellant contended in this way. Any equitable claim by Nathan John arose as from the 23rd March, 1973 the date of death of James John. For ten years, i.e. until 26th March, 1983 when Nathan's beneficiaries laid a claim, the potential equity remained dormant, inactive and unasserted. From the death of James until 1977 when Nathan died he had not asserted his claim and for another four years his beneficiaries had made none. During that time the land had been subdivided, developed and expenditure incurred by the appellant. The respondents now seeking equitable relief are defeated by their own inequitable conduct of delay. The answer to this came from Counsel for the respondent who pointed to the finding of the learned Judge that Christina John held the land on trust for herself and Nathan John. There was and could be no challenge to this finding. In the circumstances therefore the claim by or on behalf of the beneficiaries of Nathan John's Estate is governed by the Real Property Limitation Ordinance, Cap. 86, section 23. That section provides "When any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of this Ordinance, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchase and any person claiming through him." Time therefore ran against Nathan John and those claiming through him from the date of the transfer of the land by Christina John, that is, 6th May, 1976, the date which the learned Judge held Nathan must be regarded as being in a position to complain about the infringement of his rights to the Estate concerned. Approximately seven years elapsed i.e. from 6th May, 1976 until the 26th March, 1983 before the claim on behalf of the beneficiaries to Nathan's estate.

It may now be observed that the doctrine of laches has no application to cases to which Statutes of Limitation apply. The proposition is clearly stated in Halsbury Vol. 14 (3rd ed.) para.1181 - "If there is a statutory bar operating either expressly or by way of analogy the plaintiff is entitled to the full statutory period before his claim becomes unenforceable." Now by section 3 of the Real Property Limitation Ordinance (supra) "No person shall make an entry or distress or bring an action or suit; to recover any land.....but within twelve years next after the time at which the right to..... to bring such action or suit, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any

/person....

person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to the person making or bringing the same. By virtue of section 3 of Cap. 86 the full period of limitation would not have run against the estate of Nathan John until 5th May, 1986. When therefore a demand was made on behalf of the Estate in March, 1973 the claim had not yet become unenforceable.

It follows from what has been said above that the respondent was clearly entitled to the declarations 1 and 2 sought on the originating summons. Further that in the circumstances the transaction between Christina John and Samuel Ballantyne cannot be allowed to stand. But the question remains what remedy will in the circumstances allow for justice between the parties concerned.

The approach of the trial Judge appears to have followed those cases where the wrongdoer was made to account for his profits and advantages out of the transaction while allowed compensation for such work as he may have performed poursuant to the transaction. Submissions of Counsel before this Court were also along those lines. However I think that in all the circumstances of this case justice would best be met by seeking to put the Estate of Harold John in the position it would have been if the transaction between Christina John and Samuel Ballantyne had been concluded at a consideration which the evidence discloses would have been a reasonable one at the material time.

As I see it, based on the evidence as to the value put on the land for revenue purposes, a fair and reasonable price for the land at the time of the transaction would have been $108,000. From that sum I would deduct the sum paid for Estate Duty, i.e. a sum which the whole estate would have had to bear. The testamentary expenses would also have come out of the said price. Of the remaining sum a one-half share would then go to the Estate of Nathan John.

There was no clear evidence as to the testamentary expenses incurred but there was evidence that $8,429.37 was paid for Estate Duty. In view of the nature of the Estate, it seemed to me that in all probability the expenses other than payment of Estate Duty which would have been properly incurred in administering the estate would have been no more than $5,000.

In the result I think it just and practical to order that the Estate of Samuel Ballantyne do pay over to the Estate of Nathan John the sum of $47,285.31 with interest at 6% per annum thereon from May 1976 until payment.

The appeal is therefore dismissed and the judgment of the learned trial Judge varied accordingly.

/G.C.R.....

G.C.R. MOE,
Justice of Appeal

L.L. ROBOTHAM
Chief Justice

E,H.A. BISHOP
Justice of Appeal.