ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL No.16 of 1993

BETWEEN:

ROBERT MURRAY

Appellant

and

(1) REUBEN DEUBERY
(2) DENFIELD MATTHEW

Respondents

Before: The Rt. Hon. Sir Vincent Floissac — Chief Justice
The Hon. Mr. C.M. Dennis Byron — Justice of Appeal
The Hon. Mr. Satrohan Singh — Justice of Appeal

Appearances: Mr. J.E. Fuller for the Appellant
Mr. J.L. Simon for the Respondents

1995: November 15;
1996: January 15.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

This is an appeal from a judgment delivered by Georges J on 6th August 1 993. By that judgment, the learned judge ordered specific performance of an agreement for the sale of land, directed the Registrar to transfer the land to the respondents ‘as proprietors-in-common in equal shares” and ordered the appellant (as sole surviving executor of the estate of the late Theresa Jacobs) to deliver up possession of the land to the respondents.

Originally, the appellant impugned the Agreement on the grounds of non est factum, mistake and undue influence. Subsequently, the learned judge found and the appellant now evidently accepts that the Agreement was in fact executed by the appellant and that the appellant made no mistake in regard thereto. Consequently, the sole surviving issue in this appeal is

whether the Agreement should be rescinded on the ground that it is the product of undue influence. This is an issue required to be determined by reference to the facts found by the learned judge and by the application of the doctrine of undue influence to those facts.

The Facts

By a written agreement executed on 2nd March 1 979, the appellant and Leonard Willock (executors under the Will of the late Theresa Jacobs) agreed to sell and the respondents agreed to purchase 2.47 acres of land situate at Valley Church Bay in the Parish of Saint Mary in the island of Antigua and entered in the Land Register as Block number 55 1184A Parcel number 17. Whereupon the respondents paid to the appellant and his co-executor a deposit of $10,000.00 on account of the purchase price of $40,155.00 and obtained a receipt therefor.

The Agreement provided for the completion of the sale on 2nd March 1981 when it was expected that the land would be surveyed. However, during the interim period, the respondents discovered that the land was registered in the name of the late Claude Earl Francis. Accordingly, the completion of the sale had to await legal proceedings for the determination of the ownership of the land. These proceedings were instituted under suit no.89 of 1984 which finally terminated on 29th June 1986 when the High Court delivered judgment declaring that the land and other lands belonged to the estate of the late Theresa Jacobs.

On 8th September 1986, the respondents paid the balance of the purchase price to the appellant and his co-executor. By letter dated 5th March 1987 and addressed to the appellant, the respondent's solicitor demanded the appellant=s transfer of the land to the respondents. This the appellant refused and failed to do. On 10th December 1987, the respondents instituted suit no.440 of 1987 and therein claimed specific performance of the Agreement

and damages for breach of contract.

In his "Amendment to Defence", the appellant invoked the doctrine of undue influence. He therein stated:

> "At the time of entering into the said alleged Agreement, the Defendant was and still is semi-literate and was being advised by the Plaintiffs in the matter of a land dispute and valuation between the estate of Theresa Jacobs and the estate of Claude Earl Francis and the subject matter hereof was the very subject matter of the said dispute. The alleged Agreement, if executed by the Defendant, was executed by him at the Chambers of the Solicitor for the Plaintiffs who was also the Solicitor of the Defendant. The Defendant was unaware that his Solicitor also represented the Plaintiffs. The land, the subject matter of the alleged Agreement was purportedly agreed to be sold by the Defendant to the Plaintiffs at a grossly inadequate price."

With regard to the allegation that at the time the execution of the Agreement, the appellant was being advised by the respondents with respect to the dispute with the heirs of the late Claude Earl Francis over the same land, the learned judge said:

> "I pause here merely to observe that the agreement for sale was alleged to have been made on 2nd March 1979, long before proceedings had been instituted in Suit No.89 of 1 984 so that I am unable to see how the two matters could have been "inextricably linked".

With regard to the allegation that the Agreement was executed by the appellant at the Chambers of the respondents' solicitor who was also the solicitor of the appellant, the learned judge found:

> "For reasons that I shall shortly give, there is no doubt in my mind that the late Time H. Kendall Q.C. was, in my view, no more than attesting witness to the signatories of that agreement."

Later, the learned judge said:

> "Mr. Matthew further testified that Mr. Kendall was not acting for either of the parties in that transaction, a fact which Mr. Kendall himself confirmed at paragraph 3 of a letter dated 10th October 1986 (Exhibit 12) to John E. Fuller himself accepted as is shown in the final paragraph of his reply to Mr. Kendall dated 15th October 1986 (Exhibit 13)."

The learned judge added:

> "This is a grave indictment which was categorically denied by Mr. Kendall in his letter to Mr. Francis 10th October 1986 (Exhibit 1 2) the contents of which Mr. Fuller himself "accepted in toto". The Court also, by and large, accepts that letter as a full, frank and factual account of the circumstances surrounding the execution of the sale agreement by Leonard Willock and the defendant on 2nd March 1979, and the events which followed thereafter."

The learned judge concluded:

> "In my opinion therefore, it is doubtful whether either of the gentlemen and the defendant in particular had the benefit of independent legal advice prior to the execution of the sale Agreement of 2nd March 1979."

With regard to the allegation that the agreed purchase price for the land was a grossly inadequate price, the learned judge found as follows:

> "The price at which the Defendant agreed to sell to the Plaintiffs viz $15,000.00 per acre was the same price quoted to the prospective Swiss investor. They were not accorded any special rate or preferential treatment. That figure was the benchmark and as a price quoted to a foreign investor one would expect it to have been at the very least, a fair market value."

The learned judge concluded as follows:

> "Judging from the values quoted in four indentures produced in evidence through Mr. Gore, I am satisfied that his own valuation of the land in question was grossly exaggerated. And that view is reinforced by the findings of Matthew J. in Suit No. 89 of 1984 where the Court in 1986 was required to consider the value of the said land in 1968 and concluded that $2,000.00 an acre was a fair price.
>
> On the totality of the evidence, there can be no justification in my judgment for concluding that the agreed purchase price in that transaction was of such considerable undervalue as to be labeled as unconscionable bargain. The figure in fact in my view is eminently reasonable based as it was, on the price quoted to a foreign investor."

It is by reference to these findings of fact that the issue of undue influence is required to be determined. It is therefore necessary to examine the doctrine of undue influence and to endeavour to apply that doctrine to the facts as found by the learned judge.

The doctrine of undue influence

The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of the undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the

transaction, the transaction is voidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.

The modern tendency is to classify undue influence under two heads namely Class 1 (actual undue influence) and Class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is Class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical advisor and patient, parent and child and clergyman or religious advisor and parishioner or disciple. The second sub-head is Class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in the dominant party.

In **Barclays Bank PLC v O'Brian (1994)** 1 A.C. 180 at 189 & 190, *Lord Browne-Wilkinson* explained Class 2(B) in these words:

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

In order to establish a legal presumption that a dominant party exerted undue influence over a complainant to enter into a transaction, the complainant must prove (1) that at or shortly before the execution of the transaction, there existed as between the dominant party (or his agent) and the complainant a relationship of trust and confidence from which undue influence by the dominant party over the complainant will legally be presumed and (2) that the transaction was to the manifest

disadvantage of the complainant to a degree where it may be said to be unfair to the complainant or to be otherwise unconscionable.

In **National Westminster Bank v Morgan** (1985) 1 A.C. 686 at 704, *Lord Scarman* expatiated on the requirement of manifest disadvantage in these words:

> "Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction 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."

In **C.I.B.C. Mortgages PLC v Pitt (1994)** 1 A.C. 200, *Lord Browne Wilkinson* clarified that passage from Lord Scarman's judgment. Lord Browne-Wilkinson explained that manifest disadvantage is irrelevant in cases of actual undue influence (Class 1) and is relevant and requisite only in cases of legally presumed undue influence (Class 2). He said (at p208):

> "I have no doubt that the decision in *Morgan* does not extend to cases of actual undue influence. Despite two references in Lord Scarman's speech to cases of actual undue influence, as I read his speech he was primarily concerned to establish that disadvantage had to be shown, not as a constituent element of the cause of action for undue influence, but in order to raise a presumption of undue influence with Class 2. That was the only subject matter before the House of Lords in *Morgan* and the passage I have already cited was directed solely to that point."

Lord Browne-Wilkinson concluded (at p209):

> "I therefore hold that a claimant who proves actual undue influence is not under the further burden of proving that the transaction induced by undue influence was manifestly disadvantageous: he is entitled as of right to have it set aside."

Hopefully, this summarises the principles which govern the rescission of a transaction on the ground of undue influence. I shall now endeavour to apply those principles to the present case.

Application of the doctrine

The first question required to be answered in the present case is whether

there is a legal presumption that the respondents exerted undue influence over the appellant to execute the Agreement. The answer to that question depends on the nature of the relationship which existed between the respondents and the appellant at the time of or shortly before the execution of the Agreement.

There is no evidence that there ever existed any legally accredited or Class 2(A) relationship between the respondents and the appellant. The only relationship which existed was the relationship between surveyors and their client. This is not a legally accredited or Class 2(A) relationship. In any event, that relationship was established long after the execution of the Agreement.

Counsel for the appellant proposed a Class 2(B) relationship between the appellant and the respondent Denfield Matthew. Counsel drew this Court's attention to Matthew's testimony under cross-examination when he said:

> "Mr. Willock gave me his bank book in 1979 - late 1979 - to go to his bank and take out eight thousand dollars ($8,000.00). I would say he trusted me greatly."

Significantly, no mention was made of that testimony in the learned judge's exhaustive judgment. Presumably, the learned judge concluded that the testimony was intended to be in support of the allegation in paragraph 4 of the respondents' Statement of Claim and Matthew's evidence that Mr. Willock refunded him the sum of $8,000.00 out of the deposit and retained the balance of $2,000.00 pending the settlement by the Court of the ownership of the land.

In my judgment, an isolated demonstration by a complainant of trust and confidence in a dominant party is insufficient to engender a Class 2(B) relationship between the complainant and the dominant party. There must be evidence that the complainant "generally reposed trust and confidence" in the dominant party. The evidence required is evidence that before or at the time of the execution of the transaction, the complainant had habitually, frequently or repeatedly expressed or

indicated his trust and confidence in the dominant party. Matthew's testimony per se is not such evidence.

Even if the appellant established or could have established a Class 2 confidential relationship between the respondents and the appellant, that relationship would not by itself have been sufficient to generate a legal presumption of undue influence. In order to engender that presumption, the appellant also had to prove that the Agreement was to his manifest disadvantage. This he failed to do. The result is that the appellant cannot rely on the presumption of undue influence or on presumed undue influence.

In the absence of the assistance of a presumption of undue influence, the burden remained on the appellant to prove that actual or Class 1 undue influence was exerted by the respondents (or their agents) on the appellant to induce the appellant to enter into the Agreement. The appellant failed to discharge that burden. The learned judge unequivocally so found.

In those circumstances, the Agreement must be deemed to be the voluntary and spontaneous act of the appellant exercising his own independent will and judgment with full appreciation of the nature and effect of the Agreement. Accordingly, the appeal must be dismissed and the decision of the learned judge must be affirmed. I would do so with costs to the respondents to be taxed if not agreed.

SIR VINCENT FLOISSAC
Chief Justice

I Concur. C.M.DENNIS BYRON
Justice of Appeal

I Concur. SATROHAN SINGH
Justice of Appeal