BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL No.4 of 2000

BETWEEN:

HARRIET DAILEY

Appellant

and

FRANKLYN DAILEY

Respondent

Before:

The Honourable Sir Dennis Byron — Justice of Appeal
The Honourable Mr. Justice Albert Redhead — Justice of Appeal
The Honourable Mr. Justice Albert N.J. Matthew — Justice of Appeal

Appearances:

Mrs. J. George-Creque and Miss D. Borleand for Appellant
Mr. J. Husbands for the for Respondent

2001: June 16 and 17;
March 26.

JUDGMENT

[1] **MATTHEW J.A.:** These proceedings began by Originating Summons filed on February 2, 1996 under the **Married Woman's Act**, Chapter 275 of the Revised Laws of the Virgin Islands for a declaration of the interest of the Appellant in certain matrimonial properties.

[2] By that summons the Appellant sought several declarations and orders including:

(a) a declaration that Instrument of Transfer No. 749/1991 between Harriet Daley as transferor and Franklyn Dailey as transferee in respect of Parcel 16 Block 3504 B of the East End Registration Section was made under undue influence by the Respondent over the Appellant and other consequential orders;

(b) an order that the Respondent give an account of all his dealings and transactions in respect of all businesses including Franklyn's General Market;

(c) a declaration that a certificate of deposit which was executed at Banco Popular de Puerto Rico by the Respondent and Appellant was jointly owned.

[3] The originating summons was supported by an affidavit of the Appellant filed on the same day. The affidavit alleged that the Appellant aged 51 and the Respondent aged 54 got married on December 31, 1971 and are parents of two children, Franklyn Jnr. aged 33 and Kim aged 28.

[4] The affidavit further states that the Appellant was once employed with an airline from 1971 to 1979 after which she went to work at Franklyn's General Store, later Franklyn's General Market from 1979 to 1995. During the marriage the Parties acquired property at Sophie Bay on which the matrimonial home was later built. This property is not in dispute in these proceedings.

[5] The Parties also acquired two properties at the East End. One property known as Parcel 8, Block 3540 B is also not in dispute. But the other property known as Parcel 16 Block 3504 B is said by learned Counsel for the Appellant to be the gravamem of the appeal. Serious challenge is made to a document of transfer dated September 27, 1989 allegedly effecting a transfer of the Appellant's interest in that property to the Respondent.

[6] A consequential challenge is also made in respect of the transfer of the same property by the Respondent to a company known as FT Ltd on April 4, 1995 for a consideration of One Dollar. The directors and shareholders

of the company are Franklyn Dailey and his brother Ralston Dailey. Franklyn is owner of 99 shares and Ralston is owner of the other share.

[7] The Appellant alleged that she and the Respondent had a joint certificate of deposit at Banco Popular De Puerto in St. Thomas, U.S.V.I. in the amount of $85,000 and her husband withdrew the entire amount and invested the said money in a building project under construction on Parcel 16 of Block 3540 B of the East End Registration section.

[8] The Appellant further alleged that the Respondent left the matrimonial home about September 1989 about the time of Hurricane Hugo. The evidence in the case is that he left to go to live with Karena Lewis to whom the Respondent has since married.

[9] The Appellant filed a supplemental affidavit on May 30, 1996. The Respondent filed an affidavit in answer to the Appellant's affidavits on November 21, 1996. In his affidavit the Respondent alleged that he solely constructed the building which housed Franklyn's General Market and that the business commenced in 1981. He stated that the business became bankrupt in 1993 as a result of misappropriation of funds by the Appellant.

[10] The business was later sold to Fahie Ltd in 1995. The Respondent further alleged that he paid the Appellant $100,000.00 for her interest in parcel 16. In respect of the certificate of deposit the Respondent alleged that he gave the Appellant $225,000.00 to open a joint account and in 1989 to 1990 he discovered that only $70,000.00 was deposited so he withdrew that amount.

[11] On February 20, 1997 the Appellant filed another affidavit in reply to the Respondent's affidavit. In that affidavit she alleged that "our usual course of conduct in doing the purchasing for the business was to take large

quantities of cash to Puerto Rico for this purpose." She gave account of an occasion where the Respondent was held up and robbed in a store in Puerto Rico.

[12] Appellant alleged that she never received any money for her interest in parcel 16. She stated further that the sale of Franklyn's General Market to Fahie Ltd was a sham. She referred to an agreement dated January 31, 1995 indicating the sale to Fahie Ltd for $200.000.00 and on the same day Fahie Hill Ltd issued a debenture to Franklyn's General Market to secure a loan of $200,000.00

[13] Appellant alleges that notwithstanding the fact that the company documents state that the shareholders of Fahie Hill Ltd are Dennis Alphonso and Karena it is common knowledge that Dennis Alphonso has at no time operated the said business and the only persons there operating the business since 1992 are the Respondent and Karena.

[14] In addition to the affidavits the learned Judge heard oral evidence and submissions by Counsel on April 19-22, 1999; April 27, 1999 and July 22, 1999. On February 4, 2000 the learned Judge delivered judgment. The judgment order was a declaration that the business known as Franklyn's General Market is owned equally by the Parties and it was ordered that the Appellant's share be valued at $100,000.00 such sum to bear interest at the rate of 5 percent as from January 31, 1995 to the date of payment. It was further ordered that the Appellant's other claims be dismissed.

[15] The Appellant filed a notice of appeal on September 3, 2000 stipulating three grounds of appeal as follows:

(1) That the learned Judge, in accepting the value of the business Franklyn's General Market, as being the value placed thereon for sale of the said business by the Respondent to himself, erred in law

in accepting an improper basis of valuation having regard to the evidence.

(2) That the learned Judge erred in law in dismissing the declaration sought by the Appellant that a certificate of deposit held at Banco Popular de Puerto was jointly held by the Appellant and the Respondent having regard to the evidence.

[16] The third ground of appeal is that the learned Judge erred in law in failing to sufficiently take into account or at all, the evidence on the totality of which it could only be reasonably inferred that the transfer of Parcel 16 Block 3540 B by the Appellant to the Respondent was obtained by pressure, fraudulent misrepresentation and undue influence.

[17] I shall therefore deal with the three grounds of appeal seriatim.

Franklyn's General Market

Learned Counsel for the Appellant with some justification, referred to the transaction between Franklyn's General Market and Fahie Ltd as a sham transaction and criticized the Judge for taking the easiest way. In her skeletal arguments submitted on June 8,1999, after the Parties had given evidence, and tabled during her submission, Counsel submitted there can be two bases of valuation and one was the purchase price the Respondent placed on the business. In her exchanges with the Judge on July 22, 1998 Counsel virtually agreed with the judge on the figure of $100,000.00.

[18] The other method of valuation suggested by Counsel was based on the weekly takings of Franklyn's General Market, estimated between $10,000.00 and $20,000.00 a week. But that could not be a reliable basis for valuation without a knowledge of the weekly deductions. Before this

Court and even at the trial, it was also stated that there could be a valuation of the building in which the business was housed, but the sale price to Fahie Ltd included the building as well.

[19] Learned Counsel for the Respondent urged on this Court that the Judge had no other evidence to go on. Counsel submitted that this was a cash transaction business without any records being kept so the Court could not make an impossible order, that is, an order that the Respondent give an account of all his dealings and transactions in respect of the Franklyn's General Market when no records were kept.

[20] Counsel further submitted that the building was always treated as being separate from the business. Counsel referred to the evidence where the Appellant admitted that certain records which she had were destroyed by Hurricane Hugo and the Respondent saying that the reason why they kept no records was to keep overheads low, since the keeping of records would entail employing somebody to keep the records.

[21] In paragraph 12 of the originating summons it seems to me the Appellant is asking for an order in respective of the business as distinct from the building in which the business is housed, and consequent declarations in paragraph 13. My view is supported by the declarations sought in paragraph 8 in respect of three named properties, two of which it was agreed by the Parties and their Counsel are not in dispute, those are parcel 8 and the property at Sophie Bay.

[22] I agree with learned Counsel for the Respondent that in this kind of cash transaction basis it would be useless in the year 2000 to order account of a business at a date five years earlier. In her affidavit of February 20, 1997 Harriet says the usual course of conduct was to take large quantities

of cash to Puerto Rico to trade so much so that Respondent was robbed of his cash on one such occasion.

[23] I do not think a valuation on gross intake at the store could be a reliable method of taking an account without regard to the deductions. I therefore agree with learned Counsel for the Respondent that the Judge had no other evidence to go on and indeed accepted one of the alternative methods of valuation advanced by learned Counsel for the Appellant.

[24] This ground of appeal fails.

Certificate of Deposit

[25] Learned Counsel for the Appellant complained that the learned Judge did not deal with the certificate of deposit. In answer to me learned Counsel said Judge must have forgotten all about the certificate. Counsel stated that the Appellant alleged that the amount in the certificate was $85,000.00 and Respondent stated it was $70,000.00 and so Appellant is entitled to half of at least the $70,000.00 although she was urging the Court to accept that the amount was indeed $85,000.00.

[26] Learned Counsel for the Respondent agrees that the learned Judge did not deal with the certificate of deposit. Counsel submitted that the amount of the deposit was at one time $225,000.00 and the Judge must have thought that since the Appellant used most of that amount for her own benefit it was a bit of rough justice if the Respondent withdrew the remaining $70,000.00

[27] The Respondent, in his affidavit of November 21, 1996 accused the Appellant of misappropriating the difference between $225,000 and $70,000 in answer to the Appellant's allegation that he withdrew the $85,000.00 which was the amount in the certificate of deposit.

[28] The learned Judge in his brief judgment made no finding of misappropriation of funds and one cannot justly infer that he did so in order to justify the Respondent's withdrawal of the balance of money in that account.

[29] The learned Judge may be excused for not dealing specifically with this item because learned Counsel for the Appellant represented to him at the beginning of the proceedings on April 19, 1999 that the two issues before the Court were the valuation of Franklyn's General Store and the issue pertaining to parcel 16. This is further highlighted in her final submissions on July 22, 1999 and in her skeletal arguments submitted on June 8, 1999 where she alleged that the two main issues pertained to the Appellant's share in the business known as Franklyn's General Market and whether Harriet in transferring her share of Parcel 16 to Franklyn was a proper disposition.

[30] But I agree that the issue was clearly before the learned Judge for his determination and he should have made a specific declaration. Learned Counsel for the Respondent in his submissions to the Court made on April 27, 1999 recognised that the joint bank account was an issue before the Court.

[31] There is at least a common assertion that the Respondent withdrew $70,000.00 from the joint certificate of deposit held at Banco Popular de Puerto Rico and I would be prepared to declare that the Appellant is entitled to 50 per cent of that amount.

[32] In her affidavit in support of the originating summons filed on February 2, 1996 the Appellant alleged that the sum withdrawn by the Respondent was invested in Parcel 16, Block 3540 B. The Respondent also said he

used part of the money to invest in parcel 16 and the other part to meet the debts of Franklyn's General Market brought about by the misappropriation of funds by the Appellant.

[33] It seems that I should deal with the dispute pertaining to Parcel 16 before I make any declaration or order with respect to the certificate of deposit. I shall now turn to the third ground of appeal.

Transfer of Parcel 16 by Appellant to Respondent

[34] This ground of appeal relates to Parcel 16 and the complaint is that the transfer of her interest by the Appellant to the Respondent on September 27, 1989 was obtained by undue influence.

[35] Learned Counsel for the Appellant submitted that the Appellant understood that she was signing a transfer but she did not understand the impact. She trusted the Respondent and believed that even though she signed the document the property was still their own. Counsel submitted that two main issues arise as follows:

(1) whether Appellant received the $100,000.00, and

(2) whether it represents a fair value.

[36] Counsel submitted that Respondent took the Appellant to the solicitor, Colin O'Neale, but he did not advise the Appellant properly about the impact. Counsel relied on the following authorities:

Barclays Bank v O'Brien 1993 4 AER 417; 418, 422, 424;

Royal Bank of Scotland v Etridge 1998 4 AER 705,710-714;

Dunbar Bank v Nadeen 1997 2 AER 253, 262;

Bank of Montreal v Stuart 1911 AC 120, 136, 139;

Zameet v Hyman 1961 3 AER 933, 938;

Banco v Mann 1995 1 AER 936.

[37] Learned Counsel referred to a number of acts which indicated the Respondent's exercise of domination, control and influence over the Appellant but learned Counsel for the Respondent replied that none of the acts occurred before 1992 and the transaction which was being impugned took place in 1989 when there was significant harmony between the Parties.

[38] Counsel observed that the Appellant had told the lawyer, Mr. Colin O'Neale, that she had received the money. Counsel submitted that the learned Judge did not find the Appellant trustworthy but he took the opposite view of the Respondent and he believed the Respondent and he believed the evidence of Mr. O'Neale. Counsel submitted that there was a danger of presuming undue influence ten years after the event.

[39] This ground of appeal complains that the Judge failed sufficiently to take into account the totality of the evidence surrounding the transaction. The learned Judge looked at the demeanour of the Parties and decided whom he felt was speaking the truth and came to the view that there was no undue influence and the transaction was at arm's length and that no unfair advantage was being taken of Harriet.

[40] The learned Judge found that Harriet Dailey impressed him as being the kind of woman whose will cannot be so overborne. She is made of sterner stuff. That could very well be true in April 1999 but may not be very helpful in deciding whether the transaction executed on September 27, 1989 was fair and at arm's length.

[41] The evidence of the Respondent that he paid the Appellant the sum of $100,000.00 by four or five instalments over a nine to ten month period before September 27, 1989 is utterly unconvincing. He had no idea of the exact dates of payment. He had no receipts. No one witnessed those

cash payments of approximately $25,000.00 on each occasion. All he relies upon is the clause in the deed which says she acknowledge receipt of the amount. In my view this is not conclusive since she may well have been operating under his influence at the time of the transaction.

[42] The Appellant was taken to the solicitor, Mr. Colin O'Neal by the Respondent who did most of the talking. She said very little and either nodded or verbally stated matters. Mr. O'Neale could not recall. Mr. O'Neale, of course, stated that he specifically asked Mrs. Dailey if she had received the $100,000.00 and she said yes. When Mr. O'Neale was cross-examined as to whether he considered himself as acting as legal advisor to Mrs. Dailey, he replied that he did not.

[43] In **Barclays Bank PLC v O'Brien 1993 4 AER 417** at page 422, H.L. *Lord Browne-Wilkinson,* after discussing the classes of undue influence stated as follows:

"*In class 2 cases therefore, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example, by showing that the complainant had independent legal advice.*

On the facts of this case the Appellant cannot be said to have obtained legal advice far less independent legal advice.

[44] At the date of the execution of the transfer the Respondent was living at the matrimonial home but he already had a relationship with Karena. Mr. Husbands conceded that in argument. However, shortly after the execution of the document about the time of the passing of Hurricane Hugo he left the matrimonial home and proceeded to live with Karena. In the said judgment referred to above, *Lord Browne-Wilkinson* speaking of policy considerations had this to say:

"*In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them."*

[45] Speaking of an invalidating tendency, *Lord Brown-Wilkinson*, at page 424 letter 'g' states:

"Second, the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes. For myself, I accept that the risk of undue influence affecting a voluntary disposition by a wife in favour of a husband is greater than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual's will".

[46] Of course it is alleged that the Respondent gave value for the transfer but this is seriously doubted. In a case where a wife feels her very marriage is threatened by a possible rival, her true wishes could easily be overborne because of her fear of destroying or damaging her marriage.

[47] One of the noticeable features of this case is that the Appellant was never afforded an opportunity to be alone with her legal advisor to obtain legal advice. The Respondent was always present with her even when Mr. Colin asked her if she received consideration for the transfer.

[48] In **Royal Bank of Scotland v Etridge** 1988 4 AER 705 at page 711, *Lord Justice Stuart-Smith* made reference to **Barclays Bank v O'Brien** and the need to warn the wife in the absence of her husband of the amount of her potential liability and of the risk of standing surety and the need to take independent advice. In **Bank of Montreal v Stuart** 1911 AC 120 Mrs. Stuart was an invalid and active throughout in passive obedience to her husband's directions. She entered into a number of transactions as surety

for her husband's obligations resulting in her surrendering to the bank all her extensive estate.

[49] The *House of Lords* held that the transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise properly. The solicitor who acted in all or most of the transactions was solicitor to the bank and to the husband and was a director, secretary, shareholder and creditor of the company. At page 139 *Lord Macnaghten* speaking of the solicitor said:

"And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so"

[50] In **Royal Bank of Scotland v Etridge** at page 714 *Lord Justice Stuart-Smith* speaks of rebutting the presumption by the receipt of independent legal advice and refers to a statement by *Lord Justice Hobhouse* in **Banco Exterior International v Mann** 1955 1 AER 936 at page 946 that the problem is not lack of understanding but lack of independence.

[51] I regret not being able to agree with the learned trial Judge that the transaction executed on September 27, 1989 was at arm's length and that no unfair advantage was being taken of Harriet or that any mischief was afoot. I therefore declare that Instrument of Transfer No.749/1991 between Harriet Dailey and Franklyn Dailey entered on May 30, 1991 in the Land Register in respect of Parcel 16 Block 3540 B of the East End Registration Section was made under undue influence exercised by the Respondent over the Appellant.

[52] On April 4, 1985 Franklyn Dailey, by Instrument of Transfer No.752 of 1995 transferred Parcel 16 to F.T.L. Ltd for the price of One Dollar. There are two directors of the company in the persons of Franklyn Dailey and his

brother, Ralston Dailey. They are also the only shareholders of the company, Franklyn holding 99 shares and Ralston holding the other share.

[53] I make the following consequential orders requested in the originating summons:

(1) An Order for the cancellation of Instrument of Transfer 749 of 1991.
(2) An Order for the cancellation of Instrument of Transfer 752 of 1995.
(3) An Order for the rectification of the Land register for Parcel 16 Block 3540B of the East End Registration Section by restoring Entry No.2 in the Proprietorship Section thereof to show the appellant and the Respondent as the Proprietors thereof.

[54] In view of the Orders made above it becomes unnecessary to give relief for any monies withdrawn from the certificate of deposit by the Respondent since those funds were used to develop Parcel 16. The appeal is allowed with costs to the Appellant to be agreed or otherwise taxed.

A. N. J. MATTHEW
Justice of Appeal

I concur.

C. M. D. BYRON
Chief Justice

I concur.

ALBERT REDHEAD
Justice of Appeal