ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 OF 2000

BETWEEN:

[1] FREDERICK HARRIGAN
[2] HAMLET HARRIGAN
[3] ISLAND REAL ESTATE COMPANY LIMITED

Appellants

and

[1] CLEMENT DANIELS
[2] GALAXY SHOPPE (ANGUILLA) LIMITED

Respondents

Before:

The Hon. Mr Justice Satrohan Singh	Justice of Appeal
The Hon. Mr Justice Albert Redhead	Justice of Appeal
The Hon. Mr Justice Ephraim Georges	Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Patterson for the Appellants
Ms. Joyce Kentish and Mr. Elson Gaskin for the Respondents

2002: June 6; July 15;
November 11.

JUDGMENT

[1] GEORGES, J.A. [Ag.]: This appeal arises from two Sale and Purchase Agreements dated 24th April, 1997 between the First Respondents as Vendor and the First and Second Appellants for and on behalf of the Third Appellant Company as Purchaser wherein the Vendor agreed to sell and the Purchaser agreed to buy the absolute title of

[1] five parcels of land comprising approximately 2.22 acres registered

as Parcels 50, 51, 52, 53 and 54 in the North Central Registration Section of the Anguilla Land Registry with any fixtures fittings equipment chattels and stock in the building on Parcel 54 for the sum of US$367,000.00, and

[2] Parcel 24 comprising approximately 0.49 acres of land and building thereon registered in the North Central Registration Section of the Anguilla Land Registry including the goodwill of the business carried on thereon with any fixtures fittings equipment chattels and stock in the said building for the sum of US $262,400.00.

[2] According to Clause 3 of each Agreement the Purchaser agreed to pay by way of deposit 10% of the total purchase price on or before the signing of the Agreement by banker's draft to and in the name of the Vendor and the National Bank of Anguilla Limited [NBA] jointly and as stake holders and the balance of the purchase price on the date of completion of the purchase.

[3] All the parcels were encumbered by registered charges in favour of the NBA inter alia.

[4] Clause 5 of the Agreement provided that the Vendor would forthwith take and carry to completion all necessary steps and proceedings and use his best endevours to obtain the written consent of NBA to the sale.

[5] Clause 6 of the Agreement stipulated that the said Agreement was conditional upon the approval/consent of the NBA to the sale provisionally agreed to and shall be void unless within one month the same shall have been approved/consented in writing by the NBA.

[6] Both agreements were duly signed on 24th April, 1997 by the 1st Respondent and the 1st and 2nd Appellants on behalf of the 3rd Appellant Company at the premises of

Joseph Norris Payne a former Commissioner of Police of Anguilla and a Justice of the Peace who witnessed the signing of each agreement the terms and conditions of which were essentially the same.

[7] On the signing of the agreements the Appellants proferred to the 1st Respondent the agreed deposit of 10% of the total purchase price by way of a cheque in the sum of US $63,000.00 drawn on the NBA in favour of 'NBA - Galaxy Shoppe' [the 2nd Respondent] and later that day at the direction of the 1st Respondent presented the cheque and copies of the Agreements to Mr Val Banks the General Manager of the NBA.

[8] The very next day the 1st Respondent acting on the advice and at the instigation of his daughter Mrs Valarie Banks a shareholder and director of Galaxy Shoppe Limited sought to have the agreements rendered void on the ground that the 1st Respondent had not been given authority to sell by the Board.

[9] Indeed that selfsame day the 1st Respondent telephoned the 1st Appellant and indicated that he wanted the agreements made null and void asserting that he was mistaken as to the instructions given to him and stating that he lacked authority to sell and that the shareholders had made it clear to him that they would not approve the sale.

[10] In the result the 1st Respondent took no steps to obtain the written consent of the NBA as required by Clause 5 of the Agreements and in fact attempted to prevent the necessary consent being given. Whereupon the Appellants applied for and placed a restriction on each of the various parcels of land enumerated above and began legal proceedings for inter alia specific performance of the Agreements and an injunction restraining the Respondents from selling the said lands or alternatively damages in addition to or in lieu of specific performance damages for breach of contract and further and in the alternative damages for breach of contract and against the 1st

Respondent damages for breach by warranty of authority interest and costs.

[11] In an amended defence dated 7th September, 1999 the 1st Respondent [Mr Daniels] whilst admitting having entered in the written Sale and Purchase Agreements [the Agreements] dated 24th April, 1997 states [at paragraph 2]:

> [3] That the parties to said Agreements were at all materials times intended to be and were in fact the First-named Defendant as Vendor and the Third-named Plaintiff as Purchaser acting through its agents the First and Second-named Plaintiffs.
>
> [4] That it was not within the contemplation of the parties nor is it shown in the Agreement that the First and Second-named Plaintiffs had or would have any relationship with the subject matter of the said Agreements other than that of agents acting for and on behalf of a disclosed principal and accordingly they lack locus standi to sue as Plaintiffs in this action.

[12] Mr Daniel further avers [at paragraph 3] that whilst he purported to act for and on behalf of the Second-named Defendant/Respondent [Galaxy Shoppe] and indeed entered the relevant Sale and Purchase Agreement [in respect] of Parcel 24:

> (1) That he at the material time did not have the consent of the Second-named Defendant/Respondent [Galaxy Shoppe] to act on its behalf in the matter of the sale of its land to the Third-named Plaintiff and lacked the requisite authority to enter into the said Agreement on behalf of the Second-named Defendant;
>
> (2) That in purporting to contract as he did, the Purchaser was contemplated to be and was in fact the Third-named Plaintiff acting through its agents the First and Second Plaintiffs.

The 1st and 2nd Appellants [the Harrigans] he maintained were never parties to the Agreements in their own right but merely acted as agents for the 3rd Appellant. Indeed the preamble of each Agreement confirms that as does the signature clause

which is signed and sealed by the Harrigans on behalf of the 3rd Appellant company.

[13] It is also further averred [at paragraph 9] that as soon as Mr Daniels informed the other members of the Board of Galaxy Shoppe of the Agreement for sale of Parcel 24 he was instructed by the Board to inform the Purchaser of his want of authority to do so and that the Agreement was therefore null and void. Hence it is contended that there could have been no valid and binding Agreement on the part of the 2nd Respondent.

[14] At paragraph 10 of the amended Defence Mr Daniel avers that in executing the said Agreement for the sale of Parcel 24, he at all materials time acted in the mistaken belief that the ratification of authority given by the Board of Directors of Galaxy Shoppe some seventeen months earlier to effect a sale of the said Parcel 24 to another prospective purchaser on 3rd May, 1995 still subsisted and authorised him to enter into the present Agreement.

[15] In light of the foregoing the Respondents maintain that they are not guilty of breach of the alleged Agreement for the sale of Parcel 24. And having disavowed the validity of the Agreement for want of authority they further declare that there could not have subsisted simultaneously a continuing obligation to secure the written consent of the NBA for the sale of the property.

[16] The action came on for hearing before Hariprashad Charles J [Ag] [as she then was] on 19th July, 1999 and after a trial spanning nine days in a comprehensive judgment consisting of no fewer than 126 paragraphs the learned Judge dismissed the Plaintiffs/Appellants' claim with costs as well as the Defendants/Respondents' counterclaim from damages resulting for the alleged wrongful placing of restrictions by the Appellants against the Respondents' properties.

[17] The learned trial Judge in effect found that:

[1] The proper party to the suit being the third-named Plaintiff the first and second plaintiffs [the Harrigans] had no locus standi therein and ordered that they be struck off therefrom with costs thrown away to the defendants;

[2] the sale and Purchase Agreements entered into by the plaintiffs and the defendants on the 24th April, 1997 were unconscionable bargains and ordered that they be set aside; and

[3] that the said Agreements were void and did not create binding and enforceable contracts for the sale of the lands in question and should be set aside.

[18] A number of findings of fact and of law of the learned trial Judge are challenged by the plaintiffs/appellants in a Notice of Appeal filed April 10, 2000 containing ten grounds with grounds 1 and 2 being subdivided into several subparagraphs. This was subsequently supplanted by a supplementary Notice of Appeal filed October 12, 2001 containing sixteen grounds of Appeal with grounds 1 and 10 being further subdivided. Experience shows and this case is no exception that in such cases some of the grounds of appeal are subsumed by others and others are not in fact pursued at all so that it came as no surprise when at the commencement of the hearing learned Counsel for the appellants intimated to the Court that he only proposed to deal with 3 or 4 grounds.

[19] Ground 1 which in my view is the main ground of appeal states that:

[4] The learned Judge misdirected herself and erred in law in holding that the Sale and Purchase Agreements dated 27th April 1995 were unconscionable bargains and should be set aside, in that:

[5] the learned Judge failed to apply the correct test for determining whether the bargain was or was not unconscionable

[6] the learned Judge failed to appreciate that in order to establish that

the bargain was unconscionable all of the following elements had to be established by the Respondents namely:

[7] that the Respondent was a poor and ignorant person

[8] that the Respondent had not been advised to obtain legal advice

[9] that the sale price of the properties the subject matter of the Agreements was at a considerable undervalue.

[10] the learned Judge erred in finding:

[11] that the sale price of the properties were grossly inadequate

[12] that the First Named Defendant was in dire straights and his bargaining power was grievously impaired by reason of his own needs and desires

[13] that the First Named Defendant acted without independent advice

[14] that the purchasers acted in circumstances which were suspect.

[15] There was no or nor credible or sufficient evidence upon which the learned Judge could find that the Sale and Purchase Agreements were unconscionable bargains and should be set aside alternatively the learned Judge's finding was against the weight of the evidence in that the learned Judge failed to take any or any proper account of:

[16] the fact that the Respondent admitted that he had been told to obtain legal advice

[17] the evidence of the First Respondent as to his land assets

[18] the evidence as to the state of the sale properties and the impact thereof on the sale price.

Inadequate Price - Purchase at Considerable Undervalue

[20] At paragraph 106 [6] of her judgment the learned Judge found that:

> "The First-named Plaintiff as a Director and First Vice-Chairman of the National Bank of Anguilla knew of the Defendant's extremely distressed circumstances and used that knowledge to bear the First-named Defendant

down from his asking price of $850.000.00 [as I believed the testimony of the First-named Defendant] to a figure of U.S. $429,400.00 for all of the properties which represented a gross undervalue of the properties."

[21] The evidence shows that attempts were made to sell Parcel 24 to an Italian couple the Angelastri in 1995 for US $560,000.00 but that sale was aborted by the death of Mr Angelastri in November of that year. A further sale and purchase Agreement by Mrs Angelastri and another Italian business partner in 1996 for US $450,000.00 did not materialise due to the death of the business partner.

[22] Writing to Mr Roy Horsford General Manager of the NBA on February 14, 1997 [Exhibit FH 11 A] Mr Daniels stated at paragraph 1:

Dear Mr Horsford,

I have today received a firm offer from Mr Frederick Harrigan of Sandy Hill to purchase all the lands and improvements at Wall Blake registered as North Central Section Block #48813B Parcels 23 and 24 for the sum of $630,000.00. I have accepted."

Parcel 23 was subsequently subdivided into Parcels 50 and 54.

[23] At paragraph 3 of the selfsame letter to Mr Horsford Mr Daniels said:

"The amount of money agreed between Mr Harrigan and me [for the properties] is considerably less than what had been negotiated with the Angelastris in 1995. But then, the situation was much different. Today for me the properties have become untenable [sic]."

[24] In light of paragraph 1 of Mr Daniel's letter and Clauses 1, 2 and 3 of the respective Sale and Purchase Agreements dated 24th April, 1997 [Exhibits FH 1 and 2] it is plainly beyond doubt that the agreed total purchase price of the properties in question including goodwill of the business etc is US$630,000.00 of which 10% was paid by way of deposit by cheque #156817 dated April 23, 1997 signed by Frederick Harrigan in keeping with Clause 3 of both Agreements.

[25] It is in my view clearly erroneous for the trial Judge to have held that the total purchase price paid for the properties was US $429,400.00 and to have disregarded the additional amounts set out in Clause 2 of both Agreements which are components of the total purchase price [as expressly stated in Clause 3] and on which amount the 10% deposit was calculated. In which case the undervalue [if any] in the agreed purchase price would not perhaps be as gross [if at all so] as the learned Judge perceived it bearing in mind that the offer for Parcel 24 had plunged by over US $100,000.00 within a year and that by February 1997 on Mr Daniel's very own admission "*the situation was (by then) much different*" and for him the properties had become untenable.

[26] Mr Cecil Niles a Land Surveyor and Valuer put a value of US $978,000.00 on all the properties. He conceded in cross-examination that he held no degree or other credentials in valuation. No valuation report was produced by him to show how his building values were arrived at. He claimed that he used the replacement cost method and agreed that he would have got a lower figure by using the quantity survey method. No value was given in respect of a forced sale situation. The value of his testimony is consequently in my view diminished as a result. And in so far as the learned Judge accepted his figure as the market value of the properties at the time she manifestly erred. For that purpose I respectfully adopt the dicta of Chief Justice Sir Vincent Floissac and Singh JA in Windward Properties Ltd v Government of St Vincent and the Grenadines [Civil Appeal No.13 of 1991] and Buffong v Accountant General of Anguilla [1995] 50 WIR 171 respectively that the best estimate of the value of property is the price agreed between the parties. Parcels 50, 51, 52 and 53 were vacant half acre lots and the two storey building on Parcel 54 was untenantable. Small wonder that from an asking price of US $858,000.00 Mr Daniels was prepared 'to go as low as US $700,000.00'. Within such an ambit a closing price of US$630,000.00 could hardly be labelled as grossly or considerably inadequate. Ground 2 of the appeal that the learned Judge erred in accepting the evidence of the valuer Cecil Niles as representing the true value of the properties therefore succeeds.

Unconscionable Bargain

[27] In this regard Counsel for the Respondents submitted that Mr Daniels entered into those Agreements when his bargaining power was grievoulsy impaired by reason of his own needs or desires.

[28] At paragraph 87 of her judgment the learned Judge states that:

> "Counsel urged the Court to find that the financial distress the First-named Defendant was undergoing certainly brought him within the scope of the principle resulting in grievous impairment of his bargaining power because at the time that he entered into the transaction, the business which he had operated for over thirty years had collapsed. According to Ms Kentish, both him and his business were in a state of financial ruin. He was unemployed, he had no money and the astronomical debt owing to the Bank kept escalating with no means at his or the Company's disposal to repay that debt"

and at paragraph 88 the learned Judge further states that:

> "According to Counsel, the Bank had been pressing for repayment of its debt. The First-named Defendant tried to sell other properties that he owned but was unsuccessful. In his own words, he was 'overwhelmed."

[29] And at paragraph 89 of her judgment the learned Judge continued thus:

> "The First-named Defendant was given one last chance before the Bank moved in. This was when the First-named Plaintiff and his brother, Hamlet Harrigan approached the First-named Defendant. According to Learned Counsel, the First-named Plaintiff was armed with full knowledge of the First-named Defendant's distressed condition and induced him by inequality in bargaining power to enter into an improvident bargain. Counsel affirmed that the sale of the property at an undervalue was not in itself evidence of an unconscionable bargain but a sale of property at a gross undervalue can itself establish element of fraud to render the bargain unconscionable."

I pause here to note that no where in the Defendants' pleadings is fraud alleged.

[30] Then at paragraph 90 the Judge wrote that :

> "According to Ms. Kentish, from a market value of approximately U.S. $1 million, the properties are sold at less than 60% of its value for U.S. $429,000.00; a gross undervalue. She urged the Court to accept the testimony of the First-named Defendant that he was asking for a price of U.S.$850,000.00. Counsel urged the Court to conclude that the First-named Plaintiff was not dealing at arms length by virtue of his position in the Bank. And armed with the knowledge of the Defendant's indebtedness and financial needs, he procured an unconscionable bargain. Counsel cited the following authorities in support of her submissions namely:
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> [19] Lloyd's Bank Ltd v Bundy [1974] 3 All E.R. 757;
> [20] Ballantyne v O'Garro (1987) 40 WIR 151
> [21] Canadian Imperial Bank of Commerce v Ohlson et al 154 D.L.R. (4th) 33;
> [22] Black v Wilcox 70 D.L.R. (3rd) 192;
> [23] Morrison v Coast Finance Ltd. 55 D.L.R. (2nd) 710;
> [24] Alec Lobb (Garages)Ltd v Total Oil GB Ltd [1985] All ER 303.

[31] Learned Counsel further argued that the First-named Plaintiff Frederick Harrigan as Director and Vice Chairman of the Bank owed a duty of care to the Defendants to ensure that the Bank secured the best purchase price possible whether by private treaty or public auction. He further contended that the said Frederick Harrigan took no independent step to obtain an independent determination of market value so that he could bargain fairly with the Defendants in an effort to serve and protect both the interest of the Bank whom he owed a fiduciary relationship and the interest of the Defendants whom he owed a duty of good faith. Why learned Counsel asked would a businessman of Mr Daniel's experience enter into an improvident transaction? The only answer she asserted was because his bargaining power was grievously impaired by reason of his own needs or desires.

[32] It is plainly wrong to suggest [as learned Counsel for the Respondents did and the learned Judge accepted] that Frederick Harrigan as Director and First Vice Chairman of the Bank owed a fiduciary duty to the Defendants to ensure that the Bank secured the best purchase price possible whether it was sale by private treaty or public auction. A fiduciary duty is owed by a director only to the bank and certainly not to

the Defendant Vendor. When exercising its statutory power of sale [which is not the case here] the Bank is obliged by law to act in good faith and have regard to the interests of the owner/chargor and may sell or concur with any person in selling the charged property. Grounds 3 and 4 of the appeal consequently succeed. The learned Judge with respect misdirected herself and erred in law in holding that Frederick Harrigan owed a fiduciary duty to the Defendants and was in breach of that duty.

[33] Referring to 4 Halsbruy's Laws Volume 18 paragraph 344 learned Counsel for the Appellants submitted that in order to establish a prima facie case of "*unconscionable bargain*" three requirements must be satisfied, viz:

[25] that it was a purchase from a poor and ignorant person;

[26] that it was a purchase at a considerable undervalue

[27] that the vendor had no independent advice or was not informed that he should obtain independent advice.

[34] Learned Counsel also reviewed the dicta of Kay J in Re Fry, Fry v Lane [1888] 40 Ch D 312 Lord Denning MR in Lloyds Bank Ltd v Bundy [1974] 3 ALL 757 and Lord Templeman in Boustany v Pigott [1993] 42 WIR 175 [P.C.] which exemplify the circumstances in which a court will invoke its equitable jurisdiction to nullify a transaction on the ground of unconscionable conduct by one the parties to it.

[35] Learned Counsel for the Respondents also referred to the said authorities [save RE FRY] as well as others which are set out at paragraph 30 above. And the learned trial Judge herself at paragraphs 101 to 104 of her judgment gave a critical analysis of the scope and application of the selfsame principles of law as illustrated by the cases.

[36] Those principles are admirably summarized thus in the submissions of learned Counsel for Mrs Boustany [Mr Robertson] in the Boustany v Pigott case [supra at page 180] before Her Majesty's Privy Council with which their Lordships expressed general agreement and which I respectfully adopt:

(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that "*one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience*" Multiservice Bookbinding v Marden [1979] Ch 8 4 at page 110.

(2) "*Unconscionable*" relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1983] I WLR 87 at page 94.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, "it was not right that the strong should be allowed to push the weak to the wall": Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd [1985] 1 WLR 173 at page 183.

(4) A contract cannot be set aside in equity as "*an unconscionable bargain*" against a party innocent of actual or constructive fraud; even if the terms of the contract are "unfair" in the sense that they are more favourable to one party than the other ("contractual imbalance") equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: Hart v O'Connor [1985] AC 1000, applied in Nichols v Jessup [1986] NZLR 226.

(5) "In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances": per Mason J in Commercial Bank of Australia Ltd Amadio [1983] 46 ALR 402 at page 413.

[37] Mr Patterson Counsel for the Appellants submitted that although the learned Judge correctly stated the basic principles in RE FRY at paragraph 101 of her judgment she then adopted criteria at paragraph 107 which are not fully consistent with the case.

[38] After reviewing the evidence and the law as well as the submissions of learned Counsel, the learned Judge concluded at paragraph 107 that:

> "Based on these observations, I find that [a] the price for the properties were [sic] grossly inadequate; [b] the First-named Defendant was in dire straits and his bargaining power was grievously impaired by reason of his own needs or desire; [c] without independent advice; [d] the Purchasers acted in circumstances found to be suspect in respect to the signing of the Agreements. The evidence which I found was that the First and Second-named Plaintiffs hurriedly called on the First-named Defendant to execute the draft Agreements on the 24th April 1997. That on their way to the home

> of Mr Joseph Norris Payne, they presented him with the Agreements. One wonders why the Agreements were not executed at the Chambers of Courtney Abel & Associates, Solicitors for the Plaintiffs or Mitchell's Chambers. Solicitors for the Bank; both Chambers being less than a minute away. Instead, the First-named Defendant was driven in the Plaintiffs' vehicle to the home of Mr. Payne which was approximately twenty minutes away. And bearing in mind that Mr. Payne was at the material time the Chairman of the Board of Directors of the Bank."

[39] The learned Judge further concluded that all of these ingredients having been established *"in order for the bargain not to amount to an unconscionable one, the plaintiffs have to prove that the bargain was fair just and reasonable."*

[40] In utilizing that criteria Mr Patterson submitted that the learned Judge erred in that her criteria was loosely based on the dicta of Lord Denning in Lloyds Bank v Bundy [supra] in which his Lordship propounded the theory of "*Inequality of Bargaining Power*" which Counsel pointed out ought to be distinguished from 'unconscionable bargain' in the strict sense and which to be established must include the element of economic duress citing dicta of Lord Scarman in Pao On v Lau Yiu Long [1980] AC 614 to which learned Counsel declared the judge did not advert her mind. He further contended, that the learned Judge failed to take account of all the elements that needed to be proved in order to establish that ground; and in so far as she purports to base her findings of unconscionable bargain on the principles enunciated in Re Fry [supra] she has not found or dealt with the issue of whether Mr Daniels was a poor and ignorant person.

[41] The matters relied on by the learned Judge he argued do not amount to the kind of conduct envisaged in Boustany v Pigott as constituting unconscionable conduct. Unconscionable transactions based on the doctrine of inequality by bargaining power is dependent upon establishing economic duress as illustrated in Pao On and Others [Supra] which the learned Judge took no account of Counsel pointed out. On the evidence before the Court Mr Daniels could not properly be described as a poor and ignorant person having regard to his proprietary assets his substantial business

experience and his general level of intelligence Counsel further submitted.

[42] It was Lord Scarman who in the Pao On v Lau Yiu Long case [supra] defined duress as a coercion of the will so as to vitiate consent when he declared that "in a contractual situation commercial pressure is not enough. There must be a factor which could in law be regarded as a coercion of the will so as to vitiate his consent.

[43] In Crescendo Management Pty Ltd v Westpact Banking Corp [1988] 19 NSWLR 40 McHugh, J., stated that the overbearing of the will theory should be rejected - that the proper approach was to ask whether any applied pressure induced the victim to enter into the transaction and whether that pressure went beyond what the law was prepared to countenance as legitimate. He defined pressure as consisting of unlawful threats or pressure amounting to unconscionable conduct. The pressure should in other words be illegitimate in the sense of conjuring up thoughts of some morally reprehensible activity which offends the conscience of the Court. Each situation must of course be viewed on its own merits with the Court establishing de facto standards of conduct predicated on the nature of the parties relationship as well as their particular needs infirmities and expectations. Lord Scarman's coercion of the will theory would clearly apply in cases in which urgent and pressing necessity brought about by the Defendant's conduct would have unfairly and unlawfully forced the plaintiff to act as he did.

[44] In Cates et al v Knowles Industries Company Ltd [Unreported - 25 January, 1999 Bahamas Supreme Court [Common Law Side] No.885 of 1989] the Supreme Court of the Bahamas acknowledged economic duress as a ground or defence upon which a promisor could rely in order to escape having to live up to his promise. The court distinguished pressure which was coercive and which amounted to unlawful threats, from pressure which was applied in a normal and healthy commercial environment. In this case the owners of a piece of property had entered into an agreement with contractors in September 1987 for the completion by the contractors of work to a

partly constructed house, for a fixed sum, and to be performed within a stipulated time. The work not being completed, a supplemental agreement was entered into in November, 1988 which was subsequently alleged by the contractors to be invalid for economic duress. The contractors alleged that they were forced to accept the sum stipulated in the November agreement as full satisfaction of outstanding accounts in respect of completion because of pressure from their bankers as well a well as sub-contractors, and that the stipulated amount did not represent the true value of what was due and owing. They therefore claimed entitlement to be paid additional sums for all work done on a quantum meruit basis.

[45] The Court held that the quality of the evidence tendered did not meet the requirements for economic duress, and that while there may have been commercial pressure, there were no threats or coercion. The court further held that although the agreement was brought about by pressure from the contractor's creditors and the owners, in spite of the terms being less than what they had hoped for, it was nevertheless an agreement which they felt they could live with. Tucker J.'s dictum in Atlas Express Ltd v Kafco [Importers and Distributors] Ltd [1989] 1 All ER 645 was approved of by the court, where he stated:

> "Economic duress must be distinguished from commercial pressure, which on any view is not sufficient to vitiate consent. The borderline between the two may in some cases be indistinct. But the authors of Chitty on Contracts [25th edn, 1983) and of Goff and Jones on the Law of Restitution [3rd edn, 1986] appear to recognise that in appropriate cases economic duress may afford a defence, and in my judgment it does."

It is clear to me that in a number of English cases judges have acknowledged the existence of this concept.

[46] The contractors in Cates stated that they entered into the November agreement accepting some $300,000.00 less than what should have been due to them because they had no choice. They stated that:

> "…. we were pressured by the bank, subcontractors, we had people standing

> outside waiting for money.... We were told in good faith to come to a meeting to receive a cheque. That cheque was there. The agreement was there. We were forced to sign that agreement. We were forced to because we could not give up. We could not give up; either take it, leave it or walk away, yes arbitration, but we took it".

[47] The evidence does suggest that the contractors' dire need for money pressured them into accepting a lesser sum than had been hoped for. But they could not establish economic duress. Mere pressure which causes one to modify an agreement which is less favourable to him does not amount to economic duress - in this case no threat, far more an unlawful threat, could be discerned. The contractors entered into the transaction voluntarily and, according to Strachan, J., since the contractors had not completed the job within the stipulated time-frame, their accepting less than the full amount due to them amounted to consideration for the extension of time granted by the owners. Their being 'forced' by circumstances to accept less was therefore done out of commercial necessity on their part. The owners' actions were lawful and even though the contractors acted under pressure, the possibility of a "lawful act" duress could rarely succeed. The learned trial judge held that he could not accept that the agreement was secured by economic duress. The Court of Appeal case in Ctn Cash And Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 is also illustrative of and instructive on the point.

[48] In my judgment therefore the learned trial judge with the greatest respect misdirected herself and erred in law in holding that the sale and purchase agreements entered into between the parties on 24th April, 1997 were unconscionable bargains and should be set aside.

[49] For firstly for the reasons set out at paragraph 25 above it is my considered view that having regard to all the circumstances the price of the properties could not be said to have been considerably or grossly inadequate. In his own testimony Mr Daniels stated that he reduced his asking price to US $790,000.00 and as low as US $700,000.00. To have used as a guide for the value of the property [as the learned

Judge did] the price which Mr Daniels alleged he had agreed with the Angelastris in 1995 would have been out of line and clearly disproportionate. For one thing no sale had actually resulted and the price was not based on any proper valuation. Besides, experience shows that the foreign buyer not infrequently is prepared to pay and in actual fact often pays a far greater price [than the true market value] for land in the region than locals would pay.

[50] Secondly even on a broad interpretation of the expression Mr Daniels could not be said to have been "*a poor and ignorant person*". True he was at the material time be faced personal and financial ruin and was in dire economics straits but he had been a businessman of considerable years experience not unaccustomed to dealing with transactions of that nature. His indebtedness to the Bank stood at over US $2,000,000.00 but he owned valuable collateral.

[51] Thirdly, in his own evidence Mr Daniels admitted that he was told to obtain advice and the Harrigans confirmed that they had so advised him. Yet without any basis for her disbelief the learned Judge declared at paragraph 106[3] of her judgment:

> "I do not believe the Plaintiffs evidence that they asked the First-name Defendant to seek legal advice or to go and get the blessings of the other shareholders, his estranged wife and children."

and she then speculates:

> "I think that if the First-named Defendant had gone to a Solicitor or to the other share holders, there is no doubt that one of them would say you must not enter into the transaction without our consent or if you sell at such price, you will still have a rope hanging around your neck because a substantial debt would still remain unpaid."

The evidence shows however that in late November 1995 all the shareholders [save one] of the Galaxy Shoppe [Parcel 24] had in fact given their written consent to its sale. Parcels 50, 51,52, 53 and 54 were all Mr Daniels' own property.

[52] Learned Counsel for the Respondents submitted that there was absolutely no evidence that at the time of the April 24 signing the Harrigans then advised Mr Daniels to obtain legal advice - this being the material point in time that they came under the duty to ensure that he obtained independent legal advice. That duty it was submitted was not discharged. The evidence however clearly shows that Mr Daniels had had the agreements since February 1997 and if he did not seek and or obtain independent legal advice this could only have been through his own neglect and/or default and cannot in all fairness be laid at the Appellants' door.

[53] As I see it agreement was reached between the parties for sale of the lands in question when on February 14, 1998 Mr Daniels wrote to Mr Roy Horsford [Exhibit FH 11 A] stating that he had received a firm offer from Mr Frederick Harrigan to purchase all the lands comprising Parcels 23 and 24 for the sum of US$630,000.00 and that he had accepted.

[54] One week prior on February 7, 1997 Mr Daniels had written to Mr Horsford [Exhibit CD 7] pleading for postponement of the sale of the Galaxy property by public auction for at least 90 days to allow him time to pursue two customers who had now shown some interest in the properties.

[55] On 13th May, 1997 Mitchell Chambers, the Bank's lawyer wrote to Mr Daniels informing him that they had received the signed Agreement of Sale and Purchase in respect of the property dated 24th April, 1997 between himself and the Harrigans along with a cheque for US $63,000.00 purporting to be a deposit in the proposed sale. It was pointed out that the bank held a first charge on the property and awaited his instructions as to the disposal of the cheque. The closing paragraph of the said letter states:

> "Mr Daniels we wish to reiterate that you should make every effort to expedite the sale of this property failing which the Bank will have no choice but to exercise its right of sale under the Registered Land Ordinance 1974."

[56] It is my considered view that the combined effect of those letters is a clear expression of the Bank's concurrence to the sale agreement which had been reached between the parties on 14th February 1997 and later put into two sale and purchase agreements which were duly executed by the parties on 24 April 1997.

[57] It is pellucidly clear that for some years prior thereto Mr Daniels was unable to meet his repayments of his substantial indebtedness to the Bank. Interest continued to accumulate and the Bank kept pressing. A large measure of forbearance was exercised by the Bank to stave off a sale by public auction so as to facilitate a sale by private treaty but all efforts proved unavailing until the Harrigans came up with a firm offer.

[58] Times had by then changed. Mr Daniels was obviously in a distressed situation. I myself entertain no doubt whatsoever that at the time that he entered the sale and purchase agreements of Parcels 24, 50, 51, 52,53 and 54 he did so because of commercial necessity and not economic duress.

[59] The pressure which the Bank exerted on Mr Daniels is in my view the compelling reason for his entering into the transaction. His dire need for money to meet his financial obligations pressured him into accepting a lesser sum than he had hoped for. But that does not establish economic duress. In a commercial environment the actions of the Bank were perfectly legitimate and commercial pressure in the circumstances would not be sufficient to vitiate consent.

[60] It was argued on behalf of Mr Daniels that Frederick Harrigan used his inside information as a director of the Bank to take advantage of Mr Daniels when he knew he was at his most vulnerable. This ignores the fact that since 15th March 1995 the Bank had obtained judgment against Galaxy Shoppe in excess of US $2,000,000.00 which information was available to any member of the public on payment of a nominal fee at the Registry. At one stage there was a sell out of the entire stock of the Galaxy

Shoppe. Further there is evidence that Mr Daniels had treated with persons other than the Harrigans in that regard. In all the circumstances there is in my view no credible evidence that Frederick Harrigan secured the bargain by his own wrong, namely by insider trading and breach of fiduciary duty as the learned Judge found. Nor am I at all persuaded that he did not approach the Court with clear hands. In any case this was not part of the Respondent's pleaded case. Ground 5 of the appeal is therefore allowed.

[61] The learned Judge further held that the Harrigans had acted in circumstances found to be suspect in respect to the signing of the Agreements. Writing at paragraph 107 of her judgment she declared:

> "The evidence which I found was that the First and Second-named Plaintiffs hurriedly called on the First-named Defendant to execute the draft Agreements on the 24th day of April, 1997. That on their way to the home of Mr Joseph Norris Payne, they presented him with the Agreements. One wonders why the Agreements were not executed at the Chambers of Courtney Abel and Associates, Solicitors for the Plaintiffs or Mitchell's Chambers, Solicitors for the Bank; both Chambers being less than a minute away. Instead, the First name Defendant was driven in the Plaintiffs' vehicle to the home of Mr. Payne which was approximately twenty minutes away. And bearing in mind that Mr. Payne was at the material time the Chairman of the Board of Directors of the Bank."

All of this is the purely subjective analysis of the Judge and omits to mention that Mr Payne attested the signatures of the parties in his capacity of a Justice of the Peace which he was authorised to do an exercise which he no doubt routinely performed. That finding is therefore patently flawed.

[62] Learned Counsel for Mr Daniels submitted that payment of the deposit by cheque instead of banker's draft breached an essential conditioning of the Agreement viz Clause 3. As the learned trial Judge rightly pointed out in as much as the Harrigans paid the 10% of deposit of the purchase price as stipulated in the agreement and this was accepted and received by the Respondents and the Bank and no complaint was thereafter made by Mr Daniels regarding the different mode of payment. Mr Daniels

would have waived his right to receive payment of the deposit by banker's draft as [as stipulated] opposed to cheque. There is therefore no merit in that submission.

[63] Grounds 6,7, and 8 are subsumed by Ground 5 which has been allowed. Ground 9 alleges that the learned Judge misdirected herself and erred in her finding that the Respondents were induced to enter into the transactions on the basis of Frederick Harrigan's representation that he would secure a waiver of the accrued interest of the Respondents to the Bank. In his letter to Mr Roy Horsford dated February 7, 1997 [Exhibit CD7] Mr Daniels wrote that:

> "In view of the difficulties in disposing of the assets of this company and the realisation that a sale by auction would yield less cash than an outright sale, I therefore beg that the 'National Bank' grants me some relief on the interest payments of the loan."

In reply by letter dated Ferbruary14th 1997 [Exhibit FH 14] Mr Horsford explains to Mr Daniels [at paragraph 2] that:

> "The Bank requires full details of any contracts or verbal agreements that you may have for the purchase of the property before it decides on the level of interest relief it could provide you"

The letter ends by requesting Mr Daniels to send any information that he may have to the attention of the writer. The uncontroverted evidence here is that Mr Daniels was seeking interest relief from the Bank and hoped that Frederick Harrigan in his position would be able to assist. In no way can this be tantamount to a representation or misrepresentation on the part of Harrigan to induce Mr Daniels to enter into the transaction. If Mr Daniels had been given any assurance of interest waiver by Frederick Harrigan then there would have been no need to beg Mr Horsford for such relief. In that regard the learned trial Judge misdirected herself and erred in law and that ground of appeal accordingly succeeds.

[64] I now turn to the issue of the approval/consent of the Bank to the sale agreed to between the parties and embodied in the Sale and Purchase Agreement executed on

24th April, 1997. Clause 6 of the Agreements stipulates that:

> "This agreement is conditional upon the approval/consent of the National Bank of Anguilla Limited to the sale herein provisionally agreed to and shall be void unless within one month from the date hereof the same shall have been approved/consented to in writing by National Bank of Anguilla Limited."

The learned Judge held at paragraph 62 of her judgment that no approval/consent from the Bank was obtained within one month [or for that matter at all] of the execution of the said Agreements and such approval/consent by the Bank being a condition precedent to the formation of the contract the agreements were thereby rendered null and void and of no effect.

[65] As stated at paragraph 55 above it is my considered view that the combined effect of the Bank's letter to Mr Daniels dated February 14th, 1997 [Exhibit FH 14] and the Bank's attorneys [Mitchell's Chambers] dated 13th May, 1997 [Exhibit CD 6] to him is a clear expression of the Bank's concurrence to the Sale and Purchase Agreements and the learned Judge's findings on that issue are with respect erroneous. Consequently the issues which flow therefrom inevitably fall away as a result and warrant no further discourse in my view i.e. whether the consent of the Bank was a condition precedent to formation of the contract or precedent to its performance.

[66] Grounds 11,12 and 13 were not pursued. Grounds 14 and 15 can conveniently be disposed of simultaneously. They turn on the learned Judge's finding that Mr Daniels did not have authority to sell Parcel 24. After due execution of the Sale and Purchase Agreements on 24th April, 1997 in good faith Mr Daniels on May 2nd 1997 wrote to the Harrigans [Exhibit FH 6] stating that he was mistaken as to the instructions given to him by the Board of Directors of the "Galaxy Shoppe" and it had now become clear to him that the Board did not approve the agreement. It was therefore apparent that he had no authority to execute the agreement [for the sale of Parcel 24] and he therefore requested that they consider the agreement to be null and void.

[67] The evidence reveals that Galaxy Shoppe was in liquidation. As Managing Director Mr Daniels was given authority to sell the properties and he held himself out as such. From late November, 1995 written consents to sell had been obtained from all the shareholders [save Maureen Daniels] and were never revoked. In the interim Mr Daniels used his best endeavours encouraged by the Bank to secure a sale by private treaty to avoid a forced sale by public auction. Mr Daniels wrote to the Bank for extension of time to pursue prospective/interested purchasers. He was the directing mind and will of the company and held himself out and assured the Harrigans that he had the power to sell.

[68] I am fully satisfied that having regard to all the circumstances Mr Daniels had both actual and ostensible authority to sell the Galaxy Shoppe and it cannot lie in his mouth to assert otherwise. He states in his letter of May 2nd 1997 [Exhibit FH 6] to the Harrigans that he was "mistaken as to the instructions given to him by the Board of Directors of the Galaxy Shoppe". Pray, what instructions? The deposit was paid by the Appellants clearly on the basis of the promise and in reliance of the assurances given to them by Mr Daniels that he had the necessary authority to sell Parcel 24. The conclusion to which one is inexorably driven is that is plainly an attempt by the Respondents to render a valid and legally binding agreement null and void and so frustrate the transaction altogether. For the evidence clearly shows that up till then Mr Daniels had been pleading with the Bank for time to enable him to pursue interested purchasers for the properties himself. And this had been the pattern for several months. It all frankly smacks of bad faith on the part of the Respondents. The Courts always seek wherever possible to fulfil the reasonable expectations of reasonable persons rather than to defeat them.

[69] Finally, on the question as to whether the Harrigans were unnecessary parties to this action and had been improperly joined thereto as the learned trial Judge ruled I hold that whilst it is a well settled principle of law that a limited company enjoys a separate legal personality under the law distinct from directors and shareholders - Solomon v

Solomon & Co Ltd [1897] AC 22 - the evidence shows that the Harrigans as the principal shareholders and owners of the Third Appellant Company Island Real Estate Limited were so inextricably bound up/involved with this transaction in their personal capacity that it would be otiose to hold that they merely acted as agents on behalf of a disclosed principal as the learned Judge held. A company must of necessity act through its officers but the Harrigans went further by personally paying the 10% deposit cheque on the transaction which was personally negotiated by them with the Respondent. Daniel who in fact confirmed in writing to the Manager of the NBA letter dated 14th February, 1997 that he had received a firm offer of US$630,000.00 for all the lands and improvements for Frederick Harrigan which he had accepted. In all the circumstances the Harrigans in my opinion were necessary and proper parties to the suit. Ground 16 of the Appeal was not pursued.

[70] In the result, the appeal is allowed and the judgment of the learned trial Judge is set aside. Specific performance of the Agreements dated 24th April 1997 in terms of Clause 8 is hereby ordered with costs of the appeal to the Appellants in the amount of $33,333.00 in accordance with Parts 65.5[2][b][iii] and 65.13[b] of the Civil Procedure Rules 2000.

Ephraim F. Georges
Justice of Appeal [Ag.]

I concur.

Satrohan Singh
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal