THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 243 OF 2004

BETWEEN:

O'NEIL CREESE
(Representative of the Estate of Benjamin Morgan, deceased)

Claimant

v

KELVIN JOSLYN

Defendant

Appearances: Mr. Richard Williams for the Claimant
Mr. Carlyle Dougan Q.C. for the Defendant

2005: October 24
2006: November 30
2007: July 20
2008: February 1
April 28
September 16

JUDGMENT

[1] **THOM, J**: On the 28th day of May 1998 Benjamin Morgan (now deceased) by Deed No. 2479 of 1998 conveyed two lots of land at Belvedere measuring in total approximately 2.13 acres to Kelvin Joslyn for the purchase price of $50,000. After the death of Benjamin Morgan in 1998, the representative of his estate O'neil Creese in 2004 instituted these proceedings against Kelvin Joslyn seeking inter alia the following reliefs:

(a) A declaration that the conveyance No. 2479 of 1998 ought to be set aside having been procured by undue influence of the Defendant over the deceased.

(b) A declaration that the conveyance No. 2479 of 1998 ought to be set aside as having been an unconscionable bargain.

(c) A declaration that the conveyance No. 2479 of 1998 ought to be set aside as having been obtained by abuse of confidence.

[2] Kelvin Joslyn in his defence denied that the conveyance was as a result of undue influence exerted on Benjamin Morgan, abuse of confidence or an unconscionable bargain. He denied that there was a surveyor client relationship between himself and Benjamin Morgan at the time of the transaction. He alleged that Mr. Morgan was a very active and alert man in spite of his age. He had the benefit of independent legal advice from his solicitor Mr. Theodore Browne and further the Deed was read over to him by the Deputy Registrar of the High Court before he signed same.

ISSUE:

[3] Whether Deed No. 2479 of 1998 should be cancelled on the grounds of undue influence, abuse of confidence or unconscionable bargain.

UNDUE INFLUENCE:

[4] Learned Counsel for O'Neil Creese referred the Court to ***Chitty on Contracts*** 28 Ed. Volume 1 at parts 7 – 041 to 7 – 074, and to Lord Browne-Wilkinson's Classification of undue influence in ***Barclays Bank PLC v O'Brian*** [1994] A.C. 180 at 189 – 190. Learned Counsel further submitted that there was a relationship of surveyor and client between Kelvin Joslyn and Benjamin Morgan. The relationship of surveyor and client was analogous to the relationship of solicitor and client. O'Neil Creese only had to prove that Kelvin Joslyn and Benjamin Morgan were in a surveyor and client relationship, the onus then shifted to Kelvin Joslyn to rebut the presumption and to prove that the sale was free from undue influence. To do so he must establish that the duty of fiduciary care has been entirely fulfilled. Kelvin Joslyn has failed to do so.

[5] Learned Queen's Counsel for Kelvin Joslyn submitted that there was no relationship of surveyor and client between Kelvin Joslyn and Benjamin Morgan at the time of the transaction therefore there is no presumption raised of undue influence.

LAW AND ANALYSIS:

[6] The doctrine of undue influence was outlined by Sir Vincent Floissac C.J. in ***Robert Murray v Reuben Dewberry and Denfield Matthew*** Civil Appeal No. 10 of 1993 as follows:

> "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 person (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 to 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 2A which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitors and client, medical adviser and patient, parent and child and clergyman or religious adviser and parishioner or disciple. The second sub-head is Class 2B which is descriptive of the legal presumption which arises from a relationship where under the complainant generally reposed trust and confidence in the dominant party."

[7] The Claimant's case is that there was a surveyor and client relationship between Kelvin Joslyn and Benjamin Morgan consequently there was a presumption of undue influence. This relationship was analogous to a Solicitor and Client relationship. This is a Class 2A case.

[8] In the ***Robert Murray*** case, the Court of Appeal opined that the relationship of surveyor and client was not analogous to that of solicitor and client. His Lordship Sir Vincent Floissac C.J. at p. 8 under the heading "**Application of Doctrine**" stated as follows:

> "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 2A relationship between the respondents and the appellant. The only relationship which existed was the relationship between surveyors and their clients. This is not a legally accredited or Class 2A relationship."

[9] In view of the above decision I find that this case does not fall within the Class 2A category.

[10] Even if the relationship of surveyor and client was a Class 2A relationship the onus was on O'Neil Creese to prove that there was such a relationship at the time of the transaction or shortly before.

[11] While two witnesses testified on behalf of O'Neil Creese only O'Neil Creese testified on this issue. In his witness statement he stated the following at paragraphs 9 – 13:

"9. The Defendant holds himself out to be a licensed land surveyor is practicing in St. Vincent and the Grenadines and also in the business of providing land valuation services.

10. At all material times the Defendant (sic) had confidence and trust in the Defendant and relied on his expertise for advice and direction.

11. The Defendant was the Claimant's surveyor and relied on his expertise and advice with all land matters.

12. The Defendant in 1995 performed surveying works for the Deceased Claimant in Prospect, a copy the said parcel of land is attached herewith and marked "C". This survey was signed by the said Defendant and the then Chief Surveyor Mr. Williams. It seems from the face of the document that the Defendant and the said Chief Surveyor at the time were engaged

in some form of business relationship as both their names appear on the Plan as surveyor.

13. As late as the 11th day of May 1998 just seventeen days before the execution of the conveyance to the Defendant. The Defendant was engaged by the deceased to perform certain works. In pursuance thereof the Defendant carried out a survey of lands belonging to the deceased at Brighton in the parish of Saint George, a copy of the said survey is attached herewith and marked "D".

[12] Under cross-examination O'Neil Creese stated that he and Benjamin Morgan talked a lot but Benjamin Morgan did not talk about his private business. He agreed that he did not know anything about the transaction in relation to the sale of the land to Kelvin Joslyn. He agreed that he did not know the agreement to sell the land was made in December 1997 and a down payment made on December 18, 1997 for which Benjamin Morgan issued a receipt. The receipt was shown to him and he agreed it was Benjamin Morgan's signature. Further, he was not aware if Kelvin Joslyn ever advised Benjamin Morgan.

[13] It was not disputed that Kelvin Joslyn is not a licensed surveyor but he does surveying work under supervision of a licensed surveyor. It was also not disputed that the agreement for sale was made on December 18, 1997, prior to that date Kelvin Joslyn did surveying work some years ago and in 1995 as evidenced by the survey plan on January 6, 1996. It was also not disputed that the plan dated 11th May 1998 was in relation to the property for which Kelvin Joslyn had relocated the boundaries some years prior to 1995. Having seen and heard O'Neil Creese and Kelvin Joslyn I believe the testimony of Kelvin Joslyn. Kelvin Joslyn was very forthright when cross-examined. He was not contradicted. O'Neil Creese on the other hand by his own admission stated that he was living in the United Kingdom since the 1960's and he only returned to live in Saint Vincent and the Grenadines in 1997. He knew nothing about the transaction, he knew nothing about the relationship between Kelvin Joslyn and Benjamin Morgan, he was not aware of the surveying work done by Kelvin Joslyn. By his own admission, he was simply requested to

institute these proceedings and he was handed the survey plan dated January 6, 1996 signed by Kelvin Joslyn and Licensed Surveyor Clifford Williams, and the plan dated 11th May 1998.

[14] The evidence shows that while the Deed was executed on May 28, 1998 the Agreement for the sale of the land and the down payment was made on December 18, 1997 some two years after Kelvin Joslyn did surveying work for Benjamin Morgan on one of his properties. In view of the above, I find that O'Neil Creese has failed to prove that there was a relationship of surveyor and client at the time or shortly before the transaction.

[15] Further, if this is not a Class 2A case is it a Class 2B? In a Class 2B case a complainant is required to adduce evidence that the complainant generally reposed trust and confidence in the dominant party. In this case O'Neil Creese was required to adduce evidence that the complainant (Benjamin Morgan) generally reposed trust and confidence in Kelvin Joslyn.

[16] In the ***Robert Murray*** case Sir Vincent Floissac C.J. at p. 9 of the judgment stated the evidence required to establish a Class 2B relationship as follows:

> "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."

[17] O'Neil Creese by his own admission stated that he did not know Kelvin Joslyn and Benjamin Morgan to be friends or have a relationship. He further testified that Benjamin Morgan never discussed his private matters with him. Further, he was living in the United Kingdom from the 1960's and only returned to live in Saint Vincent in 1997. He was not aware that the agreement for sale was made in December 1997. He agreed that he was not aware if Kelvin Joslyn ever advised Benjamin Morgan. In view of the above, I place no weight on the bald statements at paragraphs 10 and 11 of his witness statement where he stated:

> "10. At all material times the Defendant (sic) had confidence and trust in the Defendant and relied on his expertise for advice and direction.

11. The Defendant was the Claimant's surveyor and relied on his expertise and advice with all land matters."

[18] I find that there is no evidence on which the Court can find that Benjamin Morgan generally reposed trust and confidence in Kelvin Joslyn. The onus was on O'Neil Creese to adduce evidence to raise the presumption of undue influence. This he failed to do.

ABUSE OF CONFIDENCE:

[19] Learned Counsel for O'Neil Creese referred the Court to ***Chitty on Contracts*** part 7-044 where the Learned Authors stated:

> "In a later case in the Court of Appeal it was pointed out that even if undue influence would not be a ground for upsetting such a transaction the client might be able to obtain relief on the more limited ground of abuse of confidence. This applies only between solicitor and client, principal and agent, trustee and beneficiary and persons in similar positions." – ***Bank of Credit and Commerce International SA v Aboody*** [1990] 1 QB 923.

[20] Learned Counsel submitted that a surveyor and client relationship fell within "persons in similar positions." Learned Counsel also referred the Court to the decision of the Privy Council in ***Demerara Bauxite Company Ltd v Hubbard*** [1923] A.C. 673 at 681 – 682. The ***Demerara Bauxite*** case is distinguishable from the present case, in the ***Demerara Bauxite*** case the relationship was that of solicitor and client.

[21] In ***CIBC Mortgages PLC v Pitt*** [1994] 1 AC 200 at 209 stated the principal laid down in the abuse of confidence cases as follows:

> "The law requires those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties to establish affirmatively that the transaction was a fair one: see for example ***Demerara Bauxite Co. Ltd. V Hubbard*** [1923] A.C. 673; ***Moody v Cox*** [1917] 2 Ch. 71 and the discussion in the ***Aboody*** case [1990] 1 Q.B. 923 at 962-964. The abuse of confidence principle is founded on consideration of general public policy, viz. that in order to protect those to whom fiduciaries owe duties as a class from exploitation by fiduciaries as a class, the law imposes a heavy duty on fiduciaries to show the righteousness of the transactions they enter into with those to whom they owe such duties."

[22] Having reviewed the authorities I am of the view that even if a surveyor and client relationship existed at the material time such relationship does not fall into the category of cases to which the principle of abuse of confidence applies.

UNCONSCIONABLE BARGAIN:

[23] Learned Counsel for O'Neil Creese submitted that there were three elements in the doctrine of unconscionable bargain being:

(a) The bargain must be oppressive to the complainant.

(b) It may only apply when the complainant was suffering from certain types of bargain weaknesses.

(c) The other party must have acted unconscionably in the sense of knowingly taken advantage of the complainant.

[24] Learned Counsel further submitted that all three elements exist in this case being "the deceased claimant was an aged man who in the late 1990's started going funny in his head, he was starting to go senile." Learned Counsel referred the Court to the case of ***Fry v Lane*** (1988) 40 Ch. D. 312 where the Court set aside a purchase at a considerable undervalue from a poor and ignorant person who received no independent advice.

[25] Learned Queen's Counsel for Kelvin Joslyn submitted that Benjamin Morgan received independent advice from his attorney Theodore Browne and he exercised his free and independent will after the Deed was read back to him by the Deputy Registrar of the High Court.

[26] I agree with Learned Counsel for O'Neil Creese on the law in relation to unconscionable bargain. Once the conditions for relief are met the burden shifts to Kelvin Joslyn to show that the transaction was fair just and reasonable.

(a) Oppressive Bargain

[27] Was the bargain oppressive? Sale of property at an undervalue has been considered in many cases as being an oppressive bargain, see ***Cresswell v Potter*** [1978] 1 WLR 255 and ***Backhouse v Backhouse*** [1978] 1 WLR 243.

[28] The evidence on behalf of O'Neil Creese is that the purchase price of $50,000.00 paid for the property was grossly undervalued. Mr. Franklyn Browne a valuator and member of the Vincentian Institute of Valuers and Quantity Surveyors testified on behalf of O'Neil Creese that in 1998 when the property was sold to Kelvin Joslyn the property was valued at approximately $213,000 being approximately $2.27 per square foot. Comparative prices of land sold in the area and neighbouring areas during 1997 – 1998 were tendered.

[29] Mr. Browne's testimony was challenged under cross-examination in relation to the terrain of the land. Having reviewed the evidence I find that Mr. Browne's testimony was not discredited in any way. There is no doubt that the land was sold for a price below its value.

(b) Bargain Weakness

[30] The cases have shown that relief would be granted in a wide variety of circumstances. In ***Blomley v Ryan*** Fullagar J gave the following examples:

> "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or expectation where assistance or expectation is necessary."

[31] O'Neil Creese in his evidence in chief stated that Benjamin Morgan was 86 years old in 1998, he having been born on December 13, 1911. In the late 1990's the deceased started going funny in his head, he started going senile. In 1998 he was sick and could no longer ride his bicycle.

[32] I find that based on the evidence Benjamin Morgan was an elderly man in 1997. No evidence of senility was adduced other than the bald statement of O'Neil Creese that he

was going funny in his head in the late 1990's. A letter dated 23rd July 1997 written by Benjamin Morgan was tendered in evidence by O'Neil Creese. Having examined this letter it does not show it was written by a person who was senile. Benjamin Morgan was essentially complaining that he had lost his bank books for his accounts at Barclays Bank and he was making arrangements to have one Muriel who was a signatory to the accounts to sign the forms so that he could get the books replaced. No medical evidence was adduced in relation to Benjamin Morgan. There is no evidence on which I could find that Benjamin Morgan was senile or suffered from any infirmity of mind or body at the material time.

(c) Unconscionable Conduct

[33] Learned Counsel for O'Neil Creese referred the Court to ***Chitty on Contracts*** part 7-081 where the Learned Authors stated:

> "A contract will not be set aside merely because the aggrieved party did not have independent advice and the consideration was inadequate. It must also be shown that the other party engaged in unconscionable conduct or on unconscientious use of power. He must have behaved in a morally reprehensible manner … which affects his conscience."

[34] The evidence of unconscionable conduct led on behalf of O'Neil Creese can be found in paragraphs 15 – 17 of his witness statement where he stated as follows:

> "15. The Defendant knowing the real value of the portions of lands pressured or advised the Deceased into the transaction or failed to advise the Deceased on the true value of the lands.
>
> 16. The Defendant failed to exercise proper fiduciary care in the transaction with the Deceased. And further acted unconscionably in taking advantage of the deceased.
>
> 17. The Deceased received no independent advice whatsoever on the sale."

[35] Having reviewed the evidence I find that there is no evidence to substantiate the bald assertions of O'Neil Creese in paragraphs 15 – 17 of his witness statement. In fact, O'Neil Creese admitted that he was living in the United Kingdom since the 1960's and he only returned to live in St. Vincent in 1997. He also admitted that he knew nothing about the transaction that Benjamin Morgan did not discuss his private business with him. He was not aware that Mr. Theodore Browne, who prepared the Deed, was also Benjamin Morgan's solicitor. There is no evidence on which the court could find that Kelvin Joslyn's conduct was unconscionable. Kelvin Joslyn and Benjamin Morgan were friends due to the fact that Benjamin Morgan was his step-uncle. Benjamin Morgan's sister was married to his father. The evidence shows that Kelvin Joslyn had about two years prior to the transaction purchased lands in a neighbouring residential area being three acres at $75,000 per acre which is approximately $0.56 per square foot. Kelvin Joslyn paid $0.53 for the land from Benjamin Morgan. It was Benjamin Morgan who went to Kelvin Joslyn and offered to sell him the property at the price of $50,000. It is not uncommon in the Caribbean for members of an extended family to sell land to family members at a significantly reduced price. There is not one shred of evidence that Kelvin Joslyn was a valuator or that he ever performed such functions. In fact, when Kelvin Joslyn sold his land about 3 years ago Franklyn Browne who testified on behalf of O'Neil Creese valued the land.

[36] While I find that the property was sold at an undervalue and at the time Benjamin Morgan was 86 years old there is no evidence that Benjamin Morgan acted unconscionably.

[37] I find that t he claim by O'Neil Creese fail on all three grounds of undue influence, abuse of confidence and unconscionable bargain.

[38] The Claim is hereby dismissed.

[39] It is ordered that the Claimant shall pay the Defendant costs in the sum of $14,000.

…….
Gertel Thom
HIGH COURT JUDGE