

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 121 OF 2008

BETWEEN:

ADNAN MKHOUL

Claimant

v

KEITH HENRY
ETOLA RICHARDS

Defendants

APPEARANCES:

Mr. E. Robertson for the Claimant

Mr. S. Williams for the First Defendant

2008: December 3, 8, 9;
December 18.

JUDGMENT

BACKGROUND

[1] **JOSEPH, Monica J:** In July/August 2007 the Claimant Adnan Mkhoul held discussions with Defendant Keith Henry to purchase from him (Henry) 6335 sq ft of land on which there is a two storey building (the property), situate at Belvedere in the parish of Saint George in St. Vincent and the Grenadines. Money was paid by Mkhoul to Henry but the parties differ as to the quantum.

[2] Subsequent to those discussions, both parties visited a solicitor and a deed of gift was prepared in favour of Mkhoul which was executed by Henry. Soon after the signing of that deed of gift Mkhoul traveled to Syria for medical attention. On his return to St.Vincent in November 2007 he requested Henry who was in occupation of the property to give him

possession of the dwelling house but Henry refused, the latter claiming that he had not received the purchase price for the property from Mkhoul.

- [3] Mkhoul instituted this proceeding against the first defendant Henry and second defendant Etola Richards. The latter was the occupant of the lower storey of the dwelling house. Richards was given two Notices to quit, the first dated 3rd February 2006, by solicitors on behalf of Henry prior to the execution of the deed of gift, the second notice dated 6th March 2008 by solicitors on behalf of Mkhoul. Mr. Robertson informed the Court that Mkhoul was not continuing with the case against Richards.

CLAIMS

- [4] Mkhoul applies as owner of the property by virtue of the deed of gift, for an Order that Henry deliver up possession of the property; damages for unlawful detention of the property and an injunction restraining Henry from occupying the property.
- [5] Henry asserts that the agreed purchase price was \$90,000.00 and, as that sum has not been paid to him, denies that Mkhoul owns the property. He alleges that Mkhoul used deceit and false pretences to coerce him to execute the deed of gift and he applies for the cancellation of the deed of gift.
- [6] Alternatively, he seeks an order that Mkhoul pay him \$86,000.00 being the balance of the agreed purchase price, and damages. Alternatively also, Henry claims that he signed the deed of gift in the belief that he was executing a conveyance to be held by the solicitor in trust until Henry was paid for the property.

ISSUES

- [7] Whether Claimant Mkhoul is the fee simple owner of the property.
- [8] Whether the deed of gift is a valid deed.

DOCUMENTS

[9] By Deed No. 2230 of 1990 Henry became the fee simple owner of the property. There is a Deed of Gift No. 46/2008 dated 15th August 2007 between Henry as grantor and Mkhoul as grantee.

IS THERE A CONTRACT?

[10] A valid contract comprises three components. One, agreement between parties; two, an identifiable subject matter; three, an ascertainable price.

[11] The subject matter is identifiable and there is no dispute about that. I shall consider the other two components, i.e., agreement between the parties and an ascertainable price.

[12] In his witness statement Henry states that he told Mkhoul that the purchase price of the property was \$90,000.00. Mkhoul indicated that he would be unable to pay that sum and offered \$45,000 which he (Henry) did not accept. Henry said that Mkhoul stated that if he (Henry) signed the deed Mkhoul would pay \$90,000.00 in two installments.

[13] Mkhoul's witness statement:

"After a month or two Keith started to come by me and said to me I understand that you bought my sister's property Keith then offered his property to me. I asked him how much he wanted for the property he said \$60,000.00. I said No I give \$40-45 thousand. He considered my offer and he came back and asked for \$50,000.00 I agreed to pay the sum of \$50,000.00 and he accepted the sum of \$45,000.00."

[14] Andy Mkhoul (Mkhoul's son) witness statement:

"I saw him (Henry) again at the Traffic Variety Store, on this occasion my father called me to listen to the conversation, Keith reduce the first offer from \$60,000.00 to \$50,000.00. My father said he was only paying \$45,000.00.....On third occasion when he came he accepted \$50,000.00 "

[15] To constitute an agreement there must be an offer made by one party that is accepted by the other party. From the evidence, there was an offer of selling the property for \$90,000.00 that was not accepted. Instead there was a counter offer of \$50,000.00, and

as will be seen later Mkhoul's claim is that he paid Henry \$59,685.00. Hence there is no contract. The third component is that there must be certainty as to price. From the evidence there is no such certainty and there is therefore no contract between the parties. As there is no contract, any act that flows from that contract arrangement is of no effect and the parties cannot successfully claim any relief.

WAS MONEY PAID TO HENRY?

[16] Did Mkhoul pay any sums to Henry and if so how much? Mr. Robertson submitted that, not only did Mkhoul pay Henry the sum of \$50,000.00 which was the agreed purchase price, but he went beyond that sum to \$59,685.00 in that he made these payments:

US\$13,500.00 EC equivalent	\$37,000.00 to \$38,000.00
EC	8,350.00
Cheque (Also referred to as a draft)	4,000.00
Stamp duty	6,335.00
Taxes	3,000.00

(Mkhoul said the sum paid on Henry's behalf for outstanding taxes is \$3000.00 or about \$3900.000. The sums on ten receipts amount to \$2,661.58 added to the other sums totaling \$59,346.58 and not \$59,685.00). Details of the stamp duty appear later.

[17] Mr. Williams invited the Court to accept that only \$4000.00 was paid to Henry by Mkhoul. I examine the evidence relative to money claimed to be paid to Henry by Mkhoul.

[18] Henry's oral evidence was that the only money he received from Mkhoul was the cheque for \$4000.00.

[19] Mkhoul's witness statement:

"Two or three days later we returned to Mr. Joseph's office to sign the deed as it was ready. Keith came to my office and I paid him for the land even before the deed was signed – payment was \$4000.00 bankers draft \$8250 EC cash plus US\$13,500.00."

[20] Andy Mkhoul's oral evidence:

“When Keith sign deed of gift for my daddy give him cheque.....My father give Keith cheque. Don't know which bank.When Keith sign deed of gift not long after my father give him cheque. My father give Keith cheque by Carl Joseph. He paid Keith Henry the cheque in Carl Joseph office. He paid him other money. \$38,000.00 EC and 8350 and a cheque \$4,000.00. He paid him \$38,000.00 by my daddy's store. Same day not after he left Carl Joseph's office. Before he go to Carl Joseph's office. EC\$38,000 in cash. In hundred dollar bills I check it. He paid him US\$13,500.00 in hundred dollar bills in US After that we go to lawyers. EC\$8,350.00. Same time in the office. He got \$4,000.00 from my daddy. He took cheque from his pocket. When my father give him at the office (Mkhoul) US\$13,500.00 and \$8,350.00 he had cheque in his pocket. My father go straight by the lawyers. Henry went also to sign the deed..... Me and he bring ID card. I stay downstairs. I don't know what happen after that...I know that my father paid \$4,000.00 as I heard from Carl Joseph. Same day he sign deed same day my daddy give cheque.”

[21] According to Mkhoul, he paid Henry all the money in his (Mkhoul's) office. According to Andy Mkhoul, Mkhoul paid \$4,000.00 cheque in the solicitor's office and further that he (Andy Mkhoul) did not see when this happened but was told by the solicitor that \$4,000.00 payment had taken place.

[22] According to Andy Mkhoul, Mkhoul had the cheque in his pocket when Mkhoul paid US\$37,000.00 and EC\$8,350.00 to Henry. I understand him to be saying that the cheque was in Mkhoul's pocket while Mkhoul was paying the other sums to Henry in Mkhoul's office and that Mkhoul took the cheque from his pocket and paid Henry only after the deed of gift was signed in the solicitor's office. He also said that he did not go to the lawyer's office but remained downstairs with a friend.

[23] Why would Mkhoul keep \$4,000.00 cheque in his pocket while paying the rest of the money to Henry? Why not pay all the money at the same time? Why would Mkhoul say that he paid to Henry all the money (including \$4,000.00 cheque) in his (Mkhoul) office and Andy Mkhoul say that that cheque was paid to Henry in Carl Joseph's office? Where lies the truth?

[24] Mkhoul's evidence was that on 15th August 2007 he paid Henry US\$13,500.00 in one hundred dollar bills, EC\$8,350.00 and \$4,000.00 draft in his office. He had telephoned

- the bank and requested the preparation of the cheque of \$4,000.00. Why did he not request the bank to prepare a cheque to include EC\$8,350.00 and US\$13,500.00? Why only a cheque for \$4,000.00?
- [25] I find that Mkhoul obtained the \$4,000.00 cheque from the bank on 6th July 2007, as it bears that date, and held it until 15th August 2007, the date of the signing of the deed of gift. I infer from that act that he did not intend to hand over any money to Henry until after the signing of the deed of gift.
- [26] Mkhoul was being careful. A person who obtained a cheque for \$4,000.00, on 6th July 2007, and cautiously held it until the 15th August 2007 when the deed of gift was signed, is unlikely to pay out US\$13,500.00 in \$100.00 bills and \$8,350.00 EC in the manner he claimed to have paid it. I do not believe his evidence that he paid Henry those amounts.
- [27] In his submissions, Mr. Robertson stated that stamp duty is 10% of the valuation of the property, that the purchaser and vendor each pay half, and that the Court could find from payment of stamp duty of \$6,335.00 that the valuation made by the Government valuer is \$63,350.00.
- [28] Mkhoul claims Government valuation of the property is \$63,350.00: that he paid to Henry the total sum, when added up, of \$59,685.00, (including stamp duty of \$6,335.00) and that the agreed purchase price was \$50,000.00. I find that his story is not matching up.
- [29] I believe that the only sums that Mkhoul paid to Henry or on Henry's behalf are: cheque for \$4,000.00 direct to Henry: \$2,661.58 outstanding taxes to Inland Revenue Department: Half of \$6,335.00 stamp duty, i.e., \$3,167.50, to the Registry.

DEED OF GIFT - UNDUE INFLUENCE

- [30] I think Mkhoul understood the nature of a deed of gift as there was an earlier transaction, where Mkhoul purchased land from Henry's sister, Jennifer Quammie. According to Mkhoul's witness statement, the mode of transferring ownership of that land was by deed

of gift. Additionally, his witness statement reveals that the solicitor explained the character of a deed of gift. Mkhoul's witness statement:

"When we went to Mr. Joseph Office, Keith told Mr. Joseph that he arranged to give me his property and if Mr. Joseph could prepare a Deed for us.....He told Mr. Joseph to make a Deed of Gift for me. Mr. Joseph quizzed him as to whether or not he was certain that he wanted to give me the property to which he replied "Yes I am sure".....He (Henry) said he will make it a deed of gift like to his sister and we will save."

[31] Mr. Robertson's argument was that when Henry signed the deed of gift there was no undue influence, fraud, misrepresentation or advantage. It was his submission that Henry freely intended to, and did, transfer ownership of the property to Mkhoul and received payment for the property. He submitted that Mkhoul had in fact made payments in excess of the agreed price of \$50,000.00 and had met outstanding property tax payments and stamp duty. He made reference to **Murray v Deubery and Matthew** (1996) E.C.L.R. 14.

[32] Mr. Williams invited the Court to look at all the circumstances of the case: to find that Henry intended to sell the property, not to give away the property. He submitted that Mkhoul has not paid Henry the agreed purchase price and by the deed of gift has obtained a gift of the property. In **Murray** case at p. 17 Sir Vincent Floissac, Chief Justice said:

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

[33] From the course of conduct of the parties and the sequence of events, it is evident that when discussions were held originally, the intention of both parties was the transfer of ownership by deed of gift as a deed of gift bears no sum of money on its face. Mkhoul admitted in his witness statement, to which reference was made earlier, that the intention was to save money. I think undue influence was not actually exerted over Henry.

[34] Henry knew that Mkhoul intended to obtain a property valuation but did not know when the Government valuation was received by him. I think at some point in time (when the

valuation report reached him or perhaps information before the valuation report actually reached him), Mkhoul became aware that the property value would not be \$90,000.00.

[35] I think he saw an opportunity to obtain the property for another figure, and decided to pay outstanding property tax - receipts are dated 14th August 2007 – the day before the deed of gift was signed, and stamp duty on behalf of the purchaser and the vendor, thus outsmarting Henry.

[36] There are two receipts for stamp duty on deed of gift - Keith Henry to Adnan Mkhoul : One No.162642 dated 10th January 2008, total figure of \$6,365.00 showing stamps affixed to the value of \$6335.00: another No.696175 dated 1st April 2008 for \$6,335.00.

[37] Having caused those payments to be made (if I understand Mr. Robertson) Mkhoul is claiming that those sums (one payment of stamp duty and outstanding property taxes) are added to other sums to make up the purchase price, without agreement or even knowledge on the part of Henry. That is extraordinary conduct.

[38] Of course if Henry had handled the transaction correctly in the first place by having a deed of conveyance prepared, an opportunity for outsmarting him would not have arisen. Both parties had planned to evade paying full stamp duty on the transaction. Mkhoul took advantage of that plan and consequently took advantage of Henry in that, having obtained information on the valuation of the property; he paid stamp duty based on that valuation. He thus unilaterally arrived at a supposed purchase price, of \$59,685.

[39] Mkhoul took advantage of the situation. I note that circumstance merely in the sequence of events and not to buttress Henry's case for to use it to buttress his case would be tantamount to supporting what they both agreed to do, that is, to evade payment of full stamp duty.

MISREPRESENTATION

[40] I consider that there was misrepresentation by Mkhoul. Henry said that the purchase price for the property was \$90,000.00. I believe that Mkhoul told Henry he would pay half that

purchase price when the deed of gift was signed and half later. He did not pay half but gave a cheque for \$4,000.00. On that misrepresentation Henry signed the deed of gift.

[41] Henry's apparent consent and apparent free act in signing the deed of gift were infected by that misrepresentation. Henry was affected by that misrepresentation and was therefore induced by that misrepresentation to sign the deed. Mkhoul's misrepresentation vitiates the apparent consent and apparent free act. The effect is that there was no true consent, neither was there a true free act on the part of Henry when he signed the deed of gift.

[42] Subsequent to the signing of the deed in August 2007, Henry visited the solicitor who prepared the deed and was advised to retain counsel which he did. There was no approbation on the part of Henry of the transaction of August 2007.

[43] It is the same rationale and principle that apply in cases where there is apparent consent by pressure. From Lord Diplock's speech in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* (1982) 2 AER 67 at 75-76:

"The rationale is that his apparent consent was induced by pressure exercised on him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind."

[44] In a sense the parties are both authors of their own misfortune. They are now inviting the Court to provide aid and comfort to them by granting the relief they seek, which relief has as its base their conspiracy to evade payment of full stamp duty under the Stamp Act (Cap. 318).

[45] The conduct of both parties reminds the Court of a doctrine: ***Ex turpi causa non oritur actio*** - which really expresses the principle that a party does not have a right to enforce performance of an agreement founded on a consideration that is contrary to the public interest.

DELAY IN SEEKING RELIEF

[46] It was Mr. Robertson's submission that the transaction took place in August 2007, that Henry's delay in seeking relief from the Court (in a defence and counterclaim) is fatal and that as he had failed to act promptly he cannot now seek relief from the Court.

[47] Henry's evidence was that, after the signing of the deed of gift on 15th August 2007 Mkhoul left for Syria: that in September 2007 he saw the solicitor who prepared the deed of gift who advised him to retain counsel which he did in November 2007.

[48] Retained Counsel wrote a letter dated 21st January 2008, to Mkhoul pointing out that a deed of gift had been prepared instead of a deed of conveyance and requesting payment of the balance of purchase price of \$86,000.00. Mkhoul denies receiving the letter, but the fact is that a letter was dispatched by Henry's retained counsel. This suit was filed on 18th April 2008, and defence and counterclaim filed on 25th June 2008.

[49] In **Allcard v Skinner** (1887) 36 Ch.D 145 Court of Appeal, Lindley LJ. said:

"A gift in terms absolute and unconditional naturally leads the donee to regard it as his own, and the longer he is left under this impression the more difficult it is justly to deprive him of what he has naturally so regarded."

[50] In that case the delay was more than five years. I do not consider that in the circumstances of this case, a delay of ten months is unreasonable. In view of the order I will be making, whether there was delay or not is not now relevant.

REGISTRARION OF DOCUMENTS ACT (Cap. 93)

STAMP DUY ACT (Cap. 93)

[51] Mr. Robertson drew the Court's attention to certain sections of those laws. In view of my findings and the orders I shall make I do not think it necessary to comment on them.

IS THERE ACKNOWLEDGMENT OF TITLE?

[52] Mkhoul's evidence was that, before he left for Syria, Henry gave him the keys for the house and that he gave Henry permission to store his furniture in the house, which Henry

denies. If Mkhoul's version were true how would Henry, without the keys, get the furniture from the house if he desired to take the furniture while Mkhoul was in Syria?

[53] I think that that is an attempt to try to establish that Henry acknowledged Mkhoul's title and that Henry was in the house as a tenant. I think Henry remained in the house as he had not received the purchase price for the property from Mkhoul. As I have found that Henry's act of signing the deed of gift was induced by misrepresentation, and as I have also found that there was no contract, I do not think that the relationship of landlord and tenant arises in the circumstances of this case.

CONCLUSION

[54] As I have found that there is no contract, I take the parties to the position they were before the transaction, as far as this is possible. The advantage received by Henry, that is, money paid by Mkhoul to Henry and on behalf of Henry, is to be returned to Mkhoul. The advantage received by Mkhoul, that is, the property, is to be returned to Henry. In **Newbigging v Adam** (1886) 34 Ch D 582 Bowen LJ said at 592:

“...when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission.”

And at 595:

“There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages.”

[55] I have also found that there was misrepresentation by Mkhoul that induced Henry to sign the deed of gift. I take the route of placing the parties in their position before the transaction. Cancellation of the deed of gift will accomplish this as with that cancellation Mkhoul has no title to the property.

[54] I make the following orders:

- a) Defendant Henry to pay Claimant Mkhoul the following sums:
\$ 4,000.00 (amount paid by cheque)
3,167.50 (half of stamp duty)
2,661.58 (outstanding taxes)
- b) Deed of gift No. 46/2008 dated 15th August 2007, is hereby cancelled.
- c) I make no order as to costs.

Monica Joseph
HIGH COURT JUDGE (Ag.)
14th December 2008