JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 39/2002

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)

BETWEEN	**MICHAEL LORNE**	**2ND DEFENDANT/ APPELLANT**
AND	**JENITA AUGUSTA GUNN**	**1ST DEFENDANT/ RESPONDENT**

Bert Samuels for the appellant

Alexander Williams for the respondent

19th, 20th, July 2005 & 7th April, 2006

HARRISON, P.

This is an appeal from the judgment of Mrs. Hazel Harris, J on 14th February 2002 when it was ordered:

(1) That there be judgment for the 1st Defendant against the 2nd Defendant.

(2) That the sale by the 1st Defendant to the 2nd Defendant of all that parcel of land part of Toby Abbots in the parish of Clarendon, Certificate of Title for which is registered at Volume 1093 Folio 706 of the Register Book of Titles is NULL AND VOID

(3) That the 1st Defendant is the true owner of the land aforesaid.

(4) That the Registrar of Titles cancel the registration of transfer no. 843594 endorsed on the Certificate of Title registered at Volume 1093 Folio 706 of the Register Book of Titles.

(5) That the 2nd Defendant deliver up the duplicate Certificate of Title registered at Volume 1093 Folio 706 to the 1st Defendant.

(6) That there be an account to be taken by the Registrar of the Supreme Court of all dealings with the aforesaid land and any income of and from the land received by the 2nd Defendant.

(7) Costs to the 1st Defendant to be agreed or taxed."

We heard the arguments of both counsel on 19th July 2005 and on 20th July 2005 we delivered an oral judgment dismissing the appeal with costs to the respondent to be agreed or taxed. As promised, these are our reasons in writing.

The relevant facts are that on 12th March 1996 one Salome Nelson as plaintiff, filed a writ against the respondent and the appellant, as first and second defendants, respectively. The plaintiff sought a declaration that she was the owner of one acre of a larger plot of five and one half acres of land registered at Volume 1093 Folio 706 and claimed in trespass against the appellant. The said plaintiff and the first defendant Jenita Augusta Gunn are sisters. The one acre piece of land was surveyed and demarcated on ground and given to the plaintiff by Joseph Gunn the father of both sisters. No

subdivision approval was applied for nor granted. The plaintiff took possession of and fenced the said one acre of land. Joseph Gunn died leaving by his will the remainder of four and one half acres of land to the plaintiff. However, the first defendant acknowledged the plaintiff's ownership of the said one acre of land. The second defendant, an attorney-at-law, purported to purchase from the 1st defendant the said five and one half acres of land.

On 30th April 1996 an appearance to the said writ was entered on behalf of the 2nd defendant by Messrs Knight, Pickersgill, Dowding and Samuels, attorneys-at-law.

On 19th July 1996 a defence to the claim was filed by the said attorneys-at-law on behalf of both defendants wherein the 2nd defendant stated that he was the bona fide purchaser of land registered at Volume 1093 Folio 706 bought from the first defendant the "sole registered owner at the time of the transfer."

A summons for directions dated 16th August, 1996 and filed on the said date was served on the defendant's attorneys-at-law on 3rd October 1996 for hearing on 17th December 1996.

In an affidavit dated 5th November 1996 filed on 7th November 1996 in support of an application to dismiss the action, in that it failed to disclose a reasonable cause of action and/or "for want of prosecution", was "frivolous and vexatious and an abuse of the process of the court", the appellant stated in paragraph 3:

> "... on the 30th of December 1994 I purchased a piece of land from Jenita Gunn and which said land is registered at Volume 1093 Folio 706."

On 27th April 1998 the statement of claim dated 6th March 1996 was amended on the plaintiff Nelson's application supported by her affidavit dated 30th January 1998 and the affidavit of Carlton G. Williams to allege fraud against the (2nd defendant) appellant. The particulars read in paragraph 10, on page 26 of the record:

> "10. That the transfer of the said property to the 2nd Defendant constituted a fraud upon the Plaintiff who to the knowledge of both defendants had an interest in the property, against which a caveat was duly lodged on behalf of the Plaintiff days before the transfer to the 2nd Defendant was lodged and/or registered.
>
> **PARTICULARS OF FRAUD**
>
> (i) That the Plaintiff at all material times was in open and undisturbed occupation of the relevant portion of the land, that said portion having been fenced by the Plaintiff and fully cultivated with the knowledge and consent of the 1st Defendant and the full knowledge of the 2nd Defendant.
> (ii) That the 2nd Defendant purported to represent the executors of the Will of the deceased Joseph Gunn, when in fact the executors did not consult him and did not authorize him to act on their behalf.
> (iii) That the 2nd Defendant purporting to act for one of the beneficiaries and the executors of a Will, clandestinely, and with excessive haste caused land to be transferred to him on the said day he alleged to have bought it and on the same day the documents were lodged to the titles office.
> (iv) That despite extensive search by officers of the Registrar of Titles, the Instrument of Transfer

> purporting to transfer the premises to the 2nd Defendant cannot be located.
>
> (v) That the transfer took place on the 30th December, 1994 notwithstanding that a caveat was duly lodged on the 20th December, 1994.
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> (vi) That a transfer being effected on the same day it was lodged at the Titles office, without the direct involvement of the Registrar of Titles is by itself strong evidence of fraud."

The 2nd defendant (appellant) was represented by his attorney-at-law at this hearing. He does not appear to have filed a defence to this amended statement of claim.

On 10th January 2000, on the application of the first defendant (respondent) Gunn by notice filed and dated 25th February 1999 under section 133 of the Judicature (Civil Procedure Code) Law, an order was made permitting the said first defendant to file a statement of claim on the second defendant (appellant). This statement of claim sought declarations and alleged, inter alia, undue influence by the second defendant exerted over the first defendant (respondent). The statement of claim was filed and served by the first defendant's (respondent's) attorneys-at-law on 21st January 2000. The statement of claim, alleged in paragraph 2, on page 32 of the record:

> "2. In the years 1990 and 1991 the 2nd Defendant acted as the 1st Defendant's attorney-at-law."

and in paragraph 5 - 9 continued:

> "5. In or about December 1994, the 2nd Defendant procured the 1st Defendant's signature to an instrument of transfer and thereafter caused the said instrument to be lodged, thereby

transferring the entire land into the 2nd Defendant's name.

6. At the time of the execution of the said instrument of transfer there existed between the 1st Defendant and the 2nd Defendant a relationship of trust and confidence by reason of the matters alleged herein.

7. Further, the transaction embodied in the said transfer was manifestly disadvantageous to the 1st Defendant in that:

   (1) the 1st Defendant did not receive full consideration, having only received the sum of $500,000.00.
   (2) The sale price was below market value.
   (3) The entire land was transferred and not three acres of the said land as was contemplated by the 1st Defendant.

8. Further, before and during the transaction embodying the sale:

   (1) The 2nd Defendant did not take reasonable steps to ensure that the 1st Defendant obtained independent legal advice.
   (2) The 2nd Defendant required the 1st Defendant to sign an instrument of transfer in connection with the said sale before completion of the said sale.
   (3) The 2nd Defendant failed to take any steps to protect the interest of the 1st Defendant by failing to negotiate for and agree to the usual terms and conditions designed to protect a Vendor of land.

(9) In the premises the 1st Defendant's execution of the said instrument of transfer is to be presumed to have been procured by the undue influence of the 2nd Defendant over the 1st Defendant."

No defence to the statement of claim filed by the first defendant was filed by the second defendant (appellant).

On 14th February 2002 the action came on for trial before Mrs. Justice Harris. Both parties were represented by their respective attorneys-at-law. The plaintiff withdrew her action. Up to then a defence had not been filed by the second defendant (appellant). Consequently, the learned trial judge entered judgment for the first defendant (respondent,) as earlier stated, resulting in the said appeal.

The following grounds of appeal were filed and argued:

> "1. The Learned Judge erred in Law in considering the First Defendant's claim against a co-defendant in the circumstance that the substantive suit was withdrawn. The Order made based solely on the Statement of Claim issued by one Defendant against another was wrong in Law or, alternatively, a wrong exercise of discretion as the First Defendant ought to have been ordered to commence a separate suit against the Second Defendant for her claim of undue influence which is and was unconnected and unrelated to the Plaintiff's claim against her for trespass to which she had already defended.
>
> 2. Alternatively, the Learned Trial Judge erred in law in proceeding with the trial without first ordering the proceedings between Defendants to be regularized and giving the Second Defendant an opportunity to defend those proceedings.
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> 3. The Learned Trial Judge erred in Law in delivering a Final Judgment at Trial without hearing any evidence on oath from either the Plaintiff or the First Defendant and thereby

denying the Second Defendant the right to cross-examine the First Defendant.

4. The decision of the Learned Trial Judge was unreasonable in all the circumstances.

5. That the Learned Trial Judge erred in Law in ordering that the Registrar of Titles cancel the registration of transfer no. 843594 endorsed on the certificate of title registered at Volume 1093 Folio 706 of the Register Book of Titles. In that there is no such relief under the Provisions of the Registration of Titles Act for a Litigant whose cause of action is similar to the allegations adduced by the 1st Defendant against the 2nd Defendant.

6. That the Learned Trial Judge erred when she failed to award costs in favour of the second Defendant."

Section 133 of the Judicature (Civil Procedure Code) Law ("The Code") was the relevant statutory provision at the trial on 14th February 2002 before Mrs. Justice Harris, and governed the claim of one defendant against the other. It reads:

> "133 . (1) Where a defendant claims against another defendant
>
> (a) ...
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
> (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined not only as

> between the plaintiff and the defendant making the claim but as between the plaintiff and that defendant and another defendant or between any or either of them,
>
> the defendant making the claim may without any leave issue and serve on such other defendant a notice making such claim or specifying such question or issue.
>
> (2) No appearance to such notice shall be necessary and the same procedure shall be adopted for the determination of such claim, question or issue between the defendants as would be appropriate under this Title if he were a third party."

Although the section contemplates the existence and continuation of the plaintiff's substantive claim, the claim by a defendant is not contingent on the plaintiff's. The claim and remedy of the co-defendant is independent of the plaintiff's.

The defendant who is served with the notice and now therefore regarded as a third party, is required to plead a defence in response to his co-defendant's claim.

On 10th January 2000 Mrs. Justice McIntosh on a summons for third party directions had ordered:

> "1. That the First Defendant within fourteen days serve her Statement of Claim against the Second Defendant who shall plead thereto within fourteen days with leave to the Second Defendant to reply thereto, if so advised, within seven days thereafter.
>
> 2. That the Second Defendant within sixty days file and deliver to the First Defendant an

> Affidavit of Documents limited to the documents relating to the issues raised in his pleadings.
>
> 3. That the claim of the First Defendant, by her notice dated the 25th day of February 1999, may be tried at or immediately after the trial of this action."

Section 127A reads:

> "**127A** If a third party duly served with a third party notice does not enter an appearance or makes default in delivering any pleading which he has been ordered to deliver, he shall be deemed to admit the validity of and shall be bound by any judgment given in the action, whether by consent or otherwise, and by any decision therein on any question specified in the notice; and when contribution or indemnity or other relief or remedy is claimed against him in the notice, he shall be deemed to admit his liability in respect of such contribution or indemnity or other relief or remedy." (Emphasis added)

At the trial before Mrs. Justice Harris on 14th February 2002, the appellant having failed to deliver a defence after more than 2 years, since 21st January 2000, was "deemed to admit the validity of ..." and was "bound by the judgment given in the action ...".

This deeming provision entitled the respondent to apply for judgment on the admission by the appellant to the claim of the respondent. Such an application may be done by motion and there is no necessity for evidence to be led. No issue was joined.

By contrast, however, if judgment was entered and the damages were unliquidated or statutory provisions require it, evidence will have to be led, in the assessment of such damages.

An example of the latter is section 25 of the Rent Restriction Act which requires that before an order for possession can be made a court or judge must be satisfied that it is reasonable to make the order. It was held in ***Moncure v. DeLisser*** SCCA No. 31/97 dated 31st July 1997 that adjudication was required, namely, evidence heard, before the making of the order for possession, on a judgment by default.

The respondent was not claiming unliquidated damages. She sought declarations that the sale of the said land having been procured by the undue influence of the appellant over the respondent, should be set aside, that the respondent was the true owner of the land, orders that the appellant deliver up the relevant title to the Registrar of Titles for cancellation, and that an account to be taken and costs awarded. There was also a claim for damages, which was not pursued.

There is a presumption of undue influence arising from transactions between certain specific classes of persons, because of their relationship arising from trust and confidence. The authors of Snell's Equity, 29th Edition [1990] at page 558 said:

> "... all transactions whereby persons in fiduciary positions procure a benefit for themselves will be set aside, e.g. ... solicitors purchasing from their clients ..."

In ***Allcard v. Skinner*** [1887] 36 Ch. D. 145, it was held that a gift of property by a sister in holy orders to the mother superior of a religious organization gave rise to the presumption of undue influence. The gift was returnable, as to the unexpended portion due to the undue influence imposed on the donor. Cotton, L.J. identified two classes of cases of undue influence. The first, exists where the stronger has committed fraud or wrong to gain an advantage over the weaker, being actual undue influence. The second arises where the special relationship, such as trustee and cestui que trust exists, and an advantage or benefit is obtained from the latter. In either case the benefit of the transaction is liable to be set aside.

The doctrine is concerned with the abuse of trust and confidence resulting in an unfair advantage to the person in whom the trust is imposed, in the nature of an unconscionable bargain. In ***Royal Bank of Scotland v. Etridge*** [1998] 4 All E.R. 705, Stuart-Smith, L.J. referring to ***Allcard v. Skinner,*** supra and other cases, recited the categories of undue influence, that is, actual or express and presumed undue influence. He further subdivided the latter category into two classes. He said of the doctrine, at page 712:

> "The equitable doctrine of undue influence, however, is not confined to cases of abuse, of trust and confidence; it is also concerned to protect the vulnerable from exploitation. It is brought into play whenever one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them. This need not be a relationship of trust and

> confidence; it may be a relationship of ascendancy and dependency." (Emphasis added)

The respondent, in her third-party notice to the appellant under section 133 of the Code, stated, as the grounds for her claim:

> "(1) At the material time of, and during the transaction embodying the sale of the said land to you, there existed a relationship of a fiduciary character between you and the 1st defendant, in that you were and purported to act as the 1st Defendant's attorney-at-law.
>
> 2. The transaction embodying the sale was manifestly disadvantageous to the 1st Defendant, in that the purchase price bargained for by you was below market value; the full purchase price to date has not been paid by you; and the 1st Defendant, as you were well aware, intended only to sell 3 acres of the said land and not the entire land, as indicated in the agreement for sale drafted by you.
>
> 3. Before and during the transaction embodying the said sale:
>
> (i) you did not take reasonable steps to ensure that 1st Defendant obtained independent legal advice
> (ii) you required the 1st Defendant to sign an instrument of transfer in connection with the said sale before completion
> (iii) you failed to take such steps to protect the interests of the 1st Defendant by failing to agree the usual terms and conditions designed to protect a vendor."

The appellant filed no defence as stated earlier, nor did he make any attempt to rebut this presumption of undue influence which arose therein.

We agree with counsel for the respondent that both the respondent and the plaintiff in the action had claims of fraud against the appellant, in respect of the same area of land, at Volume 1093 Folio 706, making the question or issue between the parties "substantially the same." Each claimant sought declarations as to ownership. There was no necessity for the learned trial judge to order that the respondent commence a new action against the appellant, thereby involving the former in unnecessary expense and wasted time. The learned trial judge's discretion was properly exercised. There is no merit in ground one and ground five.

As stated previously, there was no duty on the learned trial judge to direct the respondent to commence a new action against the appellant, as complained of in ground two. Nor was there any basis to complain that the learned trial judge failed to give to the appellant "an opportunity to defend those proceedings", presumably the "new" proceedings.

In his affidavit dated 31st May 2005 Mr. Bert Samuels, counsel for the appellant, inter alia, states:

> "3. That my focus was always the Defence of that action and, as a result, I somehow overlooked the fact that the first defendant had started a separate and unconnected claim against the second defendant. Accordingly, I oversighted the necessity to file a second Defence in the matter namely a Defence to the claim of the first defendant against the second defendant."

No reason was given for this "oversight", nor was any draft defence exhibited or existing when the matter came on for hearing on 14th February 2002. The draft defence is dated 27th May 2005.

The learned trial judge properly exercised her discretion in entering judgment as she did. The appellant, himself an attorney-at-law, had ample opportunity to defend the claim of the respondent, but declined to do so. There is no merit in ground two.

For the reasons advanced above, ground three, in respect of the calling of evidence and the right of the appellant to cross-examine, also fails. There was no issue joined before the learned trial judge. The presumption of undue influence not having been rebutted, still remained. No evidence was required to be led by the respondent.

Ground four which complains that the decision of the learned trial judge is "unreasonable in all the circumstances", is also without merit, for the reasons stated above.

Ground six complains that there was no power in the learned trial judge to order the Registrar of Titles to cancel the Certificate of Title of the appellant under the Registration of Titles Act, in the circumstances complained of by the respondent.

In equity, a transaction will be set aside in circumstances where a benefit has been acquired by undue influence exerted by a person against the other.

The authors of the Law of Restitution by Goff and Jones, 5th Edition [1998] at page 359, wrote:

> "There is a presumption of undue influence if a party who is in a confidential relationship with another confers a benefit on that other. Once the presumption is raised, the onus of proof is on the other party to show that the transferor acted with an independent mind and will, free of any undue influence. If the presumption is not rebutted, the transaction is set aside even though there is no evidence of actual undue influence. The 'underlying purpose of the courts of equity, in raising a presumption of undue influence in certain cases, is to prevent victimization by influence over the mind of another in circumstances where proof of the exercise of such influence may be impossible, ..." (Emphasis added)

The complaint of the respondent is one of undue influence, in the nature of equitable fraud. Once it is found to exist in a transaction, the latter will be set aside (see ***Allcard v. Skinner***, supra).

In addition, under the Registration of Titles Act, the court is empowered to cancel a certificate of title to land, if the circumstances require it. Section 158(2)(a) reads:

> "(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar –
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; ..."

It is therefore quite incorrect to say,, as counsel for the appellant argued, that there was no relief under the said Act which authorized the learned trial judge to grant such a relief of cancellation of the certificate of title in the name of the appellant. This ground also fails.

Consequently, ground seven, which complains that the learned trial judge was in error in failing to order costs in favour of the appellant is without merit and fails.

For all the above reasons we dismissed this appeal and made the order stated.

SMITH, J.A.

I have read the judgment of Harrison, P. and I agree with his reasoning and conclusion.

McCALLA, J.A. (AG.)

I have read the judgment of Harrison, P. and I agree with his reasoning and conclusion.

HARRISON, P.

ORDER

The appeal is dismissed. Judgment of the Court below affirmed. Costs to the respondent to be agreed or taxed.