JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 02 OF 2005

BEFORE:	**THE HON. MR. JUSTICE P. HARRISON, J.A.** **THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)**	
BETWEEN:	**GORDON STEWART**	**1ST APPELLANT**
AND	**ANDREW REID**	**2ND APPELLANT**
AND	**BAY ROC LIMITED**	**3RD APPELLANT**
AND	**MERRICK (HERMAN) SAMUELS**	**RESPONDENT**

Dave Garcia and Nigel Jones instructed by Myers Fletcher and Gordon for the appellants.

Leonard Green instructed by Chen, Green and Company for the respondent.

May 9 & 10 and November 18, 2005

P. HARRISON, J.A:

This is an appeal against the decision of Mr. Justice Sykes (Ag.) on December 23, 2004, refusing the appellants' application for summary judgment.

On May 13, 2005, we dismissed the appeals of the 2nd and 3rd appellants, affirmed the judgment of Sykes, J. (Ag.) and ordered that the

matter go to trial. The 1st appellant Gordon Stewart, was dismissed from the claim. We awarded costs to the 1st appellant to be paid by the respondent here and in the court below to be agreed or taxed and further ordered that the costs of the appeal be the respondent's against the 2nd and 3rd appellant to be agreed or taxed.

The relevant facts are that the respondent ("Samuels"), a fisherman and diver was injured, on November 12,1999, when he was in a collision with a ski boat operated by the 2nd appellant and owned by the 3rd appellant, while swimming in the sea adjacent to property known as Sandals Montego in the parish of St James. He was hospitalized and treated in the Cornwall Regional Hospital, Montego Bay, St James. He was eventually discharged on January 30, 2001.

Prior to his discharge, he engaged on January 2, 2000, the services of Mr. Leonard Green, attorney-at-law, who on January 4, 2000, wrote to the "Manager Sandals Montego Bay" copied to "Gordon Butch Stewart" the 1st appellant, advising that:

> "We act on behalf of the above captioned **Mr. Merrick (Herman) Samuels** who instructs us that while swimming in the coastal waters ... a motor craft driven by one of your employees negligently collided with him. ... Happily, we are advised that a member of your hotel staff has made periodic visits to the hospital and has been providing modest financial assistance and seeing to some of our client's medical and other needs ...."

and requested that:

> "... you communicate with this writer at ... (the) earliest convenient opportunity so that we may commence negotiations with you regarding an appropriate settlement."

Mr. Green's said letter was probably responded to by Axis (Jamaica) Ltd. International Loss Adjusters and Surveyors, because by his letter dated August 4, 2000, he referred to the latter's letter, saying:

> "In response to your letter dated the 21st day of March, 2000 we wish to state emphatically that we have no intention of supplying you with any proof that we received instructions from Mr. Samuels to act in this matter. Suffice it to say that we do have written authorization to do so."

He advised that the delay in the filing of the suit was due to the non-receipt of the medical report, and continuing complained:

> "What is of concern to us is the fact that you seem to be communicating with our client and we wonder to what end.
>
> Please be advised that you were made aware of our involvement in the matter as far back as the 4th day of January, 2000 and any efforts to attempt negotiations with the client without due regard to his attorney's involvement will negate the validity of any such action."

By letter dated May 11, 2001, to Appliance Traders Ltd. ("attention: Mr. Dimitri Singh"), Mr. Green advised:

> "We act on behalf of Mr. Herman Samuels who instructs us to proceed in this matter on his behalf."

and forewarned that Company of the imminent suit.

The writ of summons was filed on May 24, 2001, and the statement of claim on July 11, 2001. On August 8, 2001, Taynia Nethersole, Group Legal Advisor of Sandals Resorts International, wrote to Mr. Green. The letter reads:

> "Enclosed , please find Release duly executed by Mr. Samuels, which speaks for itself. The matter is therefore at an end. Additionally, you will note from the penultimate paragraph, that Mr. Samuels states that he has given no instructions to an Attorney-at-Law."

The said release (undated) reads, inter alia:

> **"RELEASE**
>
> I, (Herman) Samuels acknowledge all past medical and financial assistance amounting to $103,833.03 (doctor's visit $3,300.00; medication $4,528.41; groceries $2,004.50; hotel food stuff $54,726.12; room rental $28,650.00; other expenses of $10,624.00 provided to me by Bay Roc Ltd., better known to me as Sandals Montego Bay.
>
> I further acknowledge and accept the sum of $380,000.00 (along with a cellular phone) as additional compensation. In consideration of said compensation, I unconditionally release Bay Roc Ltd., trading as Sandals Montego Bay, its associates, its agents and employees, Mr. Gordon 'Butch' Stewart and his associated companies, associates and agents from any and all liability, now and in the future, with respect to this incident.
>
> I am also stating that I have not in the past nor will I give any instructions to any Attorney-at-Law to seek any additional compensation on my behalf.

> I sign this document freely and willingly in the presence of witnesses.
> SIGNED BY:
> Merrick Samuels
> Signature."

The respondent entered judgment in default of defence against the appellants on July 25, 2002, but it was set aside subsequently. The appellants in turn filed a defence and applied for summary judgment against the respondent relying on the release. The application was refused by Sykes, J. resulting in this appeal.

In refusing the appellant's application for summary judgment, Sykes, J found that the respondent:

> "... has raised a strong arguable case of undue influence ..."

He relied on the affidavit evidence before him and based his finding on the fact that the respondent had a "... low level of education" and in addition, there was:

> "... a transaction that appears to be very unfavourable to the victim who alleges that he was befriended by the defendants (appellants) and consequently trusted them ..."

The learned trial judge had considered the case of ***Swain v Hillman et al*** [2001] 1 All ER 91, relied on by Mr. Garcia for the appellant, and reasoned that the test "real prospect of success" as contrasted with "fanciful prospect" was not helpfully defined by the judges therein. He reasoned further that because Judge L.J. seemed to equate "real

prospect " of success with "improbable prospect" he then advanced the premise that:

> "If the adjective 'real' in this context, means something less than improbable then it cannot take much to satisfy a court that there is a real prospect of success."

That reasoning led the learned trial judge to conclude that:

> "If ***Swain*** is correctly decided then it does suggest that the criterion for establishing that a case has a real prospect of success is perhaps not far above that required for an injunction namely, a serious triable issue."

He maintained consequently, that "the threshold to satisfy the test of 'real prospect of success' is very, very low."

Summary judgment may be obtained by a party in circumstances where there is no valid defence to the claim or on the other hand, no substance to the claim. Rule 15.2 of the Civil Procedure Rules, 2002, reads:

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue." (Emphasis added)

The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its

probable ultimate success or failure. Hence, it must be a "real prospect" not a "fanciful" one – ***Swain v Hillman*** (supra). The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or "a serious question to be tried" test, in the case of the grant of the injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result.

Sykes, J by adopting the test of "good and arguable case" fell into error by rationalizing the test of "real prospect of success" as requiring a "low threshold" of proof. The contrary is true. I agree with Mr. Garcia, for the appellants that the "mere arguability test" adopted by the learned trial judge was the incorrect approach.

The appellants' application for summary judgment was based on the release signed by the respondent. They argued that the release was a complete defence to the respondent's claim. A release can operate as accord and satisfaction. Scrutton, LJ, in ***British Russian Gazette and Trade Outlook Trade v Associated Newspaper, Ltd*** [1933] 2 KB 616, at page 643, said:

> "Accord and satisfaction is the purchase of a release from an obligation whether arising under

> contract or tort. ... The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."

The respondent, in response, maintained that there was no valid release due to the fact that undue influence was exercised by the appellants in their dealings with the respondent.

Undue influence is the basis on which a court of equity may set aside a transaction where one party has so exercised his influence over another weakening his will,that unfair advantage is taken over that other in effecting the transaction. Their Lordships in the Privy Council, in the case of ***National Commercial Bank v Hew*** (2003) 63 WIR 183, in holding that no undue influence arose in respect of a transaction between a particular client and his banker, defined undue influence, in this way:

> "Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. As Lord Nicholls of Birkenhead observed in *Royal Bank of Scotland plc v Entridge* (No 2) [2001] UKHL 44 at paragraphs [6] and [8], [2002] 2 AC 773 at 794 and 795:
>
> > 'Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused ...

> ... It arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, or which the ascendant person then takes unfair advantage'.
>
> Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And, secondly, the influence generated by the relationship must have been abused."

The respondent in his affidavit evidence stated that the defendants and their agents were friendly and he developed a confidence in them. This was his explanation of why he signed and the circumstances under which he signed the release.

The learned trial judge found that the respondent was "unlettered could hardly read and did little writing." He interpreted the fact that the appellants' agents were friendly as having "befriended" the respondent, that is "they fren him up". Again, the learned trial judge read more into the words, than the power to draw an inference permitted. To "befriend" someone, seems more "active" than the display of a friendly demeanour, which is contrastingly "passive". There was no evidence that the respondent reposed such trust and confidence in the appellants that his will was overcome and in that atmosphere placed reliance on them to his disadvantage. Some relationships of trust and confidence are of such to give rise to the presumption of undue influence, such as, solicitor and client, parent and child, priest and believer, and doctor and patient.

Once the presumption arises the person complained against must rebut the presumption (***Allcard v Skinner*** (1887) 36 Ch. D. 145, 182). He may do so for example, by showing that the person complaining received independent legal advice. Other relationships in which undue influence is alleged, have to be proved by evidence.

Even if the relationship and conduct does not amount to undue influence, other types of unconscionable bargains will attract relief in equity.

In ***National Westminster Bank v Morgan*** [1985] 1 All ER 821, the House of Lords (per Lord Scarman), although rejecting Lord Denning's general principle of entitlement to relief in equity due to "inequality of bargaining power," in ***Lloyd's Bank v Bundy*** [1975] QB 326, did not reject the existence of unconscionability as attracting the intervention of equity. Lord Scarman, at page 831, said:

> "There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to

> determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case."
> (Emphasis added)

In ***National Commercial Bank v Hew*** (supra), their Lordships' Board (per Lord Millet), refers to "... some unconscionable conduct on the part of the defendant ..." giving rise to undue influence which would attract equitable relief.

Although unconscionable conduct is descriptive of the behaviour of the dominating party exerting undue influence, a court of equity recognizes unconscionable bargains as distinct transactions in which it will grant relief. The authors of ***Snell's Equity,*** 29th Edition (1990) at page 558, referring to unconscionable bargains said:

> "Under a well established jurisdiction, equity will set aside a purchase from a poor and ignorant vendor at a considerable undervalue, where the vendor acts without independent advice, unless the purchaser satisfies the court that the transaction was fair, just and reasonable. It has been said that "poor and ignorant" may nowadays be understood as "member of the lower income group" and "less highly educated," the latter requirement being applied in particular to the person's understanding of property transactions."

In ***Modern Equity by Hanbury and Maudsley,*** 12th edition (1985), in discussing the circumstances in which a court of equity will grant rescission, the authors noted categorized unsconscionable bargains, as distinct from the principle of undue influence, and, at page 803, said:

> "*Unconscionable Bargains.* Equity intervenes to set aside unfair transactions made with "poor and ignorant" persons. It is not enough to show that the transaction was hard and unreasonable. Three elements must be established: first, that one party was at a serious disadvantage to the other by reason of poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken; secondly, that this weakness was exploited by the other in a morally culpable manner; and thirdly, that the transaction was not merely hard, but oppressive."

In the instant case the respondent was an obviously poor and uneducated person, in poor health because of his injuries, subject to, and dependent on the benevolence of the third appellant. In those circumstances, therefore, he was vulnerable to the influence of the appellants. Prior to any entry into a contractual bargain, it was necessary to advise him to obtain and for him in fact to obtain independent legal advice.

Rule 2.3(3) of the Court of Appeal Rules 2002("the Rules") provides that:

> " (3) A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds."

Where no counter-notice is filed by the respondent, he is not precluded from advancing an argument in his favour. Rule 1.16(2) reads:

"1.16 ...

(2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless -

(a) it was relied on by the court below; or
(b) the court gives permission.

(3) However –

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but

(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground."

At the hearing before us, the record did not reveal that the issue of unconscionable bargain was raised by the respondent at the trial. Consequently, not having filed a counter-notice, the respondent would need the court's permission to advance that issue. The court could consider it only if "... the other party to the appeal ... had sufficient opportunity to contest such ground."

Counsel for the respondent did argue that the principle of undue influence applied, but he was permitted to advance also the concept of

unconscionable bargain recited in his skeleton arguments filed and in his submissions before us. His skeleton arguments filed reads:

> "12. The Courts have held that even in the absence of duress and undue influence the courts will interfere, in the exercise of its equitable jurisdiction to strike down an agreement where the terms are harsh and unconscionable. The court's jurisdiction extends to all persons under pressure and without adequate protection. No Court will countenance or will allow a party to rely on an unconscionable bargain. ***See Halsbury's Laws of England 4th ed. Vol. 9(i) para 716.***"

This court did refer Mr. Garcia for the appellants, to the fact of unconscionable bargain, to which he replied, dismissively, that he thought that the respondent would need to file a counter-notice. Unfortunately, I do not agree. The respondent's skeleton arguments were served on the appellants and the submissions were advanced. The appellants therefore had ample opportunity "to contest such ground." This Court may therefore make a decision on the said ground. There is a real prospect of success that the respondent was a party to an unconscionable bargain. Ground a. therefore fails.

Ground b. was a complaint that the learned trial judge failed to find that the 2nd defendant was not the agent of the 1st defendant. Clearly, there was no evidence on the affidavits to support the allegation of the relationship of agency between the 1st and 2nd appellants. The 1st appellant should have been struck out from the claim in that regard.

In all the circumstances, the respondent was severely injured by the action of the 2nd appellant. A real prospect of success exists in that he was the victim of an unconscionable bargain in signing the said release. He said at paragraph 16 of his affidavit, at page 58 of the record:

> "16. That I had not been given an opportunity to read the paper that I signed and I did not have anyone read it over for me and explain to me what the paper meant because I as so anxious to get money that I need just to live."

He was at that time, well known to the appellants, represented by counsel, Mr. Green, attorney-at-law. The patently, undignified comment of Horace Peterkin in his affidavit dated December 23, 2002, having spoken to Dimitri Singh that "Mr. Leonard Green, attorney-at-law, claimed to represent the plaintiff (the respondent)" does no credit to the appellants. That statement exhibits a decided course of action to deny to the respondent independent legal advice prior to the signing of the said release.

For the above reasons I am of the view that the appeal should be dismissed.

PANTON, J.A.

1. On May 9 and 10, 2005, we heard submissions in this appeal from a decision of Sykes, J.(Ag.) (as he then was) wherein on December 23, 2004, he had refused the appellants' application for summary judgment.

On May 13, 2005, we gave our decision allowing the appeal of the first appellant, and dismissing the appeals of the second and third appellants. We also awarded costs, both here and in the Court below, to the first appellant whereas we awarded the respondent his costs against the second and third appellants in respect of the proceedings before us.

2. It was readily conceded that in respect of the first appellant, Gordon Stewart, the appeal had to be allowed as, firstly, the learned judge made no finding in respect of him so far as vicarious responsibility for the acts of the second appellant is concerned; and, secondly, the available evidence indicates that the first appellant was in no way responsible for the tort alleged. The challenge to the other aspects of the decision was based on the ground that the learned judge applied the wrong test in adjudicating on the matter.

3. The relevant undisputed facts that were before the judge are that the respondent was seriously injured while in the sea in the vicinity of the Sandals Montego Bay Hotel, which is owned and managed by the third appellant. The respondent's injuries were sustained when there was an accident involving him and a ski boat owned and operated by the third appellant. The second appellant was at all material times employed to the third appellant and was physically operating the boat at the time of the accident. The respondent was hospitalized for over a year.

4. During the period of hospitalization, the respondent received financial assistance from the third appellant. In August 2001, the respondent signed a document headed "Release". It acknowledged the receipt of "past medical and financial assistance amounting to $103,833.03" as well as a further "sum of $380,000.00 (along with a cellular phone) as additional compensation". The document also includes a statement that the respondent had not given, and would not be giving, "any instructions to any attorney-at-law to seek any additional compensation" on his behalf.

5. Notwithstanding this "Release", the respondent filed suit and in an amended statement of claim filed April 19, 2002, he sought damages for negligence, he having suffered permanent impairment of 100% of the right lower limb, being 40% of the whole man. Interlocutory judgment in default of defence was entered on July 25, 2002, but this was set aside on January 31, 2003, and the appellants were given leave to file their defence. They did so on February 3, 2003. In their defence, they deny negligence and rely on the Release referred to earlier. The appellants took matters a step further when, on August 31, 2004, they applied for summary judgment, stating that on the basis of the Release, the claimant had no real prospect of succeeding on the claim.

6. Sykes, J. heard the application on November 30 and December 10, 2004, and on December 23, 2004, he delivered his decision, with written

reasons, dismissing the application. No doubt, he appreciated that a matter of this nature requires speedy determination. He described the respondent as an "unlettered man" with a "low level of education". The judge also interpreted the respondent's affidavit as indicating that persons acting on behalf of the appellants had befriended the respondent, leading him to believe that he could trust them to protect his interest. Sykes, J. concluded:

> "Admittedly, this is not the only interpretation. However if this is a legitimate interpretation of his affidavit then it shows that this is an inappropriate case for summary judgment. There are serious issues of fact to be tried". (page 78 of the record, para.21 of the reasons for judgment)

The learned judge reasoned that there was "more than the skeleton of a successful plea of undue influence" (page 81 of the record, para.28 of the reasons for judgment). He was, however, cautious enough to add that "whether it will succeed depends on what happens at the trial".

7. Before looking at the challenge that was mounted against the judgment, it would perhaps be useful to set out what I regard as the most relevant and important parts of the respondent's affidavit, sworn to on the 9th December, 2004.

> **Para. 5** "That during the period of my hospitalization at the Cornwall Regional Hospital, Montego Bay...I was visited by persons saying that they are from...Sandals Montego Bay and they provided me with foodstuff and the occasional supply of toiletries and money and I

developed a close personal relationship with them and I trusted them."

Para. 7 "...they always wanted to settle the case with me and sent a number of people to me for that purpose and I always wanted to settle the case because I was in need and had family members who had been dependent on me for support..."

Para. 8 'That I am not well educated and I can hardly read and I do very little writing."

Para. 9 'That I obtained the services of Mr. Leonard S. Green attorney around January 2, 2000 to represent me in my claim against the defendants..."

Para. 10 'That I am informed... by my said attorney-at-law ...that Sandals Montego Bay and their representatives have declined to deal with my legal representative preferring instead to deal with me directly and not advising me that in the matter of a legal claim for personal injury, my interest would best be served if I am represented by an independent attorney-at-law."

Para. 11 'That since the defendants and their agents were friendly I developed confidence in them believing that they had my best interest at heart and would not cheat me from what I was justly entitled to for the very severe injuries I received."

Para. 12 'That when I left the Cornwall Regional Hospital I was destitute impoverished and permanently disabled and further that I had incurred substantial expenses at which point Sandals Montego Bay and their representatives, offered to pay me money if I signed a paper which I did and received the sum of **THREE HUNDRED AND EIGHTY THOUSAND DOLLARS** ($380,000.00) and a cellular phone for so doing."

> **Para. 13** 'That when I signed the paper it was not explained to me that this payment was intended to be the full and final payment for all my injuries that I sustained and I thought that the amount was to be considered a gift to help me to offset some of the costs I was facing. Further I was not given an opportunity to have the paper explained to me by my own lawyer..."
>
> **Para. 15** "..I never believed that monies paid to me was intended to provide full and final payment for my claim."
>
> **Para. 16** 'That I had not been given an opportunity to read the paper that I signed and I did not have anyone read it over for me and explain to me what the paper meant because I was so anxious to get money that I need just to live."

8. The appellants challenged the decision of the learned judge on the ground that he erred in concluding that there was a strong arguable case, and that the respondent had a real prospect of success. Mr. Dave Garcia, with commendable clarity, in written submissions (along with Mr. Nigel Jones) and orally before us, advanced the argument that having regard to the Release, the appellants are to be regarded as having been discharged by the respondent, so there is no real prospect of success. In any event, according to Mr. Garcia, the claim that undue influence was used falters by virtue of the lack of the two elements that must be proven:

(a) a relationship of trust and confidence capable of giving rise to the influence; and

(b) abuse of the relationship.

9. The appellants submitted that the learned judge made a faulty assessment of the respondent's affidavit, and thereby fell into error in the conclusion that he arrived at. He ought to have assessed the affidavit for evidence of the requisite relationship giving rise to undue influence, and then say whether he found that there was the prospect of success. Instead, the judge proceeded, it was submitted, on the basis that all that was required was for the respondent to raise an issue for trial. Further, it was argued, questions of whether the transaction was to the manifest disadvantage of the respondent or whether he was independently advised (or was told to take independent advice) do not arise, as the respondent has not shown any real prospect of succeeding in establishing that the relationship existed.

10. The grounds for giving summary judgment are set out in the Civil Procedure Rules 2002. Rule 15.2 states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) the claimant has no real prospect of succeeding on the claim or issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

It is this provision that guides a judge before whom an application for summary judgment is made. The provision is similar to that which guides the English Courts. In **Sinclair v. Chief Constable of West Yorkshire and**

Another [2000] All ER (D) 2240, Lord Justice Otton confirmed the position with these words:

> "In order to defeat the application for summary judgment it is sufficient for the respondent to show 'a prospect'- i.e. some chance of success. However the prospect must be 'real'. The Court must disregard prospects which are merely fanciful, imaginary, unreal or intrinsically unrealistic".

11. I am not sure that it is correct to say that Sykes, J. used the wrong test in dealing with this matter. In paragraph 6 above, reference has already been made to passages from his judgment at pages 78 and 81 of the record. There, he indicated that it was his view that there are serious issues to be tried and that there seems to be room for the defence of undue influence to succeed. He had been referred to the case **Swain v. Hillman** [2001] 1 All ER 91. At paragraph 11 of his judgment (pages 73-74 of the record), the learned judge was apparently critical of the reasoning in **Swain** (supra) when he said:

> "This case has been cited with great frequency in these Courts but I am not so sure that the definitions offered there are particularly enlightening".

However, he continued by saying that if he were wrong in his view of the case he hoped to demonstrate in any event that the criteria in the **Swain** case had been easily met. Although he placed question marks against some aspects of the judgments in **Swain** (supra) he ended up saying this in paragraph 22 of his judgment (page 78):

> "Applying **Swain**, summary judgment would not be appropriate. **The issues can only be resolved at a trial.**" [Emphasis added]

In **Swain** (supra) Lord Woolf, M.R. (as he then was) concluded that the civil procedure rules were **"not meant to dispense with the need for a trial where there are issues which should be investigated at the trial"** [emphasis added] (page 95b). Pill, LJ and Judge, LJ agreed. This case, and others to which I need not refer, are saying that summary judgment ought not to be granted where a party has a real, as distinct from a fanciful, prospect of success in the matter that is before the Court. Where there are genuine issues to be tried, the trial should proceed. It is clear that in the instant matter, that was the view of Sykes, J. He was also of the view that the respondent had a real prospect of success. However, he may have erred so far as the nature of the issue to be tried is concerned. He focussed on undue influence, but the appellants are right that undue influence in the strict sense of the term may not be a live issue. That, however, in my view, is not the end of the matter.

12. Mr. Leonard Green, for the respondent, approached the matter in this way. He said that the categories of undue influence are not closed, and that the circumstances of the agreement will determine the question of the relationship. He maintained that there was ample evidence of a relationship of a confidential nature. The payment made to the respondent was an abuse of that relationship, and has caused manifest

disadvantage to the respondent. The appellants, he said, ought to have been put on their guard that the respondent had legal representation. Mr. Green relied on the cases **Horry v Tate and Lyle** [1982] 2 Lloyd's Law Reports 416 and **Lloyds Bank v Bundy** [1975] 1 Q.B. 326.

13. In the latter case, the question was whether there was need for independent advice to be taken by a man who had used his house to guarantee the bank overdraft of a company formed by his only son. Both men had been customers of the bank for many years. The English Court of Appeal (Lord Denning, M.R., Cairns, L.J. and Sir Eric Sachs) held that the bank had breached its fiduciary duty of care and the guarantee and charge should be set aside for undue influence. The man's signing of the guarantee and the legal charge involved a conflict of interests which could have resulted in his losing his sole remaining asset to the bank and being left penniless in old age, and he had had no independent advice as to the wisdom of what he was doing.

14. Mr. Green relied heavily on the judgment of Sir Eric Sachs, making particular reference to page 340H to page 341G wherein the learned judge considered the question of whether there was a duty of fiduciary care on the part of the bank. At page 345G, Sir Eric Sachs concluded that "on the... recited facts, the breach of the duty to take fiduciary care is manifest". Cairns, L.J., in a brief judgment, which I am substantially recounting, said:

> "I have had some doubt whether it was established in this case that there was such a special relationship... as to give rise to a duty on the part of the bank...to advise...about the desirability of ..obtaining independent advice. In the end, however, for the reasons given by Sir Eric Sachs...I have reached the conclusion that in the very unusual circumstances of this case there was such a duty. Because it was not fulfilled, the guarantee can be avoided on the ground of undue influence. I therefore agree that the appeal should be allowed, the judgment for the plaintiff set aside and judgment entered for the defendant". (page 341D-E).

Having concluded that there was a breach of the duty to take fiduciary care, Sir Eric Sachs went on to say at page 347A:

> "As regards the wider areas covered in masterly survey in the judgment of Lord Denning M.R., but not raised arguendo, I do not venture to express an opinion - though having some sympathy with the views that the courts should be able to give relief to a party who has been subject to undue pressure as defined in the concluding passage of his judgment on that point".

The passage in Lord Denning's judgment with which Sir Eric Sachs was empathizing reads thus:

> "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the

> benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself'. (page 339C-E)

15. Mr. Green also sought support for his argument from the publication "The Law of Restitution" (5th edition) by Lord Goff and Gareth Jones, Q.C. He made reference to page 359 which deals with the topic of presumed undue influence, and submitted that if this Court infers that undue influence is raised by the evidence, there would be a legal requirement for the matter to be tried. He further submitted that the Court below made the correct decision in dismissing the application even if the route it took was incorrect. He prayed in aid a passage from Lord Denning's judgment (referred to above) where the Master of the Rolls, in dealing with situations where a party has entered into a bargain not to his benefit, referred to a fourth category of "undue pressure" (page 338 D-E). In giving examples of this category, Lord Denning said:

> "Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit".(page 338G).

Lord Denning then quoted Stuart V-C in the case **Ormes v. Beadel** (1860) 2 Giff.166 at 174:

> "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this court will set it aside". (page 338G-H)

Mr. Garcia's response was that there was no fiduciary relationship, and that Sykes, J.(Ag) never referred to it. Independent advice arises only after undue influence has been shown, and there was none in this case. Further, unconscionability was a separate ground for challenge.

16. Mr. Garcia's stand is understandable. However, it overlooks the fact, it seems to me, that what the learned judge has done is to give the respondent an opportunity to present his case in circumstances that are not entirely clear-cut in favour of the appellants who have been unsuccessful before us. There is evidence which indicates that the appellants, though aware of the fact that the respondent had retained the services of an attorney-at-law, refused to treat with that attorney-at-law in respect of the interests of the respondent. On the face of it, that was not a proper approach by the appellants. In my view, that fact alone was sufficient in the circumstances of this case to require that the issues be tried. In arriving at my decision, that situation played a very important part. It is notorious that this country has had serious problems with the level of literacy. It follows therefore that when an unlettered person retains an attorney-at-law to protect his interests, that situation should not be taken

lightly. It may well be shown in the long run that the ignoring of the respondent's legal representative was of no effect so far as the signing of the Release was concerned. However, that is a matter for the trial.

17. Lord Denning's views, which were quoted earlier, may not have been readily accepted in England. However, it has been noted that they were quoted with approval by the Ontario High Court in **McKenzie v. Bank of Montreal et al** (1975) 7 O.R. (2d) 521, where a bank was held to have taken unfair advantage of a woman's emotional relationship with a man and of a wrongful seizure of the woman's car. In an article in the Modern Law Review [Vol. 39 July 1976, page 369] S. M. Waddams, Associate Professor, Faculty of Law, University of Toronto, in dealing with unconscionability in contracts, referred to those "cases in which there was no weakness of intellect but simply an undue advantage taken of inequality of bargaining power". He quoted Kay, J. in **Fry v. Lane** (1888) 40 Ch.D. 312 thus:

> "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction. This will be done even in the case of property in possession... The circumstances of poverty and ignorance of the vendor and absence of independent advice throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just and reasonable' ".

The writer went on to say:

> "This line of cases has been taken up and extended in a series of modern Canadian cases.

> The clearest cases of relief on this ground have been in favour of vendors of land, but analogous cases have granted relief also to buyers of goods and services, and to **injured persons who disadvantageously agree to release their actions for damages for personal injuries.** These cases, adopting a comment by a Canadian writer, lay down as the criterion of relief an immoderate gain or undue advantage taken of inequality of bargaining power." (Emphasis added)

18. In the circumstances, and for the reasons that I have stated, I had no hesitation in agreeing with my learned brother and sister that the decision of Sykes, J. should be affirmed so far as it relates to the second and third appellants. I hope that the Registrar of the Supreme Court will arrange for the matter to be tried at an early date.

HARRIS, J.A. (Ag.)

This is an appeal from a judgment of Sykes, J. in which he dismissed an application by the appellants for Summary Judgment.

The respondent sustained severe injuries on November 12, 1999, when a ski boat operated by the 2nd appellant collided with him while he swam in the sea close to property occupied and operated by the 3rd appellant as a hotel known as Sandals Montego Bay.

In a claim for negligence, the respondent sought to recover damages against the 1st appellant as the owner or purported owner of

the hotel, against the 2nd appellant as an employee of the 3rd appellant company and against the 3rd appellant as the operator of the hotel.

A Writ of Summons was issued by the respondent on May 24, 2001. Statement of Claim was filed on July 11, 2001. On April 19, 2002, the respondent filed an Amended Writ of Summons and Statement of Claim which were served on the appellants. Appearances were subsequently entered by all appellants.

An interlocutory judgment in default of the defence was obtained by the respondent against the appellants on July 25, 2002. Following this, the appellants successfully applied to set aside the judgment. They filed a defence denying liability and specifically pleaded a Release which had been executed by the respondent.

On August 8, 2001, the respondent executed a Release in which he accepted compensation from the 3rd appellant in the form of gifts of groceries, toiletries, money, payment of medical expenses and rental amounting to $103,833.03 as well as $380,000.00 and a cellular telephone. Incorporated in the Release was a Clause absolving the appellants from current and future liability to the respondent.

In a letter dated January 4, 2000, Mr. Leonard Green, Attorney-at-law wrote to the Manager of Sandals, Montego Bay informing him that he represented the respondent, and inviting him to communicate with him,

Mr. Green, to negotiate a settlement. A copy of his letter was sent to the 1st appellant.

On August 4, 2000, Mr. Green wrote to Axis Jamaica Ltd., the insurers of the 3rd appellant, in response to a letter from them bearing the date March 21, 2000. In his letter Mr. Green outlined, among other things, that he had written authorization from the respondent to act on his behalf. On August 8, 2001, a letter from Sandals Resort Jamaica Ltd. under the hand of Mrs. Taynia Nethersole, was sent to Mr. Green, enclosing the Release.

Two grounds of appeal were advanced by the appellants. The first ground is expressed thus:

> "The learned judge erred in concluding that there was a strong arguable case and that the claimant had a real prospect of success based on the affidavit evidence presented by the Appellants and Respondent in the Court below."

Mr. Garcia urged that in light of the Release, the doctrine of Accord and Satisfaction operates as a complete defence to the claim.

In support of the doctrine, he cited **British Russian Gazette and Trade Outlook Ltd. v. Associated Newspaper Ltd.** [1933] 2 K.B. 616 at 643-644 where Sutton, L.J. stated:

> "Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is

> discharged. The satisfaction is the consideration which makes the agreement operative."

He further submitted that the Release is an agreement between the parties which obviously demonstrates an Accord. Satisfaction is shown by way of the consideration of $380,000.00 and a cellular telephone to which reference had been made in the Release.

The learned trial judge, although accepting Mr. Garcia's submissions as correct, nevertheless found that the respondent had a strong arguable case of undue influence. However, the fundamental issue which fell for consideration before the learned trial judge was whether there was a real prospect of success of the respondent's claim in light of his challenge to the Release by raising the principle of undue influence.

The doctrine of undue influence was defined by Lord Nicholls of Birkenhead in **Royal Bank of Scotland plc v Etridge (No 2)** [2002] 2 A.C. 773 at 794 and 795 thus:

> "Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused... [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

Inherent in this equitable doctrine are two principles. Firstly, it must be established that a relationship having the capacity to give birth to

the necessary influence exists. It is also essential that the influence created by the relationship resulted in an unfair advantage to the party over whom the influence is exerted.

In dealing with the matter of the relationship, in **National Commercial Bank Jamaica Ltd. v. Hew** (2003) 63 W.I.R. 183, at 192, Lord Millet stated:

> "The necessary relationship is variously described as a relationship 'of trust and confidence' or 'of ascendancy and dependency'. Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case."

There must be in existence, evidence to establish the necessary relationship. It must be shown that the vulnerable party reposed trust and confidence in the other party, or, that the vulnerable party was in some way dependent on the dominant party. The relationship may be proved or presumed. The existence of a fiduciary or a special relationship between the parties may raise the presumption.

In **National Westminster Bank plc. v. Morgan** [1985] A.C. 686 Lord Scarman observed that the presumption arises if one person exercised a "dominating influence over another" and that the transaction must be to the manifest disadvantage of the other. In **Re Coomber** [1911] 1 Ch

723, 729 Fletcher Moulton L.J. opined that "the nature of the fiduciary relationship must be such that it justifies the interference". Nourse L.J., in **Goldsworthy v Brickell** [1987] Ch. 378, 401 expanded the categories of relationship falling within the ambit of undue influence when he said:

> "The degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made."

It was the learned trial judge's finding that there was a special relationship between the parties. He based his findings on two averments in the Affidavit of the Respondent. In paragraph 5 of the Affidavit sworn by the respondent on December 9, 2004, he stated:

> "5. That during the period of my hospitalization at the Cornwall Regional Hospital, Montego Bay in the parish of Saint James I was visited by persons saying that they are from the said Sandals Montego Bay and they provided me with foodstuff and the occasional supply of toiletries and money and I developed a close personal relationship with them and I trusted them."

At paragraph 11 he stated as follows:

> "11. That since the Defendants and their agents were friendly I developed confidence in them believing that they had my best interest at heart and would not cheat me from what I was justly entitled to for the very severe injuries I received."

In dealing with the last mentioned averment the learned trial judge said:

> "21. . . . Mr. Samuels is an unlettered man. By his own admission he is not well educated. He says he can hardly read and does very little writing. From his visits to chambers he is a patois speaker. His affidavit was put in Standard English by his lawyers. When Mr. Samuels speaks of the defendants or persons acting on their behalf being friendly and his thinking that they had his "best interest at heart" I understand him to be saying that the defendants "fren im up". In Jamaica, this means that the persons befriended him, led him to believe that he could trust them and so he relied on their words. Admittedly, this is not the only interpretation. However if this is a legitimate interpretation of his affidavit then it shows that this is an appropriate case for summary judgment. There are serious issues of fact to be tried."

The learned trial judge construed the respondent's use of the word "friendly" to mean that the appellants befriended the respondent and concluded that this led the respondent to believe that he could have trusted the appellants. Words must be given their true ordinary meaning. The word "friendly" cannot be used interchangeably with the word "befriended". By the use of the word "befriended" in substitute of the word "friendly" the learned trial judge misconstrued the true meaning of that which was intended to be conveyed by the respondent.

The respondent described the relationship between the parties as one which developed into a close personal one over the period during which he received the donations. He alluded to developing the

relationship "with them" and trusting "them." Those persons to whom he referred were never identified as agents of the appellants. However, the 3rd appellant, in the affidavit of its manager Mr. Horace Peterkin, stated that gifts were made to him and these he so acknowledged by execution of the Release. This, nonetheless would not support the assertion that a close relationship existed between the parties.

There is no evidence that any of the persons with whom the respondent developed the close relationship were persons directly connected to the appellant, or that they engineered his execution of the Release. Further, the appellants had never admitted liability. The fact that a Release was signed is not necessarily an admission of liability.

Statements by the respondent with reference to the close personal relationship with persons connected to the appellants and to the appellants' agents being friendly, would not be adequate to support a presumption that the parties enjoyed the necessary relationship. There ought to have been much more to show that a special relationship existed between them.

I will now turn to the second limb of undue influence. A court of equity will only intervene to give relief to a party where parties at the time of a transaction are in a particular relationship of confidence with each other and one resorts to the use of pressure or deception over the other, or take unfair advantage of him. The presumption of undue

influence does not operate simply because parties are in a confidential relationship.

Equity will not intervene unless the influence which has been exercised is an abuse of the confiding party. In **National Commercial Bank v Hew** (2003) 63 W.I.R. 183 at p. 193. Lord Millett said:

> "However great the influence which one person may be able to wield over another, equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimized by other people; see *Allcard v Skinner* (1887) 36 Ch D 145 at 182."

It follows therefore, that it must be demonstrated that the party in whom trust and confidence were reposed unfairly exerted influence "he is shown or presumed to possess, over the vulnerable party". There must also be evidence that the transaction is disadvantageous to the vulnerable party. In defining "disadvantageous," Lord Millett, in **National Commercial Bank v Hew** (supra) stated – "But 'disadvantageous' in this context means 'disadvantageous' as between the parties."

He continued by saying:

> "Unless the ascendant party has exploited his influence to obtain some unfair advantage from the vulnerable party, there is no ground for equity to intervene."

In an attempt to satisfy the second criterion of the doctrine, the learned trial judge erroneously embarked on an assessment of an amount which the respondent might receive on an award of damages,

provided liability was established. In a comparative review of the assessed sum, with the amount paid to the respondent under the Release, he found that on the face of it, the transaction between the parties would be to the manifest disadvantage of the respondent. It is clear that there was no admission of liability. Consequently, the respondent runs the risk of not receiving an award if the matter proceeded to trial. Therefore, the value of any sum which he may receive in the future cannot be measured against that which he had obtained under the Release.

It was also a finding of the learned trial judge that the respondent's low level of education is also evidence capable of supporting the view that the appellants had gained some unfair advantage from him. The fact that the respondent was an unlettered man, would not in itself show that the transaction was manifestly to his disadvantage.

Mr. Garcia also submitted that the respondent sought to raise undue influence in response to that which would otherwise have been a complete defence but the learned trial judge should have assessed the appellant's evidence by way of his affidavit on the assumption that it was his evidence of undue influence and decide whether it had prospect of success. The learned trial judge instead proceeded as if it

was only necessary for the respondent to raise a triable issue and concluded that there were serious issues of facts to be tried.

The learned trial judge undertook an analysis of the meaning of the words "real prospect of success". In the course of his analysis, he made reference to **Swain v Hillman and Another** [2001] 1 All E.R. 91 which had been cited by Mr. Garcia to support his contention that the respondent had no real prospect of successfully pursuing his claim.

In **Swain v. Hillman and Another** (supra) despite certain deficiencies in the claimant's case it was held that there was a "real as distinct from a fanciful prospect of success".

The learned trial judge asserted that "when the allegations of **Swain** are examined, it will be seen that the threshold to satisfy the test of 'real prospect of success' is very very low."

He went on to state:

> "If **Swain** is correctly decided then it does suggest that the criterion for establishing that a case has a real prospect of success is perhaps not far above that required for an injunction, namely, a serious triable issue. I need not come to a final position on the correctness of **Swain** because whatever is the ultimate meaning of "real prospect of succeeding", in this case the issue of undue influence is such that I cannot say at this stage that the claimant's case is hopeless. He has a strong arguable case. I cannot say that it is bound to succeed but neither can I say that it is doomed to failure."

The Affidavit of the respondent which sought to introduce the plea of undue influence did not contain sufficient evidence to raise the plea. The learned trial judge however, considered and found that there was "a strong arguable case of undue influence." He also considered and found that there were serious issues of facts to be tried. He had an obligation to have given consideration to the sufficiency of the respondent's evidence with respect to the issue of undue influence and to decide whether based on the evidence before him, there was real prospect of success of the respondent's claim. The evidence did not support his findings.

The foregoing notwithstanding, it would have been open to the learned trial judge to have considered whether, in the circumstances of this case, the principle of unconscionable bargain within the context of undue influence applies, as the classes of undue influence are expansive. Mr. Garcia urged that this is a new ground and the respondent would have had to file a Counter Notice of Appeal in support of such ground. In my view the filing of a Counter Notice would have not been necessary. On the hearing of an appeal, under Rule 1.16(4), the court is entitled to draw inference of facts which, in its view, the evidence justifies. In light of the evidence, this court could consider whether the doctrine of "unconscionable bargains" could avail the respondent.

The general rule is that the common law will not aid a claimant in cases in which some unconscionable conduct on the part of the defendant is evident. However, there are exceptions to this rule, as equity will intervene to grant redress in such cases. Equity will grant relief in situations where an unfair disadvantage has been acquired by an unconscientious use of power by a strong party against a weak one.

In **Lloyds Bank v Bundy** [1975]1 Q.B. 326 at 336H-337A Lord Denning declared:

> "There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court."

He enumerated four categories of cases falling within the scope of the equitable jurisdiction. These are "duress of goods", "unconscionable transactions", "undue influence" and "undue pressure."

At page 339 C-D he went on to state:

> "I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

In dealing with "unconscionable transactions", the learned authors of Modern Equity by Hanbury and Maudsley 12th Edition 1985 at page 803 stated:

> "Equity intervenes to set aside unfair transactions made with "poor and ignorant" persons. It is not enough to show that the transaction was hard and unreasonable. Three elements must be established: first, that one party was at a serious disadvantage to the other by reason of poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken; secondly, that this weakness was exploited by the other in a morally culpable manner; and thirdly, that the transaction was not merely hard, but oppressive."

Alec Lobb (Garages) Ltd. and Others v Total Oil G.B. Ltd. [1983] 1 W.L.R. 87 was cited by the authors in support of this statement. In that case, there was no pressure, impropriety, and separate legal advice had been taken.

The learned author of Snell's Equity (29th edition) at page 559 in recognition of the principle declared:

> "Under a well-established jurisdiction, equity will set aside a purchase from a poor and ignorant vendor at a considerable undervalue, where the vendor acts without independent advice (see **Butlin-Sanders v Butlin**(1985) 15 Fam. Law 126) unless the purchaser satisfies the court that the transaction was fair, just and reasonable **(Fry v Lane** (1888) 40 Ch.D. 312 at 322; **How v. Weldon** (1754) 2 Ves.Sen. 516; **Wood v. Abrey** (1818) 3 Madd. 417) It has been said that "poor and ignorant" may nowadays be understood as "member of the lower income group" and less highly educated," the latter requirement being applied in particular to the person's understanding of property transactions. (**Cresswell v. Potter** (1968) [1978] 1 W.L.R. 255n. at 258, per Megarry J. (Post Office telephonist). **Cf. Backhouse v. Backhouse** [1978] 1 W.L.R. 243)."

The respondent was a fisherman. He was injured in an accident with the 2nd appellant, the 3rd appellant's employee. The 3rd appellant operates a hotel in the vicinity in which the respondent was injured. The 3rd appellant admitted being the owner of the boat which was involved in the accident. It has been shown from the Statement of Claim that the respondent's injuries were extensive. He was hospitalized for over a year. For a period during his illness he received gifts of groceries, toiletries, payments of medical expenses, and payment of rental amounting to $103,833.03, which the appellants acknowledged were given to him.

On August 8, 2001, he executed a Release, the terms of which were as follows:

"I (Herman) Samuels acknowledge all past medical and financial assistance amounting to $103,833.03 (doctor's visit $3,300.00, medication $4,528.41; groceries $2,004.50; hotel food stuff $54,726.12; room rental $28,650.00; other expenses of $10,624.00 provided to me by Bay Roc Ltd., better known to me as Sandals Montego Bay.

I further acknowledge and accept the sum of $380,000.00 (along with a cellular phone) as additional compensation. In consideration of said compensation, I unconditionally release Bay Roc Ltd., trading as Sandals Montego Bay, its associates, its agents and employees, Mr. Gordon, 'Butch' Stewart and his associated companies, associates and agents from any and all liability, now and in the future, with respect to this incident.

I am also stating that I have not in the past nor will I give any instructions to any Attorney-at-law to seek any additional compensation on my behalf.

I sign this document freely and willingly in the presence of witnesses.

SIGNED BY:
Merick Samuels

WITNESS
Mickoyan Robinson
Flankers District

WITNESS
Prince E. Brown
Flankers Dist., Flankers P.O."

It appears that despite the letter from Mr. Green, the 3rd appellant may have entered into an agreement with respondent in an effort to preclude him from proceeding with a claim against them. At that time,

they may not have been aware that he had commenced proceedings, as there is no evidence that the Writ of Summons or Statement of Claim of May 24, 2001 had been served on them. However, at the time of the execution of the Release the 3rd appellant knew by way of the correspondence that he was legally represented. Yet, in a flagrant disregard of that information they entered into an agreement with him.

He was offered the sum of $483,883.00 and a cellular telephone by way of the Agreement. His injuries are substantial. His hospitalization lasted over a year. The question which would arise is whether the respondent could have been exposed to an unfair advantage at the hands of the 2nd and 3rd appellants.

The respondent had been permanently disabled. He was in need of special care and protection. The 3rd appellant gave him some assistance. However, he is an uneducated man, a fisherman. The 3rd appellant is a hotel. The 2nd appellant is an employee of the 3rd appellant. It is unlikely that the respondent's bargaining position would be strong against the appellants. It could well be that his vulnerability was exploited by the appellants when they entered into negotiations with him, wholly ignoring that he was legally represented thus failing to give him the opportunity of obtaining independent legal advice.

Mr. Green submitted that if the matter proceeded to trial and the respondent succeeds, a compensatory award of approximately

$14,000.000.00 for pain and suffering would be adequate. He cited the case of **Gregory v Blackstock and Another** CL 1998/G098 Khan's Volume 5 p. 195 in support of his proposition. The injuries sustained by Mr. Gregory are considerably similar to those suffered by the respondent in the instant case. Mr. Gregory was awarded $10,000,000.00 in April 2000 for pain and suffering.

In all the circumstances of this case, it would be within the province of a trial court to decide whether a properly advised, uneducated, indigent, physically handicapped claimant would have accepted $483,883.00 and a cellular telephone as compensation for his injuries and whether the appellants had gained an unfair advantage over him by unconscientious use of power, he having an urgent need of resources.

There is a real prospect of the respondent successfully showing that the Release cannot be effectively classified as an Accord and Satisfaction.

The second ground of appeal was stated as follows:

> "The learned judge failed to make any finding on whether the respondent has a real prospect of success in establishing that the 2nd appellant was the agent of the 1st appellant."

Mr. Garcia complained that the learned trial judge failed to take into consideration and decide whether the 2nd appellant was the 1st appellant's agent, notwithstanding that he was empowered so to do.

Rule 15.6 (1) of the Civil Procedure Rule states:

> "15.6 (1) On hearing an application for summary judgment the court may-
> (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
> (b) strike out or dismiss the claim in whole or in part;
> (c) dismiss the application;
> (d) make a conditional order; or
> (e) make such order as may seem fit."

In the amended Statement of Claim, the claim with respect to the 1st appellant is based on an allegation that the 2nd appellant is an agent of the 1st appellant. There is also an alternative allegation that the 1st appellant was the 3rd appellant's agent. The defence denies the existence of the agencies alleged.

There is no evidence that the ski boat was owned by the 1st appellant. The 3rd appellant admitted ownership of the boat. They admitted that the 2nd appellant was their employee. The Sandals Hotel was operated and managed by the 3rd appellant. There is nothing to show that the 1st appellant managed and operated the hotel. The lands on which the hotel is sited is owned by the Commissioner of Lands.

No evidence has been presented to demonstrate that the 1st appellant is the owner of the hotel operated by the 3rd appellant. In paragraph 6 of the Affidavit of Sylvan Edwards it is stated that the 1st appellant started the Sandals chain of hotels and owns shares in the

corporate entity. This in itself is not sufficient to establish that the 1st appellant could be liable for the act of the 2nd appellant when the matter of the agency is not admitted nor established by the Affidavit evidence of the respondent. The fact the respondent heard on the television and radio that the 1st appellant is the owner of the 3rd appellant would not be sufficient to raise the issue of liability on his part. The 1st appellant ought not to have been named a party to the action.

The foregoing are my reasons for agreeing with the decision of my brothers Harrison and Panton JJA in allowing the appeal of the 1st appellant, dismissing the appeal with respect to the 2nd and 3rd appellants and ordering that the matter should proceed to trial.