

Franklyn Dailey

Appellant

v.

Harriet Dailey

Respondent

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL
(BRITISH VIRGIN ISLANDS)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 2nd October 2003

Present at the hearing:-

Lord Hope of Craighead

Lord Clyde

Lord Hutton

Sir Andrew Leggatt

Sir Philip Otton

[Delivered by Lord Hope of Craighead]

1. This is an appeal from a decision of the Court of Appeal of the Eastern Caribbean States sitting in the British Virgin Islands (Byron CJ, Redhead and Matthew JJA) dated 26 March 2001 reversing in part the decision of Moore J in the High Court dated 4 February 2000 in a dispute between the parties concerning their matrimonial property.

The background

2. The parties first met in about 1966. Their first child was born on 1 May 1967, and they were married on 31 December 1971. Their second child was born on 5 July 1972. At the time of their marriage the appellant was employed as a construction worker and the respondent worked as a ticket agent for the Puerto Rico International Airline. During the 1970s they began to acquire property in Tortola. Their first purchase was of land at Sophie Bay, and it was there that their matrimonial home was constructed.

They lived there together from about 1974. In about 1978 they set up a small children's store in Road Town, Tortola. By late 1979 they had constructed another building in Tortola. They opened another business there for the sale of household goods and food which they called Franklyn's General Market ("FGM"). The children's store was merged into that business, and in November 1979 the parties gave up their jobs elsewhere so that they could devote their joint efforts to running FGM full-time.

3. As a result of this change in their activities FGM became the sole source of the parties' income. They used this income to run their household as well as the business, and the money from it was set aside in various bank accounts. The respondent kept the books of the company and she handled the money which it generated. The income which they were able to save was placed into a personal joint account at Chase Manhattan Bank in Tortola. It was later transferred to a joint Certificate of Deposit account at Banco Popular De Puerto Rico, St Thomas, United States Virgin Islands ("the CD Account"). The parties also used the income from their business to purchase and develop real property in Tortola. Among the properties which they purchased in their joint names was a parcel of land known as Parcel 16, Block 3450B, East End ("Parcel 16") which they purchased in 1984 for \$150,000.

4. In or about 1983 the appellant met Karena Lewis with whom he developed an intimate relationship. The parties continued nevertheless to live together and to conduct their business as before, although the respondent was aware of the relationship. But on 9 February 1989 Karena Lewis gave birth to the appellant's child and in September 1989 Hurricane Hugo was approaching the Virgin Islands. The appellant went to live with Karena Lewis to ride out the storm with her, and the respondent went to live with her mother. The home at Sophie Bay was severely damaged by the hurricane. The parties were unable to continue living there, so they remained where they were. In the result the appellant began living with Karena Lewis permanently.

5. On 27 September 1989 the respondent signed an instrument of transfer by which in consideration of \$100,000 she transferred Parcel 16 from the parties' joint names to the name of the appellant only. At or about the same time the appellant, who suspected the respondent of appropriating money from the business to her own use, closed the CD Account and took over control of the books and financial transactions of the company. Karena Lewis also started working at FGM. On 4 April 1995 the appellant transferred Parcel 16 to FT Ltd, a company in which he held 99 shares and his brother

the only other share, for the nominal sum of \$1. In the same year the appellant sold the business of FGM to another company, Fahie Ltd, for \$100,000. By this time the parties' relationship had broken down irretrievably. In July 1995 the appellant commenced divorce proceedings against the respondent, and in October 1995 he instructed her to leave FGM's premises. In February 1996 the respondent commenced these proceedings against the appellant for ancillary relief under section 19 of the Married Women's Property Act.

The proceedings

6. Among the reliefs which the respondent sought in her originating summons were (a) a declaration that the instrument of transfer in respect of Parcel 16 was made under undue influence exercised by the appellant over her and an order for cancellation of the transfer (paragraphs 1 and 3), (b) a declaration that the property comprised in Parcel 16 was owned by the parties in undivided half shares or such order as to the ownership thereof as might be just (paragraph 8(b)) and (c) a declaration that the CD Account was jointly owned and an order to give effect to any such declaration (paragraphs 15 and 16).

7. Moore J said that two main issues had been identified for his determination by the respondent's counsel. These were (a) the extent of the respondent's share in the business of FGM and whether that share was to be reduced in terms of such sums as the appellant alleged that the respondent had misappropriated and (b) whether the respondent had transferred her share of Parcel 16 to the appellant by way of a proper sale or whether the appellant held that share in her favour on a resulting trust. Having heard and examined the evidence, the trial judge rejected the appellant's claim that the respondent had improperly drawn out money from the business. He held that the parties were the owners of FGM at all material times, and that the respondent was entitled to a one-half share in the proceeds of sale of FGM with interest at the rate of 5 per cent from the date of sale. But he rejected the respondent's claim that her agreement to the transfer to the appellant of her share in Parcel 16 had been obtained by the exercise of undue influence. He made no findings with regard to the CD Account. He dismissed all the respondent's other claims.

8. In the Court of Appeal the respondent, who was the appellant in that court, advanced three grounds of appeal. These were (1) that the trial judge erred in law in accepting an improper valuation of the business having regard to the evidence, (2) that he erred in law in dismissing the declaration which she had sought that the CD

Account was jointly held by the parties having regard to the evidence and (3) that the judge erred in law in failing to hold in the light of the evidence that the transfer of Parcel 16 was obtained by pressure, fraudulent misrepresentation and undue influence.

9. Matthew JA, with whose judgment the other members of the Court of Appeal concurred, rejected the first ground of appeal and this point is no longer in issue. Counsel for the parties were agreed that the trial judge did not deal with the CD Account. There was a dispute as to whether the amount in the account when it was closed by the appellant was \$85,000 as the respondent alleged or \$70,000 which was the figure contended for by the appellant. Matthew JA noted that the trial judge had made no finding that any of the funds of the business had been misappropriated. He said that it could not be inferred that he had made such a finding in relation to the CD Account in order to justify the appellant's withdrawal of the balance of money from it. So he would be willing to declare that the respondent was entitled to 50 per cent of \$70,000, which was agreed as being the least amount which the appellant had withdrawn. But he found it unnecessary to make a declaration to that effect, as the parties were agreed that the sum in question had been invested in the development of Parcel 16 and he was unable to agree with the trial judge that the transfer by the respondent of her share in Parcel 16 was made at arm's length. He declared that the instrument of transfer was made under undue influence exercised by the appellant over the respondent. He ordered the cancellation of the instrument of transfer and rectification of the entry in the Land Register relating to Parcel 16 to show the parties as its joint proprietors.

10. The appellant submits that the Court of Appeal was not entitled to reverse the findings of fact which were made by the trial judge. He maintains that there was evidence before the trial judge to support his judgment that the respondent was not entitled to any share of the money which was withdrawn from the CD Account. He also maintains that there was evidence to support the decision of the trial judge that the respondent's interest in Parcel 16 was transferred to the appellant for a money payment in a transaction at arm's length. It will be convenient to deal with these two issues in the reverse order.

Parcel 16

11. The trial judge devoted most of his judgment to the question whether the respondent's act in agreeing to transfer her share of Parcel 16 to the appellant was not a free and voluntary transfer but was, as was contended by her counsel (see paragraph 10 of the

judgment), coerced out of her as a helpless and pliant wife by an overpowering, domineering and oppressive husband. He said that the respondent impressed him as being the kind of woman whose will could not so easily or readily be overborne. But he also said that, unlike her husband whom he found to be a man of refreshing candour, she was a most unimpressive witness. He said, among other things, that she was hesitant, unconvincing and truculent and that the response which she gave to many of the questions which were put to her was bereft of truth.

12. There was an acute conflict of evidence as to what happened when the parties went to the chambers of Colin O'Neal in September 1989 to effect the transfer. He was the solicitor who prepared the document by which the respondent transferred to the appellant her interest in Parcel 16. Mr O'Neal said in his evidence that he received instructions from both parties that the property was to be transferred from their joint names to the appellant. He then drew up the instrument of transfer, and the parties returned to his chambers a few days later for it to be executed. He had prepared three copies of the instrument. Keeping one for himself, he presented each of the parties with their own copy which he then read through for them. He drew particular attention to a section in the document in which it was stated that receipt of the consideration of \$100,000 "is hereby acknowledged". He said that he specifically asked the respondent whether she had received that consideration, and that her reply was that she had. He then asked them whether they were ready to sign the document, and they both said that they were. The document was signed in his presence and that of his secretary, and he and his secretary witnessed the parties' signatures. The parties then took the document to a Mr Lionel Barker in an office nearby to be notarised. He said that the respondent did not express any reservations to him about the transaction which she was entering into. A few days later he received from the appellant the sum of \$4,000 which was the stamp duty payable on the consideration of \$100,000 stated in the instrument.

13. Mr O'Neal explained that he had had no previous dealings with the parties before they instructed him to draw up the document. The appellant did most of the talking, but he recalled asking the respondent if the instructions which he was being given were what they had agreed and she indicated to him that this was so. The appellant indicated that the consideration which the respondent had received was connected to their business in some way, but it was not made clear to him precisely how the consideration had been made up and he did not press them on this

issue. He did not regard himself as acting as a legal adviser to either party. He said that they had come to him with a settled intention and that they gave him their instructions. He tried to safeguard the respondent by asking her whether she had received the consideration that the appellant had indicated, and she said that she had. He admitted that, on reflection, it would have been prudent for him to urge her to seek independent advice on the import of the document. But it did not occur to him at the time that he should do so.

14. The respondent on the other hand said that she was given a paper to read when she went to Mr O'Neal's chambers but that it was not a copy of the instrument of transfer. She said that she did not read the document, as Mr O'Neal took it back from her while she was looking through it. She maintained that she did not sign any document in Mr O'Neal's chambers or in the presence of Mr O'Neal or his secretary. She said that she signed the instrument of transfer in Mr Barker's office, and that when she was going up the stairs the appellant told her that she was going to sign something and that she was not to ask any questions. She denied receiving \$100,000 from the appellant as payment for her share of the property. She said that she did not know that the effect of the document was to transfer her interest in the property to the appellant. She also said that it did not occur to her to ask Mr O'Neal what the nature of the document was before she signed it. She signed it simply because the appellant told her to do so.

15. The trial judge said that Mr O'Neal's evidence was clear, lucid and convincing and he totally rejected the respondent's evidence on this issue. He accepted Mr O'Neal's evidence that he was satisfied, as he too was satisfied, that the transaction was at arm's length and that no unfair advantage was being taken of the respondent. He noted that Mr O'Neal had agreed with the benefit of hindsight that it might have been better if she had been represented by a different attorney. But he said that Mr O'Neal was not admitting to any impropriety in the transaction, and that he for his part did not find any. The judge treated the issue between the parties as a straightforward issue of fact. On his approach it was for the respondent to show that she had been subjected to undue influence. He rejected her evidence that she did not receive \$100,000 for her interest in the property and that she did not understand the document which she signed because the appellant told her to do so. As he pointed out, this was entirely contrary to Mr O'Neal's evidence as to his understanding of her position before she signed the document in his presence and that of his secretary. It is clear that the key to the decision of the trial judge

lay in his assessment of the credibility and reliability of the witnesses, whom he had the advantage of observing when they were in the witness box.

16. In the Court of Appeal it was submitted on the respondent's behalf that the judge had failed to take into account the totality of the evidence. Matthew JA said that the appellant's evidence as to how he had paid the respondent the sum of \$100,000 was utterly unconvincing, as he had no idea of exact dates and had no receipts and no-one had witnessed these payments. He noted that the appellant was relying on the respondent's acknowledgement of receipt in the instrument of transfer. But he said that in his view this was not conclusive "since she may well have been operating under his influence at the time of the transaction" (see paragraph 41 of the judgment). Relying on a passage in the speech of Lord Browne-Wilkinson in *Barclay's Bank Plc v O'Brien* [1994] 1 AC 180, 189E-F, he treated the case as one where a confidential relationship had been proved and there was a presumption of undue influence. So it was for the appellant to prove that the transaction had been entered into at arm's length.

17. On this approach, if sound, there was no need for the respondent to produce evidence that actual undue influence had been exerted on her. As Lord Browne-Wilkinson explained in *O'Brien* at p 189F, the onus in such a case is on the alleged wrongdoer to prove that the complainant entered into the transaction freely, for example by showing that the complainant had independent legal advice. Matthew JA concluded that on the facts of this case the respondent could not be said to have obtained legal advice, far less legal advice which was independent, as she was never offered this opportunity. He did not reach a conclusion on the question whether the appellant gave value for the transfer beyond saying that this was "seriously doubted". He appears to have regarded a decision on this question as unnecessary. The crucial steps that led the Court of Appeal to decide that the transfer was made under undue influence were that, as the respondent reposed trust and confidence in her husband and as it was he who had initiated the transaction, the burden was on him to prove that the respondent entered into it freely and at arms length and that, as she did not have independent advice when she signed the instrument, this burden had not been discharged by him.

18. In their Lordships' opinion the Court of Appeal's decision was based on an erroneous application of what Lord Browne-Wilkinson said in *O'Brien* to the facts of this case as found by the trial judge. That was a case where the wife had agreed to a

mortgage of the matrimonial home to provide security to a bank for her husband's overdraft. It was held that where a wife had been induced to stand as surety for her husband's debt by his undue influence or misrepresentation she had an equity against him to set aside that transaction. The context in which he made his observations was entirely different on its facts from the present case. The appellant claims that the respondent agreed to sell her interest in the property to him for its full value, and that the document which they signed was intended to give effect to their agreement which he on his side had performed. Two points in particular which emerge from Lord Browne-Wilkinson's speech are essential to a proper application of it to the facts of this case.

19. The first point is that, as Lord Browne-Wilkinson made clear at p 190B, the relationship of husband and wife does not, as a matter of law, raise a presumption that undue influence has been exercised. In other words, if there is to be a presumption of undue influence, the fact that there was an opportunity for this has to be demonstrated. This may be done by showing that the wife generally reposed trust and confidence in her husband, was compliant to his wishes and simply did what he suggested without bringing a truly independent mind to bear at all on what he was asking of her.

20. That was not what the evidence amounted to in this case. As the trial judge explained, the appellant was gifted with an entrepreneurial instinct. But he was an unlettered man whose background was working in the construction industry. It was the respondent who dealt with the paperwork of FGM, purchased stock for it and transacted the financial business on its behalf. She did not suggest that her relationship with the appellant was such that she relied on the appellant in all financial matters and that she simply did what she was told. Her evidence was that they discussed their plans for the development of the business and the acquisition of investments (paragraph 11 of her first affidavit). Until the marriage broke down they had a sound working relationship with each other. The evidence does not support the inference that she was so compliant to the appellant's wishes that she followed his advice without bringing an independent mind to bear on decisions as to how their financial affairs were to be organised.

21. The respondent's case was directed instead to this transaction in particular. She said that the appellant told her that the transfer of her interest in Parcel 16 to him would solve any problem as to the division of the property on the death of either of them. She said

that she agreed to do this on his instruction without payment and without understanding the implications of what he was asking of her. It would be a matter for concern, of course, if the transaction which she was being asked to enter into was gratuitous or there were other reasons for thinking that it was unfair to her. There might then be a basis for finding that, as it was to her disadvantage and she simply did what she was told, she had been subjected to undue influence. But on the face of it the transaction was not of that character. The document states that the respondent was paid \$100,000 in exchange for the transfer to the appellant of her interest in the property. The crucial question is whether that was in fact what the transaction amounted to. The question whether the price was paid lies at the centre of the argument.

22. The second point is that the cases to which Lord Browne-Wilkinson was referring were cases where the wife had granted what he described as a “voluntary disposition” in favour of her husband. As he explained at p 196C, the tenderness of the law towards married women is reflected by the fact that voluntary dispositions by a wife in favour of her husband are more likely to be set aside than other dispositions by her. What he had in mind was the risk of misrepresentation if the transaction was not on its face to the financial advantage of the wife or was one which might expose her to a liability: see p 196D-E. That is not this case either, if the character of the transaction was accurately recorded in the document. Mr O’Neal was told that the respondent had been paid \$100,000 for her interest in the property. This was a substantial sum, which attracted \$4,000 by way of stamp duty. The question as to whether \$100,000 represented the full value of the respondent’s interest in the property was never in issue. The only issues were whether that sum was paid and whether the acknowledgement in the instrument of transfer that it had been received was accurate. The trial judge held that it was, and the Court of Appeal did not make a finding to the contrary.

23. Subsequent to the decision of the Court of Appeal in this case, there has been a further examination of the law relating to the circumstances in which transactions between husband and wife may give rise to the presumption of undue influence: see *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. In the course of his speech Lord Nicholls of Birkenhead examined the principle that in some cases it is sufficient to prove the existence of a particular type of relationship for there to be a presumption of undue influence. He made these observations about it at p 797G-H, para 19:

“It is now well established that husband and wife is not one of the relationships to which this latter principle applies. In *Yerkey v Jones* (1939) 63 CLR 649, 675 Dixon J explained the reason. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over a wife which the husband often possesses. But there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife’s confidence in her husband. The court will take this into account with all the other evidence in the case.”

24. Care needs to be taken to distinguish between cases where the wife has entered into a transaction with her husband which is gratuitous and those where the agreement is for her to receive full value for the property or interest which she is to transfer to him. In the former case, as Lindley LJ explained in *Allcard v Skinner* (1887) 36 Ch D 145, 185, the burden is on the donee to support the gift if it is so large as not to be reasonably accounted for on the ground of the relationship. A transaction which is entered into for full value needs no such explanation. There is no presumption to rebut. That is not to say that a transaction of this type is immune from the exercise of undue influence. But if it is to be set aside on this ground it is for the party who makes the allegation to prove that undue influence was in fact exercised.

25. The trial judge held that the respondent received the sum stated in the instrument of transfer in payment for her interest in the property. On his findings the present case plainly falls into the latter category. The Court of Appeal said that the appellant’s evidence that the sum had been paid was unconvincing and that the fact that the respondent signed the acknowledgement of receipt in the instrument of transfer was not conclusive on this issue. But they did not go so far as to reverse the finding by the trial judge, which was based on his assessment of the parties’ credibility. Nor would they have been entitled to do so, as it was not shown that his judgment on the facts was affected by material inconsistencies or inaccuracies or that he failed to appreciate the evidence or otherwise went plainly wrong: see *Watt v Thomas* [1947] AC 484, 491 per Lord Macmillan. His judgment on this issue was supported by the clarity and convincing nature of Mr O’Neal’s evidence who took great care to satisfy himself that the acknowledgement of receipt was accurate.

26. The grounds for saying that the appellant's evidence that the sum was paid was unconvincing are far from overwhelming when they are viewed in that light. If, as the trial judge held, the agreed sum had already been paid and if, as is not disputed, that sum was sufficient to give the respondent full value for her interest in the property, there was no need for her to be separately advised before she signed the instrument of transfer giving effect to her side of the bargain which she had entered into.

27. For these reasons their Lordships are of the opinion that the trial judge was entitled to hold that the transaction was at arm's length, as the respondent had failed to establish that her agreement to it had been obtained by undue influence. It follows that the decision of the Court of Appeal, which was to the contrary effect, must be set aside.

The CD Account

28. The question whether the respondent is entitled to a share of the money which the appellant withdrew from the CD Account when it was closed by him in September 1989 is now a live issue, in view of their Lordships' decision that the transfer of the respondent's interest in Parcel 16 to the appellant was made at arm's length and not obtained by undue influence. This is because, while it is agreed that at least part of the money was used for the development of Parcel 16, it appears not to have been employed for that purpose until after the respondent executed the Instrument of Transfer on 27 September 1989. In paragraph 19 of her affidavit dated 2 February 1996 the respondent states that the money taken from the account was invested in a building project "presently under construction" on Parcel 16. It was not suggested by either party that this investment was made before the transaction for the transfer of the respondent's interest in the property was entered into. The price of \$100,000 which she received for the transfer of her interest in Parcel 16 must be taken to reflect the value of the land in its undeveloped state.

29. The first question that has to be addressed is to identify the amount of money which was withdrawn by the appellant when he closed the CD Account in or about September 1989. Happily there is no longer a dispute on this issue. Mr Farara QC for the respondent observed that the trial judge appeared not to have addressed his mind to this question at all. But he said that he was content to accept the decision of the Court of Appeal that the amount in the account when it was closed was \$70,000, and Dr Cheltenham QC for the appellant said that he was content to

proceed on this basis also. The only remaining question is whether the respondent is entitled to any share in that amount.

30. The appellant's argument is that the respondent is not entitled to any share in the sum of \$70,000, as she had already withdrawn and misappropriated more than her one half share of the amount of \$225,000 drawn from the business of FGM which had originally been placed on deposit in the account when it was set up. The question whether the respondent had misappropriated funds drawn from the business was one of the main issues that the trial judge had to resolve, and it too was an issue on which he heard the parties give evidence. In paragraph 3 of his judgment he said that, in so far as the appellant claimed that the respondent improperly mulcted the business, he rejected these claims. He found that whenever the respondent drew out monies from the business she did so either with the express or the implied consent of the appellant and that she was not accountable to him for such monies. It is true that he did not say in terms that this was the position in regard to the CD Account also. But no bank statements or other records were produced to show that the finding which he made about the respondent's conduct generally could not be applied to her handling of the monies which had been placed in that account in particular.

31. Their Lordships consider that the Court of Appeal were entitled to infer from the findings which were made by the trial judge that the appellant had failed to establish his claim that the respondent had taken money from this account for her own use. That being so, the amount which he took from the account falls to be divided between the parties equally. The respondent is entitled to interest on her share of that amount from the date when the account was closed which, in the absence of more precise evidence as to when this was, their Lordships will take to have been 30 September 1989.

Conclusion

32. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the orders of the Court of Appeal should be set aside and that the orders of Mr Justice Moore should be affirmed, save that it should be declared that the Certificate of Account which was executed at Banco Popular De Puerto Rico by the appellant and the respondent was owned by them in equal shares and that the respondent is entitled to payment by the appellant of \$35,000, being 50 per cent of the sum of \$70,000 withdrawn by him from that account, with interest thereon at the

rate of 5 per cent per annum from 30 September 1989. The respondent must pay three quarters of the appellant's costs in the Court of Appeal and before their Lordships' Board.