IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 290 OF 1997

BETWEEN	DICK KINKEAD LIMITED	PLAINTIFF
A N D	GWENDOLYN NORMAN (c/o GWENDOLYN SMART)	FIRST DEFENDANT
A N D	HUBERT SMART	SECOND DEFENDANT

Patrick McDonald for the plaintiff
Leroy Equiano for the defendants

Heard: November 3 and 4; and December 2, 1997

PANTON, J.

The question for determination in this matter is whether there are circumstances which entitle the plaintiff to be declared as a legal mortgagee or chargee of lands comprised in certificate of title registered at Vol. 1122 Folio 219 of the Register Book of Titles.

The defendants are pensioners. Their adult son, Archibald Lorenzo Smart, resides with them at 23 Lancelot Avenue, Kingston 3, the premises referred to above. He was employed to the plaintiff up to July 5, 1996. On that date, he confessed to the perpetration of a series of improprieties in respect of the plaintiff's funds and books of accounting for the period January to July, 1996, and in a note dated the said July 5, 1996, undertook to repay the plaintiff "the sums of money misappropriated and all additional charges incurred in analysing the books of the company via an audit trail".

In a report dated July 30, 1996, Price Waterhouse determined that the amount due by Mr. Smart amounted to $370,242.10. However, in a letter dated September 6, 1996, addressed to Mr. Smart, the plaintiff's attorney-at-law stated that the amount owed by him "as at the 9th August, 1996, was $472,794.00 plus interest from 10th January, 1996, and continuing and also our client's legal fees".

On the date on which Mr. Smart signed the note referred to above, his mother, the first defendant, also signed another document in favour of the plaintiff. It is headed: "**Agreement re: mortgage of 33 Lancelot Avenue, Kingston 3, Jamaica**"

It reads thus:

> "This is an agreement between Mrs. Gwendolyn Smart signing on behalf of myself and my husband, to give a first mortgage to Dick Kinkead Ltd., on our house, situated at 23 Lancelot Avenue, Kingston 3, for a sum of at least $392,946.00 or the amount to be decided on by a Price Waterhouse Audit, at which time myself and my husband agree to sign a proper mortgage document containing such terms and rate of interest as usually found in mortgages by Commercial banks.
> I, and on behalf of my husband, agree that all costs and expenses involved in preparing and completing the Mortgage, and any other security documents required e.g. the cost of the audit by Price Waterhouse, will be at our expense".

On the 8th August, 1996, the second defendant affixed his signature to the document.

The main request of the plaintiff in these proceedings is for a declaration that it is entitled to be considered as being a legal mortgagee or chargee of the land in question to secure the sum of $370,240.10 with interest on the said sum at the rate of interest usually found in mortgages by commercial banks for the 18th day of August, 1996.

The plaintiff also seeks a declaration that the said sum together with interest at the rate usually found in mortgages by commercial banks on the principal amount oustanding from time to time be considered a charge on the said lands.

There are certain consequential orders that are also sought.

According to the plaintiff, the theft by the defendants' son was discovered on the afternoon of July 5, 1996. The police were immediately summoned. Mr. Smart suggested that his parents would repay the money to the plaintiff over time, and that they would give the title for their house as security. The secretary of the plaintiff thereupon telephoned the first defendant and informed her of what had happened. Shortly after, the first defendant arrived and handed the certificate of title to the pliantiff's managing director as security for the repayment of the monies. She stated that her husband was

"in the country" but she felt she had his full authority to deal with the title on his behalf. Further, according to the plaintiff, the second defendant on August 8, 1996, informed the plaintiff's secretary that he was in agreement with what his wife (the first defendant) had done.

The plaintiff asserts that "having obtained security for repayment of the moneys which had been stolen" they "did not take any legal action against Archibald Smart at the time for the recovery of the funds".

The first defendant has deponed that she was told by the secretary of the plaintiff that her presence was required immediately. There could be no wait for her husband (the second defendant) to return from the country the following day. Further, she was not told what her son had done but was advised that if she did not sign the document her son would have been arrested and locked up over the weekend. She was, she said, "totally unaware of the implications of handing the title to Mr. Kinkead nor was (she) given the opportunity to seek legal advice or inform (her) husband".

. . . It is noteworthy that the first defendant did not have easy access to the certificate of title. She had to break off the lock to the wardrobe where the title was kept. The second defendant does not regard himself as being a party to the agreement. And both defendants have refused to sign the mortgage in favour of the plaintiff.

Learned attorney-at-law Mr. McDonald has submitted that this is simply a case of an agreement having been made between the parties, and the defendants have broken their side of the bargain. The Court should therefore give effect to the agreement that the parties themselves had made.

On the other hand, learned attorney-at-law Mr. Equiano contended that there was no contract from the beginning. The first defendant, he said, faced an intimidating situation, and was virtually under compulsion. There was an element of undue influence and duress, as well as questionable behaviour on the part of the plaintiff. The parties, he said, were never on equal terms. The defendants, he said, never intended to mortgage their property, especially in a situation in which they are too old to obtain a mortgage.

There are, in my view, certain features of this case that should be particularly noted. Firstly, the first defendant had no opportunity to consult with the second defendant before giving a commitment on his behalf. She had no general or specific authority to do what she did without consultation. It is quite significant that she did not have ready access to the certificate of title and had to use force to break the lock to the wordrobe where the document was kept. If the second defendant intended the first defendant to enter into a transaction of this nature on his or their behalf without prior consultation with him, he would no doubt, while travelling out of town, have left the title within her easy reach.

Secondly, the defendants have not been shown to have benefitted personally in any way as a result of the stolen money. The defendants' son is an adult for whom the defendants have no legal responsibility. In my view, it would be stretching a principle to suggest that forbearance to prosecute the adult son is "consideration" going from the plaintiff to the defendants.

Thirdly the adult son has signed a document that has certain inevitable consequences under the criminal law as well as under the civil law - if the plaintiff wished to turn its attention in that direction.

In my view the features listed at (1) and (2) above militate against the granting of the declaration sought. It seems appropriate to dismiss the summons on these grounds alone. On the assumption that I am wrong in this respect, I am turning my thoughts to the question of undue influence as raised by Mr. Equiano.

I am guided by the judgment of Lord Scarman in **National Westminister Bank v. Morgan** (1985) 1 All E.R. 821. His warning at page 831 is noted. There, he 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".

In my judgment, there is no doubt that the transaction is unconscionable. The defendants should have at least been permitted the benefit of independent legal advice. The stakes were too high for these pensioners to have been so deprived.

I am satisfied that power was exercised by the plaintiff over the first defendant in the first place to induce her in the presence of the police with her son being virtually in detention, to enter into a contract ostensibly binding her husband, the second defendant, without his knowledge. The Court is indeed a court of conscience and will not sanction such unconscionable conduct.

The relief and orders sought are refused. The summons is dismissed. Costs awarded to the defendants, to be agreed or taxed.