[2022] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 108/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE V HARRIS JA

BETWEEN	**PAULINE HOLNESS**	**APPELLANT**
AND	**AUGHUTON GRANT**	**RESPONDENT**

Written submissions filed by Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the appellant

Written submissions filed by Debayo Adedipe for the respondent

20 December 2022

PROCEDURAL APPEAL

(Considered on paper by the court pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of my learned brother, D Fraser JA, and agree with his reasoning and conclusion. I have nothing to add.

D FRASER JA

Introduction

[2] This is a procedural appeal by the appellant Pauline Holness against the order of Wolfe-Reece J (Ag) (as she then was) ('the learned judge'), made on 5 November 2018. By that order, the learned judge granted in part the application filed by the respondent

Aughuton Grant, on 4 June 2018, for summary judgment in a claim brought by the appellant against him and ordered costs against the appellant.

[3] The application for summary judgment was supported by the affidavit of Debayo A Adedipe, filed on 4 June 2018, to which was exhibited the affidavit of the respondent. In response to the application, the appellant relied on the affidavit of Olivia Derrett filed 14 June 2018, which referred to the amended claim form and the amended particulars of claim.

[4] The claim, initially filed 8 June 2015 and amended 14 June 2018, sought the following reliefs:

> "1) A Declaration that the foreclosure agreement and the option agreement entered into by the [appellant] and the [respondent] in respect of ALL That Parcel of Land registered at Volume 1310 Folio 859 of the Register Book of Titles … were unconscionable bargains and are declared void;
> 2) Damages for Breach of Contract and/or fraudulent misrepresentation;
> 3) Damages for Unjust Enrichment and/or in the alternative;
> 4) Recovery of possession;
> 5) Costs;
> 6) Interest
> 7) Such further and/or other relief as this Honourable Court deems just"

[5] Summary judgment was granted by the learned judge only in respect of the order seeking the declaration that the foreclosure agreement and lease and option to purchase agreements entered into between the appellant and the respondent were unconscionable bargains and void. The application for summary judgment was refused in respect of the claim for breach of contract. Costs were also awarded to the respondent and Victoria Mutual Building Society ('VMBS') which was then an interested party. Leave to appeal was granted. Notice of appeal was filed 13 November 2018 in respect of the learned judge's order granting summary judgment and costs against the appellant.

[6] The appellant has since, by notice dated 15 July 2021, wholly withdrawn this matter against VMBS. This was subsequent to the acknowledgement by Munroe & Munroe, Attorneys-at-Law for VMBS, by letter dated 7 May 2019 to the Registrar of the Supreme Court that the appellant had paid the mortgage sums due to VMBS.

The relevant facts

[7] The appellant and the respondent were childhood friends who are both from Norfolk District in the parish of Saint Elizabeth, where the property the focus of the dispute is situated ('the property'). The appellant maintains that some time before she entered into dealings with the respondent concerning the property, she had helped him when he had foreclosure problems in New York City. She further maintains that he had told her then that if she ever found herself in a 'financial situation' he would be happy to help her, because of that and other kindnesses she had shown to him. The respondent denies that he received assistance from the complainant for foreclosure problems. Instead, he asserted that the assistance she had provided was when he had been awaiting disability payments. What is clear, however, is, that, at some time prior to the entry into the agreements sought to be impugned, the appellant had provided assistance to the respondent.

[8] The appellant had been sole proprietor of the property subject to a mortgage from First Caribbean International Building Society. She was in financial difficulty, and her mortgage payments were in arrears. She faced the prospect of her property being sold by the mortgagee.

[9] The appellant and the respondent entered into a foreclosure agreement dated 3 October 2008, whereby i) he would take over the mortgage debt of $12,810,759.65 with a daily accrued sum of $4,289.94; ii) he would take a transfer of the property; iii) she would refund the respondent the sum of $3,600,000.00 by paying $100,000.00 per month for three years on the first day of the month commencing 1 November 2008; and iv) she would be entitled to 40% of the net proceeds in the event of a sale. The agreement also contained a clause that if the monthly payments were delayed by more than 10 days, the

agreement would be treated as terminated without the need for there to be any demand notice.

[10] It should be noted that the appellant maintains that the original agreement between the parties was that she would have been entitled to 60% of the net proceeds in the event of a sale, but the respondent reneged on that position. Nevertheless, she went ahead with the agreement as she had no other option. The respondent, on the other hand, maintains that it was after negotiations that the appellant's share of any sale proceeds was increased from 25% to 40%. The property was accordingly transferred to the respondent.

[11] The appellant was unable to keep up with the stipulated payments, and the foreclosure agreement was replaced by lease and option to purchase agreements. The signed agreements refer to the year 2012, but no date is inserted in either. They were prepared, and the signatures of both parties on them witnessed by Mr Wilwood Adams, attorney-at-law. Though the year 2012 is on both agreements, the parties agree that the appellant took possession of the property pursuant to the agreements, on 1 October 2011. The terms of these agreements included that the appellant was to take possession of the main part of the premises, make stipulated payments and, on completion, the property would be transferred back to her. In particular, the payment terms of the option to purchase were that the purchase price was $29,600,000.00 or US$356,000.00, and was payable as follows:

a) A monthly payment of $2,409.64 (presumably referring to United States dollars) or its Jamaican equivalent to Victoria Mutual Building Society;

b) US$1,200.00 (presumably per month) or its Jamaican dollar equivalent from 15 January 2012 to 15 December 2012 and, as of 15 January 2013, US$3000.00 per month to 15 September 2015; and

c) A final payment of US$118,564.00.

[12] It was also stated in the option to purchase that completion was on or before 50 months from the date of the agreement and that if the appellant defaulted on the payments set out in clauses (a) and (b), after one month, the respondent reserved the right to terminate the option to purchase and cancel the lease agreement.

[13] By letter dated 16 March 2015 from Clarke, Nembhard & Co, attorneys-at-Law acting on behalf of the respondent, the appellant was advised that due to her having, "consistently failed to make the required payments…notwithstanding repeated requests by [the respondent] for you to regularize your payments…the option to purchase agreement between [the respondent] and yourself is hereby terminated…". The letter went on to advise the appellant that she was required to vacate the property on or before 15 May 2015. That letter led the appellant to file the claim.

[14] In the amended particulars of claim filed on 14 June 2018, the appellant alleged that the option to purchase and lease agreements were prepared without any considered consultative involvement from her or any meeting with the respondent. She also complained that she was not told to seek independent legal advice and was desperate to get back her home.

[15] The particulars of breach, unfairness, unconscionability and/or unjust enrichment of the respondent set out in the amended particulars of claim are as follows:

> "i. Terminating the Option to Purchase albeit the time period for completion has not elapsed;
>
> ii. Terminating the Option to Purchase without giving reasonable notice;
>
> iii. Terminating the Option to Purchase when the delay in payment ought not to give the [respondent] a right to discharge the contract;
>
> iv. Being unjustly enriched in that the [respondent] would have been compensated substantially for the property

and no provision has been made for the return of same to the appellant;

v. Being unjustly enriched in that the [respondent] would have benefitted from the substantial improvements to the property to the [appellant's] detriment;

vi. Compelling the [appellant] to agree to terms in the Option to Purchase that were manifestly disadvantageous to her;

vii Causing the [appellant] to be purchasing the property from him and at the same time paying the mortgage

viii. Fraudulently misrepresenting to the [appellant] the sum of the mortgage payments and monies used to pay of [sic] the Claimant's [sic] mortgage"

[16] The appellant also outlined in those amended particulars that since her engagement with the respondent over the property, she had made payments of $15,880,000.00 to VMBS; US$100,000.00 to the respondent and expended $3,575,000.00 on refurbishments to the property.

[17] The respondent filed a defence and counterclaim on 13 October 2015 in which he admitted the execution of the foreclosure agreement and the lease and option to purchase agreements that replaced the foreclosure agreement. He stated that the parties attended on and instructed Mr Wilwood Adams to prepare the lease and option agreements. He asserted that the claimant fell into arrears in the stipulated payments under the option to purchase agreement, which he lawfully terminated due to her breaches.

[18] The respondent maintained that he made significant improvements to the property and that the appellant's defaults substantially damaged his credit rating, rendering him unable to finance his other business interests, thus causing him loss. He counter claimed for mortgage payments made on behalf of the appellant ($414,330.00); money owed on the foreclosure agreement ($2,500,000.00); the value of goods converted by her ($441,714.00); money owed on the option to purchase agreement (US$15,500.00);

mesne profit (US$3,000.00 per month from 16 September 2015 until the date the appellant delivered possession to him); possession; damages; and costs.

[19] The appellant, in her defence to the counterclaim, essentially repeated her claim while stridently opposing the reliefs sought in the counterclaim.

The grounds of appeal

[20] The grounds of appeal outlined in the amended notice of appeal dated 7 August 2019 are as follows:

> "1) That the learned judge erred in fact and/or in law and/or misdirected herself when she concluded that since undue influence or duress was not pleaded there is no basis on which the agreements can be declared unconscionable or declared void.
>
> 2) That the learned judge erred in fact and/or in law and/or misdirected herself when she concluded that there was nothing in the pleadings to substantiate that the agreements were unconscionable bargains as unconscionable bargain does not stand alone.
>
> 3) That the learned judge erred in fact and/ or misdirected herself when she failed to appreciate that the Supreme Court being a court of equity does recognize unconscionable bargains as distinct transactions for which the court can grant relief and ought to have had regard to the pleadings as a whole before granting summary judgment.
>
> 4) That the learned judge erred in fact and/or in law and/or misdirected herself when she failed to appreciate that the Supreme Court being a court of equity can grant the rescission of an agreement or contract if the same falls under an unconscionable bargain as distinct from undue influence."

The submissions

Counsel for the appellant

[21] Counsel for the appellant submitted on grounds one and two together. She posited that there is a recognised principle of an unconscionable bargain, which attracts relief in equity. She contended that from as far back as the 18th century, transactions have been set aside on this ground. However, the cases have demonstrated that it is not sufficient solely for the terms to be unconscionable or unfair in the sense that they are more favourable to the defendant than the complainant. The defendant's conduct must be shown to be unconscionable. She advanced that the court intervenes on this ground as a matter of common fairness based on the idea that it is "not right that the strong should be allowed to push the weak to the wall".

[22] Counsel advanced that the unconscionability of a defendant's conduct may be a necessary ingredient or element in some situations where relief is sought based on undue influence, duress or mistake. However, she maintained that unconscionable dealing or bargain is itself a ground for setting aside a transaction.

[23] Counsel emphasized that, in the instant case, the respondent was in a position of financial power over the appellant when the agreements were made. Further, that the appellant obtained no legal advice on the foreclosure agreement and no independent legal advice on the option agreement. She also pointed out that the option agreement did not speak to any reasonable notice or the appellant's status as a purchaser, having made substantial payments to acquire the return of her house, and having made substantial improvement to the property.

[24] Counsel, therefore, contended that in the circumstances, the learned judge erred in granting summary judgment on the basis posited by the respondent.

[25] Counsel relied on the following authorities in support of her submissions: **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment

delivered 18 November 2005; **Lloyd's Bank v Bundy** [1975] QB 326; Halsbury's Laws of England 4th edition volume 9 (i) paragraph 716; Snell's Equity, 9th edition (1990) at page 558; **Evans v Llewellin** (1787) 1 Cox 333; **Boustany v Pigott** (1993) 42 WIR 175; **Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd** [1983] 1 WLR 87; **Hart v O'Connor** [1985] AC 1000; **Fry v Lane** [1888] 40 Ch D 312; and **Harry v Kreutziger** 1978 Can LII 393 (BCCA).

[26] In relation to grounds three and four, counsel for the appellant contended that the statement of case sufficiently indicated triable issues for which there exists a legal right and that since the Supreme Court is a court of equity, it had jurisdiction to address all matters under the principles of equity. She argued that even if undue influence is necessary to determine if a bargain is unconscionable, the statement of case of the appellant foreshadows such equitable undue influence, which is properly to be determined at a trial. This would assist in a fair and just disposal pursuant to the overriding objective. She said the evidence of the parties surrounding the issues was not resolved at the summary judgment hearing by the learned judge.

[27] Counsel additionally submitted that the statement of case of the appellant also foreshadowed the principle of proprietary estoppel.

[28] Consequently, she asked the court to set aside the order for summary judgment and order that all issues be addressed at trial.

Counsel for the respondent

[29] Counsel for the respondent had filed submissions after the initial skeleton submissions were filed by the appellant in November 2018. However, he did not take advantage of the opportunity to file submissions in response to the amended notice of appeal and supplemental skeleton submissions filed on 7 August 2019, pursuant to an order made at the case management conference on 26 July 2019. Based on the grounds contained in the initial notice of appeal, his submissions did, however, deal with the central question whether the learned judge was correct to hold that the appellant was

unable to rely on the principle of unconscionable bargain standing on its own, as a basis to impugn the foreclosure and lease and option to purchase agreements.

[30] Counsel reminded the court of the basis on which the learned judge's decision based on an exercise of discretion can be reversed (per Brooks JA (as he then was) at paragraph [23] to [24] of **ASE Metals v Exclusive Holidays of Elegance** [2013] JMCA Civ 37 (applying **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042).

[31] He emphasized that the court is empowered to grant summary judgment based on Part 15 of the Supreme Court of Jamaica Civil Procedure Rules ('CPR') and he cited the authorities of **Swain v Hillman** [2001] 1 All ER 91, **ASE Metals v Exclusive Holidays of Elegance** and **Sagicor Bank v Taylor-Wright** [2018] 3 All ER 1039 in that regard.

[32] Counsel contended that having regard to the content of the statement of case, the available evidence, and the relevant principles of law, the learned judge was justified in granting summary judgment as she did. He argued that the appellant did not ground her claim in duress or undue influence and that if she was relying on those principles, she would have had to set them out in her statement of case, pursuant to rule 8.9A of the CPR. He pointed out that the appellant's case, rather, was based on her assertion of a general legal principle of unconscionable bargain, which would justify the agreements being declared nullities.

[33] He submitted that it is settled law that there is no such general principle of unconscionable bargain in English or Jamaican law that would ground a declaration that agreements, such as those in this case, are void. He said it was rarely invoked with success and that the concept has not fully developed in English law (Goode on Commercial Law 5th ed. para 3.70 footnote 234). He added that the concept often overlaps undue influence and duress (Anson's Law of Contract 28th ed, p. 298). Counsel did, however, acknowledge that there are special instances in which such relief may be

granted when there is an unconscionable bargain, such as where it is the result of duress or undue influence.

[34] Counsel further posited that there were two old categories of unconscionable bargain recognised by equity — sales of expectancies and purchases at a gross undervalue from poor and ignorant persons. Both of these, he said, are inapplicable to this case. He cited the cases of **Fry v Lane** (1888) 40 Ch D 312 and **Creswell v Potter** [1978] 1 WLR 255. The appellant, counsel asserted, is not a poor or ignorant person in the sense used in **Fry** or **Creswell** but was familiar with real estate transactions.

[35] He further noted that while the appellant relied heavily on what she described as inequality of the parties' bargaining powers, it is settled law that that is not sufficient to vitiate an agreement. He pointed to the case of **National Westminster Bank v Morgan** [1985] 1 All ER 821 at page 830, where Lord Scarman so indicated.

[36] It was counsel's view that having regard to the statements of case and the affidavit evidence before the court, the learned judge was entitled to enter summary judgment as there was no serious legal or factual question to be tested or tried on the issue of unconscionable bargain and neither undue influence nor duress was pleaded. Accordingly, he maintained that the respondent had discharged the burden of proving that the appellant had no real prospect of success on this issue. Therefore, the learned judge acted properly in entering summary judgment in favour of the respondent.

The applicable legal framework

(a) Applications for summary judgment

[37] By rule 15.2 of the CPR,

> "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 issues;
>
> (b) …"

[38] As noted at paragraph 18 of the case of **Sagicor Bank v Taylor-Wright**,

> "The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial."

[39] At paragraph 19 of the same case, it was observed that, "[t]he court will…primarily be guided by the parties' statements of case". In respect of the claimant, rule 8.9 of the CPR outlines the requirement for the claimant to set out the facts and documents on which the claimant relies. So far as relevant, rule 8.9 provides as follows:

> "(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
>
> …
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."

[40] Not only must the claimant outline the facts on which reliance will be placed; the CPR also requires the claimant to set out allegations and factual arguments on which the claimant intends to depend. Thus, rule 8.9A of the CPR states that:

> "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

[41] Also of note are that firstly the requirements of rule 8.9A may be satisfied by a reply and not only by particulars of claim, and secondly, on a summary judgment application, the court may, in addition to the parties' statements of case, have regard to affidavit evidence filed by the parties (see paragraph 20 of **Sagicor Bank v Taylor-Wright** and rule 15.5).

(b) The approach of the appellate court

[42] Whether or not an application for summary judgment is granted is an exercise of a judge's discretion. The law is well settled that the appellate court should not interfere with the exercise of the discretion of the court below, merely because it would have exercised its discretion differently had it been in the position of that court.

[43] Thus this court may only set aside the learned judge's exercise of her discretion if it is shown that (i) she misunderstood or misapplied the law or misconceived facts; or (ii) failed to give relevant consideration to the material before her; or (iii) circumstances have changed since the discretion was exercised which justifies it being varied or discharged; or (iv) though no error of law or fact can be identified, her decision was one that no judge having regard to her duty to act judicially could have reached it; and therefore her decision was palpably or demonstrably wrong (see **Hadmor Productions Ltd and others v Hamilton and others**, approved and applied in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1), and a number of subsequent cases.

Discussion and analysis

[44] Before treating with the grounds, it should be noted that, as we have not seen the reasons for the ruling of the learned judge, it is not clear on what basis the learned judge granted the order for summary judgment, that is, whether it was because she found that unconscionable bargain is not a stand-alone cause of action or, that, it is, but the circumstances of this case do not fall within its compass.

[45] This uncertainty persists because of a comparison between the grounds of appeal, which challenge the learned judge's decision on the first basis and the respondent's nuanced position whereby he maintains that unconscionable bargain is a cause of action, but only in a limited set of circumstances into which those, in this case, do not fall.

[46] In light of this uncertainty, the four grounds of appeal will be analysed under three issues that will address both possible bases. These issues are as follows:

i) In Jamaica, is unconscionable bargain or dealing recognised as a separate "stand alone" ground for setting aside a transaction?

ii) If the answer to issue i) is yes, was there material on the pleadings/evidence on which a court at trial might find evidence of unconscionable bargain or dealing?

iii) Did the appellant's statement of case foreshadow undue influence in addition to the claim of unconscionable bargain, both of which should properly be determined at a trial?

Issue i

[47] This court, in the case of **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels**, squarely addressed this issue. In that case, the respondent, a fisherman and diver, while swimming in the sea, was injured by a ski boat operated by the second appellant and owned by the third appellant. Counsel for the respondent filed a writ of summons and statement of claim seeking compensation from the appellants. After filing a defence, the appellants sought summary judgment against the respondent, relying on a release signed by the respondent unconditionally releasing the appellants from any liability. The consideration for the release was payments for medical and financial assistance previously received, an additional lump sum payment and a cellular phone. Sykes J (Ag) (as he then was) refused the application for summary judgment on the basis that the respondent had raised a strong arguable case of undue influence that would operate to invalidate the release.

[48] On appeal, this court, while upholding the decision of the lower court, held that the affidavit evidence placed before the court did not contain sufficient evidence of the necessary relationship between the parties, to raise the plea of undue influence. However, the court also found that there was a real prospect of success that it would be determined that the respondent had been the victim of an unconscionable bargain. Thus, though unconscionable bargain had not been relied on in the court below, as it was argued and

contested on appeal, in compliance with rule 1.16 of the Court of Appeal Rules ('CAR'), it could ground the dismissal of the appeal and the requirement that the matter should proceed to trial.

[49] The court was unanimous that unconscionable bargain was a stand-alone cause of action, which could avail the respondent in the absence of proof of undue influence. P Harrison JA (as he then was), in reviewing the case of **National Westminster Bank v Morgan**, noted at pages 10 – 11 that:

> "[T]he 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:
>
> > '…It is the impeachability 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 in original)

[50] After additionally considering the case of **National Commercial Bank v Hew** (2003) 63 WIR 183, P Harrison JA stated at page 11 that:

> "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."

[51] Then, after quoting a passage from Snell's Equity that will be later recounted when the dicta of H Harris JA on this point is outlined, he continued at pages 11 – 12 as follows:

> "In ***Modern Equity by Hanbury and Maudsley***, 12th edition (1985), in discussing the circumstances in which a court of equity will grant recission, the authors noted categorized unconscionable 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.'" (Emphasis in original)

[52] In the same matter, at page 28, Panton JA (as he then was) referred to the Ontario High Court case of **McKenzie v Bank of Montreal et al** (1975) 7 OR (2d) 521 in which transactions were set aside as unconscionable. In that case, a plaintiff unknowingly executed a land mortgage in favour of a bank to secure the debt of LL, a man whom the bank knew was emotionally involved with the plaintiff and involved in prior fraudulent transactions; and where LL had previously fraudulently mortgaged the plaintiff's car to the bank. Panton JA also referred to an article in the Modern Law Review (Vol. 39 July 1976, page 369) by S M Waddams, Associate Professor, Faculty of Law, University of Toronto. He stated that Waddams,

> "[I]n dealing with unconscionability in contracts, referred to those 'cases in which there was no weakness of intellect but simply an undue advantage taken of the inequality of bargaining power.'"

[53] After recounting Waddams' quoting of Kay J in **Fry v Lane,** Panton JA noted at pages 28 – 29 that Waddams went on to say that:

> "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,…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."

[54] H Harris JA, the third member of the panel, also concluded that unconscionable bargain or unconscionable transaction could be relied on by the respondent as the basis to impugn the challenged transaction, in the absence of sufficient evidence to raise the plea of undue influence. The learned judge of appeal, however, introduced some terminological uncertainty when, despite having agreed that undue influence was not established, she opined at page 40 that the learned trial judge should 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". However, the fact that she also agreed with the other judges of appeal that unconscionable bargain is a stand-alone cause of action was revealed when she later stated that, "[i]n light of the evidence, this court could consider whether the doctrine of 'unconscionable bargains' could avail the respondent". She relied on the same passages from Modern Equity and Snell's Equity referred to by P Harrison JA. In relation to the passage from Modern Equity, H Harris JA noted that the case of **Alec Lobb (Garages) Ltd And Others v Total Oil (Great Britain) Ltd** "was cited by the authors in support…".

[55] In respect of Snell's Equity (29th edition), the passage quoted from page 559 reads as follows:

> "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-Saunders 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** [1978] 1 W.L.R. 255n. at 258 per Megarry J. (Post Office telephonist). **Cf. Backhouse v Backhouse** [1978] 1 W.L.R. 243)."

[56] This court has thus, at least from 2005, recognised that, in Jamaica, unconscionable bargain is, in fact, a separate and distinct ground on which a court of equity may intervene, to set aside a transaction in appropriate circumstances.

[57] A highly persuasive earlier authority from the Judicial Committee of the Privy Council also supports that view. In **Boustany v Pigott**, their Lordships at page 180 of the report, endorsed the following propositions put forward by counsel for the appellant:

> "(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience': *Multiservice Bookbinding v Marden* [1979] Ch 84 at page 110. (2) 'Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at page 94. (3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, 'it was not right that the strong should be allowed to push the weak to the wall': *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at page 183. (4) A contract cannot be set aside in equity as 'an unconscionable bargain' against a party innocent of actual or constructive fraud; even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: *Hart v O'Connor* [1985] AC 1000, applied in *Nichols v Jessup* [1986] NZLR 226. (5) 'In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct,

> namely that unconscientious advantage has been taken of his disabling condition or circumstances': *per* Mason J in *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402 at page 413."

[58] In that matter, although the alleged victim of unconscionable behaviour on the part of the defendant was dead and neither the defendant nor her husband gave evidence, the court, after careful consideration of the relevant circumstances, inferred unconscionable conduct on the part of the defendant and set aside a lease which, in consequence of that conduct, represented an unconscionable bargain.

[59] It is clear, therefore, from the above review of authority that in Jamaica unconscionable bargain is recognised as a separate stand-alone cause of action, which, in appropriate circumstances, may be relied upon to vitiate a contract.

Issues ii and iii

[60] It is convenient to address issues ii and iii together. The submissions of counsel for the respondent appear to be mostly geared towards issue ii. The burden of counsel's argument was that the circumstances of this case do not fit into the narrow category of cases recognised as being eligible for vitiation on the basis of being unconscionable bargains. Counsel maintained that the appellant could not qualify as a "poor or ignorant person" in the sense used in **Fry v Lane** or in subsequent cases, as on her own account, she was a care giver/nursing aide who was clearly familiar with real estate transactions and development. This was evident, counsel argued, as the appellant acquired the property with her former husband, built on it and thereafter raised a mortgage of $10,000,000.00 to purchase his interest from him. He also pointed out that the amended particulars of claim disclosed that substantial sums of money had passed through her hands. A caveat to these submissions, however, is that the respondent, in his defence and counterclaim, denied that the appellant purchased her former husband's interest, indicating instead that, as evidenced by the certificate of title, the appellant's former husband had made a gift of his share to her.

[61] In treating with the contentions of the respondent, it should be acknowledged that the law has historically been cautious regarding reliance on unconscionable bargain to vitiate a transaction. This caution is due to the general principle of freedom of contract whereby the law will not intervene to vitiate an agreement merely on the basis that it is a hard bargain (see, for example, **Alec Lobb (Garages) Ltd And Others v Total Oil (Great Britain) Ltd**). Thus, while it has long been recognised as a stand-alone basis for rescission of a contract, the circumstances in which it was determined to operate were closely circumscribed.

[62] It is also important to note that the texts cited by counsel for the respondent (Goode on Commercial Law and Anson's Law of Contract) correctly point out that Lord Denning MR's holding in **Lloyd's Bank v Bundy** that inequality of bargaining power may provoke the courts to intervene was not accepted in English law. However, English law did not thereby jettison the concept of unconscionable bargain, it being noted that whether a transaction was unconscionable depended on "the particular facts of the case" (see Lord Scarman in **National Westminster Bank Plc v Morgan** at page 831).

[63] It is instructive to consider the nature of the cases in which the plea of unconscionable bargain has been successful through the review of some examples. In **Fry v Lane**, a purchase was made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice. In **Cresswell v Potter**, a telephonist who was found to be "ignorant" in terms of conveyancing transactions signed a release conveying her interest in premises as a joint tenant to the defendant without any compensation, she having not received independent advice. In **Boustany v Pigott**, a lease on terms quite disadvantageous to the lessor (who although the owner of many properties was "quite slow") was procured by the appellant through lavish treatment, flattery and praise of the lessor. The lessor was not legally represented, was without the assistance of her lawful attorney and accountant, who the appellant knew had conduct of all the lessor's legal affairs, and the lessor was totally unaware of the market rental value of her premises.

[64] In **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels**, reviewed in detail earlier in this judgment, the respondent who was a fisherman and diver injured by the appellant's boat, was considered to have a reasonable prospect of success to have the release he had signed, without independent advice absolving the appellants from any further liability, set aside on the ground that it was an unconscionable bargain.

[65] The appellant, in this case, has alleged that she obtained no legal advice on the foreclosure agreement and no independent legal advice on the option agreement. That assertion has not been challenged by the respondent. The appellant has complained that in the context of her being desperate to regain her property, she was compelled by the appellant to agree to terms in the option to purchase that were manifestly disadvantageous to her; that the respondent caused her to be purchasing the property from him and at the same time paying the mortgage; and that he fraudulently misrepresented to her the sum of the mortgage payments and monies used to pay off her mortgage. The respondent counters the appellant's contentions by saying she was quite knowledgeable in property transactions and was the one who defaulted on the agreements.

[66] The question, therefore, is whether the circumstances of this case qualify for consideration under the doctrine of unconscionable bargain, particularly under the principles as distilled in the case of **Boustany v Piggott**.

[67] In the context of this case, the resolution of issue ii is probably best considered relative to the determination on issue iii. In **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels,** this court held that the learned judge's refusal of the application for summary judgment should be upheld, because the doctrine of unconscionable bargain applied, even though it was not relied on before the learned judge. This occurred in circumstances where undue influence, which had been relied on, did not apply. The court was empowered to arrive at that conclusion under rule 1.16(4)

of the CAR. Rule 1.16(3) and (4) of the CAR falls under the heading "Hearing of appeals". It states:

> "(3) …
>
> (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.
>
> (4) The court may draw any inference of fact which it considers is justified on the evidence."

[68] In the instant case, the appellant has submitted that even if the finding of the learned judge that undue influence or duress is necessary to determine if a bargain is unconscionable, the appellant's statement of case foreshadowed equitable undue influence, which ought properly to be determined at trial. It was also submitted on behalf of the appellant that her statement of case also foreshadowed the principle of proprietary estoppel. Consequently, it was advanced that the varying contending positions of the parties should be left in their entirety to be determined at trial.

[69] As noted earlier, the respondent did not avail himself of the opportunity to file further submissions in response to the amended notice of appeal, and supplemental skeleton submissions filed on 7 August 2019, pursuant to an order made at the case management conference on 26 July 2019. There is, therefore, no challenge coming from the respondent to those submissions, though, based on the orders made at case management, he would have had the opportunity to file submissions in reply, contesting the amended grounds.

[70] It is also significant that the focus of the summary judgment application was that unconscionable bargain could not stand alone and that undue influence and duress could not be relied upon because they had not been pleaded. Though not before the learned judge, the further amended particulars of claim filed 12 November 2019 have now

included a claim for equitable undue influence. Based on rule 1.16(3)(b) and (4) and the case of **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels**, this court may consider whether, even though undue influence was not relied on before the learned judge, it having been relied on in this court, it presents a basis on which the order of the learned judge may be disturbed under the principle outlined in **Hadmor Productions Ltd and others v Hamilton and others** that circumstances have changed since the learned judge exercised her discretion, which justifies it being varied or discharged.

[71] As far as can be gleaned from the submissions of both counsel and the order of the learned judge, there was no suggestion that had undue influence been pleaded when the matter was before the learned judge, it would not have availed the claimant of a real prospect of succeeding on the claim or the issues.

[72] In Modern Equity by Hanbury and Maudsley, 13th edition (1989), the learned authors, after referring to the case of **National Westminster Bank v Morgan**, note at pages 791 -792 that:

> "The principle which justifies setting a transaction aside for undue influence is the victimisation of one party by the other. The party alleging undue influence must show that the transaction was wrongful in that it was manifestly disadvantageous to him … It is not sufficient to establish that there was a relationship of influence without this further element of disadvantage."

[73] In keeping with that academic pronouncement, in **Royal Bank pf Scotland plc v Etridge (No 2)** [2002] 2 AC 773 at pages 794 – 795 Lord Nicholls of Birkenhead defined and further explained the principle as follows:

> "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… Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion…[or]…duress…. The second form 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… Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see *Treitel, The Law of Contract*, 10th ed (1999), pp 380-381."

[74] Concerning the nature of the relationship that must exist for the plea of undue influence to arise, in similar vein, it was stated by Lord Millett in **National Commercial Bank Jamaica Ltd. v Hew** (2003) 63 WIR 183 at 192 that:

> "The necessary relationship is variously described as a relationship 'of trust and confidence' of '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…But the existence of the necessary relationship may be proved as a fact in any particular case."

[75] With the claim of undue influence now having been pleaded, that will form a part of the claim at trial. It will be for the trial court to determine whether, the dealings between the parties in relation to the foreclosure and lease and option to purchase agreements, against the background of the childhood friendship of the parties and their prior interactions was tainted by undue influence.

[76] Given that it is settled that unconscionable conduct is often a part of or may overlap with undue influence, it appears the prudent course is to grant the relief sought by the appellant so that, with the benefit of all the evidence being examined, the trial court may determine which cause of action, if any, is made out. That would include the claim for proprietary estoppel, which this court need not comment on, as it does not directly relate to the application that was before the learned judge, though it is recognised that the evidence to be deployed in this matter, may relate to a number of different causes of action.

[77] Accordingly, the order for summary judgment granted by the learned judge should be set aside, and the matter proceed to trial on all the reliefs sought by the appellant.

[78] The court sincerely apologises for the delay in the conclusion of this matter and the inconvenience that delay has occasioned.

V HARRIS JA

[79] I, too, have read, in draft, the judgment of my learned brother, D Fraser JA. I agree with his reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

(1) The order made by Wolfe-Reece J (Ag) on 5 November 2018, granting summary judgment to the respondent with respect to the claim for a declaration that the foreclosure agreement and the lease and option to purchase agreements entered into between the appellant and the respondent are unconscionable arrangements and void, is set aside.

(2) Costs to the appellant, here and in the court below, to be agreed or taxed.