

CIVIL APPEAL NO. 19 of 1988

BETWEEN:

JANET ROUSTANY - Appellant

and

GEORGE BIGOTT - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: L. Luckhoo, Q.C., instructed by Phillips, Phillips
and Archibald for the Appellant
Dr. F. Ramsahoye, Q.C., and G.A. Watt for the Respondent

1991; Feb. 27, 28,
June 17.

JUDGMENT

MOE, J.A.

This is an appeal from the judgment of a High Court Judge in which he declared a lease executed by one Catherine Bigott and the appellant to be unreasonable, null and void and ordered that it be rescinded. Catherine Bigott having died the Court appointed the respondent George Bigott to represent her estate for the purposes of the action and to carry on the further proceedings therein.

The lease concerned dated 5th September, 1980 was for a term of ten years at the yearly rent of \$12,000 payable by equal monthly instalments with provision for an option to renew for a further ten years at the same rent.

At the time that the lease was negotiated there was subsisting between the parties a lease executed on the 30th November, 1976 for a term of five years and thus with one more year and three months to run with provision for an option to renew for a further five years at a new rent to be agreed or settled by an independent third party as the fair market rent.

Findings of the learned Judge on circumstances surrounding the execution of the lease may be summarized as follows:-

/At the time.....

At the time of the transaction Catherine Pigott was 71 years old and had not been conducting her own business affairs. The appellant was aware of this. It seemed important to Pigott that she should get a steady and regular income from the premises involved and this was a matter which weighed heavily on her mind. In 1980 she was dependent on the rental proceeds from the real property to which she had access. For years she had had no real experience and knowledge in dealing with commercial transactions and she could not be considered knowledgeable about transactions of this nature. In the context of principles to be applied Pigott was poor and ignorant and in a far weaker position than the appellant who was a businesswoman and a person upon whom the respondent had some financial and other dependence in the sense of needing to get the rental income on a regular and reliable basis.

The appellant got the lease concerned at a rental which was way below the market value of the premises. It was but a small percentage of that value and in fact was a gross undervalue. The grant of a term of twenty years without any provision for increase of rent was a most unusual provision in a lease of this nature. It was inescapable that it was the appellant's intention to avoid having the rent reviewed by an independent arbiter and one of the objectives in having the new lease prepared was to have guaranteed rent at a fixed rate, which was not only below the commercial value in 1980 but was going to continue at the same rate until the turn of the century. The bargain was improvident and the circumstances under which it was made gave rise to suspicion.

Catherine Pigott negotiated with the appellant directly and when she went to a lawyer Mr. Time Kendall, O.C. to have the lease drawn up she had already made up her mind as to the provisions that were to be in it. She did not appear to have had an opportunity to discuss the transaction with any members of her family. She was a life tenant of the premises and the interests of the reversioners ought to have been considered.

The learned Judge concluding that the terms of the lease by themselves were unfair and unconscionable and that there was the inequality of bargaining power and that Catherine Pigott did not have the benefit of independent legal Counsel nor consultations with members of her family one of whom acted as her real estate and business agent, declared the lease unconscionable, null and void and ordered it rescinded. He declined to make an order for damages.

/The first.....

The first ground of appeal argued was that the learned trial Judge was wrong in not taking into consideration the limitations imposed on the respondent by the Rent Restriction Act, Cap. 327 (hereafter called the Act) in arriving at the conclusion that the rent reserved amounted to a considerable undervalue of the premises. The submission was that in determining whether the rent was a gross undervalue the sole consideration is the application of the Act. That commercial considerations and market value are irrelevant and a proper consideration would be whether the rent was way below the legally permissible rent chargeable for the premises. Referring to sections 2,5,6,10 and 18(2) of the Act Counsel argued that the maximum lawfully permissible rent chargeable at the time of execution of the lease was \$958.00 per month; consequently the \$1,000 per month charged was far from being an undervalue.

The premises involved were built around 1959 to 1960. It was therefore a "new building" for the purposes of the Act which in section 2 thereof provides - "in this Ordinance.....'New building' means a dwelling house or a public or commercial building erected after the 3rd day of September 1939".

Section 5 reads:

"It shall not be lawful for the landlord to increase the rent of -

- (a) any new building to which this Ordinance applies beyond the standard rent thereof unless the increase is sanctioned by the Rent Commissioners in accordance with the provisions of section 6.

'Standard rent' by section 2 (ibid) means.....in the case of any new building the rent at which it was first let.

It is also provided in section 10 as follows:-

- "10. When after the commencement of this Ordinance the rent of any building land or dwelling house or public or commercial building to which this Ordinance applies exceeds the standard rent by more than fifteen per centum and the excess is not sanctioned by the Rent Commissioners the amount by which the rent exceeds the standard rent as increased by fifteen per centum shall notwithstanding any agreement to the contrary, be irrecoverable from the tenant and if it is paid by the tenant shall be recoverable by him from the person to whom it was paid or his personal representatives and may, without prejudice to any other method of recovery be deducted from any rent or money due or subsequently becoming due from the tenant.

/Provided that.....

Provided that no amount paid before the commencement of this Ordinance shall be recoverable."

Section 6(1) says - "On the application of the landlord and subject to the provisions of subsection (2) the Rent Commissioners may sanction an increase of the rent of -

(a) any new building to which this Ordinance applies."

Counsel for the respondent submitted that the Act is inoperative since Rent Commissioners which need to be appointed under section 4 of the Act for the purpose of carrying into effect the provisions of the Act have not been appointed. Since the law is inoperative the parties are free to agree their rent. Section 4 of the Act does provide that the Governor-General may for the purposes of carrying into effect the provisions of this Ordinance appoint three fit and proper persons, one of whom shall be a government officer, to be Rent Commissioners for the State. Rent Commissioners have not been appointed since 1959 and therefore there are no Commissioners for the purpose of carrying into effect the provisions of the Ordinance.

As I see it, to deal with this ground of appeal does not require a resolution of the question whether the Act is inoperative. The trial Judge accepted that it is the policy of the legislation to require landlords to obtain permission from the Rent Commissioners for the raising of the rent above a certain percentage. He however pointed out that there is no absolute prohibition against revision of rents and there is no law which prohibits the increase of rental.

What the learned Judge found was that the rental was a small percentage of the market value and as such a gross undervalue. The fact that a certain amount of rent is the standard rent as defined in the Act does not alter the fact that that rent is below or is a small percentage of the market value. There was ample evidence on which the learned Judge could find as he did in this case and there should be no interference with that finding. The effect of the provisions of the Act can very well be that a landlord may find that his standard rent in a particular case is below the market value or a landlord could be fortunate to find his standard rent in a particular case above the market value.

What is important to observe is that the finding of the undervalue was not the end of the matter of the rent. The learned Judge went on to state "What in my view was the most unfair and inexplicable term in the lease was the grant of a term of 20 years without any provision for increase of rent". He found this a most unusual provision in a lease of this nature. He recalled that there was an existing lease

/with an....

with an unexpired period of more than one year containing a right to renew upon review of the rent. He found one of the objectives in having the lease concerned drawn up was to have a guaranteed rent at a fixed rate which was not only below the commercial value in 1980 but was going to continue until the turn of the century. Thus he found the bargain improvident and made on circumstances giving rise to suspicion.

The undervalue as found is sustainable on the evidence and was but one factor in the determination that the bargain was improvident. The learned Judge was entitled to take into account that a sensible landlord faced with a standard rent, well below the market value, would give himself opportunity for periodic review and increase of that rent as permitted by the law and not tie himself to that undervalue for two decades. The conclusion of the learned Judge was eminently reasonable.

Under one ground of appeal the appellant complained that there was no evidence on which the learned Judge could properly find:-

- a) that the respondent at the time of entering into the transaction impugned was either poor or ignorant; or
- b) that she was in a weaker position than the appellant; or
- c) that the respondent was dependant upon the appellant financially or otherwise.

Portions of the evidence were reviewed to show that on those portions such findings could not be reached.

In support of his submission that the parties were of equal status Counsel adverted to the evidence of the respondent that Catherine Pigott was trained as a nurse in Montreal, Canada; that besides the premises involved in the lease, she had interests in four other buildings in the city. That she managed her own personal affairs, had accounts in her own name and operated them. Dr. Walwyn's testimony that in 1966 her general health was good and his first note as to an adverse medical condition was in September 1981. She was a person who did a lot of charitable work. Her lawyer Kendall testified that she had a reputation as being a woman of substantial worth. She used one of the buildings in which she had an interest for the purpose of a dry goods business. No background of the appellant was given other than describing her as a trader selling shoes. It was Counsel's submission that in fact both parties were traders and it was absurd to suggest inequality of bargaining position.

It must.....

It must first be observed that one conclusion may be reached on the evidence as extracted by Counsel but the evidence as a whole has to be considered. Over and above that the findings concerned were in the context of principles to be applied.

Lord Denning M.R. in *Lloyds Bank v Bundy* (1974) 3 All E.R. 757 at 763 stated the principle that "the Courts will set aside a contract when one party thereto was 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". Inequality of bargaining power is a relative concept as Dillon L.J. pointed out in *Alec Lobb Ltd. v Total Oil G.B. Ltd.* (1985) 1 All E.R. 303 at page 313 and it is difficult to delineate what degree of inequality between the parties must exist before the jurisdiction may be invoked. See *Woods J.A.* in *Knupp v Bell et al* 67 D.L.R. at page 259.

In addition to the evidence adverted to by Counsel for the appellant the learned Judge had before him that at the material time Catherine Pigott was 71 years of age, was not accustomed to transactions of this nature, was concerned about getting a regular income from the premises, a matter which weighed heavily on her mind, and saw the appellant, already a tenant, as the source of that income. That as he found the appellant took advantage of Pigott's circumstances and moved in a great hurry to get the lease executed at the material time. All of these matters were relevant to the question whether the circumstances gave rise to an inequality between Pigott and the appellant and the obtaining of an unfair advantage by the appellant.

This Court ruled in *Edwards and Another v Buxton* 30 W.I.R. 92 that the Court would only disturb a Judge's decision on facts where there was no evidence at all or only a scintilla of evidence to support it. In this case there was ample evidence before the learned Judge on which he could have reached his conclusion and I cannot say that the conclusion that there was inequality of bargaining power in the circumstances was an unreasonable one.

Under another ground the appellant complained that there was no evidence on which the learned Judge could properly find:-

- a) that Catherine Pigott had no opportunity to discuss the transaction with her family; or
- b) that she was not aware of what she was doing; or
- c) the appellant intended to avoid having the rent reviewed by an independent arbiter.

/Submissions on.....

Submissions on this were made in conjunction with the ground that the learned Judge was wrong in holding that Catherine Pigott was without independent legal advice or, if he was right in so holding, that its absence led to her entering into the transaction. Here again Counsel for the appellant drew this Court's attention to a number of things as disclosed in the evidence that the experienced Attorney Time Kendall did. He pointed to evidence as follows:

Catherine Pigott gave Mr. Kendall instructions to draw up the lease. The instructions were written in pencil on a copy of the existing lease. He went over the instructions with her, made several comments and demanded to see all the parties in his Chambers. Shortly afterwards the parties went to his Chambers, i.e. Pigott, the appellant and her husband. Mr. Kendall pointed out that the subsisting lease still had over a year to run and he could not understand the hurry. Pigott's reply was that she was due to leave the State shortly and did not know when she would return. Mr. Kendall also pointed out that the rent was marginally higher than the rent then being paid and there was no provision for review. He pointed out further that the rent was fixed both for the lease and the renewal period and they were long periods. Pigott's response was she had good tenants, she wanted a guaranteed lease, she wanted no one to come to her about repairs while she was away, she had given instructions and that is what she wanted done. She wanted the lease prepared in the terms of the amended draft. It may be added that two days after that meeting, the parties returned to Mr. Kendall's Chambers. Pigott said she was leaving the State the following day and so the lease was prepared while they waited. It was executed that said day.

All of these matters the learned Judge analyzed and concluded: "that at the time the respondent saw Mr. Kendall the terms of the lease had already been agreed between herself and the appellant and that when she entered into the agreement she had no advisers at all".

Counsel's submission was that the parties had agreed upon the terms in principle but there could be no enforceable agreement until the terms were drawn up and signed. When Pigott went to Mr. Kendall he gave her clear advice on all the relevant points. There was no need or obligation to call in any members of her family for discussion. As life tenant, Pigott was entitled to take all decisions which would affect the property during her lifetime.

Counsel for the respondent urged that the Judge's consideration of the matter of Pigott, a life tenant, not having an opportunity to discuss was because as he stated "the interest of the reversioners ought also to have been considered". Reference was made to section 37 of the Settled Estates Act, Cap. 292 two subsections of which provide:-

/"37(1) a tenant.....

"37(1) A tenant for life -

.....

(b) may contract to make any lease and in making any lease may vary the terms with or without consideration, but so that the lease be in conformity with this Act:

(2) Every such contract shall be binding on and shall enure for the benefit of the settled land and shall be enforceable against and by every successor in title for the time being of the tenant for life and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself."

In *Coomber v Coomber* (1911) 1 Ch. 727 at pages 729 Fletcher Moulton L.J. expressed the opinion that "a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequences of that act". I adopt that view.

While the evidence placed before the learned Judge shows that the solicitor concerned in this case drew relevant matters to the attention of Pigott the extent of the reference, to my mind, only went as far as construing or interpreting or stating what the relevant clauses of the proposed lease provided for or omitted. The evidence as adduced did not go to show that Pigott was made to fully understand the consequences of granting a lease in such terms. One clear example is that the evidence does not show that she fully understood the effect such a lease was likely to have on the person or persons entitled to the premises at her demise. It would appear Kendall did not have opportunity to go as far as he could have. Certain things having been pointed out to Pigott, she, as Counsel said, held the sword of Damocles over Kendall. "Prepare the lease.....or I go elsewhere".

It appears therefore that the learned Judge did take the relevant considerations and on the evidence left before him it was reasonable for him to conclude that the advice such as was given by Kendall did not satisfy the criteria as enunciated by Fletcher Moulton L.J. in *Coomber's* case (*supra*). I would not interfere with this finding.

By the cross-appeal, the respondent questioned the refusal of the learned Judge to make an order as to damages and/or mesne profits. (He neither adjudicated thereon nor made an order for assessment). The learned Judge said in his judgment it did not seem to him that these proceedings were appropriate for making an order for damages. The grounds of appeal are:-

/"(1) The learned.....

- "(1) The learned trial Judge erred in Law when he failed to adjudicate on the question of quantum of damages and/or mesne profits on the uncontroverted evidence of ~~GEORGE PIGOTT~~ the lawful attorney of the plaintiff, as to the value of existing rent of similar commercial accommodation in the State of Antigua and Barbuda.
- (2) The Judgment of the trial Judge will unnecessarily protract the litigation even though the plaintiff had led all necessary evidence to establish her case and the Court ought to have adjudicated on the quantum of damages and/or mesne profits to bring an end to the litigation.
- (3) ~~Alternatively the learned~~ trial Judge erred in law when he failed to include in his judgment an order for assessment of damages and/or mesne profits by either himself, a judge of the High Court or the Registrar of the Supreme Court on the uncontroverted evidence of the said ~~GEORGE PIGOTT~~ which was led at the trial."

It may first be observed that the Indorsement on the Writ included a claim for Damages; the prayer in the Statement of Claim included a claim for Damages and Counsel for the respondent in his closing address did ask that there be an order providing the respondent with adequate compensation for the appellant's use and occupation of the premises since 5th September, 1980.

In answer to a question from the Court, Counsel stated that damages and/or mesne profits ought to be awarded on the basis of the appellant being a trespasser. The averments in the Statement of Claim alleging unconscionable bargaining provided the basis for the claim for Rescission. What was established was as pleaded that Pigott had entered into an improvident transaction. Pigott said I have entered into this contract but grant me equitable relief and rescind it. A person cannot recover damages from another for a loss which he has incurred by his own conduct. There were no averments or particulars set out in the Statement of Claim alleging loss or incurring of damages as a result of an act or acts of the appellant. In the absence of fraud a person who entered into an unconscionable bargain cannot at the same time ask for rescission and damages. See *Lempriere v Lange* (1889) 12 Ch.D. 675.

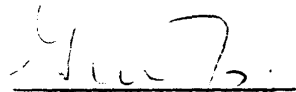
/I am unable.....

I am unable to see how the appellant can be regarded as a trespasser. Until the contract was rescinded, the appellant was holding the premises with the consent of Catherine Pigott i.e., under the agreement. In a case where he was considering whether to grant mesne profits to a landlord who had determined the lease with a tenant, it was clearly stated by Warrington L.J. in Elliott v Boynton (1924) 1 Ch. 236 at page 250:

"Now damages by way of mesne profits are awarded in cases where the defendant has wrongfully withheld possession of the land from the plaintiff. According to the authorities I have cited, until the determination of the lease by the Writ, his possession was under the lease and was not wrongful and for this period therefore no damages could be awarded as there was no wrong."

The learned Judge was quite right when he held that the proceedings were not appropriate for making any order for damages.

In the circumstances I would dismiss the appeal and the cross-appeal.



G.C.R. MOORE,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

C.M.D. BYRON,
Justice of Appeal