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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

ON THE 10TH, 11TH, 12TH AND 14TH JANUARY 1994

CAUSE #308/91

BETWEEN	ELGIN MILLER	PLAINTIFF
AND	JUDY ANN EBANKS SHELLY SMITH LADA LOVINIA EBANKS SHARON MYRLO MCCOY	DEFENDANTS

For the plaintiff: Mr. M. Parkinson
For the defendants: Mr. R. Nelson

HARRE C.J.

JUDGMENT

The parties in this case are Mr. Elgin Miller, the plaintiff, and four of his six daughters, the defendants. It will be convenient to refer to the defendants by their given names, Judy Ann, Shelly Ann, Lovinia and Sharon.

Mr. Miller alleges fraudulent misrepresentation against the defendants and relies on non est factum. He says that Judy Ann and Lovinia, acting for themselves and as agents for Shelly Ann and Sharon, orally represented to him that he should sign several documents in order to allow the defendants to obtain a loan at a bank. That representation was untrue and made, he says, with the intention that he should be induced, as he was induced, to sign the documents which were in fact instruments which transferred Registration section Prospect Block 22E Parcel 223 H11 ("the Prospect apartment") to Lovinia and Sharon and Registration Section North Side Block 57E parcel 44 ("the North Side house") to Judy Ann and Shelly Ann. Mistake is also pleaded, and

there is a further allegation that the plaintiff did not appear before a Justice of the Peace as stated on the certificates on the reverse of the documents, did not understand their contents and did not freely and voluntarily execute them as required by section 107 of the Registered Land Law (Revised).

The defendants deny that Judy Ann and Lovinia made any representations whatsoever to their father regarding obtaining a loan at a bank. They say that they and their sister, Mitzi Tomlinson, as dutiful daughters, willingly and voluntarily gave their father, the plaintiff, substantial financial assistance over a number of years and paid his utility bills, mortgage payments, car loan, insurance, hospital bills and miscellaneous household and other expenses, and that the net proceeds of the rent obtained from the Prospect apartment has primarily been put towards the payment of the Plaintiff's liabilities; that Judy Ann and Lovinia with the agreement of Shelly Ann and Sharon upon hearing that their father had remarried visited him on the 14th of November, 1990 and explained to him that they were prepared to continue settling his financial obligations which they had hitherto met provided that he transferred his interest in the North Side house and the Prospect apartment to the Defendants; that it was a term of the proposal that their father would be at liberty to reside at the North Side house for the rest of his life and that the Defendants would assume legal liability for his loan from the Bank of Nova Scotia which was secured by a charge on that house; and that Judy Ann and Lovinia discussed the proposal at length with their father who willingly agreed to accept the proposal and execute the instrument of transfer.

Evidence about the crucial meeting on 14th November 1990 was given by Mr. Miller himself, his second wife ("Miss Helen"), Lovinia, Judy Ann and Keith Gourzong the husband of another of Mr. Miller's daughters, Magalie, who is not a party to these proceedings. Before I give my view of that evidence as a whole I will dispose of one particular matter. Each of the documents signed by Mr. Miller bore on its back a certificate in the following terms -

"I HEREBY CERTIFY that the above named person appeared before me on the 15th day of Nov 1990 and being identified by A. L. Thompson acknowledged the above signature or mark to be his and that he had freely and voluntarily executed this instrument and understood its contents."

Those certificates were signed by Mr. Thompson but, most regrettably, none of the facts certified was true insofar as they related to Mr. Miller. He did not appear before Mr. Thompson, was not identified by him and did not acknowledge his signature or that he had freely and voluntarily executed the instrument and understood its contents. I am told that it has been a common practice in the Cayman Islands, when the parties are well known to the person certifying these matters, for such a certificate to be given in the absence of the person signing. If so, that practice must altogether cease, and I shall make that known to the Justices as a body. There can be no better illustration of the importance of the procedure being properly carried out than this unhappy case, which might well have been avoided altogether if it had.

I now return to the leading participants in this affair, and their evidence. Mr. Miller, the plaintiff, is aged 69, with very limited reading and writing skills. I accept that he is not completely illiterate but that he is not capable of understanding a legal document through the written word. Despite this disability, and his age, he gave me the impression of being a man who was still lively, with all his wits about him and with a mind of his own.

His second wife, Miss Helen, is also of quite mature years. She gave evidence that she is of Dutch origin and has lived in Cayman since about 1982. Her English appeared fluent enough, but was obviously not her mother tongue.

The defendants exemplify the successful younger generation of Caymanians. All hold, or have held, responsible positions in

Government, banking, Cayman Airways and the hotel industry. Of the two who gave evidence, Lovinia is a Senior Operations Officer of a Trust Company, in charge of the Deposit and Securities Departments and Judy Ann was until recently manager of in-flight services at Cayman Airways. She is now Assistant Manager at a major new hotel.

There was no conflict in the evidence of the family background before Mr. Miller's remarriage on 11th November 1990. The picture is one of a united family. They lived together in the North Side house for many years. The daughters were all brought up there. There was a little shop in the yard, run by their late mother with the help of her daughters with Lovinia taking a leading role. As the daughters prospered, they gave their parents considerable financial help, particularly during the 7 years of their mother's illness. She died in July 1989. They also helped their less affluent sister who had married a police constable. Judy-Ann estimated the daughters' expenditure over the years as \$60-70,000. Lovinia thought the seven years of her mother's illness had accounted for \$50 - \$60,000. It was fairly acknowledged on behalf of the plaintiff that the defendants had expended prodigious sums upon their parents and I am relieved of the task of going into more detail about the considerable body of evidence on that matter.

The ownership of the North Side house and the Prospect apartment at the material time was as follows. The house was effectively in the sole ownership of Mr. Miller, subject to a mortgage, although his deceased wife's name was still on the Land Register. It was established that the sum which would be required to pay off the mortgage now would be approximately CI\$32,500. The transaction of which Mr. Miller complains is the transfer of that property to Judy Ann and Shelly Ann. In explaining the ownership of the Prospect apartment I have to refer to another property at North Side, Parcel 67. When the son of the family died in 1974 he left a partly completed house and Lovinia was allowed by her parents to use Parcel 67 as collateral in order that she could buy it. Parcel 67 was transferred to her. In the event, the collateral was not needed but

she regarded the parcel as a gift, and has kept it. There was a duplex on the parcel, built by Mr. Miller, which was destroyed by Hurricane Gilbert in 1988. Insurance money in the sum of \$95,000 was paid. With that and additional loans taken out by Shelly Ann and Judy Ann the Prospect apartment and its contents were bought. Throughout these transactions Parcel 67 remained in Lovinia's name. In November 1990 the Prospect apartment was still registered in the names of Elgin Miller, the late Mrs Miller and Lovinia as joint proprietors. The transaction of which Mr. Miller complains is the transfer of his joint interest to Sharon leaving the property in the joint ownership of Lovinia and Sharon after the name of their deceased mother had also been removed from the register.

I now describe my findings relating to those transactions. Mr. Miller married Miss Helen on 11th November 1990. He says he told Lovinia and Judy Ann about it some two weeks before. They deny that. Miss Helen agreed under cross examination that he had merely introduced her as his "girlfriend" and had not mentioned marriage. In any event Mr. Miller said that as far as he knew the daughters knew nothing of the ceremony itself and did not attend. I am satisfied that the news of the marriage having taken place was a bolt from the blue and have no difficulty in inferring that both the fact and the manner of it caused consternation. An urgent meeting of the sisters was called for the following day at the house of Judy Ann. It was decided not to continue to pay their father's expenses unless they had some assurance about their inheritance. No time was wasted. By 14th November, 3 days after the marriage, the necessary Land Registry forms relating to the transfers of the two properties had been prepared and the bank as mortgagee had been consulted about how much life insurance would be required as a condition of its consent to the transfer of the mortgage on the North Side house.

Two emissaries, Lovinia and Judy Ann, then set forth towards evening on the 14th November to put an agreed proposition to their father. This case turns on my view of what proposition was presented that

evening. Was it a transfer of the Prospect apartment and the North side house in consideration of continued financial support? Or had it been agreed, either at the meeting of the sisters on the day following the wedding or thereafter that it would be presented, as the plaintiff says it was presented, in a wholly fraudulent and fictitious way as the production for signing of documents which would make possible a further bank loan?

According to the plaintiff, supported by Miss Helen, Lovinia told him that the bank was "down on him", and discussion followed about selling the Prospect apartment and using the proceeds to pay off the mortgage on the North Side house. Lovinia started to cry and Judy Ann took over, saying that they wanted him to borrow more money on the house. There was argument and eventually he agreed to sign the papers presented to him, which for good measure, had been folded in such a way that only the space at the bottom where he was invited to sign was visible.

Miss Helen confirmed that the discussion had been about a bank loan and that Lovinia had used the phrase that the bank was "down on them". She said that she did not look at the papers, for when she asked for them she was told it was just a small family affair.

There was another person present at the meeting. He was Keith Gourzong, Magalie's husband and he was there quite by chance. When Judy Ann and Lovinia arrived he was about to drive away with Mr. Miller and his new bride to attend a family birthday party. After the Millers had been persuaded to return to the house he was told that he might as well join the meeting also. He was a reluctant witness for the plaintiff. He said that he recalled an issue developing, with the sisters saying something like "Daddy you have to sign something to prevent the bank taking away your house". I find it extremely credible that something like that was said, for that was the very threat behind the scheme devised by the sisters - that if he refused to sign the supply of money from them would dry up, he would be unable to meet his mortgage payments and his house would be taken from him by

the bank. Unlike Mr. Miller, Mr. Gourzong said that the documents he saw were folded vertically. He did confirm that Miss Helen had asked to see the papers and had been refused. I am inclined to believe that happened. There was every reason to keep her at a distance from the transaction, the whole object of which was to prevent her getting her hands on what the daughters regarded as their inheritance. She was to be the real loser.

I do not, however, attach great weight to Mr. Gourzong's evidence as a whole. He acknowledged that he was not listening closely all the time to the conversation and left the meeting after 20 - 30 minutes. There is considerable conflict of evidence about how long that meeting lasted. Miss Helen said half an hour. Both Lovinia and Judy Ann put it at two hours or more and supported that estimate with an account of the time when they journeyed back to George Town. I prefer their evidence on that matter. Moreover, there was clearly no warmth in the relationship between Lovinia and Judy Ann and Mr. Gourzong, whereas he appears to have been on good terms with the plaintiff and Miss Helen and to have driven them about from time to time.

I accept that he drove Mr. Miller to visit Mr. Thompson and Mr. Conolly his attorney and also that Mr. Miller went to the Government Office at the Tower Building, George Town and the bank to make enquiries about the legal position. I also accept that by 27th June 1991 the relationship between Judy Ann and her father had reached a point where she made a report to the police about him.

My view of the admitted irregularity on the part of Mr. Thompson is that it does not of itself affect the validity of the registration of the transfers.

Section 140 of the Registered Land Law does, however, provide that the court may order rectification of the register where it is satisfied that the registration has been made or admitted by fraud or mistake.

I reject the allegation of fraud. On behalf of the plaintiff seven matters were adduced which were said to be overwhelmingly in his favour.

- his disadvantaged position because of his virtual illiteracy
- his reliance over many years on his daughters, particularly Lovinia;
- the independent evidence of Mr. Gourzong;
- the deliberate abuse of the safeguard provided by the mandatory certificate of the Justice of the Peace;
- the way in which the transaction was presented as a fait accompli at the meeting on 14th November;
- the actions of the plaintiff after the meeting, which were those of a man betrayed rather than a man who had changed his mind;
- the determination of the defendants to preserve their "investment" in their inheritance, in anticipation of which they had paid out large sums to their parents.

Indeed there are aspects of those matters which might motivate fraud, and would facilitate fraud if fraud were contemplated. Against all that is the evidence of Lovinia and Judy Ann and the utter improbability that people of their obvious ability, sophistication and position in the community, with or without the connivance of their sisters, would embark on such a childish deception and sustain it through a meeting of some two hours duration during part of which an independent witness whom one of them had invited in was present, in the person of Mr. Gourzong. The analysis of expenditure which Lovinia prepared and showed to her father is more credible as a document indicating what he would be in for in the long and short term if he rejected their real proposal than as a justification for seeking a further bank loan. Mr. Miller is uneducated but he is not a simpleton. He knew that most of his daughters were comfortably stationed in life. What compelling reason could there be, despite his marriage, for the sudden announcement by Lovinia and Judy Ann of cash flow problems which made a further bank loan necessary? Of course it

is true that the larger the mortgage on the house the less valuable an asset it would be for Miss Helen to inherit but there is no evidence that that aspect of the matter entered into the discussion at all. The presentation as Mr. Miller now claims to remember it makes little sense.

Far more likely, in my judgment, is that the sisters decided on the morrow of the wedding to lose no time in presenting their father with an ultimatum. It was not a gentle treatment and if afterwards he felt that he had been steamrollered into something which he regretted that is not surprising. But the daughters were in a strong negotiating position and having seen Lovinia and Judy Ann as witnesses I do not doubt that they also had a formidable negotiating team. A strong reason for not believing the allegation of fraud is that the fraud was unnecessary.

There being no fraud, is the plea of non est factum on the ground of mistake one on which the plaintiff can succeed? In relying so heavily on fraud in closing I think the plaintiff's counsel recognised the difficulties in his way if that were not established. In most of the cases where non est factum has been successfully pleaded, the mistake has been induced by fraud.

A number of authorities were cited to me but it is common ground that the law is most completely and authoritatively stated in Saunders v Anglia Building Society (1970) 3 All ER 961, a House of Lords case. The nature of the doctrine in relation to the present case can be found in the following extracts from their Lordships' speeches. Lord Pearson said -

"The danger of giving an undue extension to the plea of non est factum has been pointed out in a number of cases. For instance in Muskham Finance Ltd v Howard Donovan LJ delivering the judgment of the court said:

'The plea of non est factum is a plea which must necessarily be kept within

narrow limits. Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting tht he did not understand that which he had signed.'".

And Lord Wilberforce -

"As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give a relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.".

And Lord Reid -

"Further the plea cannot be available to a person whose mistake was really a mistake as the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change.".

In my judgment, Mr. Miller signed the documents knowing that he was making land transfers to his daughters in order to safeguard the payments among others, under the existing charge on his home rather than applying for an additional bank loan. There is no evidence that it was explained to him that if he died before Miss Helen she would be at the mercy of his daughters and might be unable to remain in the

matrimonial home. If it were that which he only realised later, his change of heart and anger are understandable. But that circumstance is not a discharge of the heavy burden of proof which rests upon him. Moreover, I think that he was careless when confronted with what were obviously legal documents in not insisting on obtaining professional advice, especially in view of his recent marriage which, illiterate or not, he must have realised had important legal implications. I have to say, however, that I think that his daughters would have been more worthy of the trust which he placed in them if they had not pressed him in the way they did. But I have to conclude by adopting the following words of Lord Reid in Saunders v Anglia Building Society -

"There must I think be a radical difference between what he signed and what he thought he was signing - or one could use the words 'fundamental' or 'serious' or 'very substantial'. But what amounts to a radical difference will depend on all the circumstances. ... I think that it must be left to the courts to determine in each case in light of all the facts whether there was or was not a sufficiently great difference."

- - and of Viscount Dilhorne in the same case -

"It will not suffice if the signer thought in some respect it would have a different legal effect from what it has;".

That, was, at most, the situation of the plaintiff in this case. In consequence he must fail and I give judgment for the defendants with costs.



G. E. Harre
Chief Justice

14th January 1994.