JUDGMENT
27.
1973

IN THE PRIVY COUNCIL

appeal
No. 15 of 1972 .

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL - IN CAUSE NO. 22 of 1969

BETWEEN: ALEXANDER BARTON

Plaintiff (Appellant)

AND: ALEXANDER EWAN ARMSTRONG, GEORGE ARMSTRONG & SON PTY. LIMITED, FINLAYSIDE PTY. LIMITED, SOUTHERN TABLELANDS FINANCE CO. PTY. LIMITED, GOULBURN ACCEPTANCE PTY. LIMITED, A.E. ARMSTRONG PTY. LIMITED, LANDMARK (QUEENSLAND) PTY. LIMITED (In Liquidation), PARADISE WATERS (SALES) PTY. LIMITED, PARADISE WATERS PTY. LIMITED, GOONDOO PTY. LIMITED, LANDMARK HOME UNITS PTY. LIMITED LANDMARK FINANCE PTY. LIMITED LANDMARK HOUSING & DEVELOPMENT PTY. LIMITED, LANDMARK CORPORATION LIMITED, CLARE BARTON, TERRENCE BARTON, AGOSTON GONCZE, JOHN OSBORN BOVILL, HOME HOLDINGS PTY. LIMITED, ALLEBART PTY. LIMITED, AND ALLEBART INVESTMENTS PTY. LIMITED

Defendants (Respondents)

CASE FOR THE RESPONDENTS

SOLICITORS FOR THE RESPONDENTS

Dare Reed Martin & Grant,
187 Macquarie Street,
SYDNEY.

IN THE PRIVY COUNCIL No. 15 of 1972.

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Defendants (Respondents)

CASE FOR THE RESPONDENTS ALEXANDER EWAN ARMSTRONG, GEORGE ARMSTRONG & SON PTY. LIMITED, FINLAYSIDE PTY. LIMITED, SOUTHERN TABLELANDS FINANCE CO. PTY. LIMITED, GOULBURN ACCEPTANCE PTY. LIMITED AND A.E. ARMSTRONG PTY. LIMITED

(hereinafter collectively called "the Respondents").

Record: Rule of Supreme Court pp. 4258-9

1. This is an appeal by leave of the Supreme Court of New South Wales from a Decree of that Court (Mason J.A. and Taylor A-J.A., Jacobs J.A. dissenting) made the 30th day of June 1971. That Decree dismissed the appeal of the Appellant from the Decree of Street J. dismissing the Appellant's suit.

Decree of Court of Appeal p. 4052

Decree of Street, J. pp. 3247-51

2. The suit arose out of the making of a Deed between the Appellant and the First to

Deed Exhibit H, pp, 2092-2137

Record:

Fourteenth Respondents inclusive, which Deed, in short, provided for the settlement of matters in dispute between or affecting the parties to the Deed by:-

Deed Exhibit H, pp. 2092-2137

(a) providing for the discharge of a debt of $400,000 owing by the Eighth Respondent (Paradise Waters (Sales) Pty. Limited) (hereinafter called "Sales") to the Second Respondent (George Armstrong & Son Pty. Limited) (hereinafter called "George Armstrong");

Deed Exhibit H C.1 13 p. 2105

(b) for the making by the Fourth Respondent (Southern Tablelands Finance Co. Pty. Limited) (hereinafter called "Southern Tablelands") to Sales of a loan of $300,000;

Deed Exhibit H C11. 1-2 p. 2096

(c) for the sale by the Sixth Respondent (A.E. Armstrong Pty. Limited) (hereinafter called "A.E. Armstrong") to the Appellant and persons to be nominated by him of the A.E. Armstrong's 300,000 shares in the capital of the Fourteenth Respondent (Landmark Corporation Limited) (hereinafter called "Landmark");

Deed Exhibit A C11 8-9 pp. 2100-2

(d) for the sale by the Third Respondent (Finlayside Pty. Limited) (hereinafter called "Finlayside") to

Deed Exhibit H C1. 11 p. 2104

Record:

Landmark of the Finlayside's 2,000 shares in the capital of Sales; and

(e) for certain other matters ancillary thereto.

Amended Statement of Claim pp. 1(h) - 1 (i)

3. In the suit the Appellant prayed a declaration that the Deed and certain other Deeds ancillary thereto, (being Deeds of Mortgage given by the purchasers of A.E. Armstrong's shares in the capital of Landmark) was and were void, or, alternatively, was and were, so far as concerned himself, void, and further prayed for relief consequential upon the making of the declaration prayed.

Judgment Street, J. p. 3097

4. The matters in dispute between or affecting the parties to the Deed had their origin in the affairs of Landmark a public company with an issued capital of $1,753,000 divided into shares of fifty cents (50¢) each, those shares being listed on the Sydney Stock Exchange.

Judgment Street, J. pp. 3098-9

5. Landmark was, at all material times, engaged, through subsidiaries, in the business of developing parcels of real estate and, in particular, two parcels of real estate:-

(a) a parcel in the city of Brisbane on which was being erected a

Record:

multi-storeyed office building to be known as "Landmark House";

(b) through its subsidiary companies, the Respondents Sales, Paradise Waters Limited (hereinafter called "Paradise Waters") and Goondoo Pty. Limited (hereinafter called "Goondoo") a building estate near Surfers' Paradise in Queensland, which estate was to be known as "Paradise Waters". 10

In addition the Landmark group had a mortgage management business.

6. The Respondent Alexander Ewan Armstrong (hereinafter called "Mr. Armstrong") was, from 1963 until November 1966, the Chairman of Directors of Landmark. He, either directly or through the machinery of his various family companies, the Respondents George Armstrong, Finlayside, Southern Tablelands, Goulburn Acceptance Pty. 20 Limited (hereinafter called "Goulburn Acceptance") and A.E. Armstrong (which said companies are hereinafter collectively called "the Armstrong companies") held 300,000 shares in the capital of Landmark, those shares representing the largest single shareholding in the capital of Landmark.

7. The Appellant, at the invitation of

Record:

Mr. Armstrong, became the General Manager of Landmark in 1963; subsequently, in 1964, being appointed its Managing Director. The Appellant (either directly or through his family companies) was also a substantial shareholder in Landmark, although his shareholding fell short of that controlled by Mr. Armstrong.

8. In the years 1966 and 1967, the other Directors of Landmark were the Respondent John Osborn Bovill (hereinafter called "Mr. Bovill") and one Cotter (hereinafter called "Mr. Cotter"). 10

9. By the latter part of the year 1966, the "Landmark House" project was nearing completion and the focus of the activities of Landmark and its subsidiaries was directed toward the development of the "Paradise Waters" project.

10. The real estate which made up the "Paradise Waters" project was partly freehold and partly Crown leasehold. It had formerly been owned by Goondoo, at which time Goondoo had been controlled by Mr. Armstrong. Goondoo had sold the land to Paradise Waters and had conveyed to that latter company the freehold land but, by virtue of the terms of the Crown lease, it had been unable to assign to Paradise 20

Record:

Waters the leasehold land which it retained but in respect of which it declared itself to be a trustee for Paradise Waters. The shares in Goondoo were then sold to Landmark.

11. Paradise Waters was itself a wholly owned subsidiary of Sales. The share capital of the latter company was held as to 60% by Landmark and as to the balance by the Respondent Finlayside.

12. Of the purchase price payable to the Armstrong companies in respect of the transaction whereby the real estate was conveyed to the Landmark group of companies, the sum of $400,000 remained unpaid. The payment of that sum and interest was secured by mortgages over both the freehold land and the leasehold land, those mortgages being given in favour of George Armstrong.

13. The development of the project, which involved dredging the Nerang river around the land, and forming canals which would provide water frontages to the lots intended to be created in the ultimate subdivision, was financed by advances made by United Dominion Corporation (Australia) Limited, (hereinafter called "U.D.C.") those advances being secured by mortgages over both the freehold and leasehold land,

Record:

which mortgages had priority over the mortgages granted to George Armstrong. By about November 1966 a sum in excess of $400,000 had been advanced by U.D.C. in respect of development costs, which costs were running at the order of a monthly expenditure of $22-25,000.

Judgment Street, J. pp. 3118 et seq.

14. Until about the middle of 1966 the relationship between the Appellant and Mr. Armstrong was not unfriendly. However, from that time onwards their personal relationship steadily deteriorated.

15. Before Mr. Armstrong's departure overseas in the beginning of September 1966 disagreements had occurred between the Appellant and Mr. Armstrong concerning business matters affecting Landmark.

Judgment Street, J. p. 3119

16. On Mr. Armstrong's return in the middle of October 1966 an argument occurred between them in which, according to the Appellant, he asked Mr. Armstrong to resign, a request which was refused and which, according to the Appellant, provoked threatening language on the part of Mr. Armstrong.

Judgment Street, J. pp. 3119-20

17. On the 18th October 1966, at a Board meeting of Landmark, Mr. Armstrong objected in strong terms to the method of presentation of the Company's accounts for the

Record:

year ended 30th June, 1966, which accounts, he claimed, gave a misleading picture of the financial position of Landmark. The other directors, including the Appellant jointed issue with this objection.

18. At or about the same time, Mr. Armstrong, in a conversation with Mr. Bovill expressed criticism of the Appellant's conduct in selling to a Mr. Hoggett, the new Manager of Landmark, a parcel of shares in that company at a price substantially above the market price. This criticism was conveyed to the Appellant who was resentful of it.

Judgment Street, J. pp. 3120-2

19. In consequence of these disputes and, on the initiative of the Appellant, the Directors of Landmark, at a Board Meeting held on 24th October 1966, passed a vote of confidence in the Appellant as Managing Director. At the same meeting a series of resolutions aimed at Mr. Armstrong were passed, those resolutions including a resolution which denied to Directors other than the Appellant any executive authority in connection with the Company's affairs.

Exhibit "A" pp. 2055-6

Judgment Street, J. pp. 3123-4

20. On the 4th November 1966 Mr. Armstrong's solicitors wrote to the Appellant offering to purchase from one of the Appellant's family companies 170,000 shares in

Record:

Landmark at a price of 70 cents per share, a price which was then above the current market price. This offer was rejected by the Appellant because, so he alleged, it contained a condition requiring the Appellant to remain on the Board for 3 to 6 months and to support Mr. Armstrong.

Exhibit 6 pp. 2445-8

21. Further disputes concerning the accounts of Landmark occurred at a Board Meeting held on the 8th November 1966. These disputes were resolved against Mr. Armstrong and it was decided to convene the Annual General Meeting on 2nd December 1966. Mr. Armstrong protested against the recommendation that a dividend be declared on the ground that the finances of the Company were not such as to warrant the payment of any dividend.

Exhibit 56 p. 2916

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22. At Board Meetings of Paradise Waters and of Sales held on 8th November 1966 Mr. Armstrong was removed as Chairman of Directors and the Appellant was appointed as Chairman of each of the two companies.

Exhibit 57 p. 2960

Exhibit 58 p. 2964

20

23. On 10th November 1966 the solicitors for Finlayside demanded that Mr. R.I. Grant (hereinafter called "Mr. Grant") Mr. Armstrong's solicitors should be appointed to the Boards of both Paradise Waters and Sales as a nominee of Finlayside to give

Exhibit 45 pp. 2736-7

Record:

effect to the provisions of a Deed of Covenant dated 11th February 1966 made between Finlayside, Landmark, Paradise Waters and Sales which entitled Finlayside to have equal representation with Landmark on the Boards of the two companies and to have its nominee appointed as Chairman of Directors with a casting vote.

Exhibit 45 pp. 2747-52

24. When Landmark did not comply with this demand, proceedings by way of Originating Summons were instituted on 15th November 1966, in which proceedings, Street J. on 7th December 1966, after a contested hearing, made an Order on certain terms requiring Landmark to cause Mr. Grant to be appointed as a Director of each of Paradise Waters and of Sales.

Exhibit 45 pp. 2756-2760

25. At the same time, the solicitors for George Armstrong had demanded the appointment of Mr. O. Guth as its nominee to the Board of Sales pursuant to the provisions of one of the subsidiary charges taken by it to secure the payment of the balance of the sum owing to the Armstrong companies as a result of the transaction whereby the "Paradise Waters" project was acquired by the Landmark group of companies.

Exhibit 45 p. 2738

Exhibit 45 pp. 2744-2746

26. This demand not having been complied with,

Record:

George Armstrong, on 15th November 1966 commenced proceedings by way of Originating Summons for appropriate relief.

27. At or about this time, the Appellant had approached the U.D.C. for an advance of $400,000 to be used to discharge the indebtedness to George Armstrong. U.D.C. had, according to the Appellant, promised to advance this sum.

28. On 17th November 1966 the Appellant with the support of Messrs. Bovill and Cotter resolved that Mr. Armstrong be removed from his position as Chairman of Directors of Landmark.

Exhibit 56 p. 2925

29. The mortgage from Paradise Waters to George Armstrong provided (inter alia) that the outstanding principal of $400,000 together with interest was to become due and payable on the removal of Mr. Armstrong as Chairman of Directors of Landmark.

30. Accordingly, on 21st November 1966, Mr. Armstrong's solicitors gave notice to Landmark that the amount was required to be paid and that formal notice of demand would be given to Paradise Waters.

Exhibit 46 p. 2761

Exhibit 46 p. 2762

31. On the same day, Southern Tablelands demanded immediate payment of an amount of $50,000 due from Grosvenor Developments Pty. Limited (hereinafter called

Exhibit 46 p. 2763

Record:

"Grosvenor") (another subsidiary of Landmark) which amount had been overdue since 30th September 1966.

32. On 23rd November 1966 Landmark received from U.D.C. a formal letter confirming a resolution of the Board of that Company agreeing to make available to Landmark an amount of $450,000 together with interest outstanding to the Armstrong companies so as to enable the payment of the debts owing to those companies. Thereafter the solicitors for Landmark and for the Armstrong companies gave consideration to the documentation which would be required to enable the securities held by the Armstrong companies to be discharged.

Exhibit "C" p. 2067

Exhibit 46 pp. 2764-5

Exhibit 48 pp. 2767-2780

33. At or about this time Mr. Armstrong nominated candidates (against Mr. Cotter, the retiring Director) for election to the Board of Landmark at the election to be held at its Annual General Meeting on 2nd December 1966. This led to a contest between the Appellant and Mr. Armstrong to secure proxies from the shareholders.

Exhibit "Z" pp. 2354-5

Exhibit 28 pp. 2515-7

Exhibit 47 p. 2766

34. The contest over the election of Directors gave rise to a suit in Equity brought by Mr. Armstrong to enforce a demand which he had made as a Director to inspect the proxies lodged with the Company for use

Judgment Street, J. p. 3128

Record:

at the meeting. Relief was granted by Street J. to Mr. Armstrong on 1st December 1966. (85 W.N. (N.S.W.) (Pt. I) 238).

Judgment Street, J. p. 3128

35. The contest over the election of Directors resulted in a victory for the Appellant who succeeded in having Mr. Cotter re-elected and Mr. Armstrong's candidates rejected.

36. On 10th December 1966 the Managing Director of U.D.C. informed the Appellant that his company had decided not to advance the moneys necessary to discharge the indebtedness to the Armstrong companies and that his company would make no further loans in connection with the "Paradise Waters" Project.

Exhibit 7 p. 2449

37. On 13th December 1966 the Appellant wrote to U.D.C. on behalf of Landmark demanding that U.D.C. honour its undertaking and make the advance of $450,000.

38. On the 13th December 1966 Mr. Armstrong saw Mr. B.H. Smith, (hereinafter called "Mr. Smith") a well-known accountant and his financial adviser and gave him instructions to enter into negotiations with the Appellant with a view to terminating the association of the Armstrong companies with the Landmark group of companies.

B.H. Smith pp. 572 et seq. Exhibit 35 p. 2721

39. Mr. Smith saw the Appellant on the 14th

Record:

December 1966, on which occasion Mr. Smith proposed that the Appellant should make a

B.H. Smith pp. 577 et seq.

firm offer in writing, to be subject to acceptance within 48 hours, involving the following matters:-

(a) that Landmark would pay out George Armstrong & Son's mortgage debt of $400,000 together with interest

(b) that Landmark would purchase the 40% shareholding of Finlayside in Sales for $175,000;

(c) that the Appellant would purchase the 300,000 shares in Landmark held by Mr. Armstrong and his companies for $180,000; and

(d) that upon completion Mr. Armstrong and his nominees would resign from the Boards of the various companies.

B.H. Smith pp. 577 et seq. Exhibit 36 pp. 2722-3

Exhibit 37 p. 2724

The Appellant agreed that by 16th December 1966 he would endeavour to reach a firm agreement on a variation of this proposal, the principal variation being that the purchase price for the 40% shareholding of the Armstrong companies in Sales should be $100,000 in cash and the granting of an option by that company to Mr. Armstrong or his companies to purchase 30 blocks in the completed development, at the list price of those blocks less 40%. Although

Record:

the market price for shares in Landmark was little more than half of the price proposed, the Appellant did not on that occasion, nor on any subsequent occasion, demur at the suggested price for the shares.

B.H. Smith pp. 585 et seq.
Exhibit 38 pp. 2725-7
Exhibit 39 p. 2729

40. The Appellant saw Mr. Smith again on 16th December 1966, on which occasion he informed Mr. Smith that he was not able to commit himself to a firm arrangement in terms of the discussion held on the 14th December 1966. The substance of the discussion on the 16th December 1966 turned on the Appellant's desire for extended terms to meet the payment discussed at the previous meeting. There was no change in the basic framework of the repayment of the loan, the purchase of the 40% interest in the "Paradise Waters" Project and the purchase of the 300,000 shares at 60 cents payable over three years. However, the Appellant suggested that a penthouse be sold to Mr. Armstrong by one of the Landmark Companies and requested that the payment of the loan of $400,000 and the $100,000 cash portion of the purchase price for the interest in the "Paradise Waters" project be deferred for some period.

Judgment Street, J. p. 3201

41. On the same day the Appellant's family company lent to a Landmark subsidiary the sum of $6,000 at 7% interest.

Record:
B.H. Smith pp. 590 et seq.

Exhibit 40 p. 2729

42. The Appellant saw Mr. Smith again on 19th December 1966 on which occasion there was further discussion about the request for a deferment of the payment of the two sums of $400,000 and $100,000.

B.H. Smith pp. 592 et seq. Exhibit 44 p. 2735

43. On the same day, with the approval of the Appellant, Mr. Smith saw the Managing Director of U.D.C. who indicated that that company had not finally decided to withdraw financial support from Landmark but that its attitude towards further finance would be influenced by the settlement of the differences between the Directors of Landmark, and by Mr. Armstrong, from refraining from calling up the debt of $400,000.

Exhibit 14 pp. 2479-80

44. On 20th December 1966 the Appellant in answer to a letter of 16th December 1966 informed the Stock Exchange that the dividend (amounting to $87,650) would be paid on or before 23rd January 1967.

Judgment Street, J. p. 3201

45. On 21st December 1966 the Appellant's family company lent $13,000 to another Landmark subsidiary.

B.H. Smith pp. 594 et seq. Exhibit 41 p. 2730

46. The Appellant again saw Mr. Smith on the 21st December 1966 when there was further discussion on matters of detail.

47. On 22nd December 1966 Mr. Armstrong's solicitor ascertained that U.D.C. proposed to appoint a Receiver of Landmark under

Exhibit 12 pp. 2475-6

Record:

its securities unless its existing loan was immediately reduced by $60,000 and unless Mr. Armstrong made a further advance of $300,000 to Landmark. On the same day, Mr. Armstrong, at a Board Meeting of Landmark, offered to advance the $60,000 provided that he took over the control of the company from Mr. Barton. This offer was rejected by the Appellant and Messrs. Bovill and Cotter.

Judgment Street, J. pp. 3150-1

48. On the following day the Appellant saw U.D.C., arranged for the payment to that company of $60,000 and executed further securities in favour of that company. In consequence, U.D.C. undertook not to appoint a Receiver for 7 days.

Judgment Street, J. p. 3201

49. Late in December 1966 the Appellant's family company bought on the Stock Exchange a parcel of shares in Landmark.

Judgment Street, J. p. 3151

50. On the same day the Appellant left Sydney for Surfers' Paradise where he remained until his return on or about the 2nd January 1967.

Judgment Street, J. pp. 3154-5

Exhibit 7 p. 2458

51. On 28th December 1966 Mr. Bovill and Mr. Cotter with the assent of the Appellant sent to U.D.C. a letter asking that no further steps be taken until there had been a full discussion after the Appellant's

Record:

return to Sydney from Surfers' Paradise. U.D.C. apparently acquiesced in this request.

Judgment Street, J. p. 3151

52. The Appellant returned to Sydney on the 2nd January 1967.

53. On 3rd January 1967, in response to a telephone call from Mr. Smith, the Appellant had an interview with Mr. Smith. The interview was somewhat lengthy and it was directed to alternative proposals put forward by the Appellant as ways of achieving the basic agreement that had been under consideration since 14th December 1966, that is, the repayment of the loan of $400,000 the purchase of the 40% interest in the "Paradise Waters" project and the purchase of the 300,000 shares at 60 cents each. During the course of the interview the Appellant told Mr. Smith that once Mr. Armstrong was out of Landmark he, the Appellant, was sure that U.D.C. would give Landmark finance.

Judgment Street, J. pp. 3155-6

B.H. Smith pp. 599 et seq. Exhibit 42 p. 2731

Judgment Street, J. p. 3201

B.H. Smith p. 605

54. Later on the 3rd January 1967 Mr. Smith saw Mr. Armstrong and discussed with him the proposals that had been examined between the Appellant and Mr. Smith earlier on that day.

Judgment Street, J. p. 3156

55. Mr. Smith saw Mr. Armstrong again on the 4th January 1967 and in his presence Mr.

Record:
B.H. Smith
pp. 611
et seq.
Exhibit 43
pp. 2732-4

Smith prepared some notes entitled "Basis of Agreement". There were some minor differences between the document prepared by Mr. Smith on 4th January 1967 and the matters discussed between the Appellant and Mr. Smith on 3rd January 1967.

Judgment
Street, J.
pp. 3156-7

56. Having had Mr. Armstrong initial the document entitled "Basis of Agreement" Mr. Smith then telephoned Mr. Barton and read it to him. The Appellant agreed that the document entitled "Basis of Agreement" was acceptable to him.

B.H. Smith
pp. 617
et seq.

Judgment
Street, J.
pp. 3157-8

57. The document entitled "Basis of Agreement" was given to Mr. Armstrong's solicitors on 4th January 1967 with instructions that they prepare the necessary documents as quickly as possible and forward them to the solicitors for the Appellant and for Landmark.

R.I. Grant
pp. 656 et seq.
Exhibit 50A
p. 2082-6
Exhibit 50B
p. 2087

58. On 6th January 1967 Mr. Grant prepared a first draft of the Deed, the subject of the dispute, and sent a copy of this draft to each of the other firms of solicitors under cover of a "Without Prejudice" letter.

Judgment
Street, J.

R.I. Grant
pp. 657 et seq.
Exhibit 50B
p. 2807
Exhibit 50C
p. 2808
Exhibit 50D
p. 2809
Exhibit 50E
pp. 2810-49

59. Between 6th January 1967 and 17th January 1967 there were detailed negotiations between the several solicitors with regard to the Deed. During the course of those

Judgment
Street, J.
pp. 3158-9
pp. 3163-4

Record:

negotiations alterations to the draft were made at the request of both the solicitors for the Appellant and the solicitors for Landmark.

R.I. Grant pp. 659 et seq. Exhibit 50F p. 2851 Exhibit 50G p. 2852 Exhibit 50H p. 2853

60. On 10th January 1967 Mr. Smith telephoned Mr. Barton. During the course of this telephone conversation Mr. Smith informed the Appellant that Mr. Armstrong wanted the Deed exchanged by the following Friday, 13th January, 1967. The Appellant informed Mr. Smith that this was not possible.

Judgment Street, J. pp. 3184-5

B.H. Smith p. 619

61. On 13th January 1967 the Appellant Mr. Bovill and Mr. Cotter met Mr. Smith and a Mr. Hawley at Mr. Smith's office to discuss the appointment of Mr. Smith and Mr. Hawley to the Board of Landmark, an appointment which Mr. Armstrong wanted as part of the overall settlement, and which appointment Mr. Smith and Mr. Hawley had indicated that they would not accept unless and until they had investigated and were satisfied with the affairs of Landmark. During the course of the discussion, the Appellant informed Mr. Smith that the dividend would be paid and that he was quite confident that after Mr. Armstrong was out of the company, he, the Appellant, would have no trouble in getting the money from U.D.C.

Judgment Street, J. p. 3190-1 B.H. Smith pp. 620 et seq.

Record:
Judgment Street, J. pp. 3192

62. In the late afternoon and evening of 13th January 1967 a Mr. Solomon, one of the solicitors acting for Landmark, and Mr. Grant conferred and settled all outstanding questions with regard to the draftmanship of the proposed Deed. At the conclusion of their discussion, Mr. Solomon informed Mr. Grant that the Appellant was concerned that Mr. Armstrong would not proceed with the Deed and that, at the last minute, he would make some further demand which would prevent settlement taking place. Accordingly, he asked Mr. Grant for a list of the documents required by Mr. Grant on settlement.

R.I. Grant pp. 671 et seq.
Exhibit 50K p. 2861

Exhibit 50L pp. 2862-3

Judgment Street, J. p. 3197-8

63. The final engrossment of the Deed and of the ancillary Deeds was then made and the documents were approved.

R.I. Grant p. 676

64. On 17th January 1967 the Deed was duly executed and exchanged at 5.00 p.m. on that day in Mr. Grant's office. The exchange was agreed between the solicitors to be conditional upon the approval of the Boards of the various companies expressed to be parties to the Deed and also upon Mr. Armstrong conceding some elasticity in the nomination by the Appellant of the persons or companies to buy the 300,000 shares.

Judgment Street, J. p. 3198

R.I. Grant p. 676
Exhibit 50 O p. 2868

Record:
Deed
Exhibit "H"
pp. 2096-7

65. By the Deed it was provided:-

(a) that a loan of $300,000 should be made by Southern Tablelands to Sales, secured at the option of the lender over assets of Sales or over "Landmark House", the loan to be repaid at the expiration of one year and to bear interest at the rate of 12% per annum (Clauses 1-5);

Deed
Exhibit "H"
pp. 2097-9

(b) that Mr. Armstrong or his nominee was to have an option to purchase not more than 35 groups of shares in Paradise Waters at half list price (each group of shares entitling the holder to a lot in the "Paradise Waters" project), which option was to be exercisable on or before 15th March 1967, and, if exercised, called for a payment of a deposit of 10% of the purchase price, the balance being payable on completion (Clause 6);

(c) that A.E. Armstrong should sell to the Appellant and seven other persons or companies nominated by the Appellant and approved by Mr. Smith not more than 300,000 shares in Landmark at 60 cents per share;

Deed
Exhibit "HH"
pp. 2100-1

that the dividend already declared

Record:

by Landmark but not paid should remain payable to the vendor and, if not paid on or before 18th January, 1968, an equivalent amount should be paid by the purchaser as an addition to the purchase price; that the purchase price was to be paid by three equal annual instalments commencing on 18th January 1968; that no interest was payable on the purchase price which was to be secured by a mortgage back over the shares and a personal guarantee by the Appellant of the performance of the obligations of each purchaser (Clause 8); that the Appellant would procure seven other persons who, with himself, would agree to purchase the shares from A.E. Armstrong (Clause 9);

Deed Exhibit "H" pp. 2100-1

Deed Exhibit "H" p. 2104

(d) that Finlayside would sell to Landmark its shares in Sales for $100,000 (Clause 11);

Deed Exhibit "H" p. 2104-5

(e) that Landmark Queensland Pty. Limited (hereinafter called "Landmark (Qld)") should sell to Finlayside the furnished penthouse in "Paradise Towers" for $60,000 (Clause 12);

Deed Exhibit "H" p. 2105

(f) that the Landmark group of companies should apply the $300,000 loan in

Record:

reduction of the $400,000 debt due to George Armstrong (Clause 13);

Deed Exhibit "H" pp. 2105-6

(g) that the settlement of the individual transactions for which the Deed made provision should take place on or before the following day (Clause 14);

Deed Exhibit "H" p. 2106

(h) that the parties should be released from all their obligations under the Deed in the event of a Receiver being appointed by U.D.C. prior to settlement (Clause 15);

Deed Exhibit "H" pp. 2106-8

(i) that in the event of settlement not being effected by 18th January 1967 due to the default of the Appellant or of the Landmark group of companies the Appellant would relinquish the control of Landmark in favour of Mr. Armstrong (Clause 16);

Deed Exhibit "H" pp. 2108-2110

(j) that upon settlement Mr. Smith would become Chairman of Directors of Landmark whereupon Mr. Armstrong would resign from the Boards of all the Landmark Companies and a nominee for Mr. Armstrong would be appointed to the Boards of those Companies (Clause 17).

Judgment Street, J. p. 3199

R.I. Grant pp. 678 et. seq.

66. On 18th January 1967 further steps were taken to conclude the approval and execution of the various ancillary documents

Record:

necessary to carry into effect the Deed of 17th January 1967. There was a meeting in the Landmark Boardroom that commenced at 4.00 p.m. on that day and proceeded until about 8.30 p.m. when all documents were executed and exchanged. As Mr. Grant was leaving the Landmark office the Appellant said to him "Now we have got rid of Armstrong nothing will stop us".

B.H. Smith p. 621-2

67. On 19th January 1967 the Appellant saw Mr. Smith who informed him that he (Mr. Smith) and Mr. Hawley had decided against joining the Board of Landmark. The Appellant then said, "Don't worry about that, what I would like to do is congratulate you. I think the deal is a miracle". 10

Judgment Street, J. p. 3203

68. On 24th January 1967 the Appellant's family company lent $4,000 to Landmark.

Exhibit 15 pp. 2481-2

69. On 25th January 1967 the Appellant, in reply to a letter of 24th January 1967, informed the Stock Exchange that the payment of the dividend was temporarily suspended but that an announcement as to payment would be made shortly. 20

Judgment Street, J. p. 3203

70. On 30th January 1967 the Appellant's family company lent $30,000 to a Landmark subsidiary.

Judgment Street, J. p. 3203

71. On 10th February 1967 the Board of Landmark resolved to pay the dividend.

Record:
Exhibit 17 p. 2486
Exhibit 16 pp. 2483-4

72. On 3rd March 1967 the Appellant, in reply to a letter of 13th February 1967, informed the Stock Exchange that the dividend would be paid as soon as the refinancing of the "Paradise Waters" project had been completed.

73. Between 17th January 1967 and 18th March 1967 the Appellant was endeavouring to obtain further finance for Landmark but was unable to do so.

74. On 18th March 1967 the Landmark companies failed to pay the instalment of interest due under the loan from Southern Tablelands to Sales and in consequence Southern Tablelands threatened to exercise its rights under the securities which it held.

75. Thereupon Landmark, Sales, Paradise Waters and Goondoo commenced two proceedings in the Supreme Court, they being:-

(a) an application to reopen the loan transaction pursuant to section 30 of the Moneylenders and Infants Loans Act 1941-1961; and

(b) a suit seeking an injunction restraining Southern Tablelands from exercising its rights.

Exhibits 9-10 pp. 2461-70

The basis of each proceeding was an allegation that it was a term of the agreement between the parties to the Deed (albeit

Record:

unexpressed in the Deed) that any default by the Appellant or a Landmark company should be the subject of a notice by Southern Tablelands and that there would be 7 to 14 days' time in which to rectify the default. The proceedings were ultimately compromised on the basis that Southern Tablelands undertook not to exercise until after 30th June 1967 any of its rights to enforce payment of the principal sum of $300,000 so long as the plaintiffs paid the outstanding instalments of interest due on 18th March and 18th April 1967 and continued to pay interest in accordance with the provisions of the Deed and ancillary documents.

Exhibit 11 pp. 2471-74

Judgment Street, J. p. 3203

76. On 3rd April 1967 the Appellant's family company lent a further $2,400 to Landmark.

Judgment Street, J. p. 3203

77. During April 1967 the Appellant's family company bought on the Stock Exchange at a price of 28c per share a further 8,800 shares in Landmark.

Exhibit 18 pp. 2487-2492

78. On 28th April 1967 the Appellant wrote to the Bank of New South Wales a lengthy letter in support of an application for finance, in which letter he claimed that the nett tangible asset backing of shares in Landmark was in excess of $1 per share.

Exhibit 19 p. 2493

79. On 9th May 1967 the Appellant wrote in

Record:

optimistic terms a further letter to the Bank of New South Wales.

Judgment Street, J. p. 3205

80. By the middle of 1967 Landmark's financial position had deteriorated by reason of its inability to obtain further finance.

Judgment Street, J. p. 3205

81. Thereupon discussions took place between the Appellant and Mr. Smith concerning the possibility of a Scheme of Arrangement between Landmark and its subsidiaries on the one hand and its and the subsidiaries' creditors on the other hand.

Judgment Street, J. p. 3205

82. A Scheme of Arrangement was duly formulated and applications were made to the Supreme Court for the summoning of meetings of creditors of Landmark and of the various subsidiaries with a view to their approving the Scheme.

83. Prior to the holding of the meetings of creditors, an Order for the winding-up of one of the Landmark subsidiaries, Landmark Housing & Development Pty. Limited, (hereinafter called "Housing") had been made by the Supreme Court of Queensland.

Judgment Street, J. p. 3220

84. Those meetings having been held on the 22nd November 1967, and the requisite statutory majorities having been obtained, a Petition was then presented to the Supreme Court of New South Wales seeking the

Record:

Court's approval to the proposed Scheme of Arrangement.

Judgment Street, J. p. 3220

85. That Petition came on for hearing on the 2nd day of January 1968, the hearing continuing until 11th January 1968, on which day the Petition was dismissed and an order was made that the Company be wound up on the ground of insolvency. ((1968) 1 N.S.W.R. 759.)

86. On 10th January 1968, without having previously served any letter of demand, the Appellant commenced the present suit. 10

87. Prior to the suit coming on for hearing an Order for the winding-up of another of the Landmark subsidiaries, Landmark (Qld), had been made by the Supreme Court of Queensland.

Amended Statement of Claim pp. 1-1(i)

88. By his Amended Statement of Claim, the Appellant alleged that, prior to the execution of the Deed, Mr. Armstrong on behalf of himself and of the Armstrong companies had coerced the Appellant into agreeing upon the matters dealt with by the Deed by threatening to have the Appellant murdered and by otherwise exerting unlawful pressure on the Appellant; that for the purposes mentioned he engaged certain criminals to kill or otherwise injure the Appellant; that in consequence, 20

Record:

the Appellant feared for his life and safety and that of his family with the result that he had executed the Deed and the ancillary deeds so as to avoid the threat of death or injury; that the execution of the Deeds by the Appellant was not voluntary; that in consequence of the actions of Mr. Armstrong the Appellant remained in fear of his life and safety and for that of his family following the execution of the Deed up to the filing of the Statement of Claim.

pp. 1(h) - 1(i)

89. In his prayer for relief the Appellant sought a Declaration that the Deed and the ancillary deeds were executed by him under duress, that, in the alternative, it be declared that the Deed and the ancillary deeds were executed by him under duress and had been avoided, and, further, alternatively, that it be declared that the Deed and the ancillary deeds were void, or void so far as concerned him. The Appellant also prayed for consequential relief.

Interrogatories and Answers Exhibit 1 pp. 2418-28

90. In answers to Interrogatories which were delivered to him, the Appellant gave particulars of the occasions on which and the means by which, so he alleged, Mr. Armstrong and persons acting on his behalf

Record:

had threatened or brought pressure to bear upon him in connection with the making of the Deed. Those particulars were as follows:-

(a) five distinct and identifiable occasions:-

(i) an occasion in mid-December 1966 at the offices of Landmark when Mr. Armstrong said "Unless Landmark buys my interest in Paradise Waters for $100,000 and repays the loan of $400,000 and you buy my shares at 60 cents each I will have you fixed";

(ii) an occasion on 7th January 1966 when a man named Vojinovic informed the Appellant that he, Vojinovic had instructions originating from Mr. Armstrong to assist in the killing of the Appellant;

(iii) an occasion on 12th January 1967 when, in a telephone conversation, Mr. Armstrong said to the Appellant "You had better sign these documents or else" to which the Appellant replied "I won't be blackmailed into signing these documents";

Record:

(iv) an occasion on 13th January 1967 when in a telephone conversation with the Appellant Mr. Smith said "Unless the documents are signed and exchanged today, the whole deal is off. This is an instruction from Mr. Armstrong";

(v) an occasion on 16th January 1967 when in a telephone conversation Mr. Armstrong said to the Appellant "Unless you sign this Agreement you get killed";

(b) on a number of occasions during January 1967 the Appellant received telephone calls at his home in the early mornings. The form of these telephone calls varied. On some occasions the caller would say "you will be killed". At other times the caller did not speak. At no time did the caller identify himself, but at least on one occasion the Appellant recognised the voice of Mr. Armstrong;

Interrogatoes and Answers Exhibit 1 pp. 2418-28

(c) during November and December 1966 and in January 1967 the Appellant was followed by persons acting on behalf of Mr. Armstrong.

Record:

(d) during December 1966 and January 1967 Mr. Armstrong made statements to various persons derogatory of the Appellant intending thereby to bring pressure on the Appellant to execute the Agreement.

Statements of Defence pp. 1(k)-5(f)

91. In the Statements of Defence filed on their behalf the Respondents denied all material allegations in the Amended Statement of Claim. However, during the hearing before Street J. Senior Counsel for the Respondents informed his Honour that the Respondents did not rely on subsequent inaction after 17th January 1967 as constituting laches acquiescence or delay, but that the Respondents relied on subsequent inaction only as casting doubt upon the genuineness of the Appellant's claim.

92. None of the remaining fifteen Defendants to the suit filed Statements of Defence. Of those Defendants, some did not file an Appearance, while the remainder filed Appearances submitting to such decree or order as the Court might see fit to make.

Decree Street, J. pp. 3247-51

93. The hearing of the suit occupied some fifty six days, spread over the months of May to November 1968 inclusive.

Judgment Street, J. p. 3187-8

94. The Appellant's case at the hearing before Street J. was simply that on Friday 13th

Record:

A. Barton pp. 73-4, 80

January 1966 he decided not to proceed any further in the matter of the proposed Deed and that he was only induced to change his mind and to proceed further by the threat which he claimed was made to him by Mr. Armstrong on 16th January 1967.

95. The Appellant gave evidence in support of each of the incidents already mentioned as well as of other incidents of which he had not furnished particulars. The only witnesses called on behalf of the Appellant to support his case were

J.O. Bovill pp. 424-525

a. Mr. Bovill who gave evidence of an occasion at the end of November 1966 when Mr. Armstrong said to the Appellant before a Board Meeting "You stink. You stink. I will fix you" and of an occasion when, in conversation with him (Mr. Bovill) Mr. Armstrong had asserted that he could hire gunmen from Melbourne for $2,000; and

A. Vojinovic pp. 327-423

b. the person Vojinovic.

96. The effect of the evidence called by the Respondents was to deny the allegations that there had been any threats or intimidation offered to the Appellant or that he had been subjected to any unlawful pressure. In particular Mr. Armstrong denied all the

Record:

allegations made against him by the Appellant and denied that he had instructed others to threaten, intimidate or watch the Appellant. Mr. Smith and Mr. Grant gave evidence concerning events leading up to the execution of the Deed and the ancillary deeds.

97. Street J. adopted, as the principle of law relevant to the resolution of the issues between the parties, the following:-

Judgment Street, J. p. 3101

> "Where any contract ... has been entered into under the influence of coercion, duress, menaces or intimidation it may be repudiated and avoided, and any money paid or property parted with under it may be recovered. That the contract is voidable only, and not void, then the right to avoid it may be waived. The duress or intimidation must consist in threats of violence calculated to cause fear of loss of life or of bodily harm or actual violence or unlawful imprisonment or threat thereof to one party or his or her husband or wife or child by the other party to the contract, or by someone acting with his knowledge and for his advantage."

Record:

(Encyclopedia of the Laws of England 2 Ed. Vol. 7 p. 421).

Judgment Street, J. p. 3103

98. Street J. further held (and the Appellant accepted) that the Appellant bore the onus of proof in the suit.

99. At the outset of his Judgment, Street J. propounded two questions which required to be answered in the affirmative in order that the Appellant might succeed, they being:-

Judgment Street, J. p. 3102

(i) did Mr. Armstrong threaten the Appellant; and

(ii) was the Appellant intimidated by Mr. Armstrong's threats into signing the Deed of 17th January 1967.

Judgment Street, J. p. 3103

100. In relation to the first of these questions, Street J. said:-

> "... there is directly opposing evidence from Mr. Armstrong and Mr. Barton. In resolving this conflict of interest primary importance attaches to the credit of Mr. Armstrong and to the credit of Mr. Barton. There is also considerable assistance to be derived from the evidence of other witnesses corroborative of either one or other of these two principal parties."

Judgment Street, J. p. 3103-4

101. In relation to the second of these questions, Street J. said as follows:-

Record:

"... the decision depends upon the significance and weight to be given to Mr. Barton's own evidence, assessing that evidence in the light of the credit of Mr. Barton and the circumstances prior to contemporaneous with and subsequent to the signing of the Deed of 17th January 1967."

102. His Honour made the following observations as to the credit of Mr. Armstrong.

Judgment Street, J. p. 3104

"I think so little of Mr. Armstrong's credit that I am satisfied that on any point of importance he would not hesitate, if he thought it necessary for his own protection or advantage, so to do to give false evidence ....

Judgment Street, J. p. 3106

When the whole story was unfounded as his cross-examination proceeded he is exposed as a man having little regard for the need to reserve the integrity of Court proceedings and for the obligation of the party to Court proceedings to present a true as distinct from manufactured case."

(While the Respondents would have wished to join issue with this assessment of Mr. Armstrong's credit, they do not consider that, in the light of the authorities, it is open to them to do so, since there was

Record:

before his Honour material which, if accepted by him, would have justified him in that assessment.)

103. His Honour made the following observations on the credit of the Appellant:-

Judgment Street, J. p. 3112

"This view of Mr. Armstrong's credit does not, however, necessarily result in his failing in the suit. To a substantial extent success or failure for Mr. Barton depends upon the view which I hold of Mr. Barton's credit. He has deposed to a series of events, to actions taken by him, and, in particular, to the reasons which led him to sign the agreement under challenge. Insofar as the evidence given by Mr. Barton implicates Mr. Armstrong in acts of intimidation Mr. Armstrong's evidence is confined for the greater part to simple and direct denials. My conclusion that Mr. Armstrong is a witness of little credit does not of itself result in my rejecting Mr. Armstrong's denials simply because I am not disposed to believe them. Mr. Barton's evidence itself must be carefully analysed and evaluated to see whether or not it should be accepted. If I had

Judgment Street, J. p. 3113

Record:

regarded Mr. Armstrong as a witness of credit then his denials could well have been significant in my deciding whether or not Mr. Barton's evidence is to be accepted; the denials would have had to be weighed as a factor against accepting Mr. Barton's evidence. As it is, however, Mr. Armstrong's denials are of little, if any, weight; but it still remains for me to evaluate the evidence given by Mr. Barton. This necessitates an examination of his credit.

Mr. Barton's evidence includes accounts of events, and it includes claims of the effect of events and the causal relationship between them and his own state of mind. It is quite apparent Mr. Barton entertains a deep hatred of Mr. Armstrong. This hatred is tinged with some degree of fear. This has coloured Mr. Barton's evidence and, whether deliberately or subconsciously I know not, it has led to some distortion and exaggeration on his part of the details and the significance of the events of late 1966 and early 1967.

In some important respects Mr.

Record:

Barton's evidence is at variance with proved facts, an example being his denial of having negotiated with Mr. B.H. Smith in the month of December 1966; it is quite clear that he was engaged in negotiations with Mr. Smith on Mr. Armstrong's behalf in December rather than, as he claims not before 4th January 1967.

.....

Judgment
Street, J.
p. 3115

There are substantial inaccuracies in his firmly expressed account of the negotiations; these may be due to deliberate misstatement or they may be due to distorted reconstruction. The inaccuracies may, indeed, be due partly to one cause and partly to the other. But whatever their origin, the inaccuracies are such as to indicate that great care must be taken in accepting and acting upon Mr. Barton's uncorroborated testimony. I have grave doubts about the reliability of his evidence of that part of the case which concerns Detective Sergeant Wild and Detective Constable Follington. He is at variance in some details with a witness whom I accepted as truthful and honest,

Record:

namely Detective Inspector Lendrum. And, as will appear later I do not accept his evidence regarding his state of mind in December 1966 or January 1967 with reference to the future of Landmark and with reference to the causal link between Mr. Armstrong's threats and the making of the Agreement of 17th January. There are many other points in the mass of evidence casting doubt upon the reliability of Mr. Barton's testimony. I am satisfied that most of Mr. Barton's inaccuracies are due either to faulty recollection or to some bona fide distorted reconstruction. I regard his credit as superior to that of Mr. Armstrong. He believes in the truth and justice of his case. But that belief is self-induced rather than being based on fact. His evidence must accordingly be regarded as suspect."

Judgment Street, J. p. 3116

104. In his Judgment, Street J. found that Mr. Armstrong had threatened and intimidated the Appellant, but he rejected the Appellant's evidence as to certain of the alleged acts of intimidation. In particular his Honour rejected the Appellant's evidence.

Record:
Judgment Street, J. p. 3193

a. that he had decided, on 13th January 1967 not to proceed with the proposed Deed;

Judgment Street, J. pp. 3193-4, 3198

b. that Mr. Armstrong threatened him on 16th January 1967; and

Judgment Street, J. pp. 3193-4, 3198

c. that by reason of that threat and not otherwise he thereafter proceeded to execute the Deed and the ancillary deeds.

Judgment Street, J. pp. 3252-57

105. After considering the whole of the evidence Street J. held that the Appellant was not entitled to relief in the suit because he had entered into the Deed with a free and voluntary mind for commercial reasons. His Honour accordingly dismissed the suit with costs.

Decree Street, J. pp. 3247-51
Notice of Appeal pp. 3252-7

106. From his Honour's decree the Appellant appealed to the Court of Appeal of the Supreme Court of New South Wales.

107. Of the Defendants to the suit, only the Respondents appeared or addressed any argument to the Court of Appeal.

Draft Further Amended Statement of Claim p. 4221-4

108. Upon the hearing of the appeal the Appellant sought leave further to amend his Amended Statement of Claim by alleging, in short, as additional grounds for the relief which he sought:-

(a) that the Deed of 17th January 1967 had been executed under undue influence;

Record:

(b) that, in relation to the making of the Deed Mr. Armstrong had been guilty of "equitable fraud"; and

(c) that in the circumstances in which the Deed was executed, it ought to be implied that part of the consideration for the making of the Deed was that Mr. Armstrong would refrain from intimidating the Appellant, which consideration was illegal and thus rendered the Deed void.

Amended Notice of Appeal p. 4221-4

109. In addition, by amendments to his Notice of Appeal made on the hearing of the appeal, the Appellant sought

a. to have set aside a considerable number of findings of fact made and conclusions drawn by Street J. in his Judgment; and

b. to argue that his Honour

(i) should have held that the onus of establishing the validity of the transactions effected by the Deed and the ancillary deeds was on the Respondents; and

(ii) should have concluded that that onus had not been discharged.

Decree Court of Appeal p. 4052

110. By its Decree pronounced, by majority, on the 30th day of June 1971 the Court of Appeal (Mason J.A. and Taylor A-J.A.,

Record:

Jacobs, J.A. dissenting) dismissed the Appellant's Appeal.

Judgments Jacobs, J.A. pp. 4056-4061 Mason, J.A. pp. 4205-8 Taylor, A-J.A. pp. 4221-7

111. Although the Decree of the Court of Appeal was made by majority, the Judges of the Court of Appeal were unanimous in the view that the amendments to the Amended Statement of Claim sought by the Appellant on the hearing of the Appeal ought not to be allowed and that the appeal should be restricted to the pleadings and the issues before Street J. 10.

Judgments Jacobs, J.A. pp. 4107-8, 4123 Mason, J.A. pp. 4169-4170 Taylor, A-J.A. pp. 4246-4250

112. Likewise, and despite the fact that the Decree of the Court of Appeal was pronounced by majority, the Judges constituting the Court of Appeal were unanimous in the view that Street J. did not err in law in holding that the onus of proof in the suit lay on the Appellant.

113. Further, despite the fact that the Decree of the Court of Appeal was pronounced by majority, the Judges of the Court of Appeal were of opinion that (with certain minor exceptions which are not relevant to the disposition of this Appeal) the findings of primary fact made by Street, J. (and, in particular, the findings that the last threat made by Mr. Armstrong was made on 12th January, 1967, and that the Appellant did not, on 13th January 1967, decide not to proceed with the execution of the Deed) ought not to be displaced.

Judgments Jacobs, J.A. pp. 4097-4107 Mason, J.A. pp. 4170-4205 Taylor, A-J.A. pp. 4227-4256

Record:
Judgment Jacobs, J.A. pp. 4108-4126

114. Jacobs J.A. (who would have upheld the Appellant's appeal), while accepting as a correct statement of the relevant principle the passage from the Encyclopaedia of the Laws of England adopted by Street J. in his Judgment, nonetheless appears to have been of the opinion that Street J. imposed too heavy an onus of proof upon the Appellant. His Honour would appear to be of the opinion that a plaintiff who alleges duress as a ground for impugning a transaction will sufficiently discharge the onus of proof that lies upon him if he can satisfy the Court that, at the time of entering into the impugned transaction, he was under the influence of (in the sense that he was subject to) menaces directed to the transaction.

Judgment Mason, J.A. pp. 4165-4170, 4204-5

115. Mason J.A. was of the opinion that, in order to succeed in the suit, the Appellant needed to show that his mind was so overcome by fear in consequence of the threats that he did not enter into the transaction with a free and voluntary mind; and that, the Appellant having failed to discharge that onus, he had no title to relief in the suit.

Judgment Taylor, A-J.A. pp. 4246-4255

116. Taylor A-J.A. was of the opinion that it was not sufficient for a person in the position of the Appellant merely to show that he was subject to duress and that, while so

Record:

subjected, he entered into a contract; but that the real question was whether his consent was the result of a free choice or whether it proceeded from the threats offered. His Honour was of the opinion that, the Appellant having failed to show that his execution of the Deed proceeded from such threats as were found to have been made, he had no title to relief in the suit.

117. The Respondents respectfully submit that both Street J. and the majority of the Court of Appeal were correct in dismissing the Appellant's suit and that Jacobs J.A. erred in law.

118. Before dealing with what they apprehend is the substantial issue in the Appeal, the Respondents would wish to put to the Board certain short submissions against the possibility that the Appellant might:-

a. seek to argue that the Court of Appeal was in error in refusing him leave further to amend his Amended Statement of Claim; or

b. seek to argue some point of law not raised at the trial (as, for example, the question of onus of proof) or in the Court of Appeal;

c. seek to argue that the findings of

Record:

primary fact made by Street J. at the trial ought to be set aside.

119. The Respondents respectfully submit that the Court of Appeal was correct in refusing leave to amend and that any further application for leave to amend the Appellant's Amended Statement of Claim ought to be refused.

120. That there was jurisdiction in the Court of Appeal to allow any proper amendment is undoubted (Consolidated Equity Rules, Rule 172; Equity Act, Section 84; Court of Appeal Rules, Rule 9 (1)); but the form and nature of the proposed amendments were such that, to admit them on the hearing of the Appeal, would, in the respectful submission of the Respondents, have been contrary to principle.

121. In short, the proposed amendments were open to the following objections:-

(a) in form, they were contrary to the rules of pleading and were embarrassing (Equity Act, 1900 (as amended) s. 22; Consolidated Equity Rules, Rules 80, 82);

(b) they were so obviously futile (in the sense that while Street J.'s finding as to "motivation" remained they would not have advanced the case

Record:

of the Appellant, while, if Street J.'s finding as to "motivation" were displaced, they would have been irrelevant) that they ought not to have been admitted (Horton v. Jones (No. 2) 39 S.R. 305);

(c) it would have been contrary to principle to allow amendments to raise a case founded on some oral statement by a witness in relation to a different issue (Gordon v. MacGregor 8 C.L.R. 316);

(d) it would have been contrary to principle to allow amendments after the close of evidence where the facts were not admitted and were the subject of considerable controversy (O'Keefe v. Williams 11 C.L.R. 171);

(e) in the circumstances, to have admitted the proposed amendments would have caused substantial injustice to the Respondents (Horton v. Jones (No. 2) 39 S.R. 305);

122. The Respondents submit that, the power to allow amendments being a discretionary one, unless it can be shown that, by reason of the application of a wrong principle or the misapprehension of relevant facts, a purported exercise of the discretion has miscarried,

Record:

an order made in the exercise of discretion ought not to be reviewed.

Judgments Jacobs, J.A. pp. 4056-4061 Mason, J.A. pp. 4205-8 Taylor, A-J.A. pp. 4221-7

123. A consideration of the reasons relied upon by their Honours in the Court of Appeal demonstrates that in refusing to grant leave to amend their Honours were exercising their discretion in accordance with well-recognised principles. Accordingly, their refusal to admit the proposed amendments ought not to be reviewed. (Perkowski v. City of Wellington Corporation (1959) A.C. 53).

124. Nor, having regard to the principles set out above, should any fresh application for leave to amend be entertained.

125. The Respondents further respectfully submit that the Court of Appeal was correct in refusing to permit the Appellant to raise points of law not raised at the trial before Street J., and that any further application to raise points of law not raised at the trial or before the Court of Appeal ought to be refused.

126. The principles relevant to any such application are of long standing and may conveniently be summarised as follows:-

(a) a court ought not to decide a case upon (and thus should not permit an Appellant to rely upon) a point taken

Record:

for the first time upon Appeal unless it is satisfied:-

(i) that it has before it all the facts bearing upon the new contention as completely as would have been the case if the question had arisen at the trial; and

(ii) that no satisfactory explanation could have been offered by those attacked if an opportunity for explanation had been afforded in the witness box

(The Tasmania (1890) 15 App. Cas. 223; Connecticut Fire Insurance Company v. Kavanagh (1892) A.C. 473; Grey v. Manitoba and North Western Railway Company of Canada (1897) A.C. 254; Perkowski v. City of Wellington Corporation (1959) A.C. 53; Warehousing and Forwarding Company of East Africa v. Jafferali (1964) A.C. 1; Donahey v. O'Brien (1966) 1 W.L.R. 1170; Suttor v. Gundowda 81 C.L.R. 418; Mallick v. Parish 16 S.R. 309).

(b) still less should a Court entertain a point of law, even though it may have been open on the pleadings or on the evidence, where a party has deliberately

Record:

elected to fight a trial on a particular ground and has been defeated on that ground.

(Browne v. Dunn 6 R. 67; Ley v. Hamilton 153 L.T. 384; Perkowski v. City of Wellington Corporation (1959) A.C. 53; Varawa v. Howard Smith Company Limited 13 C.L.R. 35.

127. The Respondents respectfully submit that the power to allow a fresh point of law to be argued is, likewise, a discretionary one so that, unless it can be shown that there has been a misapplication of principle, the refusal of the Court of Appeal to entertain fresh questions of law ought not to be reviewed.

Judgments Jacobs, J.A. pp. 4056-61 Mason, J.A. pp. 4205-8 Taylor, A-J.A. pp. 4221-7

128. A consideration of the reasons relied upon by their Honours in the Court of Appeal demonstrates that, in refusing to entertain fresh questions of law, their Honours were exercising their discretion in accordance with well recognised principles. Accordingly their refusal should not be reviewed (Perkowski v. City of Wellington Corporation (1959) A.C. 53).

129. Nor, in the respectful submission of the Respondents, should any fresh application to raise a fresh point of law be entertained.

130. The Respondents further respectfully submit

Record:

that no application by the Appellant to review the findings of primary fact made by Street J. ought to be entertained.

131. In short, the Respondents submit that any such application ought to be refused for the following reasons:-

a. there are no such special circumstances as would justify a departure from the long established practice of the Board to decline to review the evidence for a third time where, as in this case, there are concurrent findings of two courts on a pure question of fact (Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy (1946) A.C. 508; cf & cp. Stool of Abinabina v. Chief Kojo Enyimadu (1953) A.C. 207).

b. even without resort to that practice, it would be contrary to principle to review the findings of fact made by Street J. at the trial.

132. It cannot be suggested, in the present case, that there has been any such miscarriage of justice as would justify the proceedings to date being treated as not having been judicial proceedings at all, nor can it be demonstrated that there has been such a violation of principle or procedure that findings of fact cannot stand.

Record:

133. It follows, in the Respondent's respectful submission, that it would be contrary to the Board's practice to entertain any such application (Bateman Television Limited (in liquidation) & Anor v. Coleridge Finance Company Limited (1971) N.Z.L.R. 929).

134. The Respondents further submit that, even without the need to resort to the Board's practice, it would be contrary to principle to set aside the findings of fact made by Street J. at the trial.

135. The situations in which an appellate court can interfere with the findings of a primary judge (even where, as in the present case, the appeal is (or, at least in the case of the Court of Appeal, was) by way of re hearing) are, it is submitted, very limited. Those situations, it is submitted, are in substance as follows:-

(a) that the primary judge has misdirected himself on some question of law; e.g. onus or "quality" of onus;

(b) that the primary judge has failed to take all evidence into account;

(c) that the primary judge has misapprehended the effect of evidence;

(d) that the primary judge has drawn an inference which there is no evidence to support;

Record:

(e) that the primary judge has failed to draw an inference which he ought to have drawn.

An appellate court should not, it is submitted, interfere unless it is satisfied that any advantage enjoyed by the trial judge is not sufficient to explain or justify his conclusion. The Court should be more reluctant where the finding is against him who bears the onus. It is not sufficient merely that the appellate court would have differed from the trial judge in the conclusion which, had the court been trying the matter in the first instance, it would have drawn from the material available; the appellate court should only interfere where it is satisfied that the findings of the primary judge were clearly wrong.

("The Glannibanta" (1876) 1 P.D. 283; Khoo Sit Hoh v. Lim Thean Thong (1912) A.C. 232; Mersey Docks and Harbour Board v. Procter (1923) A.C. 253; "The Hontestroom" (1927) A.C. 37; Watt v. Thomas (1947) A.C. 484; Benmax v. Austin Motor Co. Limited (1955) A.C. 370; Dearman v. Dearman 7 C.L.R. 549; Federal Commissioner of Taxation v. Clarke 40 C.L.R. 246; Paterson v. Paterson 89 C.L.R. 212; Whiteley Muir &

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Zwanenberg Limited v. Kerr 39 A.L.J.R. 505; Da Costa v. Cockburn Salvage & Trading Pty. Limited 44 A.L.J.R. 455.)

136. The Respondents respectfully submit that it is not possible for the Appellant to argue that no advantage enjoyed by Street J. as the trial judge is sufficient to explain or justify his conclusions on questions of fact.

137. On this question, it is sufficient, so the Respondents submit, to observe that the only witness on the issue of "motivation" was (indeed, there probably couldn't be any other) the Appellant himself and that "motivation" is essentially subjective in nature. In such a case, where the statements of a party in the witness box provide, in a sense, the "best" evidence (Pascoe v. Federal Commissioner of Taxation 30 A.L.J. 402) those statements must be tested most closely and received with the greatest caution (Pascoe v. The Federal Commissioner of Taxation (supra); Jacob v. Federal Commissioner of Taxation 71 A.T.C. 4192; Cox v. Smail (1912) V.L.R. 274). This being so, the credibility of the Ap ellant was a matter of critical importance in any examination of the evidence (and, particularly, his own evidence), and it is clear, from a

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consideration of Street J's judgment, that he himself formed the view, that, to a substantial extent, success or failure for the Appellant depended upon the view which he took of the Appellant's credit. The major, if not the only, method of assessing the Appellant's credibility on this issue was an observation of his demeanour; and the only subsidiary method of assessment open to Street J. was an evaluation of the Appellant's statements as to his "motivation" in the light of his contemporaneous conduct. It is clear from an examination of Street J's judgment that, in no small measure, his assessment of the Appellant's credit was, in fact, based on an observation of the Appellant and that that assessment led him to drawing conclusions respecting his character, personality and motivation. Since Street J's findings on both primary and ultimate questions of fact are thus substantially influenced by his Honour's assessment of the Appellant's credit, the Respondents respectfully submit that the Board cannot have his Honour's advantage and cannot say that that advantage is insufficient to explain or justify his conclusions.

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Street, J.
pp. 3112-6

138. But, quite apart from questions of demeanour,

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there is ample evidence of contemporaneous events to justify his Honour's conclusion, if, as he did, his Honour chose to accept it. This being so, it is impossible, in the Respondents' respectful submission, to demonstrate that his Honour's conclusions are clearly wrong.

139. The Respondents therefore respectfully submit that the Appellant ought not to be permitted to argue that the findings of fact made by Street J. at the trial ought to be reviewed.

Judgments Street, J. pp. 3219-20
Mason, J.A. pp. 4165-70, 4204-5
Taylor, A-J.A. pp. 4246-4255

140. This leaves as a critical question in the appeal (it is, in the Respondents' respectful submission, the only question open to the Appellant in the appeal) namely, was it necessary (as Street J. at the trial, and Mason J.A. and Taylor A-J.A. on appeal, held) for the Appellant, in order that he might have succeeded in the suit, to have shown that, in executing the Deed, he was under the influence of duress in the sense that his mind was so overcome that he did not enter into the transaction with a free and voluntary mind and that, but for the threats he would not have executed the Deed; or was it sufficient (as Jacobs J.A. would appear to have held) merely to have shown that prior to the execution of the Deed he

Judgment Jacobs, J.A. pp. 4108-4126

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had been subject to threats, even though those threats may not have emanated from Mr. Armstrong, or his agents, or persons of whose activities Mr. Armstrong was aware and took advantage.

141. The Respondents respectfully submit that where, as in the present case, it is sought to avoid a transaction on the ground of duress, the plaintiff must show (the onus being upon him):-

a. acts or threats of physical violence to himself or members of his family;

b. by the defendant(s), or by his (their) agent(s), or by some third party, of whose activities the defendant(s) was (were) aware and took advantage (Kesarmal S/O Letchman Das & Anor v. N.K.V. Valliappa Chettiar S/O Nagappa Chettiar (1954) 1 W.L.R. 380; Chaplin & Co. Limited v. Brammall (1908) 1 K.B. 233; Talbot v. von Boris (1911) 1 K.B. 857; Williston on Contracts 2 Ed. s. 1622; American Restatement of The Law of Contracts Section 496).

c. which acts or threats had the effect of coercing his consent (in the sense that his consent was not freely and voluntarily given, and, but for

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the acts or threats, would not have been given) (Cumming v. Ince (1847) 11 Q.B.; Seear v. Cohen (1885) 45 L.T.N.S. 589; Mutual Finance v. John Wetton & Sons Limited (1937) 2 K.B. 389; Williston op cit ss. 1603-5; Restatement ss. 492 et seq).

Judgments Street, J. pp. 3219-20 Mason, J.A. pp. 4165-70, 4204-5, Taylor, A-J.A. pp. 4246-4255

142. Street J., at the trial, and Mason J.A. and Taylor A-J.A., on the appeal, all adopted the view that the Appellant needed to establish a causative relationship between such acts and threats as were found to have been taken or made and the execution of the Deed. Further, Taylor A-J.A. adopted the view (Street J. did not express any view, and Mason J.A. did not express any concluded view, on the question) that, in the light of Street J's findings the "Vojinovic incident" could not be relied upon by the Appellant.

Judgment Taylor, A-J.A. p. 4243

Judgment Mason, J.A. pp. 4203-4

143. Their Honours' views were, in the respectful submission of the Respondents, consonant with principle and long established authority, and ought to be sustained.

144. By contrast, Jacobs J.A., in the Respondents' respectful submission fell into error.

145. His Honour's judgment on this aspect of the

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appeal appears to involve the following steps in reasoning:-

Judgment Jacobs, J.A. pp. 4104-5, 4084-4090, 4113, 4117-8.

a. acts or threats of violence may be regarded as relevant to an allegation of duress even though they do not emanate from the defendant(s) or his (their) agent(s) and even though the defendant(s) was (were) unaware of them;

Judgment Jacobs, J.A. pp. 4107-8, 4110-4115, 4117-4124

b. it is not necessary, in such a case, in order to succeed, for a plaintiff to show a causative, but it is sufficient to show a temporal, relationship between acts and threats and impugned transaction;

Judgment Jacobs, J.A. pp. 4107-8, 4110-4115, 4117-4124

c. alternatively, if it be necessary, in such a case, to show a causative relationship, it is sufficient to show acts or threats causing fear, for then the court will assume (semble, conclusively) that the plaintiff's freedom of action has been impaired.

Judgment Jacobs, J.A. pp. 4122-6

d. further, alternatively, if it be necessary to show a causative relationship, then, even though there may not be a rule of law requiring a conclusive assumption of duress, once acts or threats causing fear are

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shown, nonetheless, in the present case, Street J. was in error in failing to conclude that the Appellant was coerced into executing the Deed.

Each of these steps is, in the Respondents' respectful submission erroneous.

Judgment Jacobs, J.A. pp. 4084-4090, 4104-5, 4113, 4117-8.

146. The first of these steps is contrary to authority of long standing, including authority binding upon the Court of Appeal (Kesarmal S/O Letchman Das v. N.K.V. Valliappa Chettiar S/O Nagappa Chettiar (1954) 1 W.L.R. 380; c.f. Fatuma Binti Mohamed Bin Salim Bakshuwen v. Mohamed Bin Salim (1952) A.C. 1; Morris v. The English Scottish and Australian Bank Limited 97 C.L.R. 624; Mayer v. Coe 88 W.N. (N.S.W.) (Pt. 1) 549; Ratcliffe v. Watters 89 W.N. (N.S.W.) (Pt. 1) 497), and his Honour's failure to follow that authority, and so to disregard the effect of the "Vojinovic incident", led him into further error.

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147. So also, in the Respondents' respectful submission, is the second step in his Honour's reasoning unsound. In short, the Respondents' submissions are as follows:-

a. the authorities upon which his Honour relies (Bracton f 16b; Coke Second Institutes 482-3; Rolle's Abridgement: "Menace"; Viner's Abridgement p. 316

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"Duress" Pl. 10-11) do not support the view that the only relevant enquiry is to ascertain whether there is a temporal relationship between acts or threats and the impugned transaction. Thus, for example the passage from Viner's Abridgement (Pl.11) clearly demonstrates that if any element of free bargaining is seen to enter into the impugned transaction (as, in the respondents' respectful submission, it clearly did in the present case) the effect of the threats is deemed to have been spent. (cf and cp. Bacon's Abridgement Vol. II p. 772; Woodman v. Skuse (1708) Pr. Ch. 266; 24 E.R. 128; Gil. Eq. Rep. 9 25 E.R. 7).

b. if, contrary to the first submission, those authorities do support his Honour's view, they merely represent an early stage in the development of the law which continued to the stage where the relevant inquiry now is: "was the agreement entered into with a free mind?" (Cumming v. Ince (1847) 11 Q.B. 112; Seear v. Cohen (1885) 45 L.T. N.S. 589). Similarly the law in relation to what might be called

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"third party duress" has developed from a stage where the defendant's knowledge of any duress was irrelevant to a stage where such duress is irrelevant unless the defendant knew and took advantage of it (cf. and cp. Anon. (1509) Keil 154 Pl 3; Thoroughgood's Case (1584) 2 Co. Rep. at f. 9b; Rolle's Abridgement "Duress d'emprisonment p. 688; Chaplin & Co. Limited v. Brammall (1908) 1 K.B. 233; Talbot v. von Boris (1911) 1 K.B. 857; Kesarmal S/O Letchman Das v. N.K.V. Valliappa Chettiar S/O Nagappa Chettiar (1954) 1 W.L.R. 380).

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148. The third step in his Honour's reasoning is, in the Respondents' respectful submission, completely unsupported by authority except in relation to one case (duress d'emprisonment); and that case is of purely antiquarian interest. The justification for what appears once to have been the presumption that a deed, executed while the obligor was illegally imprisoned, was executed under duress was the policy of the law to discourage illegal restraints (Coke Second Institute 482; Blackstone Vol. I p. 131; Bacon's Abridgement Vol. II

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p. 771). No such presumption appears ever to have existed in relation to any form of duress per minas.

Judgment 149. Jacobs, J.A. pp. 4122-6

In the absence of any such conclusive presumption arising from such a temporal relationship between acts or threats and agreement, his Honour's judgment can be supported only upon the basis that Street J. was in error in failing to draw the inference that the Appellant was coerced by fear arising from Mr. Armstrong's threats. In the Respondents' respectful submission, his Honour's judgment cannot be supported on this basis. Shortly, the grounds for this submission are as follows:-

a. The Appellant's case was that, having decided on 13th January 1967 not to execute the Deed, he was only coerced into doing so by a threat alleged to have been made by Mr. Armstrong on 16th January 1967. Street J. found, and his Honour accepted, firstly that the Appellant did not change his mind as he claimed, and secondly, that Mr. Armstrong did not make the alleged threat;

b. his Honour appears to have been in no small measure persuaded to his view by the importance which he attaches

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to the "Vojinovic incident", which incident, in the light of Street J's findings, is irrelevant to a resolution of the issues in the case;

c. while it may be that, as his Honour suggests, the course of human experience would have justified such an inference being drawn in the present case, it does not follow that that inference ought to have been drawn. Whether or not, in any case, an inference might, or ought to, be drawn depends upon the nature and quality of all evidence on the relevant issue. In the present case it cannot, in the Respondents' respectful submission, be said that the inference sought to be drawn by his Honour was so preponderant that Street J's failure to draw it was erroneous (Whitely Muir & Zwanenberg Limited v. Kerr 39 A.L.J.R. 505; Da Costa v. Cockburn Salvage & Trading Pty. Limited 44 A.L.J.R. 455). It follows, in the Respondents' respectful submission, that, in overruling Street J. on this matter, his Honour, as an appellate judge, fell into error

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as to the proper approach to be adopted on appeal.

150. For these reasons, the Respondents' respectfully submit that the Board will dismiss the appeal upon the short grounds, firstly, that no error of law on the part of Street J. or of Mason J.A. and Taylor A-J.A., has been demonstrated, and, secondly, that Street J's findings of fact should not be displaced.

151. Against the possibility, however, that the Board might hold that the Appellant has demonstrated a prima facie title to relief, the Respondents would wish to submit that, notwithstanding, the appeal should be dismissed upon the ground that restitutio in integrum was not open at the time when the suit fell to be decided.

152. The Respondents recognise that it is not necessary for it to appear to a court that precise restitutio in integrum is possible before a decree will go, and that it is sufficient if, by the use of its powers, for example, enquiries, accounts and the like, the court can produce a situation where substantial restitutio in integrum can be achieved (Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218; Brown v. Smith 34 C.L.R. 160; Spence v.

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Crawford (1939) 3 A.E.R. 271; Alati v. Kruger 94 C.L.R. 216). The Respondents would however, submit that no such situation could have been achieved in the present case. In this regard the Respondents point to the following matters:-

(a) that some of the relevant instruments were not even proved;

(b) of the contracting parties, five, namely Landmark, Landmark (Qld), Housing, Goondoo and Paradise Waters were in liquidation;

(c) except for the Appellant, no purchaser of the shares formerly held by A.E. Armstrong in Landmark had taken (indeed, as the evidence stood, they could not take) any steps to set aside his, her or its purchase of those shares;

(d) property (e.g. the penthouse) had passed and there was no evidence of its then present position;

(e) property (e.g. shares) had passed and could not be retransferred because of the winding up orders;

(f) the George Armstrong & Son mortgage which had been discharged could not be reinstated since the property over

which it had been given had been sold by U.D.C.

It would follow that, at best, the Appellant would be relieved of his obligation to pay for the shares which he had purchased and of his obligations as guarantor of the six other purchasers but that otherwise the transaction could not be affected. This, in the Respondents' respectful submission, would not involve restitutio in substance being effected.

153. The Respondents accordingly respectfully submit that the Decree of the Court of Appeal was correct and that the Appeal should be dismissed with costs for the following (among other)

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1. Because the Appellant failed to discharge the onus of showing that in entering into the Deed and the subsidiary deeds he was acting under the influence of duress on the part of Mr. Armstrong or of his agent or of any other person of whose activities Mr. Armstrong was aware or took advantage;

2. Because, in the events which have happened, even if otherwise a Decree might go, restitutio in integrum, whether in fact or in substance, was impossible;

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3. Because the Appellant had no title to any relief whatsoever in the suit.

P. Powell.