

Janet Boustany

Appellant

v.

George Pigott

Respondent

(and Cross-appeal)

FROM

THE COURT OF APPEAL OF THE EASTERN
CARIBBEAN SUPREME COURT
(ANTIGUA AND BARBUDA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
29TH APRIL 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD LOWRY
LORD MUSTILL
LORD SLYNN OF HADLEY

[Delivered by Lord Templeman.]

On 9th September 1988 Byron J., sitting in the High Court of Antigua and Barbuda, set aside a lease dated 5th September 1980 on the grounds that the lease was an unconscionable bargain. His decision was upheld by the Court of Appeal (Sir Lascelles Robotham C.J., Moe J.A. and Joseph ag. J.A.) and the tenant now appeals to Her Majesty in Council.

The facts as found by the learned judge and as appear from his notes of evidence and the relevant documents disclose the background to this appeal. Miss Catherine Pigott ("Miss Pigott"), the landlord on whose behalf the lease dated 5th September 1980 was set aside, was born on 15th October 1909. Her father, James Pigott, was in a large way of business in St. John's, Antigua and owned numerous properties. He died in 1967 leaving a family of four children who inherited his estate. Some of his properties, including properties in Market Street, were settled on Miss Pigott for life with remainder to her sister, Mrs. Stevens. For some years prior to 1976 she was not allowed by the other members of her family to sign cheques on the family business.

On 30th November 1976 Miss Pigott leased to the appellant, Mrs. Boustany, the two storey building in Market Street known as "Pigott and Company building" from 1st January 1977 for the term of five years at the monthly rent of \$833.33. The tenant covenanted to keep the interior and exterior of the property in good and tenantable repair, condition and state of decoration. The lease contained an option to the tenant to renew for a further period of five years at a rent to be agreed or fixed by a qualified third person as the fair market rent. The lease was prepared by Mr. Kendall who was a barrister practising in St. John's. He was not the family solicitor, he had no dealings with Miss Pigott save on the grant of the 1976 lease and, as will appear, on the grant of the impugned 1980 lease.

In 1977 Mr. George Pigott, a cousin of Miss Pigott, returned to Antigua after studying in Canada. He is a public accountant by profession. According to his evidence which was unchallenged on this point, at a family meeting attended by Miss Pigott who was then, in his words "quite slow", it was agreed that Mr. George Pigott should take over the management of the family properties which were then deteriorating. Mr. George Pigott took over responsibility for the conduct of Miss Pigott's business in general and the handling of all her real estate in particular from that date onwards. Between 1977 and 1980 Mr. George Pigott, acting on behalf of Miss Pigott, negotiated with Barclays Bank the terms of a lease of a building adjoining the building leased to Mrs. Boustany and of a comparable area. The rent paid by Barclays Bank in 1980 was \$5,830 a month. Mrs. Boustany was aware that Mr. George Pigott was the agent of Miss Pigott. In 1980 Mrs. Boustany presented to Mr. George Pigott, and he paid, bills for roof and other repairs to the building comprised in the 1976 lease despite the tenant's covenant to repair contained in that lease. The possibility of a new lease was discussed between Mrs. Boustany and Mr. George Pigott but no agreement was reached.

About the beginning of September 1980, at a time when Mr. George Pigott was temporarily absent from St. John's, Miss Pigott appeared in the chambers of Mr. Kendall with a copy of the 1976 lease pencilled with amendments for the grant of a new lease. The amendments provided for the grant of a new lease at a monthly rent of \$1,000 for a period of ten years from 1st January 1982 renewable at the option of the tenant for a further period of ten years at the same rent. Mr. Kendall, giving evidence at the trial of this action, said:-

"I went over the instructions with her. I made several comments. I demanded to see all the parties in my Chambers."

This significant demand resulted in Miss Pigott, Mrs. Boustany and her husband appearing in Mr. Kendall's chambers the next day or shortly thereafter.

Mr. Kendall's evidence was that:-

"I said that the subsisting lease still had over a year to run and I could not understand the hurry. Catherine Pigott said that she was due to leave the State shortly and did not know when she would return. Second point was that the rent was marginally higher than the rent that was then being paid. There was no provision for any review clause. All these were matters I raised. They listened to what I had to say. Catherine Pigott said she had given instructions and that is what she wanted done. I raised other points. The subsisting lease left the rent open in the renewal period. In this lease the rent was fixed both for the lease and the renewal period and these were long periods - 10 years and 10 years. Catherine Pigott said she had good tenants, she wanted a guaranteed lease while she was away and she did not want to have anybody come to her about repairs while she was away and that she wanted the lease prepared in the terms of the amended draft. The Boustany's said nothing. There was a lull for some minutes when no one spoke. Then Catherine Pigott asked me if I was going to do it or not and I said yes. I did it. I think it was the following day or two days later I returned from lunch and met the parties sitting in my Chambers. Catherine Pigott said she was leaving, I believe the next day, so the lease was prepared while they were still waiting. I read one copy while the parties read a copy each. Then they executed the lease, then I handed them over to my clerk for preparation of bill and collection of fees."

History does not relate who paid the bill.

Miss Pigott's expressed reasons for requiring a new lease to be prepared immediately are extraordinary in view of the fact that she was only tenant for life of substantial properties all of which were under the management of Mr. George Pigott. She had not consulted the remainderman who was vitally affected. Miss Pigott's expressed worries about repairs were even more extraordinary in view of the fact that the 1976 lease contained a full tenant's repairing covenant whereas the lease prepared by Mr. Kendall in 1980 restricted the tenant's obligations to interior repairs and contained a covenant by the landlord to keep and maintain the roof and main walls of the property in good and tenantable state of repair.

Mr. Kendall, who should never have agreed to prepare the new lease, appreciated that he had not done a good day's work if Miss Pigott was his client. He said in evidence:-

"If it was my property I would not have rented it at that figure, depending on what the lease was. ... In my own mind I thought that was an improvident

commercial transaction. As an arm's length transaction between two commercial people I would not consider the terms of the lease in line with a commercial transaction. ..."

Mr. Kendall must also have suspected that Mrs. Boustany had some influence over Miss Pigott because he also said:-

"I wanted to see all of them in my Chambers because I was endeavouring to give advice to Catherine Pigott and it did not appear that she wanted to take my advice. So I wanted to voice my concerns about the prepared lease in the presence of all of them. That is why I sent for them."

When in due course Mr. George Pigott discovered the existence of the 1980 lease, he protested to Mrs. Boustany and in particular said that the term of the lease was far too long. After consulting her husband, Mrs. Boustany refused to take any action. On 24th August 1982 Miss Pigott signed a power of attorney in favour of Mr. George Pigott and on 30th May 1983 a writ was issued asking for a declaration that the 1980 lease was an unconscionable bargain and an order that the lease be declared null and void and be rescinded.

On 5th July 1983 Mrs. Boustany applied by summons for the action to be dismissed on the grounds that the writ had been issued by the solicitor, Mr. Watt, without the authority of Miss Pigott. This summons was supported by an affidavit sworn by Mrs. Boustany who said that she had:-

"... contacted the plaintiff named therein to ascertain whether she had indeed asked Mr. Watt to commence an action against me and she told me she had not. I thereupon asked her to state this in writing and she did so in a document dated the 7th day of June, 1983, ..."

In that document Miss Pigott expressed herself as being very satisfied with the 1980 lease and considered the lease to be a conscionable bargain; she would certainly not wish to have the lease declared null and void nor rescinded and certainly did not give permission or consent to Mr. Watt or Mr. George Pigott or anyone to make the lease null and void or to file any suit against Mrs. Boustany.

After a hearing Mrs. Boustany's summons to dismiss the action with costs was rejected by the court.

By a statement of claim dated 3rd July 1984 it was alleged on behalf of Miss Pigott that:-

"(6) Shortly before the 5th day of September 1980 at which said time the defendant was aware that the Plaintiff's Attorney GEORGE PIGOTT was out of the State, the defendant collected the Plaintiff from her home, and took her to her home at

Crosbies to a tea party ostensibly to meet the Roman Catholic Bishop, Bishop Reese ... and there lavished attention and flattery upon the Plaintiff which said conduct was calculated to and did in fact induce the Plaintiff to agree to visit the Chambers of TIME H. KENDALL LL.B. in order to negotiate conditions for a new lease of her premises.

- (7) On the 5th day of September 1980 the defendant again collected the said Plaintiff at her home and took her to the said Chambers of TIME H. KENDALL, and there the Plaintiff was induced by the Defendant and her solicitor to execute a lease for a term of ten (10) years at a yearly rent of \$12,000.00 per annum or \$1,000.00 per month, ...
- (8) At the meeting on the 5th day of September 1980 the Plaintiff was not legally represented, was without the assistance of her lawful attorney and Accountant, was without advice of any sort and was totally unaware of the true market rental value of her premises. Further the Plaintiff was induced to sign the said lease which was totally against her interest by the defendant's lavish treatment, flattery and praise of the Plaintiff at her home, some few days before."

The trial began on 22nd February 1988 by which time Miss Pigott, who had been diagnosed on 26th September 1981 as suffering from Parkinson's Disease, was incapable of giving evidence. Miss Pigott's doctor gave evidence that Miss Pigott's intellect would have been normal in 1980. Mr. George Pigott gave evidence of his involvement with Miss Pigott and Mrs. Boustany.

Mr. Kendall, who was the only witness for Mrs. Boustany, surprised Miss Pigott's counsel by asserting that he had acted for Miss Pigott in connection with the 1980 lease and gave his account of the conversation and events in his Chambers in September 1980.

The trial judge having considered the judgment of Kay J. in *Fry v. Lane* (1888) 40 Ch.D. 312 and a number of subsequent authorities deduced that:-

"The legal burden on the plaintiff is to establish three principles upon which the Court will presume that there was equitable fraud and unconscionable conduct ... namely (1) that the plaintiff is poor and ignorant, (2) that the sale was at a considerable undervalue and (3) that the vendor had no independent advice. In my view, the plaintiff has succeeded on all three points and at the time of the transaction in 1980 the plaintiff was 71 years old and had not been conducting her own business affairs.

I am also satisfied from the evidence that the defendant was aware of this fact. It is true that the plaintiff could not be considered poor in the sense of being destitute or as coming from a low family background. But [from] the evidence of Mr. Kendall it seemed to be important to her that she should get a steady and regular income from the premises and the reliability and regularity of the income seemed to be a matter which weighed heavily on her mind."

Miss Pigott has since died and her estate is now represented by Mr. George Pigott, the present respondent.

In a careful and thoughtful submission, Mr. Robertson, who appeared before the Board on behalf of Mrs. Boustany, made the following submissions with which their Lordships are in general agreement.:-

(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that "one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience": *Multiservice Bookbinding v. Marden* [1979] Ch. 84, 110.

(2) "Unconscionable" relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: *Alec Lobb (Garages) Limited v. Total Oil (Great Britain) Limited* [1983] 1 W.L.R. 87, 94.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, "it was not right that the strong should be allowed to push the weak to the wall": *Alec Lobb (Garages) Limited v. Total Oil (Great Britain) Limited* [1985] 1 W.L.R. 173, 183.

(4) A contract cannot be set aside in equity as "an unconscionable bargain" against a party innocent of actual or constructive fraud. Even if the terms of the contract are "unfair" in the sense that they are more favourable to one party than the other ("contractual imbalance"), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: *Hart v. O'Connor* [1985] A.C. 1000, applied in *Nichols v. Jessup* [1986] N.Z.L.R. 226.

(5) "In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances": per Mason J. in *Commercial Bank of Australia Ltd. v. Amadio* (1983) 46 A.L.R. 402 at 413.

Mr. Robertson submitted that Miss Pigott had received independent advice from Mr. Kendall, that she had been

made aware by Mr. Kendall that the terms of the 1980 lease were disadvantageous to her, that Miss Pigott could not be described as poor or ignorant and that the judge did not find and could not, consistently with the evidence, have found unconscionable behaviour on the part of Mrs. Boustany.

The crucial question in this case is - what brought Miss Pigott to the chambers of Mr. Kendall in September 1980? That question was not answered by direct evidence because Miss Pigott was not able to give evidence and Mrs. Boustany and her husband chose not to do so. The trial judge inferred unconscionable conduct by Mrs. Boustany after careful consideration of a number of features which he held were only consistent with unconscientious conduct on the part of Mrs. Boustany. The management of the property had been given up by Miss Pigott because of her incapacity. The properties were managed by Mr. George Pigott and there was no reason why Miss Pigott should interfere in the management of this one property leased to Mrs. Boustany. There was no evidence of any personal attachment between Miss Pigott and her tenant. Mrs. Boustany had negotiated with Mr. George Pigott and knew that he was the representative of Miss Pigott. No advice was sought by Miss Pigott; she turned up not at her family's solicitors but to Mr. Kendall who knew nothing about her save that he had prepared the 1976 lease. Miss Pigott gave to Mr. Kendall, according to his evidence, absurd reasons for the grant of a new lease and no reason for the grant of a lease for twenty years on disadvantageous terms.

Miss Pigott must have been under a total misapprehension of the facts when she represented that she might be worried about the property and about the repair of the property while she was away. Mr. Kendall forcibly pointed out not only to Miss Pigott but also to Mrs. Boustany and her husband the disadvantages to Miss Pigott of the new lease but Mrs. Boustany and her husband gave no explanation and offered no concessions. They were content to allow Miss Pigott ostensibly to insist on the unjustifiable terms which they must have already persuaded her to accept. When a writ was issued Mrs. Boustany did not write to the solicitor but sought out Miss Pigott and obtained a disclaimer which the court in due course rejected. The inference which the trial judge drew, and which he was entitled to draw, was that Mrs. Boustany and her husband had prevailed upon Miss Pigott to agree to grant a lease on terms which they knew they could not extract from Mr. George Pigott or anyone else. When they were summoned by Mr. Kendall, and the unfairness of the lease was pointed out to them, they did not release Miss Pigott from the bargain which they had unfairly pressed on her. In short Mrs. Boustany must have taken advantage of Miss Pigott before, during and after the interview with Mr. Kendall and with full knowledge before the 1980 lease was settled that her conduct was unconscionable.

On behalf of Mr. George Pigott, his counsel, Dr. Ramsahoye, sought by way of cross-appeal an order for damages. Mrs. Boustany has remained in possession of the property paying the rent of \$1,000 per month. In view of the fact that the premises are subject to the Rent Restriction Act of Antigua their Lordships agree with the courts below that this is not an appropriate case for an award of damages.

In the result their Lordships will humbly advise Her Majesty that the appeal and cross-appeal ought to be dismissed. Mrs. Boustany must pay the costs of Mr. George Pigott before the Board on the appeal and cross-appeal.