Overview | [2004] EWCA Civ 904, | [2004] 2 EGLR 75, | [2004] 34 EG 68, | [2004] All ER (D) 95 (Jun)

Macklin and others v Dowsett [2004] EWCA Civ 904

COURT OF APPEAL (CIVIL DIVISION)

AULD, SEDLEY, JACOB LJJ

14 JUNE 2004

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Equity — Undue influence — Contract — Transfer of property — Claimants seeking to enforce option agreement — Defendant raising issue of undue influence — Judge elements of undue influence not proved — Correctness of decision.

K Smith for the Appellant

G Pryce for the Respondents

Rowberry Morris of Reading; Pitmans of Reading

AULD LJ:

[1] The appellant, the defendant in the action, Mr Michael John Dowsett, appeals with the permission of Arden LJ, the decision of Mr Jonathan Crow, sitting as a Judge of the High Court, on 20 November 2003, holding that Mr Dowsett was bound by an agreement that he had made with the respondents (“the Macklins”) in 1999 giving them an option to acquire property of which Mr Dowsett had a life tenancy.

[2] Mr Dowsett has lived throughout his life on land, initially in a bungalow, known as The Hut, Ash Lane, Silchester. He has lived a simple life, supporting himself by cutting and selling wood in the winter and gardening in the summer. He lives alone, having never married nor had any children.

[3] Originally, the property had been owned by Mr Dowsett's grandparents, but by 1984-1985 he had become the sole legal and equitable owner of the property subject to significant mortgage obligations.

[4] In the early 1990s the local authority condemned the bungalow and, on 17 February 1994, granted Mr Dowsett planning permission to construct a new one on the site. It was a condition of the permission that he should commence the development within five years after the grant of

permission, that is, by 17 February 1999. He began to demolish the bungalow and moved into a caravan which he brought on to the site.

[5] But he made no significant move to commence the construction of the new bungalow. Although his planning permission was conditional on commencing it within five years, all he had to do was to commence it within that time in a significant way to preserve the permission thereafter. He could then take as long as he liked to complete it.

[6] In early 1996, three years short of the required commencement date, Mr Dowsett agreed with the Macklins, on whose behalf Mr William Macklin seems to have taken the leading role throughout, to sell the property to them for £18,250, a possible under-valuation, in return for the right to live rent free there for the rest of his life. He was then aged 51. He took legal advice before transferring the property to the Macklins. That took place in September of the same year simultaneously with the grant by them to him of a life tenancy of the property, entitling him to live there rent free for the rest of his life and prohibiting any assignment by him of that interest. He used the bulk of the sale monies to pay off his mortgage debts.

[7] There was nothing in the life tenancy agreement to prevent Mr Dowsett from constructing the new bungalow for which he had planning permission or to require him to do so, or to penalise him in any way if he did not.

[8] By January 1999, now just a month short of the lapse of the planning permission unless someone commenced the permitted construction, the Macklins arranged for a local building contractor to make the necessary start by digging trenches and laying foundations at a cost of just under £1,700. At about the same time they and Mr Dowsett entered into a further written agreement, by which he granted them an option exercisable after three years if he had not completed construction of the new bungalow by then to require him to surrender the life tenancy in return for a payment by them to him of £5,000.

[9] A further three years passed without Mr Dowsett making any move to continue the construction of the bungalow. The picture given by the evidence is that it was at the very least uncertain whether he had the funds to do so. At the end of that period, in January 2002, the Macklins decided to exercise the option and, following Mr Dowsett's refusal to give up his interest under the life tenancy, they issued proceedings in the High Court for its enforcement. Mr Dowsett raised a number of issues by way of defence, but the important one for the purpose of this appeal was that the option agreement should be set aside on the ground of undue influence.

[10] To succeed in such a defence, the prima facie establishment of undue influence, Mr Dowsett, in the light of the ruling of the House of Lords in *Royal Bank of Scotland v Etridge (No 2*) [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449, had to show two things: (1) that, in entering into the option agreement, he had reposed trust and confidence in the Macklins or that they had acquired some ascendancy over him; and (2) that the transaction was not otherwise readily explicable by the relationship between them. Proof of such matters which – I emphasise – did not require him to prove any misconduct by the Macklins or even that he was disadvantaged by the transaction, would, in the absence of satisfactory evidence to rebut his contention, entitle him to have the agreement set aside for undue influence. Further and more recent authorities of this Court have underlined the rationale of the doctrine of undue influence as the protection of the vulnerable in dealings with their property and also the lack of any need to show misconduct on the part of the transferee; see *Niersmans v Pesticcio*, unreported, 1 April

2004, per Mummery LJ at paras 1, 2 and 4; and *Jennings v Cairns* [2003] EWCA 1935, per Arden LJ at paras 34, 35 and 40.

[11] The Deputy Judge found against Mr Dowsett, holding that in January 1999 when the option agreement was entered into, the Macklins had not acquired a measure of influence or ascendancy over him and, seemingly in misapplication of the second test in *Etridge*, that the transaction was not manifestly disadvantageous to him.

[12] Miss Karen Walden-Smith, for Mr Dowsett, has challenged both those reasons. She maintained that the judge erred in failing to find that Mr Dowsett had established that at the material time the Macklins had acquired a measure of influence or ascendancy over him. And she maintained that, in holding that he had failed to prove disadvantage, the judge had not only applied the wrong test, but had wrongly found on the evidence that there was no disadvantage to Mr Dowsett.

[13] Mr Gary Pryce, for the Macklins, relied on the Deputy Judge's findings of fact and on his having referred to *Etridge (No 2*) and other relevant authorities as to the applicable law. As to the first of the two elements of undue influence, he submitted that the judge correctly found on the evidence that there was no relationship of trust or confidence or of ascendancy and dependency between the parties. As to the second, explicability of the transaction, he maintained that the judge applied the correct test as required by *Etridge (No 2*), merely prefacing his discussion of it with the words “manifest disadvantage” as a convenient shorthand, and that, in any event, there was no disadvantage, manifest or otherwise, to Mr Dowsett in the 1999 option agreement.

[14] Before I turn in a little more detail to the rival submissions and some of the evidence, I should say a little more about the law and the Deputy Judge's treatment of it and his findings on those two main issues.

[15] As to the law, the critical and authoritative formulation of it is to be found in the speech of Lord Nicholls of Birkenhead in *Etridge (No 2*), at paras 11, 12, 14, 21, 22, 24 and 25 as follows:

> “11 [The] test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.
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> 12 In *CIBC Mortgages plc v Pitt* [1994] 1 AC 200your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.
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> . . .
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> 14 Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he

acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

. . .

21 As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

22 Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner* 36 Ch D 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.' In *Bank of Montreal v Stuart* [1911] AC 120, 137 Lord Macnaghten used the phrase 'immoderate and irrational' to describe this concept.

. . .

24 . . . It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.

25 This was the approach adopted by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 703-707. He cited Lindley LJ's observations in *Allcard v Skinner* 36 Ch D 145, 185, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence. Lord Scarman concluded, at p 704:

'the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted *an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it*.'"

The other authorities to which I have referred do not do any more than those passages from Lord Nicholls' speech than emphasise that the low threshold of proof required to make a case of undue influence does not require proof of misconduct on the part of the transferee or of disadvantage to the transferor.

[16] However, having regard to Mr Pryce's attempted justification of the Deputy Judge's use of the words “manifest disadvantage”, in describing the second element of undue influence, as a mere form of shorthand, I should note the following passages in *Etridge (No 2*) from Lord Nicholls' speech at para 26 and that of Lord Scott at para 220. At para 26 in *Etridge* Lord Nicholls said, with reference to Lord Scarman's quotation in the preceding paragraph:

“26 Lord Scarman attached the label 'manifest disadvantage' to this second ingredient necessary to raise the presumption. This label has been causing difficulty. It may be apt enough when applied to straightforward transactions such as a substantial gift or a sale at an undervalue. But experience has now shown that this expression can give rise to misunderstanding. The label is being understood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator.”

Lord Scott said at p 220:

> "220 As to manifest disadvantage, the expression is no more than shorthand for the proposition that the nature and ingredients of the impugned transaction are essential factors in deciding whether the evidential presumption has arisen and in determining the strength of that presumption. It is not a divining-rod by means of which the presence of undue influence in the procuring of a transaction can be identified. It is merely a description of a transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act."

[17] Despite what was said in those two passages, particularly by Lord Scott in the latter, it seems to me, with respect, dangerous to employ the notion of manifest disadvantage to a transferor in this context as a form of shorthand for inexplicability of the transaction, which may, on that account only, be set aside regardless of proof of such manifest disadvantage.

[18] The danger is well illustrated by the Deputy Judge's reasoning in this case, despite his references to *Etridge (No 2*) and Lord Nicholls' speech. He opened, in para 18 of his judgment, his understanding of the law he was to apply in the following way:

> "18 . . . it was common ground that, in order to succeed with the allegation of undue influence, Mr Dowsett has to demonstrate that there was a relationship of trust and confidence, or of ascendancy and dependency, such as to give rise to a presumption of undue influence, and secondly *that the transaction was manifestly disadvantageous to him*. There does not have to be any positive evidence of wrong-doing by the Macklins . . . Nor does there have to be a fiduciary relationship as such: . . . However, it is not sufficient simply that there is an inequality of bargaining power between the parties." [my emphasis]

19. As will appear, in his analysis of the evidence going to the second issue, the Deputy Judge persisted with the notion of disadvantage, balancing the various advantages and disadvantages to each of the parties, that is, going well beyond restricting his use of the offending words to a convenient shorthand.

20. As I have indicated, the Deputy Judge found that Mr Dowsett had not proved either of the requisite elements of undue influence as he, the Deputy Judge, had defined them. Indeed, in paragraph 19 of his judgment, he said that the evidence had fallen "well short" of proof of either of them.

21. As to the first of the two elements of undue influence, a relationship of trust and confidence or of ascendancy and dependency, the judge, in paragraphs 19 and 20 of his judgment, referred to:

(i) Mr Dowsett's lack of intimacy with or dependency on the Macklins at the time of entering into the 1996 agreement to sell to them at a possible undervalue in exchange for a life tenancy;

(ii) the fact that Mr Dowsett, though not a sophisticated businessman, was no fool;

(iii) there was no such disparity in the relative ages of Mr Dowsett and Mr William Macklin as might give rise to the latter being able to take an unfair advantage;

(iv) in response to an argument advanced on behalf of Mr Dowsett, that the 1996 agreement had required the Macklins thereafter to look after his interest at the expense of their own, he found that the Macklins had driven a hard bargain over the sale price and that he, Mr Dowsett, had known it;

(v) he had been compelled to sell them the freehold in 1996 because of financial difficulties and, "[a]ccordingly, the arrangements in 1996 had nothing to do with the Macklins acquiring or exercising a position of dominance"; and

(vi) that after the 1996 agreement, the relationship between the parties was bound by its contractual terms, a relationship of landlord and tenant in which their respective interests were adverse to one another. It would, he concluded at paragraph 20.3 of his judgment, -

"be extremely difficult to imagine any case in which the necessary relationship of trust and confidence, or of ascendancy and dependency, could arise against that background."

[22] Miss Walden-Smith prefaced her submissions on this issue with the proposition that when the parties entered into the option agreement in 1999 Mr Dowsett was entirely dependent on the Macklins to provide him with a home. She suggested that the judge, in stating to the contrary in para 19.2 of his judgment, confused the relationship between the parties in 1996 with that in 1999. That may be so, but it is the position of the parties under the 1996 agreement, just before they entered into the 1999 agreement, that matters. At that stage Mr Dowsett had a life tenancy on the site rent free, planning permission to build a new bungalow on it, and had been able to use the £18,250 sale price obtained in 1996 to pay off his mortgage debts.

[23] Another way in which Miss Walden-Smith put Mr Dowsett's case on the first point was that the Macklins in 1996 had assumed a position of ascendancy over him by obtaining the freehold of the property at an undervalue in return for giving him the right to live there for the rest of his life rent free and free of his mortgage encumbrances. In making that submission Miss Walden-Smith was at pains to criticise the Deputy Judge's finding at para 20.2 of his judgment, that one compelling reason why Mr Dowsett sold the freehold to the Macklins in 1996 was because of his difficulties in meeting his mortgage payments. However, with respect to Miss Walden-Smith, that point goes to the wrong agreement.

[24] Whatever Mr Dowsett's motivation in entering into the 1996 agreement, it is the effect, if any, that it had thereafter on his relationship with the Macklins that counts. I cannot see that it matters whether the judge was right or wrong as to the extent of and effect of Mr Dowsett's financial difficulties on his entering into the 1996 agreement on any question of dependency or of trust and confidence just before entering into the 1999 agreement. All the special features of the 1996 agreement to which Miss Walden-Smith drew attention, suggesting that it was no ordinary transaction because it created a personal right in favour of Mr Dowsett to live on the land rent free for life, do not of themselves make the 1999 agreement suspect. However, in my view, in the absence of other material circumstances, the judge was entitled, as he did, to consider the making of the 1999 agreement against the backcloth of the relationship between the parties that was defined by the terms of the 1996 agreement, in which their respective interests were, as he said, adverse to one another.

[25] There may well be circumstances in which such a contractual relationship does not tell the whole story and where some other aspect develops so as to colour the overall relationship as to make it one of ascendancy and dependency. There may equally be circumstances in which a court may approach the matter first through the transaction itself and its apparent inexplicability, by asking what relationship, if any, could have given rise to it.

[26] The candidate answer here is the fact that just before entering into the 1999 agreement, Mr Dowsett was potentially on the brink of losing the valuable planning permission for construction of the bungalow on the land, for want of commencing construction within the five-year period. It is plain from his evidence that he was in no firm financial position to save the permission by instructing a builder even to start work on the footings, still less to complete the building. That was certainly the deputy judge's view on the evidence, as emerges from the following passage of his judgment at para 21.1 when dealing with the second element of undue influence, explicability of the 1999 agreement:

> "21.1 . . . [In the circumstances he knew] he would risk having to live in a caravan . . . for the rest of his life unless the necessary works were commenced [in time] . . . Accordingly, Mr Dowsett plainly had an interest in preserving the planning permission, and if [as was the case on William Macklin's evidence) the Macklins would only come to his rescue by laying the foundations if he signed the Option Agreement, then he plainly derived a benefit under it."

[27] The question for the Court, it seems to me, is not just whether he derived such a benefit under it, but whether he would have entered into such a contract, exposing himself to termination of his existing rent free life tenancy in exchange for an obligation to implement the planning permission within three years and the receipt of a paltry £5,000, if he had not found the means and the will to construct and complete the new bungalow within that time.

[28] The Macklins knew, just before they proposed the option agreement to him, that he had not the means to save the planning permission himself by making a start on the construction of the footings. Why else did they do it in his stead? Plainly to preserve and enhance the commercial value of their own future interest in the property and, notionally at any rate, to preserve for him the somewhat theoretical opportunity to support that aim by building the bungalow himself. The terms that they proposed – and that he accepted in the 1999 agreement – clearly signalled their doubt that he would make it and their wish to drive a hard bargain in the likely event that he would not. It seems to me that the additional factor in this first element of undue influence to be established is, in the circumstances, the financial disparity in the parties' bargaining positions just before entering into the option agreement, a disparity of which the Macklins were all too well aware and which was, at least, vulnerable to exploitation by them. In the circumstances, I consider that the Deputy Judge wrongly found that Mr Dowsett had not established, on at least a prima facie basis, some relationship of ascendancy and dependency between them at the material time.

[29] As to the second element, which, as I have said, the Deputy Judge characterised as whether the option agreement of 1999 was “manifestly disadvantageous” to Mr Dowsett, he found in para 21 of his judgment that it was not so for the following reasons:

> (1) the Macklins did him a favour in 1999 by coming to his rescue to lay the foundations of the permitted new building just before the date when otherwise the planning permission would have expired;
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> (2) the option agreement was beneficial, rather than harsh, to Mr Dowsett because it gave him another three years in which to continue and complete the construction of the new bungalow;
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> (3) although the Macklins by then had an even greater interest than Mr Dowsett in preserving the planning permission because they stood to benefit from the commercial value that it would bring to the property when the life tenancy fell in, that merely demonstrated that their interests were congruent; and
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> (4) although under the option agreement Mr Dowsett placed himself “at risk of losing the one thing he most wanted, namely his right to live on the property” and that £5,000 was “an extremely modest sum for the surrender of the life tenancy”, it lay within his hands to avoid losing it by getting on with the construction of the new bungalow.

[30] As I have said, Miss Walden-Smith's main submission was that the judge applied the wrong test, namely whether the option agreement was manifestly disadvantageous to Mr Dowsett. She is plainly right about that, having regard to the passages from Lord Nicholls' speech in *Etridge (No2*) and to the Deputy Judge's reasoning in para 21 of his judgment as I have summarised it. The proper question was whether, in the circumstances, the agreement

required explanation, which, in my view, it certainly did. As Miss Walden-Smith observed, by signing it Mr Dowsett gave the Macklins the right to force him to surrender his right to live at the property rent free for the rest of his life for a mere payment of £5,000.

[31] For what it is worth, Miss Walden-Smith also criticised the judge's findings on the wrong test that he had adopted, namely his finding that, far from being disadvantaged by the transaction, Mr Dowsett had benefited from it.

[32] On the contrary, she submitted, the Macklins acquired alternative benefits of the long term enhancement of the value of the property by Mr Dowsett's construction of the bungalow, if he did it, within three years or, if he failed to do so, to acquire the right to terminate his life tenancy for £5,000 and have the estate vacant in possession.

[33] Mr Pryce submitted that both parties were, or would have been able, to benefit from the option agreement - the Macklins in having the land with the benefit of the new building and implementation of the planning permission, and Mr Dowsett the opportunity of being able to implement the planning permission for his own benefit and life-long living.

[34] But in fact it seems to me the corresponding disadvantages to Mr Dowsett are plain. If he wanted to continue to enjoy the life tenancy granted by the 1996 agreement, he was now bound to do what had previously been optional, namely to construct a new bungalow and, moreover, to do so within three years. Failure to do that would lose him and his caravan the right to remain there for the rest of his life, all for the small sum of £5,000. Lifetime enjoyment of his life tenancy was, as must have been apparent to the Macklins and to him, the least likely because plainly he did not have the financial means to build a bungalow within the time. As Jacob LJ said in the course of Miss Walden-Smith's submissions, the 1999 agreement in effect granted an option to the Macklins to purchase Mr Dowsett's life tenancy for £5,000 in three years time. If, indeed, as the Deputy Judge seems to have regarded, their interests had been congruent in the sense that they both wanted a newly built bungalow on the land, it might have been better expressed by the option agreement giving the Macklins power to enter on the land and to construct the building themselves. In the event, even applying the test of “manifest disadvantage” which the judge plainly applied, his reasoning, in my view, cannot support his finding that Mr Dowsett had failed to discharge the onus on him of showing an inexplicability or, as the judge would have had it, manifest disadvantage in entering into the 1999 option agreement.

[35] Accordingly for those reasons I would hold that Mr Dowsett had established both elements on a prima facie basis and that the appeal should be allowed.

SEDLEY LJ:

[36] I agree. I would record my appreciation of Mr Pryce's economical and well informed argument for the respondents, but it has not succeeded. That is because no argument could overcome the fundamental inequity of the option agreement, itself, in my judgment, redolent of a relationship at the time of the agreement of ascendancy and dependency. For the rest, I, too, would allow this appeal for the reasons given by my Lord, Auld LJ.

JACOB LJ:

[37] I agree with both judgments.

Appeal allowed.

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