Lloyds Bank Ltd. v. Bundy

[1975] QB 326, [1974] 3 All ER 757

THE MASTER OF THE ROLLS (Lord Denning): Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank he did not know what he was doing: or at any rate not the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The Judge was sorry for him. He said he was a "poor old gentleman". He was so obviously incapacitated that the Judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the Judge felt he could do nothing for him. There is nothing, he said, "which takes this out of the vast range of commercial transactions". He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank.

Now there is an appeal to this Court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound.

<u>The events before December 1969.</u>

Herbert Bundy had only one son, Michael Bundy. He had great faith in him. They were both customers of Lloyds Bank at the Salisbury branch. They had been customers for many years. The son formed a company called M.J.B. Plant Hire Ltd.

It hired out earth-moving machinery and so forth. The company banked at Lloyds too at the same branch.

In 1961 the son's company was in difficulties. The father on 19th September 1966 guaranteed the company's overdraft for £1300 and charged Yew Tree Farm to the bank to secure the £1500. Afterwards the son's company got further into difficulties. The overdraft ran into thousands. In May 1967 the assistant bank manager, Mr. Bennett, told the son the bank must have further security. The son said his father would give it. So Mr.

Bennett and the son went together to see the father. Mr. Bennett produced the papers. He suggested that the father should sign a further guarantee for £5,000 and to execute a further charge for £6,000. The father said that he would help his son as far as he possibly could. Mr. Bennett did not ask the father to sign the papers there and then. He left them with the father so that he could consider them over night and take advice on them. Th6 father showed them to his solicitor, Mr. Trethowan, who lived in the same village. The solicitor told the father the £5,000 was the utmost that he could sink in his son's affairs. The house was worth about £10,000 and this was half his assets. On that advice the father on 27th May 1969 did execute the further guarantee and the charge, and Mr. Bennett witnessed it. So at the end of May 1967 the father had charged the house to secure £7500.

The events of December 1969.

During the next six months the affairs of the son and his company went from bad to worse. The bank had granted the son's company an overdraft up to a limit of £10,000, but this was not enough to meet the outgoings. The son's company drew cheques which the bank returned unpaid. The bank were anxious. By this time Mr. Bennett had left to go to another branch. He was succeeded by a new assistant manager, Mr. Head. In November 1969 Mr. Head saw the son and told him that the account was unsatisfactory and that he considered that the company might have to cease operations. The son suggested that the difficulty was only temporary and that his father would be prepared to provide further money if necessary.

On 17th December 1969 there came the occasion which, in the Judge's words, was important and disastrous for the father. The son took Mr. Head to see his father. Mr. Head had never met the father before. This was his first visit. He went prepared. He took with him a form of guarantee and a form of charge filled in with the father's name ready for signature. There was a family gathering. The father and mother were there. The son and the son's wife. Mr. Head said that the bank had given serious thought as to whether they could continue to support the son's company. But that the bank were prepared to do so in this way:

> (i) The bank would continue to allow the company to draw money on overdraft up to the existing level of £10,000, but the bank would require the company to pay 10% of its incomings into a separate account. So that 10% would not go to reduce the overdraft. Mr. Head said that this would have the effect "of reducing the level of borrowing". In other words, the bank was cutting down the overdraft.
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> (ii) The bank would require the father to give a guarantee of the company's account in a sum of £11,000 and to give the bank a further charge on the house of £3,500, so as to bring the total charge to £11,000. The house was only worth about £10,000, so this charge for £11,000 would sweep up all that the father had.

On hearing the proposal, the father said that Michael was his only son and that he was 100% behind him. Mr. Head produced the forms that had aleady been filled in. The father signed them and Mr. Head witnessed them there and then. On this occasion, Mr. Head,

unlike Mr. Bennett, did not leave the forms with the father: nor did the father have any independent advice.

It is important to notice the state of mind of Mr. Head and of the father. Mr Head said in evidence:

> "Defendant asked me what in my opinion the company was doing wrong and company's position. I told him. I did not explain the company's affairs very fully as I had only just taken over the account.... The son said that company had a number of bad debts. I was not entirely satisfied with this. I thought the trouble was more deep seated .... It did not occur to me that there was any conflict of interest. I thought there was no conflict of interest. I would think the defendant relied on me implicitly to advise him about the transaction as bank manager. I knew he had no other assets except Yew Tree Cottage."

The father said in evidence:

> "I always thought Mr. Head was genuine. I have always trusted him....No discussion how business was doing that I can remember. I simply sat back and did what they said."

The solicitor, Mr. Trethowan, said of the father: "He is straightforward. Agrees with anyone. I doubt if he understood all that Mr. Head explained to him."

So the father signed the papers. Mr. Head witnessed them and took them away. The father had charged the whole of his remaining asset, leaving himself with nothing. The son and his company gained a respite. But only for a short time. Five months later, in May 1970, a receiving order was made against the son. Thereupon the bank stopped all overdraft facilities for the company. It ceased to trade. The father's solicitor, Mr. Trethowan at once went to see Mr. Head. He said he was concerned that the father had signed the guarantee.

In due course the bank insisted on the sale of the house. In December 1971 they agreed to sell it for £7,500 with vacant possession. The family were very disappointed with this figure. It was, they said, worth much more. Estate agents were called to say so. But the Judge held it was a valid sale and that the bank can take all the proceeds. The sale has not been completed, because Herbert Bundy is still in possession. The bank have brought these proceedings to evict Herbert Bundy.

The General Rule.

Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to

Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the Courts will set aside a contract, or a transfer of property, when the parties have not met en equal terms - when the one is so strong in bargaining power and the other so weak - that, as a matter of common fairness it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them.

I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.

III The Categories.

The first category is that of "duress of goods". A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as, by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due: and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess, see Astley v. Reynolds (1731) 2 Stra. 915; Green v. Duckett (1883) 11 Q.B.D. 275. To which may be added the cases of "colore officii", where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker - who is urgently in need - more than is justly due, see Pigott's case cited by Lord Kenyon L.J. in 2 Espinasse at pages 723-4; Parker v. Bristol & Exeter Railway Co. (1851) 6 Exch. 702; Steele v. Williams (1853) 8 Exch. 625. In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power - the strength of the one versus the urgent need of the other - renders the transaction voidable and the money paid to be recovered back, see Maskell v. Horner (1915) 3 K.B. 106.

The second category is that of the "expectant heir." A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it - and then being in urgent need -another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him, see Evans v, Llewellyn (1787) 1 Cox Eq. Cas. 333. Even though there be no evidence of fraud or

misrepresentation, nevertheless the transaction will be set aside, see Fry v. Lane (1888) 40 Ch. D. 312., where Mr. Justice Kay said (at page 522):

> "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction."

The third category is that of "undue influence" usually so called. These are divided into two classes as stated by Lord Justice Cotton in Allcard v. Skinner (1887) 36 Ch. D. at page 171. The first are those where the stronger has been guilty of some fraud or wrongful act - expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relations which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relations are such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relation of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford, Lord Chancellor, in Tate v. Williamson (1861) L.R. 2 Ch. App 55) at page 6l:

> "Wherever the persons stand in such a relation that? while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted, to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to obtain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Such a case was Tufton v. Sperni (1952) 2 T.L.R. 516, C.A. The fourth category is that of "undue" pressure. The most apposite of that is Williams v. Bayley (1866) L.R. 2 H.L. 200, where a son forged his father's name to a promissory note, and, by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect:

> "Take your choice - give us security for your son's debt. If you do take that on yourself, then it will all go smoothly: if you do not, we shall be bound to exercise pressure."

Thereupon the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said at page 218:

> "A contract to give security for the debt of another, which is a contract without consideration. Is above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it."

Other instances of undue pressure are where an employer - the stronger party -had employed a builder - the weaker party - to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. Vice-Chancellor Stuart said:

> "When an agreement, hard and inequitable in itself, has been executed under pressure on the part of the party who executes it, the Court will set it aside",

see Ormes v. Beadel (1860) 2 Giff. 166 at page 174 (reversed on another ground, 2 de G.F. & J- 333; D. & C. Builders Ltd. v. Rees (1966) 2 Q.B. at page 623.

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court, of Admiralty have always recognised that fact, The fundamental rule is that if the parties have made an agreement, the Court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decide what is fair and just", see Akerblom v. Price (1881) 7 Q.B.D. 129 at page 133 by Lord Justice Brett applied in a striking case The Port Caledonia and The Anna(1903) P. 184, when the rescuer refused to help with a rope unless he was paid £1,000

IV. The General Principles.

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for his own excessive sum may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other, One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points:-

> (1) The consideration moving from the bank was grossly inadequate. The son's company was in serious difficulty. The overdraft was at its limit of £10,000. The bank considered that its existing security was insufficient. In order to get further security, it asked the father to charge the house - his sole asset - to the uttermost. It was worth £10,000. The charge was for £11,000. That was for the benefit of the bank. But not at all for the benefit of the father, or indeed for the company. The

bank did not premise to continue the overdraft or to increase it. On the contrary, it required the overdraft to be reduced. All that the company gained was a short respite from impending doom

(2) The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on it implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. It allowed the father to charge the house to his ruin.

(3) The relationship between the father and the son was one where the father's natural affection had much influence on him. He would naturally desire to accede to his son's request. He trusted his son. There was a conflict of interest between the bank and the father. Yet the bank did not realise it. Nor did it suggest that the father should get independent advice. If the father had gone to his solicitor - or to any man of business - there is no doubt that any one of them would say: "You must not enter into this transaction. You are giving up your house, your sole remaining asset, for no benefit to you. The company is in such a parlous state that you must not do it."

These considerations seem to me to bring this case within the principles I have stated. But, in case that principle is wrong, I would also say that the case falls within the category of undue influence of the second class stated by Lord Justice Cotton in Allcard v. Skinner. I have no doubt that the assistant bank manager acted in the utmost good faith and was straightforward and genuine. Indeed the father said so. But beyond doubt he was acting in the interests of the bank - to get further security for a bad debt. There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands - for nothing -without his having independent advice. I would therefore allow this appeal.

Cairns L.J. and Sir Eric Sachs concurred.

[In National Westminster Bank plc v. Morgan, [1985] A.C. 686, the House of Lords doubted whether it was necessary to adopt a general principle of inequality of bargaining power.]