

Cunningham v Jacobsen

Court of Appeal

10 Ward CJ, Martin & Burchett JJ.

13, 14 & 15 April 1994

Appeal in civil case No.564/93

Equity - trusts - equity only to those who do equity

Trusts - obligations and presumptions - when they arise

20 *Undue influence - trust - obligations and presumptions on trustee*

In the Supreme Court a commercial agreement between the appellant and the respondent had been set aside on the grounds of undue influence by the respondent but nevertheless the appellant was ordered to repay moneys to the respondent in respect of moneys advanced for a business project. The appellant appealed against that latter finding and the respondent cross appealed.

Held:-

- 30 1. The agreement was not unfair to the appellant (as the judge below had found).
2. The obligations and presumptions under a relationship of trustee and beneficiary cannot arise before a trust exists; so the appellant could not rely (as the judge below had allowed him to) on a presumption (of undue influence) which only arose after the trust came into existence.
3. In any event even if grounds were shown to set aside the trust deed (i.e. the agreement); a Court will only grant equity to those who do equity and so the agreement would be set aside only if the moneys advanced were repaid.
- 40 4. But more fundamentally, the appellant was the trustee and the respondent the beneficiary and not the other way round as the judge below apparently thought. The respondent could not then (as beneficiary) be treated as owing fiduciary duties or be presumed to exercise undue influence over the trustee, the appellant.
5. The agreement was valid and enforceable and the moneys advanced repayable; appeal dismissed and cross appeal allowed.

Counsel for appellant : Mr Edwards

50 Counsel for respondent : Mr Appleby

Judgment

This is an appeal against a judgment of Dalgety J on 10 January 1994 when he set aside a commercial agreement made between Mr Cunningham and Mr Jacobsen on the grounds of undue influence; but nevertheless ordered Mr Cunningham to repay to Mr Jacobsen \$37,992.36 in respect of money advanced for a business project.

The parties used to be close friends and had been partners in another business venture. In 1991 Mr Cunningham wanted to form a sports fishing business based in Vava'u. He found supporters in New Zealand and asked Austral Marine Ltd ("Austral") to carry out preliminary boat design work. Austral requested a deposit of NZ\$20,000, whereupon two of the syndicates dropped out. Mr Cunningham told Austral that he could not pay, and not to proceed.

Shortly afterwards Mr Thomson of Austral approached Mr Cunningham and proposed a partnership. Austral would design and build the boat and supply the engine; Mr Cunningham would supply the electronics, safety gear and fishing gear, and manage the business in Tonga. Austral would have a 49% share; Mr Cunningham 48% and 3% would go to a Mr Smith for certain other services.

Mr Cunningham needed a substantial sum of money but did not have it. He asked Mr Jacobsen who, with some reluctance, agreed to put in up to NZ\$40,000. This was to be borrowed from his wife, and he was anxious to protect the investment as far as possible. He also wanted to remain anonymous. On the learned judge's findings, that was agreed in principle and the details were left to be worked out later.

Mr Jacobsen or his solicitor prepared heads of agreement recording the arrangement between Mr Smith, Austral and Mr Cunningham and identifying their respective areas of responsibility and shares. This agreement was signed by the partners on or about 9 December 1991. It provided that Mr Cunningham would have

"48% for providing electronics, fishing and ancillary equipment as previously agreed, and for the management and running of the Vava'u partnership."

Mr Jacobsen also prepared a draft agreement between himself and Mr Cunningham. Mr Cunningham says he never saw it. The learned judge disbelieved him. Mr Jacobsen instructed his solicitor in New Zealand, Mr Macdonald, to prepare a formal agreement based on the draft, which he did in the following terms:

"THIS DEED is made the 18th day of December 1991

BETWEEN CAPTAIN FRANK CUNNINGHAM of New Zealand
("Cunningham")

AND GUY SINCLAIR JACOBSEN of New Zealand
("Jacobsen")

1. CUNNINGHAM acknowledges that he is indebted to Jacobsen in the sum of (27,998 New Zealand Dollars) being money advanced to enable Cunningham to acquire a forty eight per cent (48%) interest in the Vava'u Sports Fishing Partnership ("the Partnership Interest") and that further advances may be made for the same purpose up to a maximum including all advances of FORTY THOUSAND DOLLARS (\$40,000.00) (together "the Advances").

2. CUNNINGHAM acknowledges and declares that he holds the Partnership Interest in trust for Jacobsen on the terms and subject to the provisions of this Deed.

3. CUNNINGHAM agrees that until the Advances have been paid in full all profits derived from the Partnership Interest shall be applied in repayment of the Advances provided that Cunningham shall be able to retain for his own use the sum of ONE THOUSAND DOLLARS (\$1,000.00) per month.

4. WHEN the Advances have been repaid in full each of Cunningham and Jacobsen shall be entitled to receive one half of the profits attributable to the Partnership Interest throughout the lifetime of Cunningham and thereafter Jacobsen shall be entitled absolutely to the Partnership Interest.

110 5. IF any of the assets of the Partnership should be sold or the Partnership dissolved Cunningham will immediately pay to Jacobsen any amounts received by or due to him in respect of the sale or dissolution.

6. IF called upon by Jacobsen to do so Cunningham will transfer to Jacobsen all his legal right title and interest in the Partnership Interest.

THIS AGREEMENT was executed in Auckland, New Zealand on the 18th day of December 1991 by the parties.*

The partnership was dissolved on 14 June 1993. On 2 July 1993 Mr Jacobsen demanded the transfer to him of the share in the partnership. On 23 July 1993 Mr Cunningham brought this action to declare the agreement null and void. He relies on various grounds which the learned judge summarised as:

- (a) non est factum;
- (b) the relationship between the parties was that of trustee and beneficiary; not lender and borrower
- (c) undue influence;
- (d) the oppressive and unconscionable nature of the bargain; and
- (e) fraud.

130 Mr Jacobsen sought to enforce the agreement; and in the alternative counterclaimed for repayment of money had and received; alternatively loaned.

The learned judge rejected the allegations of non est factum, express undue influence, and fraud. In particular, he held that Mr Cunningham "... knew precisely what he was signing, he having spent two hours discussing it with (Mr Jacobsen) who advised him as to its meaning and suggested he seek independent legal advice before signing.* There is no appeal against his conclusions on these matters. But he set aside the agreement on the ground of presumed undue influence. He stated:

140 "... the relationship of Trustee and Beneficiary exists as between the Plaintiff (Mr Cunningham) and the Defendant, and ... the bargain constituted by the Trust Deed substantially benefited the Defendant (Mr Jacobsen) and was unfair to the Plaintiff. The presumption (of undue influence) applies and it is for the Defendant, if he can, to rebut it and show that the deed was not procured by an abuse of influence.*

He considered the relevant factors to be

- *the degree of trust the Plaintiff reposed in the Defendant
 - the use of a Trust Deed, the parties being respectively Trustee and Beneficiary
 - the disproportionate benefit gained by the Defendant under the Deed ...
 - the bargain was unfair to the Plaintiff; and
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(the Plaintiff's lack of independent advice)"

He found that Mr Jacobsen had not rebutted the presumption of undue influence, and declared the agreement null and void.

Notwithstanding that, the learned judge gave judgment for Mr Jacobsen on the basis that Mr Cunningham had "... admitted that these sums were advanced to him by way of loan which he was obliged to repay."

We do not share the view of the learned judge that the bargain was unfair to Mr Cunningham. He wanted to pursue a project which he would not afford. Mr Jacobsen made that possible, by what can only be described as a high risk investment. Subject to matters over which nobody had control, it was up to Mr Cunningham to make the project succeed. If it succeeded, he was guaranteed an income until Mr Jacobsen's money had been repaid; after that he had the prospect of a substantial share of the profits for the remainder of his life. If it failed, he would lose nothing and Mr Jacobsen risked losing very substantially. That was not unfair to Mr Cunningham.

Mr Edwards argued that clause 6 of the agreement was unfair because Mr Cunningham could be obliged to transfer his interest to Mr Jacobsen on demand. Such a transfer would only mean that Mr Jacobsen had come out of hiding; it would not disentitle Mr Cunningham to his share of the profits under clause 4 of the agreement.

But there are more fundamental flaws in the reasoning of the learned judge in respect of the trust.

1. The obligations and presumptions under a relationship of trustee and beneficiary cannot arise before the trust exists. The learned judge found as a fact that Mr Cunningham was not induced to enter into the agreement by express undue influence. To challenge the validity of the Trust Deed Mr Cunningham must therefore show that there was a special relationship between himself and Mr Jacobsen, before the deed was created, which gave rise to a presumption of undue influence. The evidence fell far short of this. They were close friends and business associates, but there was nothing to show that Mr Jacobsen was in such a dominant position as to give rise to that presumption. Mr Cunningham cannot rely on a presumption which only arose after the trust came into existence.
2. Even if grounds were shown to set aside the Trust Deed, the court will only grant equity to those who do equity. In these circumstances that means that the Deed would be set aside only if the money advanced were repaid.
3. More fundamentally still, the learned judge has confused the respective positions of the parties. Under the trust deed it was Mr Cunningham who was the trustee, not Mr Jacobsen. Mr Cunningham held the money in trust for Mr Jacobsen, not the other way round as the learned judge appears to have thought. Mr Jacobsen as beneficiary of the trust cannot be treated as owing fiduciary duties, or be presumed to exercise undue influence over Mr Cunningham, who is the trustee.

The findings of the learned judge in respect of the trust deed are plainly wrong and cannot be allowed to stand. Nor can the judgment, given on the basis that what was involved was a loan. In our view the trust deed is valid and enforceable. The money was advanced under that deed and not by way of loan.

The appeal is dismissed; the cross appeal is allowed. The order in the court below is set aside. For it we substitute an order that Mr Cunningham's claim be dismissed with costs to be taxed if not agreed. We order Mr Cunningham to pay the costs of the appeal assessed at \$750.