

CANADA / JUDGMENT

Sandwell v. Sayers

2022 BCSC 605

COURT

Supreme Court of British Columbia

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2022 BCSC 605 Sandwell v. Sayers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sandwell v. Sayers,

2022 BCSC 605

Date: 20220419

Docket: S131321

Registry: Kelowna

Between:

Don Marlen Sandwell

Plaintiff

And

Marleane Sayers also known as Marleane Maxwell and Floyd Tayler

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

K.D. Rule

Appearing on her own behalf:

M. Sayers, also known as

M. Maxwell

Appearing on his own behalf:

F. Tayler

Place and Dates of Trial/Hearing:

Kelowna, B.C.

January 25-26, 2022

Place and Date of Judgment:

Kelowna, B.C.

April 19, 2022

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Introduction

- [1] The plaintiff is the 91-year-old father of the defendant. In December 2020 he transferred an interest in his home located at 11-1885 Parkview Crescent, Kelowna, B.C., to the defendant, making them joint tenants.
- [2] The plaintiff's amended notice of civil claim and this notice of application seeking summary trial, seek a declaration that the defendant holds her interest in the property in trust for the plaintiff, and an order that the defendant be removed from title and that the property vest with the plaintiff.

Background

- [3] The plaintiff lives alone at the property. There is no mortgage on it. It has an appraised value of \$464,000.
- [4] The plaintiff has one other child, Floyd Tayler ("Floyd"). The defendant is the youngest child. She is a realtor in the Fraser Valley.

- [5] The plaintiff is generally in good health. Although he underwent surgery to remove a benign brain tumor in 2009, there is no affirmative evidence of any cognitive impairment. No issue is raised with respect to his competence at the time of the transfer.
- [6] In 2008 the plaintiff executed a transfer of his home to Floyd for \$1.00. The transfer was never registered and the original documents were retained by the lawyer who prepared them. That lawyer passed away several years ago. Copies of the documents were discovered by the defendant in November 2020. There is a note written on them, apparently by the lawyer, that reads, "This transfer will not be used except with your consent or in the event that your health fails and there is no likelihood of your recovery". That note appears to be dated "08/04/23".
- [7] As to their discovery, the defendant says in part:
42. I brought it to Dad, and he was surprised. We could not figure out why there were two of them, or what they were for - I told him that it looked like a transfer for his entire house, and he said that means Floyd could kick him onto the street. I told him he should see a lawyer right away, but he said he had spent enough on lawyers.
- [8] The plaintiff's affidavit is silent as to the circumstances of the preparation of those documents. He says this about their discovery in his affidavit:
9. [The defendant] told me that the document said that my son, Floyd Tayler, had a binding claim over all my property and could leave me totally broke. To be more convincing she underlined in yellow pen to be clear on this discovery. Don't worry Dad, Marleane said, Floyd hasn't registered this paper yet so we can still save you.
- [9] Following that discovery an appointment was made for the plaintiff to see a notary, Mr. Brendon Rothwell. In his affidavit evidence Mr. Rothwell indicates that he is unable to identify who made the appointment. The accounts of how the appointments were made are described in different terms by the plaintiff and the defendant. In her affidavit, the defendant says:
45. Around November 26, 2020, Dad told me that he wanted to sign over half the Property to me. He told me he wanted me to have half the house now, and that I would get the rest of it when he died. He found a Notary in Kelowna, and made an appointment for us to discuss with a notary for November 26, 2020, later in the day. Dad, my husband, and I all went. We discussed with the notary, Brendon Rothwell, about me being put on title, and then Mr. Rothwell sent my husband and I away while Mr. Rothwell met with just Dad.
- [10] The plaintiff says in his affidavit:
10. On December 4th, Marleane told me she herself had an appointment to see a notary at 2:20 pm and that I should go with her. However, when I arrived, it was clear that the notary was expecting me, not her, and he had papers already drawn up adding Marleane to the title to my house. I believe that Marleane made the appointment to get on title to my house.

[11] Mr. Rothwell's affidavit includes the following:

3. The initial appointment was a consultation on November 26th 2020. I first met with Don, Marleane, and Marleane's husband. We discussed generally the reason for the visit, which was to add Mareleane on title to Don's house as a joint tenant. I told Marleane that I could not take instructions from her. I then met with Don alone and reviewed with him the pros and cons of transferring title into a jointure with Marleane, and what that could mean for Floyd, Don's son. I was concerned that Don was overwhelmed and I told him to take some time to think about it.
4. The following day Don called the firm and left voicemails with me and with Reception stating that he wanted to speak to me urgently. I talked to him on the phone and he said he did not want me to proceed with the transfer.
5. On December 3rd 2020 Don left a total of 4 voicemails with my staff and myself indicating that he wanted to go ahead. On that same day I received an email from Marleane which stated as follows: "Hi. My Dad called asking me to get confirmation you received his phone message this morning to proceed with the transfer. Will you please send me confirmation you did receive his request. Please feel free to contact him direct. It is his hope that we can sign and complete the transfer tomorrow Friday afternoon ". Now produced and shown to me is a copy of that email attached to this my Affidavit as Exhibit "A".
8. I did have some concerns about Undue Influence, and those concerns were recorded by me on page 2 of my usual Checklist, attached as Exhibit "B". I noted "U.I. concerns Discussed with DS that I would contact him subsequent to meeting. MS & Hubby only in town for the day ." and on page 3 I noted "I recommended he take time to think about it, and to have a cooling off period" and under Action Item/Notes I have written "Want to talk to Don before proceeding."
9. I was cognizant of resulting trust issues and so I drafted the Deed of Gift. Now produced and shown to me and attached to this my Affidavit as Exhibit "C" is a copy of that Deed of Gift.
12. I did not suggest that Ms. Sayer sign a Form A returning legal title to Don, registerable solely on Don's instructions, which could be used should Don need to get his house back into his own name.
13. Ultimately, I decided, based on instructions from Don and his assurance that he was "100% positive" that he wanted to proceed with the transfer, I went ahead with it.

Issues and Analysis

- [12] The primary dispute focusses on whether the doctrine of unconscionable procurement exists in British Columbia.
- [13] The plaintiff seeks his relief pursuant to that doctrine but, in the alternative the plaintiff relies on unjust enrichment as a basis for the relief sought.

- [14] In advancing each claim the plaintiff focusses on the question of whether the execution of the transfer documents and the deed of gift was fully informed.
- [15] In relation to unconscionable procurement the plaintiff argues the actual understanding of the nature and effect of the legal documents that he signed and his understanding of the transaction generally are critical. He puts it this way in his argument:
81. In trying to determine if the donor understood what he or she was doing, the courts will look closely at the extent to which the donor of the gift received and understood legal advice, and the extent to which the donor, as a result, took steps to protect him or herself during his or her own lifetime. A close reading of this line of cases reveals that the lack of ancillary safety features will often sway the court into reversing an improvident transaction.
- [16] In relation to unjust enrichment, he seizes on the concept of "full, free and informed thought". As will be discussed below, it is a phrase that has been used and interpreted in dealing with issues of undue influence. Here, the plaintiff says the advice received from Mr. Rothwell was insufficient to empower his free, full and informed thought.
- [17] To place the plaintiff's position in context, I will first review the law of resulting trust as it would apply to the facts before me.
- [18] Transfers between parents and adult children are presumed to be bargains not gifts: *Pecore v. Pecore*, 2007 SCC 17. As a result, in the absence of proof that the transferor intended to make a gift, the transferee holds the title in trust for the transferor.
- [19] Where there is evidence of a gift, the presumption of resulting trust may be rebutted. Here the deed of gift is the principle evidence of the plaintiff's intention to make a gift.
- [20] In assessing the evidence of intention, a court will consider whether there was undue influence. As noted in *Bostrom v. Bigford*, 2019 BCSC 79 "there can be no gift where the transfer was under undue influence".
- [21] The circumstances where a presumption of undue influence arise are described in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 1991 CanLII 69 [Geffen]. Madam Justice Wilson at 377 stated:

It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

- [22] The presumption of undue influence may be rebutted by evidence that the gift was made with "full, free and informed thought": *Cowper-Smith v. Morgan*, 2016 BCCA 200 [Cowper-Smith]. In that decision the Court noted:

- [50] Factors to be considered in determining whether the donor acted of her own "full, free and informed thought" in entering the transaction include: (i) the lack of actual influence or opportunity to influence the donor; (ii) the receipt of or opportunity to obtain independent legal advice; (iii) the donor's ability to resist any such influence; and (iv) the donor's knowledge and appreciation about what she was doing. See *Stewart v. McLean*, 2010 BCSC 64 at para. 97.
- [23] This introduces the issue of the sufficiency of legal advice as a component of the broader assessment of full, free and informed thought.
- [24] Here the plaintiff acknowledges that the presumption of resulting trust is rebutted by the deed of gift signed by the plaintiff as prepared by the notary. Further, the plaintiff concedes there is no presumption of undue influence and there is no evidence that the defendant had the ability to "dominate the will" of the plaintiff.
- [25] The plaintiff does however raise the sufficiency, or more accurately the insufficiency, of the legal advice the plaintiff received. First, he says that it supports a finding of unconscionable procurement. Second, he says it supports a finding that the plaintiff did not act with full, free and informed thought, thereby warranting a finding of unjust enrichment.
- [26] The plaintiff raises the impact of his brain tumor and subsequent surgery as relevant. As noted, he does not suggest there is any issue of competence. He does suggest that his brain tumor led to impulsive and impetuous conduct. In support the plaintiff relies on medical note addressed "To whom it may Concern" dated Oct 28, 2021, which references the 2009 surgery. The medical note says "This kind of traumatic injurt may precipitate impulsive behaviour". This is not a properly constructed expert opinion and there is no indication it was served as such. In addition, it offers no comment specific to the plaintiff's behaviour or the transaction at issue. It is of no assistance on the issues presented here.
- [27] The plaintiff also attaches 292 pages of clinical notes and records. To the extent they contain opinions, those opinions are not admissible.
- [28] In short, it has not been shown that the plaintiff's brain tumor or the 2009 surgery to treat the tumour are relevant to the issues on this summary trial.

Unconscionable Procurement

- [29] The plaintiff argues that the legal construct referred to as "unconscionable. procurement" provides for the remedy sought by the plaintiff. The doctrine/rule appears to have its foundation in the Chancery Court decision of *Cook v. Lamotte* (1851), 15 Beav. 243, 51 E.R. 527. Several Canadian decisions have referred to the doctrine or its practical equivalent, including in Ontario, Nova Scotia, Alberta, and most recently in British Columbia. Its place in current Canadian law, and more specifically British Columbia, is questioned by the defence.

[30] In general terms, the doctrine would indicate that where there is a transfer of significant benefit that the recipient actively caused to occur, there must be proof of the donor's full comprehension and understanding of the effects of the transfer for it to be upheld.

[31] A recent decision in Ontario, *Fichera v. McAllister*, 2021 ONSC 2685 [Fichera], provides a useful summary of the doctrine of unconscionable procurement:

31 The doctrine of unconscionable procurement renders an inter vivos gift voidable; at issue is the "donor's necessary understanding to make a transaction conscionable when it takes place in circumstances that suggest, on a prima facie basis, the contrary": *Gefen v. Gaertner*, 2019 ONSC 6015, at para. 158, citing John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada, 2014), at p. 571.

32 The onus rests on the party attacking the transaction to prove, on a balance of probabilities, that it was unconscionably procured. Once the party challenging the transaction has established a significant benefit and the active involvement on the part of the person obtaining the benefit in the procurement or arrangement of the transfer, then there is a presumption that the donor of the gift did not truly understand what she was doing in making the transaction: *Gefen*, at para. 159. This presumption is not determinative. Both parties must adduce evidence about the donor's understanding of what she was doing; the "issue turns on whether the donor appreciated the effect, nature and consequence of the transaction in a manner sufficient to render it fair, just and reasonable": *Gefen*, at paras. 161-162, citing Poyser, at pp. 570 and 574.

[32] The two key and interrelated features are the donor's understanding of the transaction and the onus of establishing that understanding.

[33] It is in this context that the plaintiff focusses on the scope of the advice received from and the steps taken by the notary Mr. Rothwell. The plaintiff says that in assessing whether there has been unconscionable procurement, the most important consideration is his "actual understanding of the nature and effect of the legal documents that he signed and his understanding of the transaction generally".

[34] The plaintiff says that since the doctrine does not require a finding of undue influence, only the absence of proof of a full appreciation of the effect of what he was doing is required. Importantly the onus, he says, is on the defendant to demonstrate there was that understanding.

[35] The defendant simply says the doctrine is not good law. She argues that the law of resulting trust and undue influence have taken the place that unconscionable procurement may have had.

[36] She says that the principles of resulting trust and unconscionable procurement have parallel defining characteristics and considerations save one: the requirement to show that the child (the defendant in this case) has the ability to dominate the will of the parent. In her written argument she said this:

14. The issue then is this: with unconscionable procurement, the Plaintiff is skipping the first part of undue influence - which is showing the ability for the recipient to [dominate] the mind of the transferor. The application of unconscionable procurement goes straight to finding gift prima facie unenforceable, as if undue influence is found - without first showing a vulnerability of the transferor.
15. In effect, unconscionable procurement completely refutes undue influence. It cuts to a gift being prima facie unenforceable without first showing a vulnerability of the transferor. It's a colourable short-cut to get to the remedy undue influence provides for, without first showing undue influence.
16. In current case law, equity steps in when the transferor was vulnerable; not all fully informed lawful actions are undone by equity, but where a party is taking advantage of a vulnerability, equity does come in. Undue influence is based on this exact premise. Unconscionability, in the contractual sense, does the exact same thing: it requires first there to be a vulnerability to exploit. The law does not, as it stands, make every legal action potentially rebuttable.
- [37] I am aware of only two cases in British Columbia that reference unconscionable procurement. The first, *Re: Klop*, 2021 BCSC 644, did so in passing only.
- [38] The other is the very recent decision of *Pinsonneault v. Courtney*, 2022 BCSC 120 [Pinsonneault]. It dealt with a transfer of a property by the plaintiff to the defendants without consideration and was accompanied by a deed of gift. Subsequently, the plaintiff wished to avoid the transfer.
- [39] At paragraph 67, the Court identified the critical issues of fact as:
- In my view, the critical determination to be made is a factual one: when Ms. Pinsonneault signed the documents in the notary's office, what was her intention? Did she realize that the document she executed would have the effect of transferring title to the defendants, or was she unaware of the consequences that would follow? Did she intend to give title to the property to the defendants without receiving any monetary compensation for it? Put more simply, did she intend the transfer to be an outright gift to the defendants?
- [40] Mr. Justice Williams reviewed the various sources of relief claimed and the associated legal principles. Some of them are not relevant here, but they included resulting trust, wrongful procurement, and undue influence. As to wrongful procurement, Justice Williams stated the following:
- [187] The doctrine of wrongful (or unconscionable) procurement is derived from the principle that where a donee obtains a benefit from a donor that in turn disadvantages that donor, the donee must prove that the donor had the "necessary level of understanding to make a transaction conscionable": John E.S. Poyser, *Capacity and Undue Influence* 2nd ed (Toronto: Carswell, 2019) at 629 in *Gefen v. Gaertner*, 2019 ONSC 6015 at para.158. It is an equitable principle: Poyser at 628. A finding of wrongful procurement renders a transfer voidable by

the court: Gefen at para. 158.

- [188] The Court in Gefen provided that the onus is on the party attacking the transaction to prove on a balance of probabilities that: (1) a significant benefit was provided; and (2) active involvement by the person obtaining the benefit of the procurement: at para. 159. Once these two elements are established, it is presumed that the donor "did not truly understand what they were doing when they made the transaction." Gefen at para. 159.
- [189] Once the presumption is established, the transaction is voidable and the Court must determine whether it would be unconscionable to let the transaction stand. As stated in Gefen at para. 161, at this stage,
- [161] Both parties must adduce evidence about the donor's actual understanding of what she was doing. If the evidence does not come down on either side, the attacker will have failed to meet the onus and the transaction will stand: Poyser, at p. 570.
- [162] The attacker must ensure that there is enough evidence before the court in the final weighing to allow the court to conclude, as a finding of fact, that the donor failed to have a conscionable understanding of what she was doing when completing the transaction. This issue turns on whether the donor appreciated the effect, nature, and consequence of the transaction in a manner sufficient to render it fair, just, and reasonable: Poyser, at p. 574.
- [190] The question the court must ask is whether the donor "fully appreciate[d] [the] effect, nature and, and consequence" of providing gift: *Kinsella v. Pask*, 28 O.L.R. 393 at 400, 12 D.L.R. 522.
- [41] Justice Williams concluded on the facts that, "there is no evidence before this Court that can assist the defendants in rebutting the presumption of resulting trust": at para. 211. Although unnecessary, he went on to say "[s]imilarly, the doctrine of wrongful procurement is, to my mind, met by the circumstances at hand": at para. 217.
- [42] The defendant argues that Pinsonneault appears to have simply accepted the existence of the doctrine where the issue was not fully argued and without analysis.
- [43] Both Pinsonneault and Fichera refer to John E.S. Poyser, *Capacity and Undue Influence*, 2nd ed. (Toronto: Carswell, 2019). That text contains a lengthy historical review of the origins and the application of the doctrine. The review is presented in the form of an argument as to why the doctrine should be considered to be good law. The following references provide context:
- The doctrine was popular in the 1800s and early 1900s. It fell from vogue thereafter. It is rarely mentioned in current case law. Provided that it is adopted in a narrowed form, it remains good law and, it is submitted, remains culturally relevant. A court might still apply it to good effect in an appropriate fact situation: at 629.

· The doctrine has been expressed in a variety of ways. If it is to be used on a modern basis, the issue becomes how to express the doctrine in terms that are true to its roots and practical to apply.

The most commonly quoted formulations are statements of it in England by Sir John Romilly in *Cooke v. Lamotte*, and in Canada by Mulock C.J.A., in *Kinsella v. Pask*. Both of those cases involved wealth transfer situations where a person actively procured a gift for their own benefit: at 633.

· The doctrine fell largely if not entirely from use in the 1900s. That may be a function of it having been drawn too widely. If it is to have continued use, that use is most likely to be in a narrowed form. It does no violence to the doctrine to narrow it. The hiatus and the possibility for resurgence are both discussed below.

Based on the above, a narrowed formulation is suggested. The best formulation of the doctrine is submitted to be a two-element statement that maintains reference to a presumption.

(A) The doctrine of unconscionable procurement applies where the party seeking to set aside a wealth transfer transaction is able to prove two things:

- (1) A person obtains a significant benefit from another by gift or other voluntary inter vivos wealth transfer.
- (2) The person obtaining the enjoyment of that benefit was actively involved in procuring or arranging the transfer from the maker.

(B) When those two elements are present a presumption of fact operates that allows the court to infer that the transfer was not properly explained or fully understood by the maker. The court is then entitled to scrutinize the situation with its moral sense awakened with a view to deciding whether the maker fully appreciated the effect, nature, and consequence of the transaction.

(C) Inasmuch as the doctrine is one of equity, the court is ultimately being asked to decide whether the transaction is conscionable or unconscionable. The onus is on the attacker to prove that the maker did not enjoy the full appreciation mentioned in point (B) and that the transaction, as a result, is unconscionable. The evidential presumption aides the attacker but will not carry the case if countervailing evidence is available to rob the basic facts in point (A) of their inferential force: at 637-638.

· The equitable tool under discussion here has fallen from judicial vogue in a very real way since the late 1800s and early 1900s. It has not been overruled, and remains obscure but good law: at 655.

[44] As to the status of the doctrine at the time of Poyser's writing, he notes at pages 656 to 658 that the doctrine has generally been adopted in Ontario, but rejected in Nova Scotia. On that subject he says this:

There was no criticism until the doctrine came under fire in *Fairfield v. Mitchell*, a decision of the Nova Scotia Court of Appeal. Ilesley C.J. stated that the a broad expression of the doctrine was not good law. He suggested that the courts should look back to the fact situations of the earlier cases to couple the doctrine to some limiting requirement, "otherwise the law would practically be that every large donation is prima facie invalid, which, in my opinion, is not the law." The most common limiting requirement in the early case law is the activity of a procurer. The point raised by Ilesley C.J. can be put another way. The attacker has to prove equitable unconscionability but the mere fact that a large gift is made should not, taken by itself, be enough to make out a prima facie case.

It might be argued that the doctrine was outright overturned in Nova Scotia by Ilesley C.J. It can also be argued that the doctrine was simply narrowed by those efforts. The thesis presented here is that the doctrine ought to be viewed as narrowed, not overturned, and that it should be applied on a continuing basis. Why? It fills a gap. There will be cases, like *Cooke v. Lamotte*, where a transaction clearly offends the conscience but is not caught by unconscionable bargain doctrine (there being no special disadvantage) or by undue influence by relationship (there being no relationship of trust or confidence), and is not a character where actual undue influence can be made out.

The decision of Ilesley C.J. is only of force in Nova Scotia, but the point made in the decision is persuasive and well-taken. That point is well illustrated by considering gifts to charity. Without some limitation on the doctrine, most large inter vivos gifts to charity would be caught up with a prima facie implication of unconscionability. The charities would be put to extraordinary demands of proof, forced to bring evidence in each case to establish that the maker did in fact fully appreciate the effect, nature and consequences of the transaction. That would be the case even though they had no part in arranging the gift. In many cases charities are surprised by large unsolicited gifts. They have absolutely no knowledge of the donor's situation at the time it is made, and do not have the opportunity to send someone out to grill the donor about the level of understanding the donor enjoys. It would be odd to do so. Yet, a narrowed application of the principle may still be warranted in the case of a charity. Where the charity has been involved in procuring the gift, making arrangements to see it carried into effect, it may still be reasonable to ask for some proof of that character. People are permitted to be improvident, but equity does not permit other people or organizations to take an active role in procuring an advantage without the demand that there should be some evidence to prove the transaction was fully understood and conscionable.

The doctrine certainly remains available in other Canadian jurisdictions. The cases in England that established it are so old that most, if not all, of those cases were accepted into the law of Canada as the various provinces and territories adopted the laws of England as their own. Following the lead of Ilesley C.J., the doctrine should arguably be limited but is still available in appropriate cases as a tool to overturn transactions that can be shown to be unconscionable.

[Emphasis added.]

[45] Mr. Poyser's conclusion is contained at page 659 as follows:

Should the doctrine be resurrected? The doctrine should be left dormant if it is no longer culturally relevant. It developed at a time where it was considered unconscionable for a person to procure a gift for their own advantage to the material prejudice of a second person who did not appreciate what he or she was doing. If that conduct is now culturally viewed as permissible, then the rule is dead, not asleep. A modern court is free to take the position that the underlying conduct targeted by the doctrine is just as unconscionable today as it was in the 1700s and 1800s. It can be argued that the core wrong addressed by the doctrine never goes in and out of fashion. The doctrine might have to be narrowed to retain that relevance but remains relevant nonetheless.

It is submitted here that the doctrine of unconscionable procurement should be resurrected and applied. It fills a gap where relief is warranted but otherwise unavailable. It stands nicely in a parallel position to the doctrine of righteousness that applies in the case of testamentary wealth transfers. The doctrine of righteousness catches procurers in the testamentary realm, and the equitable doctrine of unconscionable procurement catches them in the inter vivos realm.

[46] As suggested by Poyser, based in *Fairfield v. Mitchell and Mattatall*, 1959 CanLII 371, 19 D.L.R. (2d) 521 (N.S.C.A.), I agree that, at a minimum if the doctrine exists in British Columbia, there must be limits imposed on the scope of the doctrine. Failing to do so would be to entirely displace the law of resulting trusts in many cases when that law is an effective and reasoned approach to determining when a transaction may be set aside.

[47] *Pinsonneault and Fichera* also refer to *Gefen v. Gaertner*, 2019 ONSC 6015, aff'd 2022 ONCA 174. The reasons on the appeal were delivered on March 2, 2022. The Court of Appeal for Ontario said the following on the question of the existence of the doctrine in Canadian law:

61 The parties did not challenge the validity of the doctrine of unconscionable procurement. In the absence of full legal argument on the existence and desirability of any doctrine of unconscionable procurement, I do not propose to address the merits of any such doctrine and whether grounds to attack transactions beyond such traditional grounds as undue influence and incapacity should be endorsed. Thus, this decision should not be taken as approval or rejection of unconscionable procurement being part of the law of Ontario.

[48] In *Re Hansard Spruce Mills Ltd.*, Re, [1954] 4 D.L.R. 590, 1954 CanLII 253 at 595, (B.C.S.C.), Mr. Justice Wilson (as he then was) concluded:

4 I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;

- (c) the judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

5 If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

- [49] I do not feel compelled by Pinsonneault to accept that the doctrine of unconscionable procurement has a place in current British Columbia law, but I do not reject the possibility. Mr. Justice Williams' comments were in obiter as he based his decision on resulting trust. Further, there is no indication that the question of the existence of the doctrine in British Columbia was fully argued. However, one cannot conceive every factual scenario.
- [50] I do not intend to make a decision that applies beyond the scope of the facts that are before me. I will go no further than to say that if unconscionable procurement is good law in British Columbia, it does not afford the plaintiff the remedy he seeks. I reach my conclusion for two reasons.
- [51] First, the level of involvement of the defendant in this transaction has not been shown to be to the degree or of a nature that calls for the court's intervention.
- [52] The evidence before me raises the specter that the defendant set the initial appointment with Mr. Rothwell and orchestrated the transfer. The furthest the evidence of the plaintiff goes, however, is to indicate the defendant arranged the appointment and caused him to fear his son could take his property.
- [53] The requirement for "active involvement on the part of the person obtaining the benefit in the procurement or arrangement of the transfer" is not well defined in the cases. If the doctrine is to have a place in British Columbia law that requirement is an important feature of it. Whatever the parameters for "active involvement" might be, more is required to constitute active involvement than what the evidence here shows occurred.
- [54] Second, the evidence of the plaintiff's understanding of the transaction is not sufficient to invoke the doctrine.
- [55] Here the plaintiff's arguments focus on the limitations of the advice from Mr. Rothwell. Notably absent in the plaintiff's evidence is any clear indication of a misunderstanding of the impact of his actions or affirmative statement of what his understanding was. While legal advice may assist in proving actual understanding, alone, it is not capable of proving what the plaintiff's actual understanding was. His affidavit, in addition to paragraph 10 referred to above says only this:

11. I have no memory of being told by the notary that I should see a lawyer first. I do recall Mr. Rothwell repeatedly telling me that I could stay in my house until I died. He said: "you don't have to worry about ever losing your home" he told me. I do not recall any discussion of what would happen if I needed to sell my house. I was told by Mr. Rothwell that she would get half on my death.
- [56] The plaintiff's evidence does not provide any indication of what took place in the time between his attendances and calls to Mr. Rothwell as described in Mr. Rothwell's affidavit as set out above. What motivated him is unknown.
- [57] Certainly, the plaintiff had the opportunity to obtain more comprehensive legal advice. There is no affirmative evidence to say that he did or did not.
- [58] Mr. Rothwell's actions in having the plaintiff go away to think about it and the plaintiff's subsequent calls on November 27, 2020 and then December 3, 2020 indicate that the plaintiff did think about it. The plaintiff concedes there is no basis to find undue influence and there is no presumption of it.
- [59] As noted above in Pinsonneault, at para. 189, Gefen states that "[b]oth parties must adduce evidence about the donor's actual understanding of what she was doing". The plaintiff describes his lack of memory, but what he actually understood is unclear. In his argument, the plaintiff states: "For Don to contact Mr. Rothwell and ask to have the transaction unwound confirms that Don believed that he had retained the ability to get his house back into his own name should he wish to do so". However, the plaintiff does not provide this evidence. Rather, he argues it as an inference to be drawn. That is problematic.
- [60] It is clear from this litigation that the plaintiff regrets the transfer. That he would call the notary to unwind it does not prove his understanding when it was completed.
- [61] In summary, I have real doubt about the place of the doctrine of unconscionable procurement in British Columbia law. To the extent that it does have a place, it has not been proven on the facts and evidence placed before me.

Unjust Enrichment

- [62] To establish a claim of unjust enrichment the plaintiff must establish three things:
1. An enrichment;
 2. A corresponding deprivation; and
 3. The lack of a juristic reason for the enrichment.
- [63] There is no question the defendant has been enriched or that the plaintiff has suffered a corresponding deprivation.
- [64] The plaintiff accepts that the deed of gift would provide the juristic reason, but argues that the absence of full, free and informed thought nullifies its evidentiary value.

- [65] It is in this context that the plaintiff seizes on the assessment of "full, free and informed thought" as described in Cowper-Smith and specifically the scope of the advice received from and the steps taken by the notary Mr. Rothwell. His argument is that, even though there is no presumption of undue influence, a finding that he did not execute the documents with full, free and informed thought is sufficient to support the relief claimed.
- [66] Geffen reviewed the policy and practical considerations as it set the parameters for the presumption of undue influence. The plaintiff's proposition would represent a substantial alteration to the law by removing the presumption of undue influence as the trigger to assessing the existence of full, free and informed thought.
- [67] I am unable to accede to the plaintiff's argument

Conclusion

- [68] The circumstances here are unfortunate. It would always be preferable for disputes between parents and children to be resolved privately, but sadly that is often not the case. This and many other cases are proof.
- [69] The evidence of the parties reveals a troubled and, at times, estranged relationship over the years. The transaction occurred in what appears to have been a brief reconciliation period between the parties. In her oral submissions, the defendant expressed a desire for there to be respect for her father's wishes. This is contrary to her position in this litigation that ignores what her father's wishes currently are, in favour of earlier wishes that benefit her.
- [70] This case is, however, about the legal enforceability of the plaintiff's actions. It is my conclusion that the transfer of the interest in the property is legally sound.
- [71] The plaintiff's claim is dismissed. Subject to the parties requesting to make submissions as to costs, costs should follow the result. If either party wishes to make submissions as to costs they should inform the other party and trial scheduling within 21 days of release of this decision.

"Betton J."

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