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Morrison v. Coast Finance Ltd.

Morrison (Plaintiff) Appellant v. Coast Finance Ltd. and Vancouver Associated Car Markets Ltd. (Defendants) Respondents

British Columbia Court of Appeal

Davey, Sheppard and Bull, JJ.A.

Judgment: October 27, 1965
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Counsel: *A. G. MacKinnon*, for plaintiff, appellant.

B. J. McConnell, for defendants, respondents.

Subject: Civil Practice and Procedure; Estates and Trusts

Equity --- Relief from unconscionable transactions — Mortgage and loan transactions.

Trusts and Trustees --- Breach of trust — Remedies — Against third parties — Knowledge of transferee.

Contracts — Action to Set Aside Mortgage — Unconscionable Bargain — Agents and Trustees — Liability to Account.

Appeal from the judgment of Hutcheson, J., dismissing appellant's action to set aside a mortgage. Appeal allowed.

The facts are fully set out in the judgments of Davey and Sheppard, JJ.A.

Per Davey, J.A., Bull, J.A. concurring:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related but the doctrines are separate and distinct; the latter invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. Proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger creates a presumption of fraud which the stronger must rebut by proving that the bargain was fair, just and equitable. *Aylesford (Earl) v. Morris* (1873) 8 Ch App 484, at 491, 42 LJ Ch 546; *Harrison v. Guest* (1855) 6 De GM and G 424, at 438, affirmed (1860) 8 HL Cas 481, at 492, 493, 11 ER 517; *Fry v. Lane; Whittet v. Bush* (1888) 40 Ch D 312, at 322, 58 LJ Ch 113, applied.

In the case at bar, respondents advanced money to the appellant, well knowing that it was to be used to advance their own interests, and the facts surrounding the obtaining of the loan were such as to lead to the conclusion that there was gross overreaching. The mortgage should be set aside without requiring the appellant to repay the loan.

Per Sheppard, J.A.:

On the facts of the case at bar there is an alternative remedy in account, on the grounds that the respondents, through their agent, knowingly participated in a breach of the equitable duty owed to the appellant by others who stood in a fiduciary and trust relationship to her. *Nocton v. Ashburton (Lord)*, [1914] A.C. 932, at 957, 83 LJ Ch 784, applied.

An agent or fiduciary who puts himself in a position where his interest and duty are in conflict becomes liable in account. *Parker v. McKenna* (1874) 10 Ch App 96, at 118, 44 LJ Ch 425; *Salford Corpn. v. Lever*, [1891] 1 Q.B. 168, 60 LJQB 39; *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch D 339, 59 LT 345, applied.

***Davey, J.A.*:**

1 The appellant, Morrison, an old woman 79 years of age, and a widow of meagre means, was persuaded by two men, Lowe and Kitely, to borrow $4,200 from the respondent, Coast Finance Ltd., on a first mortgage on her home for that amount and interest to maturity and to lend the proceeds to them so that Lowe could repay $915 that he owed the finance company, and he and Kitely could pay the other respondent company $2,302 for two automobiles they were buying from it for resale. The proceeds of the loan were applied accordingly and the balance was repaid at once to the finance company and automobile company, respectively, by way of prepayment of monthly instalments, insurance premiums, and costs. The mortgage was to be repaid at the rate of $300 a month, which was to be secured from payments to be made by Lowe at the finance company's office on her account by way of repayment of the money lent to him and Kitely. She had no other means of repaying the money, and the house was her only substantial asset. She had no independent advice, although the evidence shows she wanted and asked for help. Lowe and Kitely failed to pay the appellant. She commenced action to have the mortgage set aside as having been procured by undue influence and as an unconscionable bargain made between persons in an unequal position. She did not join Lowe and Kitely as defendants to the action.

2 The learned trial judge dismissed the action on the grounds that the relationship between the parties was not such as to create a presumption of undue influence, and that none had been proven; that there was nothing in the terms of the mortgage to make it an unconscionable transaction. In my respectful opinion, that learned trial judge took too narrow a view of the appellant's case on the second ground.

3 Appellant's principal submission before us on this second ground was that, not only the mortgage, but the whole transaction was unconscionable; that it was unconscionable for Lowe and Kitely and the two companies to have the appellant mortgage her home in order to secure the money to lend to Lowe and Kitely to enable them to pay off the finance company and buy the two cars from the automobile company. This case is somewhat sketchily, but sufficiently, set up in the pleadings: See *Nocton v. Ashburton (Lord)*, [1914] A.C. 932, 83 LJ Ch 784, last headnote. Counsel told us he took this point below, and respondent's counsel made only a qualified denial. It is apparent that the learned trial judge and respondent's counsel did not appreciate the full scope of appellant's case on this point.

4 The equitable principles relating to undue influence and relief against unconscionable bargains are closely

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related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Aylesford (Earl) v. Morris* (1873) 8 Ch App 484, 42 LJ Ch 546, *per* Lord Selborne at p. 491, or perhaps by showing that no advantage was taken: See *Harrison v. Guest* (1855) 6 De GM & G 424, at 438, affirmed (1860) 8 HL Cas 481, at 492, 493, 11 ER 517. In *Fry v. Lane; Whittet v. Bush* (1889) 40 Ch D 312, 58 LJ Ch 113, Kay, J. accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. He said at p. 322:

> 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.
>
> This will be done even in the case of property in possession, and *a fortiori* if the interest be reversionary.
>
> The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord *Selborne's* words, that the purchase was 'fair, just, and reasonable.'

5 The finance company was engaged in the business of financing automobile purchases and lending money on mortgages. The other respondent company was an automobile dealer. They shared adjoining offices, employed the same solicitor, and had a common office manager, one Crawford, who in the final stages of this transaction acted for both companies. The president, director, and owner of half the shares of the finance company was a director of the automobile company, and with his wife controlled it. The finance company financed most of the automobile company's paper.

6 There can be no doubt about the inequality in the position of the appellant on one side and the respondent companies and Lowe and Kitely on the other. The question is whether the transaction was so unfair that it creates a presumption of overreaching by the respondents.

7 The learned trial judge approached this question as if it was a simple case of the appellant borrowing money from the finance company for her own purposes — that is to say, to lend it to Lowe and Kitely. Accordingly, he looked to see if the terms of the mortgage were unconscionable. If that were the true scope of the inquiry, I would agree with his conclusion, for although the rate of interest is high and the mortgage does not state the effective rate of interest as required by the *Interest Act*, RSC, 1952, ch. 156, sec. 6, the rate of interest is not so high as to be exorbitant for a loan up to 100 per cent of the value of the security, as this was.

8 But this was not a simple loan of that kind. It was a loan to the appellant to advance the interests of the companies as well as Lowe and Kitely by providing her with money to lend to Lowe and Kitely to enable them to carry out their arrangements with the companies. Crawford made certain that the proceeds of the loan reached the two respondent companies. The appellant, Lowe and Kitely did not retain one cent of the money advanced, although the two men got delivery of the two automobiles they bought with the money.

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9 The extreme folly of this old woman mortgaging her home in order to borrow money which she could not repay out of her own resources, for the purpose of lending it to the two men, who were comparative strangers, is self evident. It would have been bad enough if there had been any prospect of profit, but there was no expectation of reward and no real security. The amount to be paid back to her was exactly the amount of her mortgage to the finance company. The respondent companies knew the essential facts, and undertook the preparation of the documents for the transaction. For them to take advantage of her obvious ignorance and inexperience in order to further their respective businesses raises a presumption of fraud within the above authorities. The distinction between the case which the learned trial judge considered, and that which arises on the evidence was neatly put by appellant's counsel. He said it would not be wrong for a bank to lend money to an old and ignorant person, upon usual banking terms, for his own purposes, but quite wrong to lend him money on those terms so that he might lend it to an impecunious debtor from whom the bank intended to recover it in payment of a bad debt.

10 There is supporting evidence of gross overreaching by the respondent companies. They received the application for the loan, not from the appellant, but from Lowe or Kitely, who, with them, were to benefit by it. Without having seen the appellant, Crawford obtained a valuation of her home and instructed the companies' solicitor to prepare the mortgage. He first met her when she came to the companies' office with Lowe, Kitely and Lowe's friend, Ivy Patton, just before signing the mortgage. She was alone with persons expecting to benefit by her folly. He took them to the respondents' solicitor to sign the papers, where he must have heard the appellant say to Lowe, when she learned the amount of the mortgage, "Frank, that is more than I agreed to lend you." He must have heard the appellant ask the solicitor, "Should I sign this?" showing that she felt the need of advice, and the solicitor inform her that he could not advise her without knowing more of her arrangements with her friends. Crawford does not admit hearing these things, but he does not deny that he did so, and he must have heard them since the solicitor says Crawford was within three feet of the appellant at the counter.

11 After the mortgage had been signed, Crawford escorted the party back to his office, where he had a cheque for the proceeds of the mortgage made out to the appellant and had her endorse and hand it to Lowe or Kitely; then he secured it from them, and it was deposited to the account of the automobile company, out of which Lowe's debt of $915 to the finance company was paid. This money was thereby disbursed and distributed the day before the mortgage was registered, a course so unusual that it excites suspicion. Significant also is the fact that, either late that day or the next, Crawford drew a promissory note from Lowe to the appellant for the amount of the mortgage and had Lowe sign it. At the same time he drew a conditional-sales agreement between Low and Kitely and the automobile company for the two cars they had bought, and caused the automobile company to assign its vendor's interest to the appellant, notwithstanding Lowe and Kitely had earlier paid the purchase price in full from the proceeds of the loan. The companies were turning over to this inexperienced, unprotected old woman, as the sole security for a loan she was making to advance the interests of Lowe and Kitely and themselves, a security of questionable value. I cannot believe that the law is so deficient that it cannot reach and remedy such a gross abuse of overwhelming inequality between the parties.

12 Probably the whole transaction ought to be set aside, but that cannot be done as Lowe and Kitely are not before us, and the automobiles sold to them are likely worthless and irrecoverable. That has troubled me. On reflection, I have concluded that it will be sufficient to set aside the mortgage, without requiring the appellant to repay the money, since, as was intended, that part which was not immediately repaid to or retained by the finance company was immediately returned on other accounts to the companies, who were acting in concert. That will allow the sale of the automobiles and the payment of Lowe's debt to stand. The automobile company loses nothing and justice will be done to the finance company by requiring the appellant as a condition of relief to transfer to it Lowe's promissory note and the conditional-sales agreement that the companies secured for her.

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13 I should add that the companies called only their solicitor and his student-at-law, and did not call Crawford or any other officer, and made no attempt to prove that the whole transaction was fair, just and reasonable.

14 In view of the tenor of this judgment and the criticism of the companies, I should add that the criticism does not extend to their solicitor or his student. The evidence does not indicate that the solicitor knew that the money the appellant was borrowing was in the main to be at once returned to the companies on transactions between them and Lowe and Kitely. So far as he knew this was a simple routine loan by the finance company. The facts known by the two companies and their participation in the proceeds of the mortgage made it their duty to see that the appellant received independent advice, but the knowledge possessed by the solicitor was not sufficient to impose that duty upon him, and he is not to be criticized for not doing so. But I think it would have been better if he had told her to consult another solicitor instead of telling her he could not advise her.

15 In conclusion, the way in which the form for maker on the mortgage was completed must be deprecated. The solicitor certified that the appellant mortgagor was personally known to him, which was not the case. He established her identity to his satisfaction by putting certain questions to her. He should have required some one personally known to him to identify her under oath and have so certified on the appropriate form.

16 The loose practice followed in this case facilitates impersonation and forgery of documents of title of which we have had a recent example.

17 Contrary to the rules, the exhibits are printed in numerical order instead of chronological. The respective solicitors ought not to have accepted or approved the book in that form, nor should the registrar have settled it. In similar cases we have deprived the successful party of a substantial part of his costs, but because of the incidence of such an order, I think we ought not to do so here.

18 I would allow the appeal accordingly.

***Sheppard, J.A.*:**

19 This appeal is from the judgment of Hutcheson, J., dismissing the plaintiff's action to set aside a mortgage by the plaintiff to the defendant, Coast Finance Ltd. The facts follow.

20 In 1960, the plaintiff, an elderly widow then 79, owned a house in New Westminster from which she derived a rent of $30 a month for each of three rooms when rented, $5 from a rented garage and $75 from the old age pension. From that sum she paid taxes, repairs and provided her living. A month or two before April 12, 1960, the date of the mortgage in question, one, Kitely, rented one of her rooms. Kitely was an alcoholic and, on becoming ill, was visited by members of Alcoholics Anonymous and by one, Lowe, not a member of that organization. Lowe informed the plaintiff that he wished to help Kitely get into the business of selling autos as Kitely had only one lung and in that business the work was light. Later Lowe said that Kitely would have to "put up some money in it;" he thought $300 or $350 would permit Kitely to become associated with Lowe in the selling of autos, that a partner, Barney, had approximately $900 invested. Accordingly, Lowe wished the plaintiff to borrow $300 to $350 for Kitely.

21 On April 12, 1960, the plaintiff executed a mortgage at the office of Boucher, solicitor for the defendant companies, under the following circumstances. The Coast Finance Ltd. was a finance company with two shareholders; one of these shareholders, together with his wife, held the majority of shares in the Vancouver Associated Car Markets Ltd. (the associated company), which was in the business of selling automobiles, and its finan-

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cing of sales was put through the defendant finance company. Both companies had offices in the same building and Crawford was office manager of both companies. In view of the authority exercised by Crawford for each company, in arranging the mortgage, its terms, the disbursement for the finance company, and in executing the assignment (Ex. 6) for the associated company, it would appear that Crawford was really the manager of each company.

22 On April 11, 1960, the sales manager of the associated company asked Crawford to find out whether the plaintiff's house was sufficient security for a mortgage of $4,000 to $5,000. Crawford learned that the mortgage by the plaintiff was for the purposes of Lowe and Kitely, to be used in part by them for the purchase of autos from the associated company. On April 12, 1960, Crawford had a search made of the plaintiff's property and reported to the associated company that the plaintiff's house was security up to $4,000 or $5,000. On the morning of April 12, Crawford had given instructions to Boucher, solicitor for the defendant companies, to prepare the mortgage in question. According to the plaintiff, Lowe, Kitely and Ivy Powell, a friend of Lowe, called on the plaintiff and took her by automobile to an office where Lowe and Kitely went inside, leaving the two women outside in the automobile for some time. Later that afternoon, Lowe, Kitely, Mrs. Powell and the plaintiff called upon Crawford at the office of the defendant finance company. Up to that time Crawford had received no instructions from the plaintiff about the mortgage. About 4:30 p.m. Crawford took the four to the office of Boucher, a solicitor, where Boucher had the plaintiff execute a mortgage to the finance company for $4,816. Boucher, whose evidence the learned trial judge accepted, explained the mortgage to the plaintiff at the counter in the outer office where the others were seated; that the mortgage was for $4,816, and when the plaintiff saw the amount, she said to Lowe, "Frank, this is more money than I promised to lend you." Then followed some conversation between Lowe and the plaintiff. Eventually she asked Boucher if she should sign the mortgage and he said that he was not prepared to advise her but he did explain to her all the relevant parts. Eventually she said that she guessed it was all right, "Where do I sign?" She thereupon executed the mortgage and Boucher executed the acknowledgement thereon.

23 From Boucher's office, Crawford, Lowe, Kitely, Mrs. Powell and the plaintiff went to the office of the defendant finance company. According to Crawford, a cheque was made out for $4,200 from the finance company to the plaintiff (Ex. 8), who endorsed and delivered it to Lowe and Kitely who gave a receipt (Ex. 10); the cheque was then deposited to the account of the associated company. At this time the mortgage had not been registered and, on the evidence, it is not usual to advance money before registration; Crawford stated that Boucher advised him on this occasion that it would be permissible to advance the money before registration, but Boucher denies having ever given such advice. Further, no orders were obtained from the plaintiff for payment out of the proceeds, but later the proceeds were disbursed by the associated company as follows:

24 (I) Received by the finance company, $2,309.60 as follows: (a) Retained by the finance company for payment of interest on the mortgage in advance, $616; (b) Paid to the finance company in payment of a debt of Lowe, secured by Steinson's mortgage, $915; (c) Paid to the finance company in prepayment of the instalments under the mortgage for two months, and a fraction of the third instalment, $778.60, making a total to the finance company of $2,309.60.

25 (II) Retained by the associated company for two autos which were sold to Lowe and Kitely, $2,302.

26 (III) Expenses of mortgage: (a) To Boucher for legal fees for preparing and registering the mortgage, $60.50; (b) To C. A. Bass for insurance, $143.90, making a total of expenses, $204.40. A grand total of $4,816, the amount of the mortgage.

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27 The plaintiff expected some security for these moneys; that evening Crawford prepared and sent to her: (a) A conditional-sales agreement (Ex. 6) covering the two autos sold by the associated company to Lowe and Kitely, and assigned by the associated company to the plaintiff. As these two autos were paid for by cash out of the proceeds of the plaintiff's mortgage, hence any security of the seller therein was illusory; (b) A promissory note (Ex. 3) whereby the defendant, Lowe, agreed to repay the amount of the advance at the rate of $300 per month.

28 On April 13, 1960, Boucher found that the duplicate certificate of title was not in the land registry office and, therefore, that the mortgage could not be registered. Marshall-Gratrix, his student, called on the plaintiff to obtain the certificate of title and she attempted to explain the transaction to him. She was obviously worried about the whole matter. She said she had signed the mortgage to get out of Boucher's office. "They were all shouting at me." She produced the certificate of title, and Marshall-Gratrix explained to her that he represented the mortgagee and did not represent her and, if she had any doubts, she should see a lawyer of her own. She asked him whom to consult and he told her how to get the names of lawyers but refused to recommend anyone. The following day the certificate of title was found on a desk in Boucher's office, no doubt having been placed there by Lowe. Marshall-Gratrix, under the circumstances, telephoned the plaintiff about the certificate of title and she explained that someone, whose name she forgot, had given her a note, and she said, "That was all right, wasn't it?" He made some non-committal remark and did not pursue the matter any further. The mortgage was registered against the plaintiff's house.

29 The business of Lowe and Kitely did not materialize; Lowe was in the penitentiary and Kitely's whereabouts are unknown to Crawford. The plaintiff has no moneys with which to meet the payments under the mortgage and no source of revenue and, on September 18, 1961, brought action to set aside the mortgage. After trial before Hutcheson, J., that learned judge, on October 23, 1964, delivered the judgment dismissing the action and in his reasons held against undue influence as follows:

> I doubt if the acts particularized as constituting the undue influence can be so characterized. In any event I cannot find upon the evidence that Andrew Crawford at any time exerted upon the plaintiff any undue influence within the proper meaning of that phrase and I must therefore conclude that the plaintiff was not induced to enter into the mortgage that it is sought to set aside by any undue influence exerted by either of the defendant companies.
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> . . . . .
>
> What transpired in the companies' offices in Mrs. Morrison's presence following the execution of the mortgage obviously did not lead to her signing that document. There steps were taken to carry out the agreement that had previously been made between Mrs. Morrison and Lowe that she would raise money on the security of her property and that the money she might borrow would be turned over to Kitely and Lowe as a loan to assist in their new venture. That verbal agreement was made before Mrs. Morrison was in touch with the Coast Finance Ltd. and that company was not a party to it. In any event I cannot find that Mr. Crawford was guilty of any improper conduct on this occasion.
>
> It is also alleged that Kitely and Lowe exercised undue influence in order to obtain the signature of the plaintiff to the indenture of mortgage. The plaintiff's evidence did not, in my view, disclose any conduct on their part that would support this allegation. In any event Kitely and Lowe were not acting on behalf of Coast Finance Ltd. nor is it shown that that company was aware of any improper conduct on their part.

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30 The appeal is argued on the ground that the basis for rescission is not undue influence proved to have been exercised in fact, but rather upon constructive fraud, one of the frauds mentioned in *Chesterfield (Earl) v. Janssen* (1751) 2 Ves Sen 125, at 155, 28 ER 82, and which fraud may be inferred from the relation of the parties which may permit the inference, as in *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127, 98 L.J.P.C. 1, or in the case at bar from the transaction itself, because the inequality of the parties and the inadequacy of consideration to the plaintiff indicate that an advantage had been taken of her: *Baker v. Monk* (1864) 4 De GJ & Sm 388, 46 ER 968, followed in *Fry v. Lane; Whittet v. Bush* (1888) 40 Ch D 312, 58 LJ Ch 113. Eldon, L.C., in *Huguenin v. Baseley* (1807) 14 Ves 273, 33 ER 526, stated at p. 300:

> The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.

31 Therefore, it is contended that the presumption is to be drawn that the plaintiff's intention to execute the mortgage was so produced, in the absence of proof that the transaction occurred under circumstances which enabled the plaintiff to exercise an independent will so as to justify the court in holding that the transaction was the result of a free exercise of her will: See *Allcard v. Skinner* (1887) 36 Ch D 145, at 171, 56 LJ Ch 1052, cited in *Glover v. Glover*, [1951] 1 D.L.R. 657, at 663 (P.C.). The circumstances are similar to those in *Hrynyk v. Hrynyk*, [1932] 1 W.W.R. 82, 40 Man. R. 173 (C.A.) where the father transferred his assets to the defendant son for a covenant to support him, which was so vague as to be illusory, and it was held that the transaction was improvident and should be set aside following *Fry v. Lane; Whittet v. Bush, supra*. In this case, while the plaintiff did expect to be provided by Lowe and Kitely with security, that provided was: (a) A conditional-sales agreement signed by Lowe and Kitely to the associated company and assigned by it, under which the security was illusory as the associated company had received the payment therefor before the lien note was signed; (b) A promissory note signed by Lowe which was expected to be paid out of the profits of the business of selling second-hand automobiles to be carried on by Lowe and Kitely, which expectation has, of course, been disappointed, Lowe then being in the penitentiary and the whereabouts of Kitely being unknown to Crawford.

32 On the facts established, there is an alternative remedy in account, on the basis of a personal liability of the defendants, in that Lowe and Kitely became trustees of the funds received from the mortgage and that Crawford, the agent of the defendant companies, knowingly participated in the breach of equitable duty of Lowe and Kitely so as to make the defendant companies equally liable in account.

33 The position of the plaintiff here is similar to the plaintiff in *Nocton v. Ashburton (Lord)*, [1914] A.C. 932, 83 LJ Ch 784, where Viscount Haldane, L.C. said at p. 957:

> I think that Neville, J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

34 The relief in account may readily be given in this action as the substantial facts are not rebutted by the defendant companies but are largely confirmed by the answers of Crawford on discovery.

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35 Lowe and Kitely were trustees for the plaintiff of the proceeds of the mortgage, under the circumstances that they, being agents and fiduciaries of the plaintiff, put themselves in a position where their duty and interests were in conflict.

36 (1) Lowe and Kitely were agents of the plaintiff in applying for the mortgage to the defendant company. There was no application by her; Crawford admits he had no instructions from the plaintiff. The application for the mortgage came to him from Lowe for himself and Kitely.

37 (2) Lowe and Kitely were also fiduciaries of the plaintiff; "fiduciary" is defined in *Black's Law Dictionary* as "relating to or founded upon a trust or confidence," and in *Re Coomber*; *Coomber v. Coomber*, [1911] 1 Ch. 723, 80 LJ Ch 399, by Fletcher Moulton, L.J. as follows, at pp. 728-9:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it.

approved in *Glover v. Glover, supra*, at pp. 663-4.

38 Lowe and Kitely were agents and fiduciaries of the plaintiff: (a) In that they advised the plaintiff about obtaining the loan from the finance company and handing over the proceeds to them; (b) In that the plaintiff at Boucher's office stated that she expected the loan to be for $300 to $350 and when she saw that it was in the amount of $4,816 she asked Lowe and Kitely for their advice; (c) And in that Lowe and Kitely applied for the loan on behalf of the plaintiff and thereupon the plaintiff endorsed to them the cheque for $4,200, relying upon them to use it in the business of selling automobiles.

39 The equitable rule is that an agent or fiduciary who puts himself in a position where his interest and duty are in conflict becomes liable in account. In *Parker v. McKenna* (1874) 10 Ch App 96, 44 LJ Ch 425, certain directors were held liable in account for profits made by their taking over from a shareholder his agreement to purchase shares in their company. Lord Cairns, L.C. said at p. 118:

> Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.

40 A similar result is found in *Salford (Corpn.) v. Lever*, [1891] 1 Q.B. 168, 60 LJQB 39, where a purchasing agent accepted a bribe; and in *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch D 339, 59 LT 345, where the officer of the plaintiff company received profits as a shareholder in another company from the plaintiff's business going to that other company.

41 The conflict of duty and interest arose in the case at bar by Lowe and Kitely applying for the loan as agents of the plaintiff, to be used to purchase Kitely into an automobile business then being carried on and expected to produce $300 a month to repay the mortgage, but which Lowe and Kitely intended to use for their own

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profit apart from such business, as by Lowe paying the finance company, and by their buying two cars from the associated company. Again, there was a trust in handing the cheque to Lowe and Kitely. The defendant companies became equally liable to account as were Lowe and Kitely. When a third person knowingly participates with a trustee in the breach of trust, such third person becomes subject to the same liability as the trustee, including the liability to account.

42 In *Rolfe v. Gregory* (1865) 4 De G J & Sm 576, 34 LJ Ch 274, 46 ER 1042, the wrongful receipt and conversion of trust property placed the receiver in the same position as the trustee from whom he received it. There the lord chancellor stated at p. 275:

> This wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and by the principles of this Court he becomes subject in a Court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself.

43 In *Soar v. Ashwell*, [1893] 2 Q.B. 390, 69 LT 585, Lord Esher, M.R. stated at p. 394:

> The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his cestui que trusts for all such money or property without regard to lapse of time.

44 And Bowen, L.J. at pp. 396-7:

> Secondly, the rule as to limitations of time which has been laid down in reference to express trusts has also been thought appropriate to cases where a stranger participates in the fraud of a trustee: *Barnes v. Addy* (1874) 9 Ch App 244, 43 LJ Ch 513. Thirdly, a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant.

45 The defendant companies could not be liable if they took the funds as *bona fide* purchasers. Initially, the companies had, through Crawford, notice that the moneys were trust funds in the hands of Lowe and Kitely, as Crawford knew that Lowe had applied for the loan on behalf of the plaintiff and that Lowe and Kitely intended to benefit from the transaction by purchasing two automobiles from the associated company. Hence Crawford, and, therefore, his companies, knew that Lowe and Kitely were in a position where their interest and duty were in conflict. A cheque for the proceeds of the loan was handed to the plaintiff who endorsed it at once to Lowe and Kitely, who passed it on to the associated company. The fact that the proceeds passed through the hands of the plaintiff would not prevent a trust unless Lowe and Kitely disclosed to the plaintiff all material facts, as in *De Bussche v. Alt* (1878) 8 Ch D 286, 47 LJ Ch 381, and, also, that this plaintiff could exercise an independent will: *Allcard v. Skinner, supra*, at p. 171. In *Br. Amer. Elevator Co. v. Bank of British North America*, [1919] A.C. 658, 88 L.J.P.C. 118, the elevator company remitted funds to its agent to purchase grain, and the bank, with the assent of the agent, applied the moneys in discharge of the agent's indebtedness to the bank. The bank was

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held liable in account. That appears to be the position of the defendant companies.

46 Heretofore the defendants have been dealt with on the basis of Crawford having been at the most a participant in the breach by notice of the trust. But the evidence goes much further to prove that Crawford assisted Lowe and Kitely as agents for the plaintiff mortgagor to obtain the proceeds of the mortgage for their own advantage and that of the defendant companies. That is shown by the following circumstances:

47 (1) The defendant companies, through Crawford, carried out the transaction with undue haste. On April 12, Crawford instructed Boucher to prepare the mortgage, and at 4:30 p.m. that afternoon Crawford, with the plaintiff and three others, attended at Boucher's office and had the mortgage executed, then returned to the office of the defendant companies. The proceeds of the loan were disbursed at once. It is unusual to disburse a mortgage before registration, but Crawford states that Boucher advised him that in this instance it would be in order to make the disbursements. That Boucher denies.

48 (2) The mortgage transaction was irregular as not in the usual form. There were no instructions from the plaintiff to prepare the mortgage and no application by her for the mortgage. The proceeds were disbursed immediately by having the plaintiff endorse the cheque to Lowe and Kitely, who delivered the cheque to the associated company where it returned under the control of Crawford, and there the moneys were used in discharging for the finance company a personal debt of Lowe, the trustee, and in paying future interest and instalments under the mortgage and in paying to the associated company the purchase price of two automobiles bought by Lowe and Kitely.

49 (3) That night or the following day Crawford prepared and sent to the plaintiff the conditional-sales agreement but that was a mere sham security as Crawford must have known that the automobiles were paid for out of the proceeds of the loan received by the associated company.

50 Further, Crawford had prepared the note (Ex. 3) which was signed by Lowe, who went to the penitentiary. In the result, Crawford's knowledge exceeded that of Marshall-Gratrix, but Marshall-Gratrix warned the plaintiff to obtain independent advice, as to him the transaction called for that precaution, as the plaintiff had not the mental capacity to exercise the independent will required by *Allcard v. Skinner, supra*, to determine whether or not she should give the mortgage in question and deliver the proceeds to Lowe and Kitely. As Marshall-Gratrix knew the plaintiff should have had independent advice, then equally so must Crawford have known, and, therefore, the defendant companies.

51 A trustee who acquires a benefit from his office is liable to account for that benefit: *Keech v. Sandford* (1726) Sel Cas Ch 61, 2 Eq Cas Abr 741, 25 ER 223; *Boston Deep Sea Fishing & Ice Co. v. Ansell*, *supra*, and equally any person who knowingly participates with the trustee in the breach of the trustee's duty.

52 It follows that the defendant companies through Crawford, their office manager, have knowingly participated in the breach of trust by applying the trust funds to the personal benefit of the trustees and, therefore, the defendant companies have become liable as trustees to the plaintiff and are liable to account for the benefits received. This claim in account is not expressly raised in the statement of claim but follows from the allegations in the statement of claim and the admissions of Crawford on discovery, hence the material facts are before the court.

53 Under such circumstances, the defendant companies are deemed to hold for the plaintiff the funds advanced under the mortgage; those funds will, therefore, be taken as applied in payment of the mortgage and the

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discharge thereof delivered forthwith to the plaintiff by the finance company.

54 The plaintiff will have the costs of the action and of the appeal.

***Bull, J.A.*:**

55 In this appeal I agree with my brother Davey that the learned trial judge was right in finding that the appellant had not proved undue influence as she must under the attendant circumstances and relationship between the parties, but that he took too narrow a view on the other main cause of action that the transaction constituted an inequitable and unconscionable bargain with respect to which relief should be granted. I concur in my said brother's view that although the terms and conditions of the mortgage sought to be set aside in themselves were not inequitable, the whole transaction of which the mortgage was a very important and integral part was patently unconscionable, and that both respondents actively participated in that transaction to their own respective interests. Although circumstances and lack of parties make it clear that the whole unconscionable transaction cannot be rescinded, I have reached the conclusion that equity requires that the mortgage itself should be rescinded on the terms set out by my brother Davey. Therefore, I would allow the appeal on that basis for the reasons set out in his judgment and in which I fully concur.

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