


Osorio v. Cardona, 1984 CanLII 364 (BC S.C.)

Print:  [PDF Format](#)
Date: 1984-11-27
Docket: C824291
Parallel citations: 15 D.L.R. (4th) 619 • 59 B.C.L.R. 29
URL: <http://www.canlii.org/en/bc/bcsc/doc/1984/1984canlii364/1984canlii364.html>
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Supreme Court of British Columbia

Osorio v. Cardona

Date: 1984-11-27

G. Gavin, for plaintiffs.

J. A. W. Schuman, for defendant.

(Vancouver No. C824291)

[1] 27th November 1984. MCLACHLIN J.:— On 10th July 1982 the defendant Oscar Cardona won \$735,403 at the races. The plaintiffs bring this action for the recovery of the balance of 20 per cent of those winnings which they allege to be owed them pursuant to an agreement made at the racetrack prior to the defendant's win.

THE FACTS

[2] The parties, all recent citizens of Canada, have lived most of their lives in Colombia. In their leisure time, they enjoyed betting on horse races at Exhibition Park. Oscar Cardona in particular was an avid fan. He went to the track often and bet large sums regularly. It was his practice to work late into the night on calculations to assist him in his choice of horses for the next day's races.

[3] 10th July 1982 was a particularly important day at the races. A wagering scheme known as the Sweep Six was offered. Six races were involved. A wagerer who correctly predicted the winner of all six races stood to win very large sums of money.

[4] Oscar Cardona bought a ticket on the Sweep Six offering various combinations of horses for each race for \$128. The plaintiffs, Messrs. Osorio, Ruiz and Zapata, pooled their money and bought a \$6 ticket on the Sweep Six, which allowed them only one horse per race.

[5] After two races and three beers in the lounge, Oscar Cardona went to the restaurant and joined a table where Messrs. Osorio, Ruiz and Zapata, among others, were seated. More beer was ordered and they watched the third race. Oscar Cardona disclosed to his friends that he had a ticket on the Sweep Six and was still in, that is, he had correctly predicted the winner of the first three races. The plaintiffs, in a state of excitement rivalled only by Mr. Cardona's, told him that they too held a Sweep Six ticket and they too were still in the running. Wonderment ensued that two such favoured tickets should be found at the same table, followed shortly by the less joyful realization that it was highly unlikely that both tickets would win. An appraisal of how the ticket holders could maximize their chances of winning followed.

[6] It was initially agreed that if either ticket won the holder would give 30 per cent of the winnings to the other. Then Mr. Cardona pointed out that he had a better chance of winning than the plaintiffs since he had various combinations of horses on the remaining races, any of which could win, while the

plaintiffs' ticket offered only one prediction for each race. Accordingly, he proposed to Mr. Osorio that the agreement should be varied to provide that if Mr. Cardona's ticket won, the plaintiffs would receive only 20 per cent of his winnings, while if the plaintiffs' ticket won, Mr. Cardona would receive 30 per cent of the purse. Mr. Osorio replied that he would have to consult with his partners. He did so, and Mr. Osorio's revised proposal was accepted.

[7] The parties watched the remaining races in growing excitement. On the fifth race, the plaintiffs' horse did not win, and their chances of winning on their ticket ended. The plaintiffs testified and Mr. Cardona did not deny that Mr. Cardona counselled them not to worry, since they still could win with him on his ticket. Finally, the sixth race was run. Mr. Cardona's ticket showed the winning horse. He had won the Sweep Six.

[8] The plaintiffs accompanied Mr. Cardona, in a state of almost hysterical excitement, to the racetrack office. There the parties' state of jubilation quickly soured. Mr. Cardona showed the clerk in attendance his ticket and asked for a cheque. Mr. Osorio asked whether a cheque for 20 per cent of the winnings could be made payable to the plaintiffs. The clerk replied that this could not be done and Mr. Cardona affirmed that he did not want a cheque made to the plaintiffs in any event. Mr. Cardona gave the plaintiffs a "severe look". He accused them of not trusting him and told them not to worry and not to push him -they would be paid.

[9] Mr. Cardona left the office in the company of Oscar Debadout, a friend whom he had asked to drive him home. Much concerned, Mr. Osorio followed them to the parking lot, where he asked again about the plaintiffs' share of the money. Mr. Cardona told him, "Don't worry, I will be at the party tonight".

[10] At a Chilean party in North Vancouver that night, Mr. Cardona assured Mrs. Osorio that he would pay the money. However, any reassurance the plaintiffs may have taken from those words was marred by the assurance of another friend of Mr. Cardona that Mr. Cardona intended to pay them their 10 per cent of the winnings.

[11] The plaintiffs' anxiety was increased by Mr. Cardona's behaviour the next day, when Mr. Osorio met him by chance at Italian days on Commercial Drive. Mr. Cardona refused Mr. Osorio's greeting. When Mr. Osorio began talking to Mr. Zapata, nearby, as to whether they should talk to Mr. Cardona, the latter chastised him for always talking about money. Mr. Osorio went home. Three hours later he returned to Commercial Drive and attempted to talk to Mr. Cardona about the money. Mr. Cardona refused, stating that Mr. Osorio was pushing him too much. Mr. Osorio then invited the group to his home, where they passed two hours in pleasant socializing. Before Mr. Cardona left, Mr. Osorio had been led to believe that the plaintiffs should call on Mr. Cardona the next morning, when he would give them their share of the winnings.

[12] The next morning, the plaintiffs and Oscar Debadout went to the house where Mr. Cardona was staying. He appeared none too pleased at having been awakened at 8 o'clock in the morning. After he dressed, they drove him to a car rental agency. Before parting, Mr. Osorio again asked him about the money. Mr. Cardona replied, "You worry too much. Wait for me at your home".

[13] The three plaintiffs waited at Mr. Osorio's house for three days, in vain. Late Monday afternoon Mr. Cardona telephoned to say he would come the next day. Mr. Osorio became increasingly concerned. Mr. Cardona was a single man, without property or family ties; there was nothing to prevent him leaving with what the plaintiffs regarded as their money. When Mr. Cardona had not telephoned by 10 or 11 o'clock on Tuesday, the plaintiffs decided to get help. They drove to Hornby Street to the Lawyer Referral Service. On the way home, they stopped at the police station, where they were advised that the police would not intervene, the matter being civil rather than criminal. They returned to Mr. Osorio's house, where they waited all afternoon. At last they left in search of Mr. Cardona. While they were away Mr. Cardona telephoned Mrs. Osorio and advised her that he would come on the next day and pay.

[14] The next day at noon Mr. Cardona's girlfriend, Alicia, increased the plaintiffs' anxiety by reporting that Mr. Cardona intended to leave for New York. Finally, about 3 o'clock Mr. Cardona telephoned. According to Mr. Osorio, Mr. Cardona stated: "Evilio, I am going to give you \$50,000 because when I made the deal I was drunk. If you guys had won the money maybe you would not pay me the 30 per cent

and I am also here with my lawyer so I will give you this telephone number. You have two or three minutes to phone me back". He added that that was all the money they would get and they could take it or leave it.

[15] Mr. Osorio told Mr. Cardona that he had not been drunk when he made the agreement and stated that Mr. Cardona's proposal was not the deal that had been made. After hanging up, he related Mr. Cardona's proposal to the other plaintiffs. After conferring with them, he phoned Mr. Cardona back and advised that \$50,000 was not acceptable because it was not what had been agreed. According to Mr. Osorio, Mr. Cardona then raised his offer to \$60,000, stating, "That's what you guys get". It was agreed that Mr. Cardona and Mr. Osorio would meet the next morning at MacDonald's on Granville Street. Mr. Cardona specified that no one was to accompany Mr. Osorio but Mr. Debadout.

[16] Mr. Osorio told his friends that Mr. Cardona was prepared to give them \$60,000 and no more. According to Mr. Osorio, the plaintiffs agreed that they would take the \$60,000 "for the moment" and use the money to hire a lawyer and fight for the rest of what was owed them. The plaintiffs' position is that Mr. Osorio told Mr. Cardona this in the phone call. Mr. Cardona denies this and maintains that he was left with the understanding that the plaintiffs would accept \$60,000 in full settlement of their claim.

[17] The plaintiffs then visited a law office, where they spoke with an articulated student. They were advised of the danger that accepting a portion of what was owed them might be construed as surrender of the balance of the claim. On the other hand, the fact that Mr. Cardona could leave with all the money giving them nothing was apparent. In an attempt to balance practical with legal advice, the law student advised them to accept the \$60,000, but on the clear understanding that they intended to pursue their claim for the balance.

[18] Mr. Osorio, attended by Oscar Debadout, went to MacDonald's as arranged the next morning at 10 a.m. Jorge Laronda, a friend of Mr. Cardona's, arrived and stated Mr. Cardona would come later. (Mr. Cardona, unknown to the plaintiffs, was consulting a lawyer.) About 45 minutes later Mr. Cardona arrived in the company of his boss, Mr. Rudd. Mr. Laronda joined them and Mr. Cardona left to talk to Mr. Osorio and Mr. Debadout. They had a long conversation about luck and winning, as well as the agreement they had made. Mr. Cardona told Mr. Osorio that he would give them only \$60,000 and that that would be all they would be getting. Mr. Osorio advised Mr. Cardona that this was not in accordance with their agreement. Mr. Cardona says that in the end Mr. Osorio told him that the plaintiffs would be happy with \$60,000. Mr. Osorio maintains that he told Mr. Cardona they would accept that sum only for the moment.

[19] At the end of the meeting, Mr. Cardona gave Mr. Osorio an envelope containing a cheque for \$60,000. Mr. Osorio states that he reminded Mr. Cardona once more of the agreement; Mr. Cardona contends Mr. Osorio indicated he was satisfied with \$60,000. Mr. Rudd and Mr. Laronda came over. Mr. Rudd was introduced. He asked whether everyone was happy. He states everyone professed to be content. They then shook hands and parted. The plaintiffs promptly consulted a lawyer and launched this claim for the balance of the funds.

THE ISSUES

[20] It is not disputed that an agreement was made at the racetrack 10th July that the defendant would give the plaintiffs 20 per cent of his winnings should he win the Sweep Six in exchange for the plaintiffs' promise that they would give him 30 per cent of their winnings should their ticket win.

[21] The following defences, however, are raised:

1. That the agreement is unenforceable because it is a wager.
2. That the agreement is unenforceable because there was no intention to create legal relations;
3. That the plaintiffs accepted \$60,000 in full settlement of their claim.

[22] I shall consider each defence in turn.

DISCUSSION

1. *Is the agreement a contract of wager?*

[23] The English Gaming Act of 1845 (8 & 9 Vict.), c. 109, which forms part of the law of this province, makes contracts of wager unenforceable. Section 18 provides:

XVIII. And be it enacted, That all Contracts or Agreements, whether by Parole or in Writing, by way of gaming or wagering, shall be null and void ...

It has been held that the word "gaming" adds nothing to the word "wagering" in that statute: *Tote Investors Ltd. v. Smoker*, [1968] 1 Q.B. 509 at 516, [1967] 3 W.L.R. 1239, [1967] 3 All E.R. 242 (C.A.). The question, therefore, is whether the agreement between the parties was a contract of wagering.

[24] The popular meaning of wagering is "an agreement or contract by which each of the parties promises to give money or its equivalent to the other according to the issue of an uncertain event": The Shorter Oxford Dictionary. This interpretation has been adopted in several cases construing s. 18 of the Gaming Act: *Higginson v. Simpson* (1877), 2 C.P.D. 76; *DeJardin v. Roy* (1910), 12 W.L.R. 704 (Sask. Dist. Ct.); *Breitmeier v. Batke* [reflex](#), (1966), 56 W.W.R. 678 (Alta. Dist. Ct.); *Simons v. Ginnetti*, B.C. Co. Ct., Vancouver No. F821999, 19th January 1984 (not yet reported). If this definition is applied, the agreement here in question is a contract of wager, involving as it did promises to pay money upon the happening of a contingent event.

[25] Other authorities, however, have defined a contract of wager under the Gaming Act more restrictively, confining it to contracts where one of the parties is bound to win and the other to lose dependent on a contingent event. In *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484 at 490-91, Hawkins J. formulated the classic definition of the term:

... according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue, of a future uncertain event, mutually agreed that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. *It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.* (The italics are McLachlin J.'s.)

[26] This definition has been approved many times, most notably in *Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1, 45 T.L.R. 238 (C.A.); *Tote Investors Ltd. v. Smoker*, supra. In the latter case, Lord Denning M.R. stated of the definition [p. 516]:

I would not myself like to treat it as a rigid definition or interpret it as a statute, but it does bring out this feature: it is essential that each party may either win or lose. If one party can neither win nor lose, then it is not "gaming" or "wagering". This was accepted by the House of Lords in *Attorney-General v. Luncheon and Sports Club Ltd.*, [1929] A.C. 400, 45 T.L.R. 294. The actual decision turned on the special position of a club as a distributing agent. Nevertheless Lord Dunedin said:

"Inasmuch as on the determination of the event in question - to wit, whether a certain horse is first or is placed in a race, as the case may be - the club can neither win nor lose, it follows that there is no bet with the only bookmaker alleged."

The court concluded that the contract in question in *Tote* was not a contract of gaming or wagering, because one party was not bound to win and another to lose on the happening of the contingent event.

[27] The same interpretation of the Gaming Act was adopted in Canada in *Lyman v. Kuzik* [reflex](#), (1965), 57 W.W.R. 110 (Alta. C.A.). Four bingo players had agreed to divide a money prize to be awarded to the game winner. It was held that this was not a contract of wager. Porter J.A. stated at p. 112:

At the time these four people agreed that they would divide the \$5,000 amongst them, no one of them had won that money or any money. *As a result of their agreeing that they would divide the \$5,000 it was certain that no one of them ... could lose in the outcome of any future event in the game.* (The italics are McLachlin J.'s.)

[28] In comparing the two lines of authority on the interpretation of "wagering", it is significant that none of the cases which define the term broadly as a contract of chance evidence any consideration of the established authorities in support of the narrower definition. I am satisfied that the better view of what constitutes wagering is that expressed in *Carlill v. Carbolic Smoke Ball*, and confirmed and applied repeatedly and consistently wherever courts have considered the matter on the authorities.

[29] The question is whether the agreement here in issue is one in which, dependent on the contingency expressed in the agreement, one of the parties must win and the other lose. In my view, it is not. The agreement was predicated on two contingencies - the plaintiffs' ticket winning or the defendant's ticket winning. If the plaintiffs' ticket won, the defendant would share in the prize and thus win too. The same would happen if the defendant's ticket won. In either case, there would be no losers as a result of the agreement. The contract was not a wager but a pooling arrangement.

[30] Pooling or sharing arrangements have often been held to be enforceable: *Lyman v. Kuzik*, supra, *Simpkins v. Pays*, [1955] 1 W.L.R. 975, [1955] 3 All E.R. 10 (H.C.). Most recently, in *Qiamco v. Gaspar*, Nanaimo No. SC5277, 18th April 1984 (not yet reported), Bouck J. upheld the plaintiff's right to recover pursuant to an agreement to split the winnings of a lottery ticket in the event the defendant won, stating at p. 7, "a partnership was created in the ownership of the winning ticket".

[31] I conclude that the agreement is not void by reason of the Gaming Act.

2. *Is intention to create legal obligations established?*

[32] A concluded agreement is not always enforceable. Only if the parties intend their agreement to be legally binding and enforceable can it be enforced in the courts. Thus, promises stated to be binding "in honour only" and social engagements and jests are not enforceable: Waddams, *The Law of Contract*, 2nd ed., pp. 114-15. The test for intention to create legal relations is objective. As stated by Waddams at p. 113:

No one supposes that a promisor can excuse himself by making a secret mental reservation to the effect that he does not intend to be legally bound, like a 16th century theologian subscribing to a heretical confession.

[33] I have concluded that the defendant cannot rely on this defence. First, I am not persuaded that he did not intend to create a binding contract. His statement that he never intended to honour the agreement is belied by his assurance to the plaintiffs that they could still win with him after their ticket had been disqualified in the fifth race.

[34] Secondly, even if the defendant's evidence were accepted, it goes no further than to establish that the defendant had a secret mental reservation about performing the agreement-that he did not intend to pay even as he made and confirmed the agreement and accepted the plaintiffs' promise that they would pay him if they won. That is not enough. He conducted himself toward the plaintiffs as if he intended the obligation to be enforceable. The circumstances surrounding the making of the contract, viewed objectively, establish that the parties treated their agreement as a serious matter of considerable consequence. The agreement was not lightly made, but was the result of negotiation. After agreeing to give the plaintiffs 30 per cent of his winnings in exchange for their promise to give him 30 per cent of theirs, Mr. Cardona reconsidered and concluded that 20 per cent would be fairer. He put the proposition to the plaintiffs. They considered amongst themselves and agreed to the change. If the agreement between the parties was not to be binding and enforceable, why bother to propose and consider changes with such care? Moreover, the parties had in the past entered into pooling or sharing arrangements between themselves and other members of their community - arrangements which were always fulfilled. Given these circumstances, the defendant could rely on his alleged intention not to be bound by the agreement only if he had made that abundantly clear to the plaintiffs. He did not do so.

3. *Was a valid settlement concluded?*

[35] The defendant contends that a binding settlement was made whereby the plaintiffs agreed to accept \$60,000 in full payment of their claim. The plaintiffs deny this.

[36] The plaintiffs having established a contract requiring the defendant to pay them \$147,403, the

onus shifts to the defendant of proving that by a subsequent agreement they agreed to accept \$60,000 in full satisfaction of the debt. In determining whether such agreement exists, the court will view the transaction not from the point of view of whether each party inwardly assented, but rather on the basis of whether their conduct, viewed objectively, discloses a meeting of minds: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 (D.C.).

[37] The evidence is conflicting on the essential point of whether Mr. Osorio, the spokesman for the plaintiffs, agreed to accept \$60,000 in full and final settlement of all claims. Mr. Cardona says that in the last telephone call on Wednesday, 14th July, he told Mr. Osorio that \$60,000 was all the plaintiffs would receive and that Mr. Osorio responded that the plaintiffs would be happy with that sum. He states he would not have gone to MacDonald's and paid the plaintiffs \$60,000 on any other basis. He and Mr. Rudd testify that at MacDonald's, Mr. Osorio confirmed that he was happy with \$60,000. Mr. Osorio, backed by the evidence of Mr. Ruiz and Mr. Debadout, maintains that he made it clear that the plaintiffs would accept \$60,000 "for the moment". He denies that he ever indicated that the payment of \$60,000 would constitute final settlement of the claim.

[38] The evidence presented by the plaintiffs as to exactly what was said in the telephone conversation is confused and unsatisfactory. In his evidence in chief, Mr. Osorio denied that Mr. Cardona asked whether he would be happy with the \$60,000 on the telephone. He stated after hanging up he told the other plaintiffs that Mr. Cardona would pay \$60,000 and no more, and that at that time the plaintiffs agreed to take \$60,000 for the moment and fight for the rest. He further stated that the next day at MacDonald's he attempted unsuccessfully to persuade Mr. Cardona to honour the agreement in its entirety (transcript, pp. 36-40). In cross-examination Mr. Osorio stated he told Mr. Cardona on the telephone that the plaintiffs would accept the \$60,000 "for now". There is further conflict between the witnesses as to whether that statement "for the moment" was made before consulting the other plaintiffs, or whether there was a conference in the middle of the telephone conversation between the plaintiffs wherein they agreed to take the \$60,000 "for the moment".

[39] On the other hand, Mr. Cardona's evidence of the telephone call was straightforward and not impeached on cross-examination. In that call he made it very clear that \$60,000 was all he was going to pay, and Mr. Osorio agreed that the plaintiffs would take the \$60,000.

[40] On all the evidence, I conclude that in all probability the plaintiffs did not clearly stipulate to Mr. Cardona that they were accepting the \$60,000 only for the moment and intended to fight for the rest in a telephone conversation of 14th July. Only after seeing a lawyer later that afternoon did they realize the danger in accepting a portion of the money. I further conclude that Mr. Osorio told Mr. Cardona that they were still relying on the agreement the next day at MacDonald's, but not in such forceful terms that Mr. Cardona would conclude that they were rejecting his offer of \$60,000 in final settlement of the claim.

[41] In accepting Mr. Cardona's cheque for \$60,000 without clearly protesting the plaintiffs' intention to sue for more, Mr. Osorio implicitly accepted the condition on which it was tendered—that that was all the plaintiffs would get. I am satisfied that Mr. Cardona would never have paid \$60,000 had he not been satisfied that such payment would settle his obligation. I conclude that on an objective view of the dealings between the parties, an agreement was made to accept \$60,000 in full settlement of the claim.

[42] Was that agreement enforceable? Mr. Cardona gave no new consideration for the plaintiffs' agreement to accept \$60,000 in final settlement of their claim - his payment was partial discharge of a past obligation. However, this does not prevent the agreement being enforceable. The Law and Equity Act, s. 40 provides:

40. Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

[43] Quite apart from the want of consideration, an agreement to accept part payment of a debt in full satisfaction thereof may not be enforceable on the ground of unconscionability. This is so where the debtor has exercised undue pressure by threatening to pay nothing unless the creditor, who has little option to accept what he can get, agrees to the settlement.

[44] The leading case on this point is *D. & C. Bldrs. Ltd. v. Rees*, [1966] 2 Q.B. 617, [1966] 2 W.L.R. 288, [1965] 3 All E.R. 837 (C.A.). A small company consisting of a plumber and a decorator carried out work for the defendant and rendered a bill for £482 13s. 1d. After being pressed for payment for months, the defendant, who knew the plaintiff was in financial difficulties, offered £300 in settlement of the debt, saying that if this were not accepted, nothing would be paid. The plaintiff accepted and gave a receipt stating "on completion of the account". It then sued for the balance. The plaintiff's claim was upheld on appeal, on the ground that there had been no true accord since the agreement was the result of undue pressure by the defendant on the plaintiff. Lord Denning M.R. distinguished at p. 841 between a true accord in settlement of a debt and one coerced by unconscionable tactics:

The creditor is barred from his legal rights only when it would be *inequitable* for him to insist on them. Where there has been a *true accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts on* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

In the present case, on the facts as found by the judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments, and she knew it. When the creditor asked for payment of the £480 due to him, she said to him in effect: "We cannot pay you the £480. But we will pay you £300 if you will accept it in settlement. If you do not accept it on those terms, you will get nothing. £300 is better than nothing." She had no right to say any such thing. She could properly have said: "We cannot pay you more than £300. Please accept it on account." But she had no right to insist on his taking it in settlement. When she said: "We will pay you nothing unless you accept £300 in settlement" she was putting undue pressure on the creditor. She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do (to accept £300 in settlement): and she succeeded. He complied with her demand. That was on recent authority a case of intimidation (see *Rookes v. Barnard*, ([1964] 1 All E.R. 367; [1964] A.C. 1129) and *J. T. Stratford & Son, Ltd. v. Lindley* ([1964] 2 All E.R. 209 at p. 216; [1965] A.C. 269 at pp. 283, 284)). In these circumstances there was no true accord so as to found a defence of accord and satisfaction (see *Day v. McLea* ((1889), 22 Q.B.D. 610)). There is also no equity in the defendant to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation. (The italics are Lord Denning M.R.'s.)

[45] The facts in the case at bar are similar to those described by Lord Denning. The defendant owed the plaintiffs \$147,080.60. He said to them in effect, "I will not pay you what I owe you. But I will give you \$60,000 in full settlement". He said this in circumstances where he must have known that the plaintiffs would be under irresistible pressure to accept the \$60,000. They were poor people with no legal knowledge and no money to hire a lawyer to assist them. The defendant was a single man without property or family ties and could leave the country with all the money at any moment. He had let it be known that he had planned to leave the country shortly. For five days he had alternately avoided and placated the plaintiffs, leaving them in a state of uncertainty and emotional turmoil. In these circumstances the plaintiffs decided to accept the money and use it to hire a lawyer to fight for the rest. The resultant agreement was, in my opinion, procured by undue pressure and intimidation.

[46] The defendant argues that this case is unlike *D. & C. Bldrs. Ltd. v. Rees* in that the plaintiffs did not need the money to save them from bankruptcy. I cannot accept this distinction. The defendant's evasive behaviour and the possibility that he would leave the country with the money and never return created pressure as great as had they needed the money for some urgent purpose. It is the misuse of a position of advantage to create undue pressure which makes it inequitable for the defendant to insist on his accord. The particular means by which that pressure is brought to bear will necessarily vary with the facts of each case.

[47] The conclusion in *D. & C. Bldrs. Ltd. v. Rees* is an application of the general principles governing the setting aside of unconscionable bargains. These were set out in *Harry v. Kreutziger* 1978 CanLII 393 (BC C.A.), (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.). Mclytyre J.A., as he then

was, after reviewing the authorities, stated at p. 173:

From these authorities, this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

[48] In the case at bar there was inequality of bargaining power due to the ignorance, need and distress of the weaker, leaving them in the power of the stronger. The bargain was manifestly unfair. To use the words of Lambert J.A. in *Harry v. Kreutziger* (p. 177), it was "sufficiently divergent from community standards of commercial morality that it should be rescinded".

[49] A final point must be considered. The defendant argues that the plaintiffs have disentitled themselves from relying on the doctrine of unconscionability because of their conduct. Equity, he contends, should grant them no relief because the plaintiffs did not frankly acknowledge that a settlement agreement had been made. I do not think that the plaintiffs should be denied the relief to which they are otherwise entitled on this ground. It is not surprising that in the confusion and emotional turmoil which surrounded their final discussions with the defendant and the time which intervened between then and the trial that divergent views of what was said might be presented in evidence. There was no misconduct of the plaintiffs and no equity in the defendant to justify denying the plaintiffs the relief to which they are entitled.

[50] For these reasons, I conclude that the settlement agreement made by the parties is unenforceable.

CONCLUSION

[51] The plaintiffs are entitled to judgment in the sum of \$147,080.60, together with interest under the Court Order Interest Act and costs.

[52] The counterclaim, which was not pursued, is dismissed.

Judgment for plaintiffs.