

The Demerara Bauxite Company, Limited - - - - *Appellants*

v.

Louisa Malvina Hubbard and others - - - - *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL (COLONY OF BRITISH GUIANA).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD PARMOOR.

[*Delivered by LORD PARMOOR.*]

This is an appeal against a judgment and order of the West Indian Court of Appeal, whereby that Court dismissed the appeal of the appellants from a judgment of Mr. Justice Berkeley, sitting in the Supreme Court of British Guiana, which ordered that the action by the appellants should be dismissed with costs to the respondents Hubbard and Emory, and with no costs to the respondent Humphrys. It is not necessary to discuss the form of the action, nor was any difficulty raised on this point in the hearing before their Lordships. The questions at issue are (1) whether at the material date the relationship between Humphrys and Mrs. Hubbard was of such a nature that it constituted the confidential relationship of solicitor and client, and (2) whether, if such relationship existed, the conduct of Humphrys, and the nature of the bargain between him and Mrs. Hubbard, were such that the transaction is unenforceable, on the principles applicable to transactions between a solicitor and client.

The first issue may be dealt with shortly. There is a concurrent finding in both Courts that the relationship of solicitor and client

did exist between Humphrys and Mrs. Hubbard on the 30th January, 1919, which is accepted by both parties as the material date. It is not suggested that, in either Court, a wrong principle was applied. In both Courts reference is made to the judgment of Parker J. in *Allison v. Clayhills*, 97, L.T., 709. In this case Mr. Justice Parker says that although the relationship of solicitor and client in a strict sense has been discontinued, the same principle applies so long as the confidence, naturally arising from such a relationship, is proved or may be presumed to continue, and that even if the solicitor is no longer retained or acting, his duty, in the contemplation in a Court of Equity may still be such as to throw upon him the onus of upholding the validity of a purchase or lease from his clients, and that in considering whether this onus lies upon him the test appears to be the proper answer to the question, whether in the particular transaction he owes his client any duty in the contemplation of a Court of Equity. Whether in any particular transaction any duty exists which makes the relationship between the parties that of solicitor and client, will depend, in each case, upon all the surrounding circumstances. In the present appeal the relevant circumstances are such that their Lordships cannot doubt that at the date of the transaction in question (30th January, 1919), both Courts were right in holding that Humphrys did stand in a confidential relationship with Mrs. Hubbard. It is fair to Humphrys to say that he does not in his evidence question the confidential nature of the relationship which existed between him and Mrs. Hubbard, but states quite frankly that the duties incident to this relationship were not, at the relevant date, present to his mind.

Humphrys first saw Mrs. Hubbard in October, 1915. She called on him accompanied by Burrowes, who introduced her to him. Burrowes was present on the occasion of most of the subsequent meetings. Humphrys advised Mrs. Hubbard, and also Burrowes, in the winding up of Hubbard's estate, and with reference thereto did the necessary legal business. Mrs. Hubbard gave all her legal work to Humphrys, and his relationship to her as legal adviser was not terminated until May or June, 1920. It is, moreover, material to observe that Humphrys, who at that time was a Proxy Director of the appellant Company, was approached, in reference to the sale of the properties in question, by the Chairman, J. A. King, who said to him, "Humphrys, Mrs. Hubbard is a client of yours isn't she?" Humphrys replied, "Yes, I attend the Court and represent her in a certain action against the estate." J. A. King further said, "Will you let us know if Mrs. Hubbard is going to sell?" Humphrys replied, "All right I will do my best for you, but you had better write me and make me an offer." On the 23rd January, 1918, Mr. A. G. King, secretary to the Company wrote a letter to Humphrys offering "your client" the sum of \$3,000 for the properties in question. Humphrys told Burrowes of this offer, and subsequently

Burrowes told him that Mrs. Hubbard would not accept it. At a subsequent interview Humphrys mentioned the matter to Mrs. Hubbard, but she refused to entertain it. In March or April, 1918, Humphrys received another offer of \$5,000 from the appellant Company, and informed Burrowes. Burrowes saw Mrs. Hubbard but she declined the offer. In January, 1919, the respondent, Emory, met Humphrys, stating that the properties were not worth more than \$5,000, or \$5,500, as they had very little bauxite on them, and that the value to the appellant Company was that they lay between their lands. He asked Humphrys to ask Mrs. Hubbard to give him an option of buying them for \$5,500. Humphrys said he could not do this having regard to his relationship with the appellant Company, but said that he would ask Mrs. Hubbard to give him an option for \$5,500, and, that if he got it, he would tell the appellant Company, and ask if they intended to spring on their offer. He further told Emory that he would put the highest offer before the appellant Company, and let them say if they would take it or not. Humphrys asked Burrowes to ask Mrs. Hubbard to come and see him as he wished to make her an offer for the land of \$5,500. It is material to note that what Humphrys mentioned was not an option to purchase, but an offer for the land, and that the interview was sought not by Mrs. Hubbard but by Humphrys. On the 30th January, 1919, Mrs. Hubbard came to Humphrys' chambers accompanied by Burrowes, and her niece Mrs. Valladares. It was argued on behalf of the appellant Company that there was no evidence, or not sufficient evidence, that the relationship of solicitor and client existed between Humphrys and Mrs. Hubbard when they met to discuss the offer made by Humphrys on that date. It appears to their Lordships that the narrative as above set out, is amply sufficient to support the findings of both Courts. Independently of those findings, their Lordships would have no hesitation in coming to the conclusion that when Humphrys met Mrs. Hubbard on the 30th of January, 1919, he was in a confidential relationship to her, and that his duty towards her was the same as that which exists between a solicitor and his client.

The interview at the chambers of Humphrys on the 30th January, 1919, is so material that it is better to give at length the evidence of Humphrys. In examination in chief, Humphrys states:—

“ On the 30th January, Mr. Burrowes, Mrs. Hubbard and Mrs. Valladares came to my chambers. On coming in Mrs. Valladares said, ‘ Mr. Humphrys, auntie and I have been speaking over this matter, and we have decided to sell the lands as they are not earning anything.’ They all sat down, Mrs. Hubbard asked me the last offer made by Mr. King for land. I said \$5,000, therefore my offer of \$5,500 for option is \$500 in excess. I reminded her that the Bauxite Company had said \$5,000 was their final offer. I told her some people in America might want to acquire these properties and might or might not care to take them for more than \$5,500, and therefore I might or might not make a profit on the transaction because the Bauxite Company, although they had said \$5,000 was their last offer, might change their minds when they knew someone else was after it. I

said if she gave option it must be for three months, and I was only prepared to pay \$25 for option. She then said, 'Mr. Humphrys, if I sell these lands to you, what about these actions? Transport would be opposed.' I said, 'No, I would guarantee no trouble in that respect because if I exercised option I would arrange with J. T. Hubbard's solicitor to deposit security and pass transport. If he refused, no transport would be passed until actions concluded.' Burrowes said, 'In that case Mrs. Hubbard would be out of her money for a long time and it would not be earning any interest.' I said that was so and that if I exercised option, I would pay her interest on purchase price, \$5,500 at 6 per cent. Burrowes said this was fair, and Mrs. Valladares then said to Mrs. Hubbard, 'I think, auntie, you better sell the lands.' Mrs. Hubbard said, 'Yes, I think so,' and turning to Burrowes asked him what he thought. He said, 'The lands are yours and if you are satisfied I am satisfied.' Mrs. Hubbard asked what papers I would require her to sign. I said I would send a written option next day to her. I told her I am only 'prepared to pay \$25 for option.' I don't remember telling her what operated to make the offer only \$25. I knew in my own mind. I told her any profit I made over and above \$5,500 would be mine. There was no question of my selling for her. She knew profit was mine."

This account is supplemented in the cross examination.

"Q.—In making your offer to Mrs. Hubbard did you tell her that Mr. King, both in writing and verbally, had requested you to inform him if Mrs. Hubbard decided to sell? A.—Mr. King never, up to that date, had written to me on that point, but he had spoken to me. I did not tell Mrs. Hubbard I had done so. It never occurred to me to tell her because I was not conscious of the law relating to solicitor and client, nor did I bring my mind to bear on the fact that I was dealing with a client. I looked on her as an ordinary individual without any regard to the law on solicitor and client. On account of her age I told her I might or might not make a profit. I also told her that as I had known her for a long time. I did not tell her Emory had asked me to get an option for him from her for \$5,500. I never mentioned his name at all. I told her the last offer of Bauxite Company was \$5,000, and I offered \$500 more. I told Mrs. Hubbard that when Bauxite Company knew someone else was in the field they might spring on their offer. I did not tell Mrs. Hubbard that someone else was in the field in so many words. I told her someone in America might want to acquire the property."

The first question which arises is whether Humphrys made a full disclosure to Mrs. Hubbard of all the facts known to him to enable her to decide whether it was in her interest to give Humphrys a three months' option for \$25. In the opinion of their Lordships the answer must be in the negative. Humphrys knew at this time that Emory had made a definite offer beyond that of the Bauxite Company, a matter directly material both on the advisability of granting an option to Humphrys, and as to the amount at which such an offer should be given. He further stated that the Bauxite Company's offer for \$5,000 was a final offer, and did not inform Mrs. Hubbard of what he told Emory, that the Bauxite Company would give more than \$5,000, and that if he obtained the option from Mrs. Hubbard of \$5,500 he would tell the Bauxite Company, and ask if they intended to spring on their offer. The position was, to the knowledge of Humphrys, that there were two competitors desirous to obtain

an option over the properties, and that the prospect of the price to be obtained, depended on the extent to which they were prepared to outbid one another. Mrs. Hubbard and Burrowes, at the interview on the 30th January, 1919, appear to have regarded the granting of the option as equivalent to a sale of the lands, whereas in truth Humphrys bought, for the sum of \$25, the probability of enhanced value to be obtained from the competition between the Bauxite Company and Emory. No one in a confidential relationship towards Mrs. Hubbard such as that of solicitor towards his client could have fulfilled his duty in taking an option over the properties of the person towards whom he stood in such a position, without specifically informing her of the offers which had been made and explaining their effect on the question of value. This necessarily constituted the main element for consideration in determining whether or not it was in the interest of Mrs. Hubbard to grant the option in favour of Humphrys. Humphrys himself says that he did not tell Mrs. Hubbard that he had spoken to Mr. King, because he was not conscious of the law relating to solicitor and client, nor did he bring his mind to bear on the fact that he was dealing with a client.

The omission of Humphrys to disclose to Mrs. Hubbard the fact that Emory had asked for an option over the property for \$5,500 is not remedied by his telling her that some people in America might want to acquire the properties, and might, or might not, care to take them for more than \$5,000, and that therefore he might, or might not, make a profit on the transaction, because the appellant Company, although they had said \$5,000 was their last offer, might change their minds when they knew someone else was after it. An exact disclosure of the conditions under which Emory made his offer was, in the opinion of their Lordships, essential to enable Mrs. Hubbard to determine whether the offer made by Humphrys to her was a fair one. There does not appear to have been, in the ordinary sense, a market for the properties in question, and the value therefore to a large extent depended upon the existence of probable competitive purchasers. The crucial date is the 30th January, 1919. It is not a question of honesty, but of a full disclosure and of a fair price. If, at this date, it could be shown that Humphrys had fulfilled all the duties which attached to his confidential relationship towards Mrs. Hubbard, the fact, that he subsequently made a considerable profit on the transaction would not render it void and unenforceable. Humphrys says that he was astonished when a few days later Emory offered \$11,000, and in return the appellant Company \$11,200.

On the other hand, it is no answer that he had underrated the fair sum to be inserted in the option, since Mrs. Hubbard was entitled to know fully all the factors, which in such a case would be of importance to her in coming to a conclusion what the sum should be. The conclusion is that Mrs. Hubbard did accept

less than a fair sum in the option from a person who stood to her in a confidential position, and whose offer she might not have accepted, had all the relevant facts been placed before her.

If these findings are accepted, the appellant Company cannot succeed in their action, to enforce on Mrs. Hubbard the terms of the option made between her and Humphrys, unless it can be shown that she had competent independent advice. The principle has long been established that, in the absence of competent independent advice, a transaction of the character involved in this appeal, between persons in the relationship of solicitor and client, or in a confidential relationship of a similar character, cannot be upheld, unless, when it is impeached, the person claiming to enforce the contract, can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession, and can further show that the transaction was, in itself, a fair one, having regard to all the circumstances. In order that these conditions may be fulfilled it is incumbent to prove that the person who holds the confidential relationship advised his client as diligently as he should have done had the transaction been one between his client and a stranger, and that the transaction was as advantageous to the client, as it would have been, if he had been endeavouring to sell the property to a stranger. This principle is one of wide application, and must not be regarded as a technical rule of English law. An apt illustration of its application to Scotch law is to be found in the case of *Gillespie and Sons v. Gardner*, 1909 Session Cases, 1061, to which their Lordships were referred during the argument, and which states that a bargain between a law agent and his client, cannot be supported unless the law agent can show that the bargain was fair, and entered into without concealment of any kind.

The only remaining question is whether it can be shown that Mrs. Hubbard had competent independent advice from Burrowes. Burrowes was not in a position to give independent advice as co-executor with Mrs. Hubbard. He wrote a letter on the 1st February, 1916, to one, Catherine Van Sertima, making a suggestion that the undivided halves of the properties in question should be transported to her, or that she be paid in cash the half value of the said properties, \$750. The whole value of the properties was \$1,500, as stated in the declaration for estate duty. There is a further letter from Burrowes to Catherine Van Sertima, dated the 27th March, 1916, in which it is stated that Catherine Van Sertima had accepted from Mrs. Hubbard the sum of \$900 for her half of the share of Mrs. Hubbard. Burrowes further states in his evidence that he thought \$5,000 a fair offer for the properties, and told Mrs. Hubbard so, but that she was disinclined to accept \$5,000, and so he informed Humphrys. Burrowes further states that if it was his property he should at once have sold, and invested in Government bonds at 5 per cent. The fact that Burrowes, as co-executor, had had before

him previous offers for the properties, and that he regarded \$5,000 as a fair offer is not sufficient to constitute him into a competent independent adviser. At the interview at the chambers of Humphrys, on the 30th January, 1919, it appears that Burrowes was under the impression that the transaction contemplated was a sale, and not merely an option which might never be carried out. It is true that Burrowes, as well as Humphrys himself, said that the higher figure offered after the 31st January was a complete surprise to him, and to everyone, and if Humphrys could have shown that he had fulfilled all the conditions which attached to his confidential relationship, their Lordships do not think that the transaction could have been set aside on the ground that he had received a price so far in excess of that contained in the option. It was further argued that Mrs. Hubbard, subsequently, and with full knowledge, affirmed the sale she had made with Humphrys at an interview on the 7th April, 1919. The only evidence in support of this allegation is, that it having come to the notice of Humphrys that nasty remarks had been made as to his buying the properties under the terms of the option at \$5,500, he had an interview on that date with Mrs. Hubbard and Burrowes at which he asked her to say if she was dissatisfied, and that he would give her the whole of the purchase price, but that it would put him in a very uncomfortable position as he had arranged to give another gentleman \$2,700 out of it. Mrs. Hubbard asked if any reduction was to be made from the \$5,500 as she would like it clear. Humphrys undertook to see that she got it without any reduction. If the original transaction is unenforceable for the reasons given, it is clear that it was not subsequently ratified at this date, even if such ratification is possible.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs and will humbly advise His Majesty accordingly.

In the Privy Council.

THE DEMERARA BAUXITE COMPANY,
LIMITED,

o.

LOUISA MALVINA HUBBARD AND OTHERS.

DELIVERED BY LORD PARMOOR.

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