IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO HCV 2001/S – 081

BETWEEN	**MERRICK (HERMAN) SAMUELS**	**CLAIMANT**
AND	**GORDON STEWART**	**FIRST DEFENDANT**
AND	**ANDREW K. REID**	**SECOND DEFENDANT**
AND	**BAY ROC LIMITED**	**THIRD DEFENDANT**

IN CHAMBERS

Mr. Leonard S. Green instructed by Chen, Green and Company for the claimant

Mr. Dave Garcia and Mr. Nigel Jones instructed by Myers, Fletcher and Gordon for all the defendants

November 30, 2004, December 10 and December 23, 2004

Sykes J (Ag)

APPLICATION FOR SUMMARY JUDGMENT

1. The claimant was severely injured by a motor boat on November 13, 2000 while he was swimming in waters near a hotel known as Sandals Montego Bay. He filed suit against all three defendants seeking compensation for his injuries. The first defendant is alleged to be the owner of Sandals Montego Bay. The second defendant is alleged to be an employee of the hotel and the third defendant is alleged to be the operator of the hotel. It is not necessary for me to state any more of the facts having regard to my decision. I shall confine by analysis to the sole issue that has been raised during the hearing of this application which is whether

the defendants are entitled to summary judgment under rule 15.2(1)(a) of the Civil Procedure Rules 2002.

2. The defendants say that the claimant has "*no real prospect of succeeding*" because he signed a release sometime in August 2001. Mr. Garcia submitted that the terms of the release and the money paid under it meet the legal definition of accord and satisfaction as defined in ***British Russian Gazette and Trade Outlook, Limited v Associated Newspapers, Limited*** [1933] 2 K.B. 616 by Scrutton L.J. at pages 643 – 644. In that case, the Lord Justice said that accord and satisfaction is the purchase of a release from an obligation whether arising in contract or tort by means of valuable consideration. The accord is the agreement and the satisfaction is the consideration that gives life to the agreement.

3. The claimant challenges this conclusion. He says that his agreement was procured by undue influence.

The affidavit evidence

4. Mr. Horace Peterkin, who identified himself as the General Manager of Sandals Montego Bay, a hotel managed by the third defendant, swore an affidavit dated January 2, 2003, in which he gives an extremely terse account of the circumstances that led to the signing of the release. He apparently is speaking for all three defendants. He says that he discussed the matter of compensation with the claimant. During the discussions he alleges that Mr. Samuels said he had no lawyer. Mr. Peterkin added that he was informed by a Mr. Dimitri Singh who is described as the legal officer of Bay Roc Limited, the third defendant, that Mr. Leonard Green, attorney at law, "claimed" to represent the claimant.

5. Let us now look at some of the incontrovertible facts concerning what has almost been dismissively described as this "claim" by Mr. Green to represent the claimant.

i. the writ of summons was filed on May 24, 2001, three months before the release was signed. The writ was signed by Mr. Vincent Chen, a partner in the firm of Chen, Green and Company;

ii. the writ states that it was issued by Chen, Green and Company. The address of the attorneys is stated on the writ;

iii. the statement of claim was filed on July 11, 2001, a month before the date the release was signed. The statement of claim was filed by Chen, Green and Company;

iv. an appearance was entered on May 10, 2002 by the three defendants;

v. the claimant obtained interlocutory judgment in default of defence against all three defendants in July 2002. This was ten months after the release;

vi. the defendants applied to have the judgment set aside on the basis of the release signed in August 2001;

vii. Mr. Green in a letter dated January 4, 2000 addressed to the manager of Sandals Montego Bay, copied to Mr. Gordon Stewart, the first defendant, stated that he acted on behalf of Mr. Samuels. The letter invited the manager to contact Mr. Green in order to commence negotiations for an appropriate settlement. This was twenty months before the release was signed by Mr. Samuels. There is no evidence that the manager of Sandals Montego Bay or Mr. Gordon Stewart had not received this letter. It is fair to point out

that there is no evidence that they did receive the letters but during the hearing of this matter no issue was taken by the defendants about this;

viii. Mr. Green wrote a letter dated August 4, 2000 to Axis (Jamaica) Limited. Axis is the insurer of the third defendant. This was a year before the release. In that letter Mr. Green referred to a letter from Axis to him dated March 21, 2000. Mr. Green made it clear that he had written authorisation from Mr. Samuels to act on his behalf. The letter from Mr. Green also stated that the only matter delaying the filing of suit was a detailed medical report from Dr. Francis Lindo on the injuries suffered by Mr. Samuels. The letter closes with a reminder to Axis that they were made aware of Mr. Green's involvement in the matter from at least January 4, 2000. This means that Mr. Green sent communication to at least three persons on this matter – one to the manager of Sandals Montego Bay, another to the first defendant Mr. Gordon Stewart and a third to the insurers of the third defendant;

ix. Mr. Green raised, in the August 4, 2000 letter to Axis, concerns about the propriety of Axis seeking to communicate directly with Mr. Samuels without any regard to his (Mr. Samuels') attorney's involvement;

x. Ms Taynia Nethersole, who described herself as the Group Legal Advisor, signed a letter dated August 8, 2001. This letter was addressed to Mr. Green and it enclosed the release signed by Mr. Samuels.

6. Given these uncontroverted facts, it is difficult to see how Mr. Dimitri Singh could have informed Mr. Peterkin that Mr. Green merely "claimed to represent the plaintiff".

7. On the court file there is an affidavit from Mr. Dimitri Singh dated October 10, 2002. He refers to the release but he omits to say whether he was contacted by Mr. Green who "claimed to represent the plaintiff."

8. If Ms Nethersole's letter is correctly dated, then Mr. Peterkin's evidence that the release was executed August 9, 2001 could not possibly be correct.

9. Mr. Samuels has filed an affidavit. The critical parts are found at paragraphs 9 – 11. He says that he retained the services of Mr. Green around January 2, 2000. He adds that the defendants and their agents were friendly and he developed confidence in them and thought they had his best interest at heart. He is raising the issue of undue influence.

The submissions for the defendants

10. Mr. Garcia's submissions based on ***British Russian Gazette and Trade Outlook*** are undoubtedly correct. No one is taking issue with the principle. According to Mr. Garcia, the claimant signed the release. Mr. Garcia submitted that the claimant's act was free and voluntary. Therefore, there was no undue influence. Consequently, his clients should succeed on this application for summary judgment. The accord in the agreement embodied in the release and the satisfaction is the JA$483,833.03 paid to the claimant as well as a cellular phone.

11. Mr. Garcia cites ***Swain v Hillman and another*** [2001] 1 All ER 91 to make the point that Mr. Samuels has no real prospect of succeeding in this claim. This case has been cited with great frequency in these courts but I

am not so sure that the definitions offered there are particularly enlightening. Assuming I am wrong in my view of this case and it does not have the blemish of which I speak and intend to demonstrate, I hope to show the ***Swain*** criteria for deciding whether there is a real prospect of success is easily met. The claimant has met it in this case.

12. I begin with the cautionary words of Judge LJ. The Lord Justice said at page 96b

> *To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require.*

This is a clear indication that the power now conferred on the courts to grant summary judgment should be exercised very circumspectly. Often times when the application is made for summary judgment, the only information before the courts will be just the pleadings and sometimes witness statements. No evidence is heard, there is no cross-examination. The case of either party may be strengthened by requests for information.

13. The Lord Justice added at the same page

> *If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable.*

14. The question is what does "real prospect of success" mean in ***Swain***? Lord Woolf MR sought to give some meaning to the adjective "real" in the phrase "real prospect of succeeding". He said that "real" is used to distinguish "real prospect" from "fanciful prospect". The learned Master of the Rolls stated that it was not necessary for a judge to conclude that the litigant was bound to fail before he could conclude that that litigant had no

"real prospect of success". This was setting the bar for summary judgment to high but of course, if there is absolutely no hope of success then such a case is more than appropriate candidate for summary judgment.

15. I am not sure that Master of the Rolls' attempt at a definition was particularly helpful since it does not say what "real" means. Lord Woolf stated what it does not mean. We are left with this: "real" means real and not fanciful. To define a word in terms of itself as well as what it does not mean does not advance the case very much. To be fair, Lord Woolf did say that the phrase spoke for itself and did not need any further elaboration. It does not seem that these clear words were not so clear to the judge who was said by the Master of the Rolls to have applied the wrong test but came to the right conclusion. The judge was trying to give effect to the adjective ***real***. The distinction drawn by the Master of the Rolls assumes that cases fall into two and only two camps: "real" and "fanciful".

16. Judge LJ agreed with the reasoning and analysis of Lord Woolf. This means that he accepted Lord Woolf's definition of "real" but he goes on to distinguish between a "real prospect of success" and an improbable prospect of success. Judge LJ said that a case might have an improbable prospect of success but still has a real prospect of success. One would have thought that if success was improbable then there would not be any ***real*** prospect of success. It does seem odd that a judge can conclude that success is improbable but then goes on to say that there is a ***real*** prospect of success. The logic of Judge LJ compels the conclusion that he thought that the prospect success of a given case can be described as "improbable" but not fanciful and if it is not fanciful it is therefore real, although success is improbable. If this is so, how does Judge LJ distinguish between a

"fanciful prospect of success" and improbable success since he must be taken to be saying the improbability of success is outside the meaning of fanciful prospect of success? If the adjective ***real***, in this context, means something less than improbable then it cannot take much to satisfy a court that there is a real prospect of success.

17. When the allegations of ***Swain*** are examined, it will be seen that the threshold to satisfy the test of "real prospect of success" is very, very low. The allegations were that the claimant was injured by a plank that was placed in the position from which it eventually fell, three days before it actually fell and injured the claimant. Pill LJ highlighted serious deficiencies on the claimant's case. The claimant did not plead that any one negligently dislodged the board from its location. Two suggested possibilities explaining the falling of the board were regarded as unlikely by Pill LJ. Despite this he felt that the judge was correct to hold that there was a "real, as distinct from a fanciful prospect of success" (see page 95j). For Lord Woolf these gaps in the pleadings were matters along with others for a judge to consider carefully at trial (see page 95b).

18. Given the weaknesses in the pleadings and the challenge that the claimant would have in proving his case one would have thought that such a case did not have a "real prospect of success". All three judges of the Court of Appeal, concluded otherwise. One possible way of stating the conclusion from the case is: where a litigant's chances of success are improbable, but not fanciful, then there may be a real prospect of success. One is left to wonder in light of ***Swain*** whether there is much difference between a "prospect of success" and a "**real** prospect of success".

19. If ***Swain*** is correctly decided then it does suggest that the criterion for establishing that a case has a real prospect of success is perhaps not far above that required for an injunction, namely, a serious triable issue. I need not come to a final position on the correctness of ***Swain*** because whatever is the ultimate meaning of "real prospect of succeeding", in this case the issue of undue influence is such that I cannot say at this stage that the claimant's case is hopeless. He has a strong arguable case. I cannot say that it is bound to succeed but neither can I say that it is doomed to failure.

Undue influence

20. Given the low threshold of a "real prospect of success", it became apparent that Mr. Garcia would have a difficult time establishing that this case was a fit and proper one for summary judgment. Nonetheless, Mr. Garcia bravely sallied forth. He says that the friendliness of the defendants as described by Mr. Samuels in his affidavit is not a sufficient basis for concluding that the claimant was the victim of undue influence and had reposed trust and confidence in the defendants. This submission is sound as an abstract statement of principle but if meaning is given to the idea being communicated by Mr. Samuels the submission cannot be accepted. Words are nothing more than the vehicles of thought and what the speaker means is not necessarily the same as the dictionary meaning. Words take meaning from their context.

21. I believe that Mr. Garcia is ignoring the nuances of language and culture in this case. Mr. Samuels is an unlettered man. By his own admission he is not well educated. He says he can hardly read and does

very little writing. From his visits to chambers, he is a patois speaker. His affidavit was put in Standard English by his lawyers. When Mr. Samuels speaks of the defendants or persons acting on their behalf being friendly and his thinking that they had his "best interest at heart" I understand him to be saying that the defendants "fren im up". In Jamaica, this means that the persons befriended him, led him to believe that he could trust them and so he relied on their words. Admittedly, this is not the only interpretation. However if this is a legitimate interpretation of his affidavit then it shows that this is an inappropriate case for summary judgment. There are serious issues of fact to be tried.

22. The worse that could be said about his case is that success is improbable but clearly not fanciful. Applying ***Swain***, summary judgment would not be appropriate. The issues can only be resolved at a trial.

23. It seems to me that the circumstances under which the release was signed were such that they could be described as a special opportunity or special occasion during which the claimant reposed trust and confidence in the defendants and/or their agents. This way of describing the contact between the defendants and the claimant is deliberate. I adopt the language of Dixon J in ***Johnson v Buttress*** [1936] 56 C.L.R. 113. He refers to special capacity or opportunity which in my view has the desirable effect of forcing us to recognise that the whole purpose of the law of undue influence is to protect parties from being victimised by other persons. In the case before me, Dixon J's description is appropriate. This is not a case in which there is any evidence of any contact or relationship between the parties before the accident. This was indeed a special occasion. Dixon J demonstrates that it is not necessary in cases of undue influence that the relationship between the parties need to be of long standing. It can be brief and regardless of how long

or how brief the relationship is between the parties the question is whether any particular transaction was free from undue influence.

24. Though it is common to speak of actual undue influence and presumed undue influence, those descriptions are simply aids in analysis of the case law but are not hard and fast categories. The cases from the United Kingdom, in this area, have shown an undesirable predilection for labels and categorisation in this area of law. This process of categorisation and subcategorization reached its zenith in ***BCCI v Aboody*** [1990] 1 Q.B. 923. This has resulted in a tendency, at least among some lawyers here in Jamaica, to try to fit cases into categories rather than look to see whether there was a relationship or special capacity/opportunity between the parties that may give rise to an abuse of trust and confidence. It is for this reason I prefer the passage of Dixon J in ***Johnson v Buttress*** 135. Dixon J set out the principle in these terms:

> ***The basis of the equitable jurisdiction*** *to set aside an alienation of property on the ground of undue influence* ***is the prevention of an unconscientious use of any special capacity or opportunity that may exist*** *or arise of affecting the alienor's will or freedom of judgment in reference to such a matter.* ***The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party****. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected.* (my emphasis)

The specific context was a property transaction. This is not inconsistent or different from the decision of the Privy Council in ***National Commercial Bank (Jamaica) Ltd. v Raymond Hew and Clifton Hew*** (2003) 63 W.I.R.

183 per Lord Millett at para. 29 to 31. When Lord Millet spoke of a relationship capable of giving rise to the necessary influence, he could not possibly have meant to exclude a situation where the influence arose out of a specific or singular transaction. What he meant was that those who allege that there is undue influence must adduce evidence to ground the allegation. The fact that, prima facie, the circumstances do not fall within the usual category of cases is not critical. What is of real importance is not categorisation but whether there is evidence capable of supporting the allegation of undue influence.

25. Before leaving this part of the case I should make mention of two aspects of this case that may be enough to ground the allegation of undue influence. One of the bits of evidence that may assist in establishing undue influence is that the transaction appears to be to the manifest disadvantage of the claimant. The statement of claim pleads special damages of $230,000. The injuries alleged upon which general damages would be assessed if the claimant is successful include but not limited to

i. compound fracture of shaft of right femur;
ii. compound fracture of neck of right femur;
iii. extensive scarring of buttocks and sacrum with non-functional anus;
iv. 100% impairment of right lower limb;
v. 40% disability of whole person

26. Given these claims, it does seem a bit odd that Mr. Samuels, properly advised by an attorney or someone with similar knowledge, training and expertise would have settled for $483,833.03 and a cellular phone. The injuries outlined above, if liability is established, would suggest an award in excess of $2,500,000/$3,000,000. On the face of it, this transaction between

the defendants and the claimant was to the manifest disadvantage of the claimant.

27. The second bit of evidence that can assist in concluding that there was undue influence is the low level of education of the victim (see paragraph 21).

28. When there is the combined evidence of low education and a transaction that appears to be very unfavourable to the victim who alleges that he was befriended by the defendants and consequently trusted them it seems to me that we have more than the skeleton of a successful plea of undue influence. Whether it will succeed depends upon what happens at the trial.

Conclusion

29. Mr. Samuels has raised a strong arguable case of undue influence which cannot be summarily dismissed at this stage. No evidence other than affidavit evidence is before me. For me to accept Mr. Garcia's submission that there is no evidence capable of grounding undue influence would require that I reject the claimant's affidavit as untrue. This approach is inappropriate for this type of application. It has been said that summary judgment applications are not to be mini-trials. It is impossible to decide on the merits of either case outside of a trial. I therefore dismiss this application for summary judgment.

30. Leave to appeal granted. Costs to be costs in the claim.