LEVY v VERANO

Privy Council
Lord Atkin, Lord Alness and Sir Sidney Rowlatt.

Bankruptcy — fraudulent preference — intention to prefer.
Bankruptcy — fraudulent preference — meaning of "made" within three months — Bankruptcy Ordinance, s. 44.
Land tenure — when deed is "made" — effect of Governor's consent. — Land Titles Order, s. 4.
Undue influence — whether confidential relationship raises presumption of.
Partnership — whether an account will be ordered to enable a party to discover material for attacking an agreement based on agreed figures.

A partnership was dissolved by the death of one of the two partners. After certain arrangements had proved unsatisfactory, it was agreed that the partnership assets should be divided, the surviving partner (the appellant) taking the Lisbon business of the partnership and the sons of the deceased (the debtors) the Gibraltar business, which they continued to run. The debtors were pressed by their bank to repay an overdraft and the appellant gave them a loan for this purpose against a promise of security. The debtors handed certain title deeds to the appellant and later executed a mortgage in his favour. They subsequently became bankrupt.

The official trustee (the respondent) brought an action against the appellant to have the mortgage set aside as a fraudulent preference, or alternatively on the ground of undue influence, and for an account of the partnership. The Chief Justice declared the mortgage null and void and ordered certain accounts.

Held: (i) The fact that the appellant already had an equitable security and that it had been agreed from the start that he should be secured negatived an intent to prefer.

(ii) A deed is "made" when it is executed, not when it receives the Governor's consent.

(iii) The confidential relationship between the appellant as executor of the deceased partner's will and the debtors did not raise any presumption of undue influence, or if it did, the presumption was clearly rebutted, since the transaction was an ordinary business one, the debtors were all experienced business men, two of them also being executors of their father's will.

(iv) The parties having entered into an agreement on the basis of agreed figures, a partnership account could not properly be ordered so long as the agreement stood.

Notes. The reference to the avoidance of transactions as fraudulent preferences if made within three months of the commencement of the bankruptcy would appear to be a reference to s. 46 (1) of the Bankruptcy Order in Council, Gibraltar, 1894, as amended by the Bankruptcy Order Amendment Ordinance, 1917 (No. 14 of 1917). The corresponding provision is s. 44 (1) of the Bankruptcy Ordinance (Cap. 9, 1964 Ed.).

The Gibraltar Titles and Lands Consolidation Order in Council, 1888, was re-named on revision of the Laws and appears as the Land (Titles) Order (Cap. 82, 1964 Ed.).

Case referred to in the judgment

Allcard v Skinner, (1887) 36 Ch. D. 145:

Appeal

This was an appeal from a judgment of the Supreme Court, declaring a mortgage null and void against the official trustee, ordering a partnership account and reserving certain other questions.

22 November 1934: The following judgment was read—

This is an appeal from the judgment of the Supreme Court of Gibraltar given by the Chief Justice in an action brought by the respondent as official trustee in bankruptcy of the property of five brothers trading as Levy Brothers against the two defendants who are father and son. The second appellant is merely a formal party and need not further be considered. The action was brought for an account of a partnership between the first appellant and the father of the debtors which was dissolved by the death of the latter in June 1921, and for an account of a partnership between the appellant and the debtors from June 1921. The plaintiff further sought to set aside a partnership agreement of June 1922, and a private agreement of June 1926, and claimed a declaration that a mortgage dated 13 September 1928, should be declared null and void as against the plaintiff. The learned Chief Justice declared the mortgage to be null and void and ordered certain accounts, reserving his decision on the claim to set aside the agreements mentioned until he saw the result of taking the accounts. The appellant seeks to have judgment in the action entered for the defendants.

The questions in the action have their origin in the existence of a firm of Levy & Co., which appears to have been founded over 100 years ago, and to have carried on a large and prosperous business as general merchants at Gibraltar and Lisbon. In 1920 the two partners were the late Isaac Esther Levy hereinafter called the testator, the father of the five debtors and the appellant Isaac Abraham Levy, who was cousin and brother-in-law of the testator, and whose daughter was married to one of the debtors, Moses Levy. The business of the firm was managed at Gibraltar by the testator, who with his family resided there, and at Lisbon by the appellant. The terms were regulated by a partnership deed of 1904 as modified by two subsequent agreements. There are three clauses in the deed which seem to be relevant to this inquiry:

> "16th. In case of the firm being dissolved either by the voluntary withdrawal of one partner or by reason of death the liquidation will be made exclusively by the surviving partner or by the person who may remain with the business of the firm or firms.
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> 17th. It is expressly agreed that the surviving partner or the partner who may remain with the business for his account owing to the retirement of the other partner will have the right to remain with all or part of the stores, buildings, lands, factories and other assets of the firm without exception and for the values with which they have figured in the balance to the 31st of the previous December.
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> 18th. It is mutually agreed that in case of death the heir or heirs or other representative or representatives of the deceased partner will not have any right to intervene in the winding up of the business nor will he or they have any right to detailed accounts but only a note signed by the surviving partner showing the final result in favour of the partner who has died without specifying details which the next-of-kin or personal representative of the deceased partner will not have the right to examine or to question."

On 16 June 1921, the testator died leaving five sons, the present debtors, Judah, Moses, Solomon, Semtob and Haim, two daughters and a widow. By his will dated 19 April 1921, he appointed the defendant and three of his sons, Judah, Moses and Solomon, his trustees and executors; after making special provision for his two daughters, he left his property in trust for his wife for life with remainder to his five sons. Before the testator's death, the defendant had given notice to retire from the partnership, but the notice had not expired before the death. In June 1921, both the partners were men over 60. In view of the issues raised, it is material to note that at the time of the testator's death the sons were of full age. Judah was 37, Moses 34, Solomon 30, and the two youngest 24. The three eldest had been educated abroad, Moses had been trained as an accountant, Solomon spoke five languages, and all of them seem to have spent the whole of their business life in the business of Levy & Co.

At the time of the death of the testator, the accounts of Levy & Co. appear to have been in arrear, and no final balance-sheet had been drawn up later than about 1917. The balance-sheet for 1918 was not completed till December 1922. It is obvious that everyone proceeded after the death on

the footing that it was desirable that the business should be continued and that the testator's sons should have an interest in it. In June 1922, a scheme was formulated by the defendant for the formation of a limited company with a capital of $500,000, of which the defendant was to hold 90,000, the five sons 80,000 each, and the defendant's son Abner (the second defendant) 10,000. The defendant's capital was expressed to be only a part of his capital in the business and provisions were made for paying him out. The scheme was home-made and proved unworkable. When the defendant took it to England to be made effective, English lawyers pointed out difficulties; and Judah himself was not satisfied with the predominant powers given to his uncle. No limited company was ever formed, but the uncle and nephews went on conducting the business in a partnership on the terms of the written scheme so far as applicable. The sons appear to have managed the business in Gibraltar, the uncle continuing to reside in Lisbon and manage the business there. In 1926 a different arrangement was made. The sons took over the Gibraltar business, the uncle kept the Lisbon business. The terms were expressed in an agreement of 7 June 1926, prepared by the defendant. It recited that the defendant had transferred to the Gibraltar books the testator's share in the business at Lisbon and that there was very little, if anything, to be realised. It set out the amount of capital of the testator in the business as then amounting to about £50,000; and provided that the five sons were to take over the Gibraltar business with a capital of $400,000, which was the equivalent of the testator's share, together with certain other assets of the widow and sister and Judah brought in presumably as loans to the partners. The new business was to be carried on by the style of Levy Brothers. The sons were to take over the assets and liabilities of Levy & Co.; the uncle was not to participate in the new firm. He was to lend the new firm a sum of $100,000, which was to be repaid in instalments beginning in June 1927. Provision was made for paying out the defendant's interest in the old firm, which was agreed at $167,500. There seems to be an issue whether the loan was ever made by the defendant: there seems to be no doubt that if made it was not repaid as agreed. In accordance with this agreement, circular notices were given by the defendant and the sons that this Gibraltar business had been transferred to the sons, and the five brothers proceeded to carry on the business of the new firm at Gibraltar in the name of Levy Brothers. They continued so to trade until, on 2 April 1930, they filed their own petition in bankruptcy. On 25 July 1930, they were adjudicated bankrupt.

In consequence of the change in the firm, one of the creditors, Barclay's Bank (Dominion), pressed the new firm to redeem the overdraft, one of the liabilities which Levy Brothers had taken over. The firm wrote to the appellant asking him for assistance in meeting the demand, saying "we are ready to guarantee the transaction by mortgage of properties"—20 January 1927. The debtors had apparently already deposited with the bank the title deeds of a house which had been devised by the testator to the unmarried daughter and of a house devised to his son Judah. The defendant advanced £11,300, of which £9,000 was paid to the bank, the title deeds were

handed back to the debtors, who handed them to the appellant, who thus held an equitable charge over them in place of the bank. By the Gibraltar Titles and Lands Consolidation Order in Council 1888, all deeds relating to land in Gibraltar must be approved by the Governor before they have any operation and must be registered within six months of the date if executed within the colony and eighteen months if executed outside the colony. In February 1927, a mortgage deed was prepared to secure the defendant's advance. No doubt for the purpose of postponing registration as long as possible the mortgagee was expressed to be Abner Levy, the second defendant, who was resident in Lisbon. This mortgage was allowed to lapse unregistered, and a new mortgage dated 13 September 1928, was executed in which Abner was again expressed to be the mortgagee. The mortgage consideration was £7,200, which the sister and the five brothers agreed to repay by stated instalments; and the defendant, and the two executor sons and the daughter as to her property conveyed the properties to the mortgagee with the usual proviso. The deed was executed by both Abner and his father in Lisbon. It was duly approved by the Governor and registered on 26 February 1930, within eighteen months of the date. It was said that the document was not registered in time. In their Lordships' opinion the document was executed abroad within the meaning of the ordinance. It does not appear to matter for what purpose the execution took place abroad. The execution by two material parties, the mortgagee and one of the executors, in fact took place abroad; and the registration appears therefore to have been regular. The mortgage was also assailed, on a ground which was approved by the Chief Justice, as a fraudulent preference. There appear to their Lordships to be two complete answers to this point. In the first instance, there was no proof at all of any intention by the debtors to prefer the first defendant, assuming him to be the real creditor. The defendant already held an equitable charge over at least part of the property; and the mortgage was entered into in pursuance of the promise made in 1927 that if he would pay off the bank he should have security. The intention to prefer seems to be clearly negatived. In the second place, a transaction alleged to be a fraudulent preference can only be avoided if "made" within three months of the commencement of the bankruptcy—2 April 1930. The mortgage was executed in 1928. It was suggested that it could not be said to be "made" until the Governor's consent made it operative, viz., on 21 February 1930. Their Lordships have little doubt that the effect of the Governor's consent was to give retrospective operation to the deed when once approved; but in any case it seems impossible that the date of making with intent to prefer can be transferred from the actual execution of the deed to a date when by an act of a third party it became operative. This ground therefore fails.

The mortgage was, however, set aside by the Chief Justice on the ground of undue influence. There was, it is said, a confidential relationship existing between the debtors and the defendant as executor and trustee of their father's will which raised a presumption that the execution was obtained by the undue influence of the defendant, a presumption which was not negatived.

Their Lordships find it difficult to bring this case within measurable reach of the important principle of equity which is involved. At the date of the mortgage in question, the five debtors were aged respectively 44, 41, 37, and 31. They had been all their lives engaged in business, and for two years on their own account. They had taken over a liability to the bank; and had got their uncle to make them the necessary advance against the security held by the bank and a promise of other security. The uncle had made the advance: he was an equitable mortgagee by deposit of the title deeds, and the document gave him a legal mortgage. There had been a previous legal mortgage in existence since February, 1927, and there had been prolonged opportunities for the brothers to discuss the matter and take what legal advice they desired. Two of the brothers were themselves in the same fiduciary relationship to the other three as the defendant, for they were also executors and trustees of the testator's will. In these circumstances, to suggest that the transaction between experienced business men did not represent the independent volition of the mortgagors appears unfounded. Whether it be preferable, using the words of Lindley, L.J. in *Allcard v Skinner* [1], to say that the bargain was based on the ordinary motives on which ordinary persons act, so that no presumption ever arose, or to say that assuming that a presumption arose from the relation, the existence of any undue influence in bringing about the transaction was clearly rebutted, it seems unnecessary to decide. Their Lordships are clearly of opinion that there is no ground for setting aside the mortgage deed. Counsel for the defendant pointed out that in any case a difficulty arose in respect of the relief given, inasmuch as one of the mortgagors was the unmarried sister who brought in some of her own property and was neither a debtor nor a party to the action. But in the result just stated it becomes unnecessary to consider this.

It is necessary to consider the remaining claim for relief. The plaintiff attacked the two agreements of 1922 and 1926, and also asked for accounts of the partnership of Levy & Co. dissolved in June 1921, and of the dealings between the defendant and the debtors since 1921. The attack on the agreements of 1922 and 1926 is on the ground of undue influence. The learned judge directed an account "as at the time Isaac Abraham Levy claims to have severed his connection with the firm of Levy & Co." He was of opinion that this account might have some bearing on the agreement dated 7 June 1926, and therefore, as recited in the formal judgment, reserved his opinion on the questions raised on "these agreements."

It appears to their Lordships that as long as the agreement of 1926 stands, the plaintiff is not entitled to the account ordered. In their Lordships' opinion that agreement clearly proceeded on the footing that the existing accounts were stated and settled thereby. The five brothers had been carrying on the business at Gibraltar since 1921 or 1922, and were fully

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[1] (1887) 36 Ch. D. 145, at p. 185.

capable of deciding whether the statement of accounts then made required any further investigation, and whether it was a good business proposition to accept the Gibraltar business on the footing of the detailed figures contained in the agreement. Balance sheets of the firm had been prepared for each of the years since 1921, and there was no suggestion and certainly no proof of either fraud or mistake in the figures; nor any relief asked for or granted on that footing. In these circumstances, it would appear that the plaintiff had no right to the account granted unless and until he could set aside the agreement of 1926. It would be contrary to all principle to allow the account to be taken as a form of fishing discovery seeking material for attacking the agreement by which they were stated and settled.

Enough has been said to indicate that the order of the court must be set aside so far as it gave any relief to the plaintiff. But the question still remains whether the Chief Justice was right in reserving the question as to setting aside the agreements, presumably that of 1922 as well as that of 1926. Apparently the Chief Justice was not prepared, on the evidence then before him, to come to a decision in favour of the plaintiff: and in this he was manifestly right. Their Lordships find it unnecessary to repeat what they have said on the same topic in reference to the mortgage of 1928. The circumstances were much the same as in the later transaction, except that in 1926 the sons were two years, and in 1922 six years, younger. There was, it is true, no antecedent agreement to go into partnership; but the transactions in both cases were most natural and almost inevitable. The elderly surviving partner, who wished to retire first, takes his nephews, the sons of his former partner, into partnership and then transfers to them the part of the business at Gibraltar where their father and they resided, in which they had been engaged from their youth, and which they had managed since their father's death. It is true that the terms were drafted by the uncle: but there was ample time given for consideration and for suggested amendments, and one at least was made. In their Lordships' opinion, the evidence establishes that the bargains made in 1922 and 1926 were, as far as the brothers were concerned, the result of a free and independent exercise of their own judgement, whether there be a presumption of undue influence or not. There appears, therefore, to be no reason for reserving any further consideration of this case. In their Lordships' opinion, the appeal should be allowed and the action dismissed with costs, and their Lordships will humbly advise His Majesty accordingly. The appellants must have the costs of this appeal.