1980 November 5

[L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, JJ.]

DINOS COUDOUNARIS,
Appellant-Defendant,

v.

WINNIFRED L. COUDOUNARIS,
Respondent-Plaintiff.

(*Civil Appeal No.* 4928).

Civil Procedure—Appeal—Time within which to file appeal—Computation—Date on which judgment appealed from was delivered excluded—Section 31(a) *of the Interpretation Law, Cap.* 1—*Order* 35 *rule* 2 *of the Civil Procedure Rules.*

Contract—Undue influence—Defendant getting a benefit from the contract and acting all along upon legal advice—Section 16 *of the Contract Law, Cap.* 149—*Extension of the law of undue influence by* Mutual Finance Ltd. *v.* John Wetton & Sons Ltd. [1937] 2 *All E.R.* 657—*Whether applicable in Cyprus.*

On July 9, 1968 the appellant-defendant (defendant 2 in the Court below) and his brother (defendant 1 in the Court below) who was the husband of the respondent-plaintiff signed five bonds in favour of the respondent for the sum of £15,000. The signing of the bonds in question was the result of a settlement between the parties which was reached with the help of a common friend, who was asked by the parties to act as a mediator; and the settlement was reached in the course of a meeting at his house which was attended only by the two brothers, the respondent and her advocate being on call. What gave rise to the dispute between the parties was the institution of an action by the respondent against the two brothers claiming £50,000 for services rendered to them. Whilst this action was pending two banks, to which the business group of the two brothers were heavily indebted, exerted pressure on them for payment of their debts, making it conditional to the removal of that pressure, the withdrawal or postponement of the aforesaid action of the respondent against them.

In an action by the respondent for £6,000 under two of the

above bonds the trial Court having found, *inter alia*, that throughout the negotiations defendant 2 was represented and advised by an advocate; and that the claim of the respondent-plaintiff was an old and outstanding one gave judgment against defendant 2 for the sum of £6000.— Defendant 1 in the Court below entered no appearance and judgment was given against him by default.

Upon appeal by defendant 2 counsel for the appellant mainly contested the above findings of the trial Court and argued further that the bonds in question were induced by undue influence.

Regarding the question of undue influence this was answered in the negative by the trial Court which held that under Cyprus Law undue influence could only be a ground for avoiding a contract if it was exercised by or on behalf of a party and not a third party. The trial Court, further, assumed that the common law principles and all English decisions on the matter were applicable, and proceeded to examine whether the extension of the law of undue influence, as enunciated in the case of *Mutual Finance Ltd.*, v. *John Wetton & Sons Ltd.*, [1937] 2 All E.R. 657, could be invoked in this case; and concluded that the principle in the *Mutual Finance* case could not apply to the facts of this case even if it was part of the law of Cyprus. The differentiation made by the trial Court rested, in particular, on the fact that the appellant received a benefit from this settlement and that the whole matter was negotiated through lawyers.

Counsel for the respondent argued, by way of preliminary objection that the appeal had been filed out of time because it was filed within a period of 43 days from the date of the judgment appealed against and not 42 as provided by Order 35, rule 2 of the Civil Procedure Rules. Counsel submitted that the day the judgment was delivered should be included in the computation of time inasmuch as the judgment became binding on the day it was delivered.

Held, (I) *on the preliminary objection:* That in computing the time, in the present case, the date on which the judgment appealed from was delivered must be excluded and counting of the period of 42 days should commence as from the following day; that, therefore, this appeal has been filed within the prescribed time; and accordingly the preliminary objection must fail (see section 31 of the Interpretation Law, Cap. 1).

Held, (II) *on the merits of the appeal:* That on the totality of the evidence, both oral and documentary, the conclusions of the trial Court were duly warranted and this Court has not been persuaded that there exist reasons justifying it on appeal to interfere with these findings of fact or conclusions drawn therefrom; that on the facts as found by the trial Court no undue influence has been established; and that, accordingly, the appeal must fail.

Appeal dismissed.

Cases referred to:

Radcliffe v. *Bartholomew* [1892] 1 Q.B. 161;

Mutual Finance Ltd. v. *John Wetton & Sons* [1937] 2 All E.R. 657.

Appeal.

Appeal by defendant No. 2 against the judgment of the District Court of Nicosia (Stavrinakis and Stylianides, D.J.J.) dated the 7th July, 1970 (Action No. 2600/69) whereby he was adjudged to pay to plaintiff the sum of £6,000—owed under two bonds.

Chr. Demetriades, for the appellant.

C. Glykys, for the respondent.

Cur. adv. vult.

L. Loizou J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou:

A. Loizou J.: This is an appeal by defendant 2—appellant, against the judgment of the Full Court of Nicosia by which (a) he was adjudged to pay to the plaintiff-respondent the sum of £6,000.- owed under two bonds with interest on £3,000.- at 6% per annum from 2nd February, 1969, and on the other £3,000.- at 6% per annum from 3rd May, 1969, to date of payment and the costs of the proceedings, and (b) his counterclaim was dismissed.

At the commencement of the hearing of this appeal and by way of preliminary objection, it was argued by counsel for the respondent that same had been filed out of time. The Court reserved its ruling on the point and heard also the appeal on the substance. In counting the days that passed between the date the judgment appealed from was delivered and the date this appeal was filed, one finds that the latter is the forty-

third day if the former is included in the counting and the forty-second if the first is excluded and the counting starts as from the day following the first.

The argument advanced on this procedural point is that in view of the wording of Order 35, rule 2, of our Civil Procedure Rules, the day the judgment was delivered should be included in such computation of time inasmuch as the judgment became binding on the day same was delivered, and this in view of the wording of Order 34, rule 2.

Order 35, rule 2, in so far as relevant, reads as follows:

> "..... no other appeal shall be brought after the expiration of six weeks, unless the Court or Judge, at the time of making the order or at any time subsequently, or the Court of Appeal shall enlarge the time. The said respective periods shall be calculated from the time that the judgment or order becomes binding on the intending appellant, or in the case of the refusal of an application, from the date of such refusal .....".

It is common ground that no order to enlarge the time was obtained and therefore the issue has to be examined in that perspective.

Order 34, rule 2, provides that:

> "Every judgment when entered shall be dated as of the day on which it was pronounced and shall, save where it otherwise directs take effect from that date .....".

Order 64, rule 12, of the Old English Rules provided that:

> "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day".

In the Annual Practice of 1958 there appears the following comment by reference to the case of *Radcliffe* v. *Bartholomew* [1892] 1 Q.B., 161:

> "So where by statute a prosecution had to be launched 'within one calendar month after the cause of such complaint shall arise', and the act complained of was committed

on May 30, and the information laid on June 30, it was in time".

There does not exist a corresponding rule in our Rules but section 31 of the Interpretation Law, Cap. 1, and in particular paragraph (a) thereof reads as follows:

"In computing time for the purposes of any Law or public instrument unless the contrary intention appears—

(a) a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;".

This statutory provision, in our view, supplements, with its wide application regarding the computation of time for the purposes of any law or public instrument, the gap that exists in the Civil Procedure Rules and there does not appear from the wording of Order 35, rule 2 or Order 34, rule 2, to exist any intention whatsoever to exclude the manner of computation provided for by the aforementioned section 31, paragraph (a) of the Interpretation Law.

In the computation of time, therefore, in the present case, the date on which the judgment appealed from was delivered must be excluded and counting should commence as from the following day. In view of this the present appeal cannot but be found to have been filed within the prescribed time and therefore this preliminary objection fails.

We turn now to the examination of the appeal on the substance. The respondent in this appeal was the wife of defendant 1 and the appellant (defendant No. 2 in the Court below) was the brother of defendant 1, who entered no appearance and judgment was given against him by default. The case, however, was contested and heard as between the appellant and the respondent in this appeal.

The two brothers were in business together, either as partners and under various trade names, or as shareholders and directors of various companies. The respondent in 1967 instituted an action against the two brothers claiming £50,000.— for services rendered to them for a period of about 25 years. Whilst same was pending, the Ottoman Bank and the Bank of Cyprus Ltd.,

to which the business group—in one capacity or other—of the two brothers was heavily indebted, exerted pressure on them for payment of their debts, making it conditional to the removal of that pressure, the withdrawal or postponement of the aforesaid action of the respondent against them.

In an effort to negotiate a settlement between the two brothers and the respondent, the late Lefkios Zenon, a retired Judge, obviously a person of common trust, was asked and acted as a mediator. The meeting took place at his house but was attended only by the two brothers and the respondent and her advocate were on call. Later on her advocate attended the meeting at the house of the mediator, but only defendant 1 was present. The claim of the respondent was then settled for £15,000.— and on the 9th July, 1968, five bonds were issued by the two brothers, the two defendants in the said action, in favour of the respondent, for £3,000.— each. Two of these bonds were the subject-matter of the present proceedings and the other three are the subject-matter in three other actions pendings in the District Court of Limassol, under Nos. 4232/69, 5424/69, 985/70, which were agreed not to be heard as the final adjudication upon the present proceedings would be considered as deciding also the outcome of the aforesaid three actions.

This settlement was not much discussed after the meeting of the two brothers with the late Mr. Zenon and when the respondent and her counsel joined them. It was however the finding of the trial Court that though the respondent did not appear to have taken a very active part in the negotiations, yet, having impressed them as a very shrewed and clever woman taking a keen interest in her affairs, it was highly improbable to have left her interest unrepresented during negotiations for the settlement of a case involving many thousand pounds. The Court then went on to say:

> "Obviously somebody was negotiating on her behalf and this person must have been a trusted one such as her husband or her advocate. It is the allegation of the defendant that the husband of the plaintiff was acting as the latter's agent, but in view of his dual and conflicting capacity we cannot from the material we have before us infer safely that the husband was authorized to negotiate on

her behalf or even if he was acting as the plaintiff's agent what was the extent of his authority so as to draw the line between acts and promises made as agents or as an interested party himself. However, what is not a mere conjecture but a safe inference is the fact that the plaintiff knew perfectly well what was going on either directly or through her husband, lawyer or other persons and also because of her active participation in the business of the defendant. There can be no doubt that she knew of the pressure put on the defendant. Any allegation of hers that she did not know what was going on or what was the actual financial position of the defendant we reject as obviously unnatural and incredible".

The Court then summed up its findings as follows:

"A. The defendants were under pressure.

B. The pressure was not put on by the plaintiff or on her behalf.

C. The pressure put on by the Banks was in the nature of taking legal proceedings unless the action of the plaintiff was either withdrawn or postponed. Bankruptcy was not mentioned but it could not be excluded.

D. The plaintiff knew about the pressure during the negotiations.

E. Throughout the negotiations the defendant was represented and advised by an advocate.

The problem the defendants were facing at the time of signing the bonds was that irrespective of whether it was a good settlement or not, they were facing the prospect of legal proceedings against them by their creditors and at the time they were not in position to meet their claims. We do not accept as sound the allegation that at the time of signing, the defendant was worrying about the fainting spells of his brother or the latter's strained relations with the plaintiff. We cannot say that there was no consideration for the bonds. On the contrary, it appears from the evidence before us and in particular the telegrams sent by the plaintiff to the defendants that her claim was an old and outstanding one for years and furthermore not

only there is no rejection of such a claim but on the contrary there is acknowledgment of the liability if not any particular amount".

The appellant contested, however, finding (E) above. It was argued that the trial Court was probably, as it was put, misled from correspondence exchanged to the contents of which we need not refer in view of the conclusion which we are about to give on this point.

Another factual aspect of the case which has been questioned by the appellant is the finding of the trial Court to the effect that the respondent's claim was an old outstanding one for years and that not only there was no rejection of such a claim, but that on the contrary there was acknowledgment of the liability if not of the particular amount.

On the totality of the evidence, both oral and documentary, we find that the conclusions of the trial Court were duly warranted and we have not been persuaded that there exist reasons justifying us on appeal to interfere with these findings of fact or conclusions drawn therefrom.

A number of legal and factual issues were raised in these hotly contested proceedings and the trial Court dealt with each one of them. One of the issues was that the bonds in question were induced by undue influence and it dealt in extenso with the meaning and effect of section 16 of our Contract Law, Cap. 149, and the case of *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.* [1937] 2 All E.R. p. 657.

This case was considered to have extended the doctrine of undue influence under Common Law to cover cases where the undue influence which usually arises in contracts made between relatives and persons in a fiduciary position to contracts between third parties. As stated in its editorial note "this case involved some extension of the law of undue influence but did nothing to define the limits of the doctrine".

It was the trial Court's view that as the Law stands in Cyprus, undue influence could only be a ground for avoiding a contract if it was exercised by or on behalf of a party to it and not be the result of the independent acts of a third person and that the law of England differed in this respect from the law of Cyprus

and the corresponding identical provision of the Indian Contract Act. They said: "To hold otherwise is like accepting an amendment of our statutory provision and not just its interpretation, qualification or illustration by judicial decision of the English Courts based on Common Law which can be extended and even amended by judicial decisions notwithstanding the known English adherence to existing legal procedure .....".

We need not, however, pronounce on this interpretation as the trial Court having answered this question as it did in the negative, it went on, proceeding on the assumption that the Common Law principles and all English decisions on the matter were applicable in Cyprus, including the extension of the Common Law as enunciated in the *Mutual Finance* case (*supra*), to answer the second question, namely, whether the facts of the case could bring this doctrine—if applicable—into operation in favour of the appellant. For the purpose it recapitulated the facts of the case as follows:

> "The bonds in question were signed with full knowledge of what they were doing. The Banks were pressing the defendants but as we have already said the pressure had nothing to do with the plaintiff. Also we cannot say that there was no consideration for the bonds especially after the statement of defendant that the bonds were intended to be paid in case their business ameliorated and the property of the companies was sold. The defendant was acting all along with legal advice".

From the aforesaid facts it pointed out the difference with the *Mutual Finance* case and concluded that the principle in the *Mutual Finance* case could not apply to the facts of the case even if it was part of the law of Cyprus. The differentiation made rested in particular on the fact that the appellant received a benefit from this settlement and that as already held by it, the trial Court was not satisfied that at the time he was concerned about the health of his brother and his relation with his wife and that that amounted to mutual distress sufficiently strong to affect his free consent. It also felt that it need not go any further into the factual aspect of the case as the whole matter was negotiated through lawyers and its outcome, in spite of the pressure, was a settlement to the interest of the appellant and his codefendant.

On the aforesaid facts, therefore, as found by the trial Court this appeal should fail as we have already said that we are not prepared to interfere with there findings of fact and conclusions drawn therefrom. In view, however, of the particular circumstances of this case we make no order as to costs.

Appeal dismissed. No order as to costs.