Privy Council Appeal No. 16 of 1937

Martin Cashin and others - - - - - - *Appellants*

v.

Peter J. Cashin - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEWFOUNDLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1938.

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD WRIGHT.
LORD MAUGHAM.

[*Delivered by* LORD MAUGHAM.]

This is an appeal from the judgment of the Supreme Court of Newfoundland (Sir William H. Horwood C.J., Kent J. and Higgins J.) given on the 8th January, 1937, dismissing by a majority (Kent J. dissenting) an appeal from the judgment of Sir William H. Horwood C.J. given on the 21st July, 1936. By the judgment it was ordered that an agreement under seal dated the 8th September, 1927, to which the appellants and the respondent were parties be set aside, and declared to be null and void.

The agreement under seal dated the 8th September, 1927 (which will be referred to as "the deed") related to the estate of Sir Michael P. Cashin who died on the 30th August, 1926. He left surviving him his wife, the appellant Gertrude C. Cashin (Lady Cashin) and four adult children, the appellants Lawrence V. Cashin, and Martin Cashin, the respondent Peter J. Cashin, and a married daughter Mrs. Mary Fox.

Sir Michael Cashin had made his last will on the 15th November, 1925. By it the appellants Lady Cashin and Lawrence Cashin were appointed to be the executors. He bequeathed to each of his sons $40,000, and after some small charitable and other legacies he bequeathed the residue of his estate to Lady Cashin for life and after her death to his three sons in equal shares. The two executors proved the will on the 20th September, 1926. According to the inventory and valuation of the property filed with the petition for letters of probate the total value of the estate was $99,496. The sum of $4,702, being the duty payable on this amount under the (Newfoundland) Death Duties Act, 1914 to 1916, was promptly paid. On this footing the estate

was insufficient to pay the legacies in full and in fact the three sons would have received roughly only $20,000 apiece, and there would have been no residue.

Sir Michael in the year 1924 had made or at least attempted to make some large gifts to Lady Cashin. In particular he had, in circumstances which were investigated at the trial, transferred to her $300,000 Dominion of Canada 5 per cent. 1943 Bearer Bonds. That transaction took place on the 8th May, 1924. He also on the same day had given to her $40,000 which had been standing to his account at the Montreal Trust Company, St. John's; and on the 21st May, 1924, he gave to her a further sum of $20,000 which had been standing to his account at the Bank of Montreal, St. John's. No attempt has been made by any person to impeach either of these latter gifts; but the respondent alleged in the action that the gift of the bonds was imperfect and therefore void; and it is necessary to state certain undisputed facts as to this alleged gift.

Sir Michael had purchased the bonds through agents in Canada in March, 1924, and they were forwarded to him at the Bank of Montreal, St. John's. After the arrival of the bonds Sir Michael with his son Mr. Lawrence Cashin, went to the Bank of Montreal, took possession of the bonds and placed them in a safety deposit box rented by him in the vaults of the Royal Bank of Canada, and in which he kept his personal papers and securities. Shortly afterwards, Sir Michael, wishing to present these bonds to his wife as a gift, consulted his son-in-law, Mr. Cyril J. Fox, K.C., a lawyer of experience practising in St. John's, as to how he could effect the gift. The interview with Mr. Fox took place in Sir Michael's bedroom at his home in the presence of Lady Cashin and of his son Mr. Lawrence Cashin. Sir Michael told Mr. Fox of his intention to give the bonds to his wife and asked him what he should do to carry out his intention. Mr. Fox told him he might do so either by deed or by manual delivery of the bonds themselves to Lady Cashin. Accordingly on or about the 8th of May, 1924, shortly after his conversation with Mr. Fox, Sir Michael, accompanied by his son Mr. Lawrence Cashin, went to the Royal Bank of Canada for the purpose of transferring the bonds to Lady Cashin. At the bank he was told by the officials that it was necessary for Lady Cashin to be present to effect the gift and sign the lease of the deposit box to be issued to her for the safe keeping of the bonds in place of that previously held by Sir Michael. Mr. L. V. Cashin then went home for Lady Cashin and brought her to the bank for this purpose. Sir Michael surrendered his lease of the deposit box to the bank and the bank issued a fresh lease of the deposit box to Lady Cashin. She then executed a printed form on the back of the lease the substance of which (the original has long since been destroyed) was in these terms:—

> "I hereby designate 'Sir Michael Cashin and Mr. Lawrence Cashin' as my deputies to have access to and control of the

> contents of Safe Deposit Box " (giving the number) " now rented by me in the vaults of the Royal Bank of Canada," etc., " until this authority is revoked in writing to the Bank."

It should be added that at this date Mr. Lawrence Cashin was living at home with his father and mother.

If the matter had rested upon these undisputed facts it seems to their Lordships that no question as to the validity of the gift of the bonds could have arisen; but Sir Michael, after his return to Newfoundland from a visit to England on account of his health, in the summer of 1924 and until his death some three years later, used his power under the proxy form above set out to collect and cash the coupons attached to the bonds. This circumstance, in a case where —as here—husband and wife are living in amity together, is capable of an easy explanation, but it is to be observed that in this case no explanation of it was given at the trial. Two other facts may be mentioned as possibly having some bearing on the question of the completeness of the gift. Sir Michael continued to pay income tax on the bonds. This would be natural enough if there were evidence that he was collecting the coupons with Lady Cashin's consent. The other circumstance is the magnitude of the bequests in his will. This has always been regarded as of very slight importance as an indication to negative a previous gift or advancement (Comp. *Dummer* v. *Pitcher* 2 My. & K. 262, at p. 276). Moreover the will read as a whole contains some indication that he did not consider the bonds to be his. After his conversation with his son-in-law and the transaction at the Royal Bank of Canada on the 8th May, 1924, it does not seem an unlikely conjecture that, if he had desired the bonds which he had placed in the possession of his wife to pass under his will, he would have mentioned them in terms. A will speaks from the death of a testator. Sir Michael may have expected or at least hoped when he made his will to gain large sums of money before his death. In fact he gave up his position and his interest in the family business of Cashin and Company on the 1st December, 1925, and died suddenly some nine months later.

As has been stated, death duties on the estate had been paid on the footing that the bonds had been given to Lady Cashin over two years before the death, the period before death necessary to enable the executors to escape the payment of duties in respect of a gift under the law of Newfoundland. Some six months later endeavours were made on behalf of the Minister of Finance to obtain payment of death duties on the bonds on the footing that they formed part of the estate, the contention being based on the fact that Sir Michael had collected and used the interest on the bonds during his lifetime. Affidavits by Mr. Lawrence Cashin and Lady Cashin to establish the gift did not succeed in getting the revenue authorities to abandon the claim. The respondent Mr. Peter Cashin was then made acquainted with the contention put forward by the Government, and he and Mr. Lawrence Cashin

interviewed Sir John Crosbie, the Minister of Finance, who explained to them the Government's contention. They were unable to persuade him to abandon it. In August, 1927, a formal claim was made for payment of death duties in respect of the bonds.

When this claim was received Mr. Lawrence Cashin again consulted with the respondent, who, it should be mentioned, was at this time his partner, as to the course that should be pursued. They went to see first Mr. Wood, K.C., and then another lawyer, Mr. Howley, as to whether or not the estate was liable. According to the respondent the advice of these gentlemen was not encouraging; and ultimately in order to avoid publicity and the necessity of Lady Cashin appearing in Court it was decided that the payment should be made.

On the 24th August, 1927, a cheque for 25,257 dollars 56 cents was forwarded to the Minister of Finance by the executors in settlement of the claim for additional death duties. The letter accompanying the cheque contained the following passage:—

> "We beg to enclose certified cheque for $25,257.56 amount of said corrected assessment, but in doing so we desire it to be distinctly understood, that we do not depart from our contention, that the Canadian Bonds were at the time of Sir Michael's death the property of Lady Cashin.
>
> "We are advised, however, that principally owing to the fact, that the interest on these Bonds was placed to the credit of Sir Michael Cashin, that the Bonds although the property of Lady Cashin, are technically liable for the Death Duties.
>
> "We therefore make this payment without prejudice to the ownership of Lady Cashin."

A few days later the deed which is the subject of the appeal and which had been discussed for some time previously was executed by the four persons concerned, namely, Lady Cashin and her three sons. It undoubtedly binds the respondent unless it can be established that there is some sufficient ground in equity for setting it aside. There is no suggestion of fraudulent representation raised by the pleadings and no allegation which would support a plea of *non est factum*.

The deed (omitting attestation and signatures) was in these terms:—

> "THIS INDENTURE made the 8th day of September Anno Domini One thousand nine hundred and twenty-seven BETWEEN GERTRUDE C. CASHIN of Saint John's in the Island of Newfoundland Widow of the first part PETER J. CASHIN of the same place MERCHANT of the second part MARTIN F. CASHIN late of Montreal in the Dominion of Canada (but at present of Saint John's in the Island aforesaid) Doctor of Medicine of the third part and LAWRENCE V. CASHIN of the same place Merchant of the fourth part.
>
> "WHEREAS Michael P. Cashin of Saint John's Merchant died on or about the 30th day of August Anno Domini One thousand nine hundred and twenty-six having previously made and executed his last Will and testament in which he bequeathed certain pecuniary legacies to the party of the first part and other parties AND WHEREAS Probate to the Will of the said deceased was granted by the

Supreme Court of Newfoundland to Gertrude C. Cashin and Lawrence V. Cashin the Executrix and Executor therein named AND WHEREAS the Estate of the said Michael P. Cashin is insufficient to pay the legacies bequeathed by his said Will and WHEREAS prior to his death on or about the 8th day of May Anno Domini One thousand nine hundred and twenty-four the deceased transferred and made over to the said Gertrude C. Cashin certain Bonds of the Government of Canada to the par value of Three Hundred Thousand Dollars for her sole and absolute use and benefit AND WHEREAS payment of Death Duties in respect of the said Bonds was claimed by the Government of Newfoundland and settlement in respect of the said claim was made AND WHEREAS the parties hereto are desirous of carrying into effect the wishes of the said deceased as set forth in his said Will and by the said transfer of the Bonds to the said Gertrude C. Cashin, NOW THIS INDENTURE WITNESSETH in consideration of the premises and by way of family arrangement the parties hereto hereby agree as follows:—

"1. The party of the first part agrees and undertakes to provide such a sum over and above the realised value of the Estate of the said deceased as will be sufficient to pay all the liabilities of the said deceased at the time of his death and all Death Duties paid or payable to the Government of Newfoundland in respect of his Estate and all the pecuniary legacies bequeathed by the said deceased by his said Will (including the legacies to the second third and fourth parties) in full.

"2. The parties of the second third and fourth parts hereby do and each of them doth recognise and admit the validity of the said transfer and making over to the said Gertrude C. Cashin of the said Bonds of the Government of Canada and hereby release the said Gertrude C. Cashin from any claim of them or either of them in respect thereof and in so far as they may or can have and do hereby confirm the said Bonds unto the said Gertrude C. Cashin absolutely freed and discharged of any claim which they or either of them has or may or can have upon the said Bonds or any part thereof."

There is no difficulty in understanding this deed. It might have been better to recite that doubts had arisen as to whether the transfer to Lady Cashin had been so completed that, notwithstanding the collection and retention of the coupons by Sir Michael, the bonds became the property of Lady Cashin on the 8th May, 1924; but the respondent as well as his brothers was fully conscious that it was on this ground that the claim of the Government was made, and the respondent himself was well aware of the doubts which had existed, since he had accompanied Mr. Lawrence Cashin on the visits both to Mr. Wood, K.C. and to Mr. Howley to obtain advice as to whether the claim of the Government could safely be resisted. In these circumstances the deed states in plain terms that Lady Cashin is to provide a sum sufficient to pay the additional estate duty and all the pecuniary legacies in full, and on the other hand, her three sons are to give up any claim against her in relation to the bonds. The deed does not purport to be, nor is it in substance, an agreement by the executors with the beneficiaries. Lady Cashin was in possession of the bonds and plainly thought, and, it may be added, had stated on oath, that she had a good title to them. Mr. Lawrence Cashin, the other executor, was of the same opinion and had pledged himself

in that sense by an affidavit of the 7th March, 1927. The respondent if he had wished to contest the validity of the gift would have had to obtain the leave of the Court to use the name of Mr. Lawrence Cashin, upon a proper indemnity, to sue Lady Cashin. He might well hesitate a long while to take such a step: and there was a family reason against it, namely, the fact that the daughter Mrs. Mary Fox had been left out of the will, and that it was desirable to place Lady Cashin in a position to provide for her.

After the deed was executed, its provisions so far as Lady Cashin was concerned were at once carried out. On the 9th September, 1927, Mr. Martin Cashin received the sum of $20,000 the balance of his legacy of $40,000. The first $20,000 had been paid to him on account on the 18th June, 1927, to enable him to open an office in Montreal. The respondent and Mr. Lawrence Cashin each received his legacy of $40,000, or an equivalent in Canadian bonds, either on the 9th September, 1927, or shortly afterwards. Their Lordships are well aware that the respondent stated that he had received his legacy in October or November, 1926; but on careful consideration of the evidence they are satisfied that this is not correct. His recollection in some other respects was plainly shown to be unreliable, and Mr. Lawrence Cashin was quite certain that no such payment or handing over of bonds was made to him till after the deed which alone made such a payment or handing over a proper one.

So far as the evidence goes, peace reigned in the family till October, 1930. At that time the respondent asked Mr. Lawrence Cashin to destroy the deed, a request which, of course, was not complied with. The action was commenced in the year 1936. The delay in commencing it is not explained. It is sought to set aside the deed mainly on the ground that it constituted a release or gift of the bonds to a person in a fiduciary position based upon statements therein which did not accord with the facts. In the alternative it is contended that the deed if intended to take effect as a family arrangement was an agreement *uberrimae fidei* casting upon the executors of Sir Michael Cashin a duty of full disclosure which they failed to fulfil. The assumption on which both these contentions rest is that the bonds had not been the subject of a complete gift by Sir Michael to Lady Cashin and therefore at his death formed part of his estate. It seems to their Lordships that this is not the correct method of approach to the question whether the deed can now be set aside. The proper course is first to consider the true nature of the transaction embodied in the deed, and, secondly, to ascertain what facts as to the alleged gift were then known to the parties including the executors and what representations, if any, were made to or what facts were withheld from the respondent.

On the first point it seems clear to their Lordships that the deed is framed and takes effect as a family arrangement. It does not in any true sense purport to be a sale; it is a

release by the three sons of a doubtful claim against their mother. It is an entire mistake on the admitted facts to treat Lady Cashin as if at the date of the deed she were a trustee of the bonds for the beneficiaries, and that is so even if *ex post facto* it were to be decided that the gift had not been completed. Further it is clear that Lady Cashin's position as regards the deed was just the same as if she had not proved the will of Sir Michael. She had no information as an executrix as to the validity of the gift or the want of it which she did not possess before her husband's death, and her position as executrix gave her no advantage in coming to an agreement with her sons. Nor does the deed involve a family agreement tainted in fact even remotely with undue influence. There is here no suggestion, to use a celebrated phrase, of influence being acquired and abused, or of confidence being reposed and betrayed (*Smith* v. *Kay* (1859) 7 H.L.C. 750, at p. 779).

In this view of the transaction it seems to their Lordships that the law as laid down by Lord Eldon L.C. as long ago as the year 1819 in the case of *Gordon* v. *Gordon* (3 Swans. 400, at p. 463) is apposite:—

> "Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties."

It will be noted that there is no mention of a necessity for independent advice, and that the agreement may well stand though the parties have greatly misunderstood their situation. On the other hand, no doubt there are cases in which a young and inexperienced person, more particularly if he is contracting with persons with whom he is not, owing to their position or experience or for some other reason, on equal terms, ought as a matter of fairness to be separately advised. In the present case the respondent was not only of more than the age of discretion, but he was a merchant of such knowledge, experience and ability that he was appointed in the next year to be Minister of Finance. If there was any inequality in relation to capacity to contract as between him and his mother it was clearly not due to an insufficiency on the side of the former.

Their Lordships have then to consider whether the transaction was founded upon falsehood or misrepresentation, including in that term a concealment of material facts, and whether it was unfair having regard to the circumstances as then known to the other parties to the deed. It has already been observed that no actual misrepresentation whatever is alleged in the statement of claim. A concealment of any material fact would no doubt be just as serious

as a misrepresentation (see *Gordon* v. *Gordon supra* at pp. 470, 473, 476), and a failure to make full and complete disclosure of the assets of the estate (apart from the bonds), was indeed alleged in the particulars; but this allegation was disproved at the trial and is not now relied on. At the trial the respondent swore that the deed was brought to him at his office (meaning the partnership office) by his brother Lawrence, and that he had never seen it before. According to his account it already had on it the signature of his mother. Mr. Lawrence Cashin said to him "Mr. Wood" (the family solicitor) "has drafted this and mother feels that she should get back these death duties by us signing this and we feel this is a legal opportunity of getting back the death duties". The respondent alleges that he expressed an opinion that they would not get back the duties, and then signed the deed without reading it. The appellant Martin Cashin was also present and, according to the respondent, he read it and signed it and said he did not think it was worth the paper it was written on. If he said so it could only be in regard to recovery of the duties that he made such a remark for anyone capable of transacting business must have seen that by it Lady Cashin was making herself liable to pay a large sum (more than $60,000) and was being released from any claim to the bonds. Mr. Lawrence Cashin's account of the matter was different in important respects. In particular he swore that the deed had been talked over repeatedly in the family and that the respondent was fully aware of its contents. Their Lordships must observe that on the respondent's own showing the deed, being executed with a hope of getting a return of the duty on the bonds, must obviously have contained in some form or other a formal and final assertion, admission or acknowledgment of the validity of the gift of the bonds, since that was the only point in dispute with the Government. Nor can it be forgotten that the respondent had been a party to at least three discussions on the matter, the first with the Minister of Finance, a second with Mr. Wood and a third with Mr. Howley, that he was a partner with Mr. Lawrence Cashin and was constantly seeing him, that there was nothing whatever to prevent him reading the deed as his brother Martin in fact did, and that it is impossible to believe that his brother and partner, Mr. Lawrence Cashin, who had in fact four copies of the deed in his hand, could have expected that the respondent would not read it. There is no suggestion of surprise or hurry on the occasion when the deed was executed. A statement in the witness-box by the respondent that it looked as though Lady Cashin and his two brothers, to say nothing of the family lawyer, Mr. Wood, had submitted the deed to him for his signature on the chance that he would not read it, which involves an imputation of a gross and disgraceful and a most foolish fraud, is one which is plainly without foundation.

Their Lordships wish to add that in a case where the person executing the deed is neither blind nor illiterate,

where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him—not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed.

There remains for consideration as a factor in the case the matter of the fairness of the transaction embodied in the deed. In view of the facts as known to Lady Cashin and Mr. Lawrence Cashin, and to Mr. Martin Cashin, was the transaction one which was unfair to the respondent? This is not a matter of balancing values which can be actuarially ascertained. An arrangement of the kind under consideration would not be unfair merely because it was generous on the one side or the other. For example, family resettlements executed between father, tenant for life, and son, tenant in tail, the latter being advised by the same solicitor as the former, have been considered reasonable and supported by the Court even though, from a pecuniary point of view, the son's position is greatly prejudiced. (See *Savery* v. *King*, (1856), 5 H.L.C. 627 at p. 657; *Fane* v. *Fane*, L.R. 20 Eq. 698 and cases there cited.) A parent can be generous to a son, or legitimate children to an illegitimate one, or a son to a mother upon the occasion of a family arrangement without its being proper or possible in equity, merely on that ground, to suggest that the arrangement is an unfair one and ought to be set aside. It would indeed be strange if an agreement entered into by parties of full contracting capacity could be set aside in equity because, regarded from the standpoint of the family, it was generous as well as just.

It should be stated that there was another and a serious difficulty in the path of the respondent which their Lordships think it right to mention lest it should be thought that it has escaped notice. There are several authorities which establish the proposition that an imperfect gift followed by the appointment of the donee as executor, the intention to give continuing, entitles the donee to the property (*Strong* v. *Bird* (1874) L.R. 18 Eq. 315; *In re Stewart* [1908] 2 Ch. 251; *In re Pink* [1912] 2 Ch. 528, and see as to the meaning of the words "a continuing intention" the remarks of Kennedy L.J. at pp. 538, 539). The point was not considered in the Courts of Newfoundland, and their Lordships think it better to express no opinion as to it.

In relation to the execution of the deed in this case, their Lordships have been unable to come to the conclusion that there was any material fact which was not known to the respondent bearing upon the question of the prospects of proceedings against Lady Cashin to recover the bonds. The respondent, as appears from his own evidence, had all along known that Sir Michael after May, 1924, had

collected the interest on the bonds; and he also knew of the contents of the will and of the claim by the Government. For the reasons already given the respondent could not in the circumstances have the deed set aside because it was a record of an unsatisfactory bargain on his part; but it may be well to add that in the opinion of their Lordships even that is not made out. True it is that two learned Judges including the Chief Justice, have come to the conclusion, twelve years after the event, that the completeness of the gift of the bonds was not established. Mr. Justice Kent came to an opposite conclusion. The recollection of the persons concerned so long after the transaction in May, 1924, was plainly a good deal impaired, and it was probably for that reason that Lady Cashin's evidence left several matters untouched and unexplained. Their Lordships do not think it necessary to express an opinion as to whether the bonds were effectively given to Lady Cashin or not; they are satisfied that proceedings against her in 1927 would have had very doubtful prospects of success, and on this view the deed was in no sense unfair to the respondent.

To summarise, their Lordships have come to the conclusion that there was neither concealment of material facts nor any want of fairness in the transaction embodied in the deed.

Their Lordships are accordingly of the opinion that the appeal must be allowed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

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MARTIN CASHIN AND OTHERS

v.

PETER J. CASHIN

DELIVERED BY LORD MAUGHAM

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