

THE HIGH COURT

1980 No. 2858P

IN THE MATTER OF THE COMPANIES ACT 1963
AND IN THE MATTER OF RAY-GER LIMITED



BETWEEN:

SEAN O'FLAHAGAN AND ELIZABETH O'FLAHAGAN

Plaintiff

AND

RAY-GER LIMITED FREDERICK POPE, AND MARY BOURKE

Defendants

Judgment of Mr. Justice Costello delivered the 28th day of April 1983.

*Mary P. Bourke
Registrar*

INTRODUCTION

The late Mr. James O'Flanagan and the defendant, Mr. Pope, entered into a business relationship which involved the formation of a company (the first named defendant) in which each held one share, and the acquisition by the company of a number of properties including, in particular, a shop premises (now worth, I am told, about £100,000) at 139 St. Peter's Road, Walkinstown, Dublin. The plaintiff Mr. Sean O'Flanagan is a son of the deceased Mr. O'Flanagan and the executor of his will. The plaintiff Elizabeth O'Flanagan is the deceased's widow. The first claim in these proceedings which I will consider is that the company holds the premises 139 St. Peter's Road in trust for the plaintiffs jointly or, alternatively, in trust for the plaintiff Mr. Sean O'Flanagan alone. The second claim relates to the company. After Mr. O'Flanagan's death Mr. Pope, appointed the third-named defendant a director of the company and he and his co-director then refused to register Mr. Sean O'Flanagan as a shareholder in place of his late father and, relying on a written agreement of the 15th March 1976, they claim that Mr. O'Flanagan's estate has no interest in the company and no claim on its assets. The plaintiffs claim, calling in aid certain well established equitable principles, is that the written agreement should be set aside on the ground (a) that it was procured by undue influence or

alternatively (b) that the bargain it represented was an unconscionable one; injunctive, declaratory and other relief are also claimed.

I propose in Part I of this Judgment to deal with the early part of the relationship between the deceased and Mr. Pope (who I will call the Defendant) which relates in particular (but not exclusively) to the claim that the company is a trustee of the premises; in Part II with the claim to set aside the agreement of the 15th March, 1976; in Part III to other issues that arise. In Part IV I will give my conclusions on the relief claimed by the plaintiffs.

PART I

Mr. and Mrs. O'Flanagan had lived for a number of years in England before Mrs. O'Flanagan's return to this country in the year 1963. She came for the purpose of finding a suitable premises in which she and her husband could carry on business. She succeeded in negotiating a 21 year lease of 139 St. Peter's Road, Walkinstown at an annual rent of £916 and she opened up a grocery business in it. The premises (comprising a shop with living accommodation overhead) were one of several newly constructed buildings which formed a small shopping centre. In another of the premises in the same shopping centre, at No. 129 St. Peter's Road, Mr. Frederick Pope (the second named defendant) opened up a newsagency business. In the

year 1965 Mr. O'Flanagan joined his wife and together they set about building up their business. They formed a family company (Grechills Supermarket Limited) but the arrangements between them were very informal; the lease of the premises was left in the name of Mrs. O'Flanagan and the shares in the company were not divided evenly between them. I am satisfied however, that it was intended that they would run the business on a ^{*}joint basis and that its profits were to be jointly owned. ^{*}

Unfortunately their plans did not work out as they had hoped as ill health struck Mr. O'Flanagan. He sustained his first stroke in the month of June 1967 and it was a bad one. In July of 1969 he suffered a second one and in the year 1971 a third. These so incapacitated him that Mrs. O'Flanagan was required to run the business virtually single-handed until she, in her turn, succumbed to high blood pressure. As a result, early in the year 1973, it was decided to sell the goodwill of the business and the leasehold interest in the premises and on the 14th December, 1973 a contract was entered into with a Mr. Edmund Tunney for a consideration of £32,000. After paying various debts the O'Flanagans had a little over £19,000 left from the sale of the premises. ^{*}This was put into a joint account in a local Bank and I am satisfied from Mrs. O'Flanagan's evidence that she and her husband owned this money jointly.

Proceeds

As a result of the series of strokes which Mr. O'Flanagan suffered he walked with a limp and the movement of his mouth was impaired. But his misfortunes did not end there. In the month of September 1973 it was found that he had a malignant tumour of the large bowel and he underwent major surgery for cancer. From then on Mr. O'Flanagan knew that he suffered from cancer; as did all his friends including, notwithstanding protestations to the contrary, the second named defendant in these proceedings.

Mr. Fred Pope is highly intelligent and a very articulate person with obviously a great deal of business acumen. Originally his relationship with Mr. O'Flanagan was a social one. He and Mr. O'Flanagan went drinking together over many years at least three or four nights every week. Mrs O'Flanagan was far from happy with this relationship and the effect which it had on her husband as he had been advised by his doctors not to drink because of the effect alcohol would have as a result of drugs he was required to take. But he ignored this advice and very frequently came home so drunk that he fell about the house. At the time of the sale of the O'Flanagans premises (and just after Mr. O'Flanagan's first operation) the relationship between Mr. O'Flanagan and the defendant changed from being a purely social one into a business one. This development came about in the following way.

The Solicitors for the landlords of the shopping centre wrote to each of the tenants in March of 1972 offering to sell to them the freehold interest in their properties. The O'Flanagans did not want to take the offer up and gave their purchaser, Mr. Tunney, an opportunity to do so if he so wished. The defendant however was very active amongst his co-tenants in the shopping centre and endeavoured to negotiate a joint agreement between all the tenants and their landlords. These efforts failed; in particular a Mr. Stewart, the lessee of 135A St. Peter's Road, did not wish to buy out the freehold. Late in the year 1973 and early in the year 1974 the defendant put forward for Mr. O'Flanagan's consideration a scheme for a joint venture between them. He suggested that they should go into partnership to buy a licensed premises; that the O'Flanagans would buy out their landlords interest and having done so raise capital by selling the property subject to the lease. He would do the same in respect of 129 St. Peter's Road and also in respect of other premises he owned at 49 Sundrive Road, Kimmage. Each partner would put an equal amount of capital into the business and the profits would be divided equally.

Mrs. O'Flanagan was against the idea from the word go. Not only did she dislike the effect which the association with Mr. Pope had on her

husband's welfare but also because she considered the investment in the freehold to be a bad one. She urgently needed money and in fact had to go out to seek work to maintain herself, her husband (who was unable to work) and her large family of eight children. It speaks volumes for Mr. Pope's powers of persuasion that he eventually succeeded in getting her agreement to his proposals. He did this by constantly coming to her house in the company of her husband and extolling the benefits of the venture which he had in mind.

I need not delay in detailing the course of the negotiations. I should, however, make clear that although Mr. O'Flanagan was a party to the eventual agreement the defendant was the instigator of the whole plan and in the discussions which took place with Mrs. O'Flanagan Mr. O'Flanagan was a mere onlooker in the efforts his friend was making to persuade his wife to agree to part with their joint savings. When agreement was reached in February 1974 the defendant's proposals had developed and matured. He told Mrs. O'Flanagan that he had formed a company (the first named defendant herein); that as part of the scheme for raising capital to buy a licensed premises the company should buy out the landlords interest in 135A St. Peter's Road (Mr. Stewart's premises); that the company needed a short-term loan of £7,000 from the O'Flanagans which would be repaid when Mr. Pope had

effected the sale of his two premises. I am satisfied that what was eventually agreed initially between the partners and then between the partners and Mrs O'Flanagan was as follows:

- (a) Mr. and Mrs. O'Flanagan were to buy out the freehold in 139 St. Peter's Road; the property would be theirs and they would enjoy the rents and profits until it was sold for the purpose of providing capital to buy a licensed premises;
- (b) the defendant Mr. Pope would buy out his landlords interest in 129 St. Peter's Road and 48 Sundrive Road, Kimmage and he too would sell these properties and put an equal amount into the partnership business, as Mr O'Flanagan put in;
- (c) the partnership business would be carried on by the company, Ray-Ger Limited, in which Mr. Pope and Mr. O'Flanagan would have an equal interest;
- (d) for the purpose of raising further capital the company would buy out the landlords interest in 135A St. Peter's Road. For this purpose Mr. and Mrs. O'Flanagan would lend to the company the sum of £7,000 and this would be repaid immediately on the sale by Mr. Pope of 129 St. Peter's Road.

Mrs. O'Flanagan had no part in the running of the enterprise and she

took little interest in it beyond releasing the money when requested to do so by Mr. Pope. Not surprisingly her memory is not entirely accurate as to when monies were actually paid over. It is possible, however, to get fairly exact dates from the company's records. It appears that the first drawing on the joint account was made about the 20th February, 1974. It was for the sum of £3,200, Mrs. O'Flanagan having been told by the defendant that this was needed for deposits on the properties which were being purchased. A second payment of £1,000 was made on the 1st August, 1974 and another of £2,000 on the 9th August, 1974. A final payment of £7,500 was made on the 30th October, 1974 (in all a sum of £13,700). *

Mrs. O'Flanagan was informed that the payment of £1,000 was needed in respect of the purchase of the properties and on the 9th August the defendant told her that he was in financial difficulties and on his insistence she authorised the withdrawal of a further £2,000. On the 30th October she was again visited by the defendant in the company of her husband. Mr. Pope then explained to her that the cost of purchasing 139, St. Peter's Road would work out at £13,700 and having deducted the sum of £6,200 which she had already paid she was asked to authorise the withdrawal of a sum of £7,500 to make up the balance.

Mrs. O'Flanagan presumed that the monies would be used in accordance

with her agreement with the defendant. On the 1st August the defendant handed Mrs. O'Flanagan a handwritten document signed by him and the deceased purporting to be a receipt for the sum of £4,200 "for investment in the above named company" (i.e. Ray-Ger Limited). A similar document was handed to her on the 9th August. These documents were very misleading as Mrs. O'Flanagan had not agreed to give the money as an "investment in the company" but she paid no attention to them. An even more misleading document was prepared by the defendant and given by him to her on the 30th October. Written on company notepaper it states:-

"It is hereby agreed that Mrs. Elizabeth O'Flanagan has a 25% holding in the above company and that she has a 50% interest in the liabilities and proceeds arising out of the purchase and eventual sale of 135A and 139 St. Peter's Road, Wulkinstown, D. 12".

The defendant suggested that this letter truly represented Mrs. O'Flanagan's interest both in the company and in the properties it owned but he claimed that her interest changed at a later date. I have no difficulty in rejecting this evidence. There was never any question of Mrs. O'Flanagan having an interest in the company. By this letter (as well as the two earlier "receipts") the defendant, it seems to me, was preparing his defences against the inevitable onslaught which he anticipated would result when Mrs. O'Flanagan learned what he had done

with her money. (

* Instead of using Mr. and Mrs. O'Flanagan's money for purchasing for them the freehold of 139 St. Peter's Road he used it to purchase the premises for the company (of which he owned one of the two issued shares). He then used 139 St. Peter's Road as security for a loan which the company obtained from the United Dominions Trust ("the U.D.T") for £7,000. He arranged that this sum was to be charged on both 135A and 139 St. Peter's Road. In further breach of his agreement he bought out the freehold interest in 139 St. Peter's Road (with a further loan from the U.D.T.) but never sold his interest and never paid any money into the company. Again, in breach of contract, he did not buy out the landlords interest in 48 Sundrive Road. In fact during Mr. O'Flanagan's lifetime the defendant never put a penny into the venture, beyond incurring incorporation costs of about £160.

In order to consider the plaintiffs claim that the company holds 139 St. Peter's Road as a trustee I must examine more closely exactly what occurred. The company was incorporated on the 25th February, 1974 and the first meeting of the board of directors was held on the 19th March. Mr. O'Flanagan's solicitor (who became the company's solicitor) and a representative from his accountants firm (which became the company's

auditors) attended the meeting. Mr. O'Flanagan and Mr. Pope were appointed directors and one share each was issued to them. Mr. O'Dowd, the accountants representative, prepared draft minutes which recorded his understanding of the parties agreement about the property to be purchased. Before it was circulated, however, the defendant sent on a handwritten note of what the minutes were to contain and this was eventually incorporated in them. His note was significantly different from Mr. O'Dowd's draft as it provided that the company was to purchase 139 St. Peter's Road. *It is thus clear that from the very beginning of the venture the defendant had decided that the monies which he would obtain from the O'Flanagans would be used for the purchase of 139 St. Peter's Road by the company and not, as he had agreed, by the O'Flanagans themselves.

It is important to note the exact wording of the minute in relation to this property. It reads as follows:-

"It is expressly agreed that expenses and other outgoings of the purchase by the company of 139 St. Peter's Road will be the responsibility of Mr. O'Flanagan personally and that the total income from the ultimate sale of 139 St. Peter's Road and all other benefits of charges on 139 St. Peter's Road shall accrue to Mr. O'Flanagan".

The phraseology used by the defendant in preparing this minute is somewhat obscure but it is reasonably clear that he is recording the fact that although the property was to be taken in the name of the company that

Mr. O'Flanagan was to be responsible for outgoings and that he was to be entitled to the proceeds of its sale.

It was not until the year following that Mrs. O'Flanagan found out what had happened. By May of 1975 she was in serious financial difficulties for reasons which I will explain later no rent had been received from 139 St. Peter's Road and, of course, Mr. O'Flanagan was not able to work. Mrs. O'Flanagan therefore decided to raise some money on the security of 139 St. Peter's Road. When she asked her husband about the title deeds she discovered for the first time that he and Mr. Pope had used the money which she jointly owned with her husband to buy the property in the company's name. Not unnaturally he was extremely angry. She believed herself to have been tricked by the defendant and she rang his solicitor to try to find out what was going on. She asked him was he aware that 139 St. Peter's Road belonged to her and her husband, but the defendant's solicitor declined to discuss the matter with her and advised her to get separate legal advice.

After Mrs. O'Flanagan's telephone call the defendant was contacted by his solicitors and as a result he wrote a letter of the 15th May, 1975 to Mrs. O'Flanagan. It was an extremely abusive letter. In the course of it he denied that he had conspired with Mr. O'Flanagan to use the company to defraud Mrs. O'Flanagan and he went on:-

* "You are of course very well aware that you have not been and will not be cheated in any way whatever. You are also aware that 139 St. Peter's Road was purchased in trust by the company for the benefit of yourself and your husband and that the premises are not part of the company's share capital".

Having complained of her "vicious irrational outbursts and profane telephone calls" he threatened legal proceedings if she attempted further to damage his character.

*This letter is, of course, of crucial importance in this case; it acknowledges that the company held the property as trustee and is strongly supportive of the plaintiffs claim in these proceedings.

Strenuous objection to the admissibility of this letter was taken at the trial on the grounds that it was written on a privileged occasion. The defendant had headed the letter "without prejudice" but those words alone possess no magic properties and some more substantial grounds had to be found to justify the defendants objection to the admissibility of this letter. Before reading it I heard evidence from both the plaintiff and the defendant. The defendant said that after he received a telephone call from his solicitor he discussed the situation with Mr. O'Flanagan in a public house, that Mr. O'Flanagan said that he was in trouble at home and that Mr. Pope would have to get "Mrs. O'Flanagan off his back", that Mr. O'Flanagan told him that he had been assaulted by his wife and that he was afraid of further assaults, that Mr. O'Flanagan had suggested that he,

Mr. Pope, should say that the company held the property in trust.

I cannot accept this evidence. Mrs. O'Flanagan knew that her husband was terminally ill and, in any event, she is not the sort of person who would strike her husband, and I think it is highly improbable that Mr. O'Flanagan told the defendant that she had done so. I accept that Mr. O'Flanagan would have conveyed to the defendant that his wife was very angry at what had been done and that he must have urged on him the need to put matters right. But the relationship between the deceased and the defendant was not such that the deceased could have influenced the defendant to write something that was untrue. X

Furthermore, I accept Mrs. O'Flanagan's account of what she said to the defendant's solicitor on the telephone and I do not believe that she threatened to issue legal proceedings and I cannot accept that Mr. O'Flanagan's solicitor would have misrepresented what she had stated in the way suggested by the defendant.

* The rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another and terms are offered for the settlement of a dispute or negotiation (see In re Dainty 1983 2 Q.B. 116, 119). Mrs. O'Flanagan did not threaten any legal proceedings; her main concern was to ascertain from the defendant's

solicitor what the true position was about her property. Having admitted the document in evidence without having read it my view as to its admissibility was confirmed when I did so as it will be seen that the defendant was not offering to settle a dispute but was making a statement as to the rights of the plaintiff and her husband in relation the the property in addition he was himself threatening legal proceedings against Mrs. O'Flanagan. It is clear that the defendant obviously hoped that by heading the letter "without prejudice" he would be able to ensure that the letter could not be used if Mrs. O'Flanagan subsequently attempted to rely on it to support her claim that the company held the property as a trustee for her and her husband.

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[I am satisfied that the letter was a true admission and acknowledgement that the company held the property in trust.] This conclusion gets support from a number of aspects of the case. Mr. O'Flanagan must have been well aware that by using the money from the joint account to buy 139 St. Peter's Road in the name of the company he was involved in a deception on his wife.

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[It is probable that he went along with the deception on the defendant's assurance that the company would hold the property in trust for himself or for himself and his wife jointly.] That the partners so agreed gets support from the minute of the 19th March, 1971 to which I have referred. In

addition, at a meeting attended by the company's accountant, Mr. O'Flanagan

(3) [stated to the meeting that the company held the property in trust and this statement was not corrected by the defendant who was also present.]

(4) Furthermore, [Mr. O'Flanagan received rent from 139 St. Peter's Road (at a time when the property was in the name of the company) in circumstances

which showed that he was asserting his right to it as against the company's right.] The defendants have relied on the manner in which the property was

treated in the company's accounts and records and Mr. O'Flanagan's apparent acquiescence in such treatment to negative the existence of a trust. But

I do not think that this evidence outweighs the clear statement which is to be found in the letter of the 15th May, 1975 and the inferences to be drawn from the other evidence in the case to which I have referred.

I conclude therefore that the company held 139 St. Peter's Road under an express trust for Mr. and Mrs. O'Flanagan jointly which had been created at the time it was conveyed into the company's name. Mr. and Mrs. O'Flanagan had been jointly entitled to the money in their joint account and I think that their equitable interest in the property was as joint tenants. It follows from this that on Mr. O'Flanagan's death Mrs. O'Flanagan, as surviving joint tenant, became entitled to the entire beneficial interest in the property.

The trust was an express one arising from the agreement of the directors at the time the property was conveyed to the company. The letter of the 15th May, 1975 was written with the approval of both the directors of the company and binds the company. I should add that if an express trust had not existed I would have been prepared to hold that a constructive trust arose by operation of law when the deceased and the defendant wrongfully used the money entrusted to them for the purpose of buying property to be put into the name of Mr. and Mrs. O'Flanagan, for the purpose of taking the property in the company's name.

I also find that in using the trust property for the purpose of securing ~~the~~ loan for the company from the U.B.T. and by creating a charge for this purpose the company acted in breach of trust.

I will deal later in this judgment with the appropriate relief to which the plaintiffs are entitled arising from the findings I have just made.

PART II

I come now to consider the executors claim against the company. At the time of Mr. O'Flanagan's death the company had issued two shares of its hundred pound share capital, one to Mr. O'Flanagan and one to the defendant Mr. Pope. Mr. Sean O'Flanagan as executor of his father's will claims to be entitled to be registered as owner of his father's share. After Mr. O'Flanagan's

death a new director was appointed and the unissued share capital was allotted to Mr. Pope and his nominee. Registration of Mr. Sean O'Flanagan has been refused. In support of this refusal the Defendant relies on a written agreement of the 15th March, 1976 signed by both himself and the deceased and sealed with the company seal.

In this part of my judgment I will deal with the plaintiffs claim that this written agreement should be set aside because (a) it was obtained by undue influence or (b) it represents an unconscionable bargain. The equitable principles which the plaintiffs call in aid are well established. The cases where a plaintiff seeks to set aside a gift or other transaction on the ground that it was procured by undue influence have been divided into two classes; firstly, those in which it can be expressly proved that undue influence was exercised, in which circumstances the Court intervenes on the principle that no one should be allowed to retain any benefit arising from his own fraud or wrongful act; secondly, those in which the relations between the donor and donee have at or shortly before the execution of a gift been such as to raise a presumption that the donor had influence over the donee. Then, the Court intervenes, not on the ground that any wrongful act has in fact been committed by the donee but on the ground of public policy and to prevent the relations which existed between the parties and the

influence arising therefrom being abused. The Court will set aside the gift unless it is proved (and the onus is on the donee in such cases) that in fact the gift was the result of a free exercise of the donor's will (see Allgard v. Skinner 36 Ch. D.145 at 171). The Courts have not defined the degree of confidence and trust which must exist in a relationship before it can be said that a donee is in a position to exert undue influence. It has been long established that the relationship of parent and child, guardian and ward, doctor and patient, religious adviser and pupil are relationships which give rise to the presumption to which I have referred. But the categories are not closed and in Gregg v. Kidd (1956) I.R. 183 Budd, J. held that the relationship raised the presumption to which I have referred in a case in which an uncle settled property on his nephew. Recently in England a majority of the Court of Appeal (in Re Brocklehurst's Estate (1978) 1 Ch. 21) took the view that the presumption did not arise from the relationship of friendship between an elderly man and a companion from a different class in the social structure, whilst in In Re Crniff (1971) 1 Ch. 95 it was held that the relationship between an elderly man and his secretary gave rise to the presumption. The presumption does not arise in the case of wills (see, In the goods of Kavanagh, deceased (unreported) 24th October 1978 in which I held that express undue influence was proved).

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Just as the Courts have declined to define the exact categories of relationship which will give rise to the presumption of undue influence so too they have declined to define exactly what undue influence is. The approach which Courts of Equity should adopt was suggested by Sir Samuel Romilly (a distinguished Chancery lawyer and former Solicitor General) in one of the early leading cases on the matter (Huguenin .v. Basely (1807) 14 Ves. 273); an approach which subsequently obtained judicial approval from Lord Cottenham in Dent .v. Bennett (4 My. & Cr. 277) and from Byrne J., in Cavendish .v. Strutt (19 T.L.R. 453). The passage to which I refer reads as follows:-

"where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the person in whose favour it is made; and if it sees that any arts or stratagems, or any undue influence have been used - if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an influence over him - if there be the least scintilla of fraud, this Court will and ought to interpose ..." (quoted in White and Tudor "Leading Cases in Equity" Vol. 1, P 216)

The plaintiffs do not rely solely on the equitable principles relating to undue influence. They claim in the alternative that the agreement of the 15th March, 1976 should be set aside on the ground that it is an unconscionable bargain. The principle relied on was stated by Lord Hatherley in a dissenting judgment in O'Rourke .v. Bolingbroke 2 App. Cas.

814, 823, a case dealing with a sale at undervalue by an expectant heir but which enunciated a principle of wider application. The passage reads as follows:-

"It ... appears that the principle on which equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of expectant heirs or of persons under pressure without adequate protection and in the case of dealings with uneducated ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract

This passage was quoted with approval by Gavan Duffy J. in Grealish v.

Murphy (1946 I.R. 35), a case in which the plaintiff was a mentally retarded

adult but in which no undue influence was shown to have been exercised. The

transaction which he entered into, however, was set aside on the ground that

equity comes to the rescue in cases where the parties to a contract have not

met on equal terms, the Court holding that the deed was an improvident one,

and that the plaintiffs weakness of mind coupled with the inadequacy of the

advice he obtained justified the intervention of the Court in that case

(see also Fry v. Lane 10 Ch. D. 312, at 322).

As the evidence relating to the relationship between the deceased and the defendant and the evidence relating to the allegation of undue influence are inextricably mixed I propose to examine the facts surrounding the making of the agreement of the 15th March, 1976 and then give my opinion

as to whether or not the plaintiff has made out a case for the intervention of the Court on the ground that undue influence was exercised by the defendant in relation to it.

I turn, then, to the facts leading up to the execution of agreement.

It is quite clear that after the defendant had written his abusive letter to Mrs. O'Flanagan that relations between him and the deceased became severely strained. In the summer of 1975 Mr. O'Flanagan had to go into hospital for an operation on his elbow and in November of that year he underwent a second major operation for cancer. The deceased had sufficiently recovered from the operation in the early part of 1976 to enable him to deal with the highly unsatisfactory situation which existed between himself and the defendant. To try to rectify the situation he contacted the company's auditor, Mr. Fay, and on his instructions Mr. Fay wrote to the defendant to convene a meeting of the directors of the company on the 17th February. The defendant's reaction was a very significant one. He obviously was aware that both Mr. Fay and the company's solicitor would attend the meeting (as they had on previous occasions) and the defendant refused to attend it, demanding instead that a private meeting be held between himself and Mr. O'Flanagan before any formal board meeting took place. Mr. O'Flanagan's reaction is equally significant. He wrote back

agreeing to a private meeting, provided that it was held in Mr. Fay's office adjacent to the room where the directors meeting would be held and provided that it would not last longer than half an hour, and provided that the defendant undertook to attend the directors meeting directly after the private meeting, a directors meeting at which the company's solicitor and auditor would be present. It seems to me to be quite clear that Mr. O'Flanagan was apprehensive of what would happen if he and Mr. O'Flanagan had met in one of their old haunts and he sought to protect himself from the danger he anticipated might exist if he was to meet the defendant alone. The defendant, however, did not agree to a private meeting on the lines suggested by Mr. O'Flanagan and instead on the 5th March wrote direct to him suggesting that they should meet in a public house. This they did (two occasions according to the defendant) and as a result there emerged a written agreement of the 15th March, signed, as I have said, by both parties and typed on the company's notepaper.

The only evidence of what transpired between Mr. O'Flanagan and the defendant is the defendant's own testimony. He stated in evidence that relations between himself and the deceased had been bad for the latter part of the previous year and that they hadn't met for several months. He gave no explanation as to why he wanted a private meeting before the board meeting or why he refused to meet in Mr. Fay's office with the deceased. He

explained that he and the deceased met in the lounge of the Belgard Public House in the morning time and drank coffee. He said that Mr. O'Flanagan was looking very well and that he told him of the operation that he had had (but he did not tell him that he was suffering from cancer). The defendant stated that the deceased said that he was in a bad way for money and that he told the deceased that he also needed some money. After discussions which went on that day and on a second day in the Belgard lounge it was agreed that he and the deceased would settle their differences in the manner set out in the written agreement. Handwritten drafts of this agreement had been prepared (but these were subsequently torn up) and on the second meeting he and the deceased went to a small office in the defendant's premises at 129 St. Peter's Road where the defendant typed up the agreement. He said that they then went back to the Belgard lounge, that Mr. O'Flanagan had the company's seal with him and that they then signed and sealed the document in the Belgard Lounge.

At the time that he typed up the written agreement the defendant also typed up a receipt for the sum of £1,384 which the deceased signed. The defendant explained that the company had received rent from 139 St. Peter's Road and that the figure in the receipt represented this rent. The deceased had borrowed money from the defendant and had given him I.O.U.'s in respect

of these loans. The defendant said that they added these up and then two cheques were drawn on the company's account, one for £766 and one for £618 (both payable to "cash"). Mr. O'Flanagan gave the smaller cheque to the defendant to discharge the debts he owed him and kept the larger cheque. The receipt makes no mention that the money was rent from the company's property (property which the previous year the defendant had agreed was held in trust for Mr. and Mrs. O'Flanagan) and it is stated to be a receipt of £1,384 "being repayments in part of money lent by me to the company".

As the written agreement is of such importance in this case I think I should set it out in full.

It is dated the 15th March, 1976 and headed "to whom it may concern"

and then reads:-

"We the undersigned, James O'Flanagan and Fred Pope being the joint managing directors of Ray-Ger Limited hereby agree to settle our differences in the company in the following ways.

1. We agree that payments made by the company to either of us shall be regarded as being payments of our respective loans in the company's accounts, and that neither of us shall charge the company interest on any loans that we have given or may in the future give to the company.
2. We agree that in the event of one of the directors dying, the surviving director shall have the right to acquire all of the remaining unissued ordinary shares of the company, and to appoint another director of his choice.
3. We agree that the only liability of the company to the heirs or assigns of a deceased director shall be for the balance due to him in the directors loan accounts.
4. We agree that neither of us shall seek to have the company liquidated.
5. We agree that the purpose of this mutual agreement is to protect the company and its directors against demands that might be made by a deceased director's heirs or assigns.

6. We agree that this agreement cancels all previous agreements that have been made between us in connection with the running of the company.
7. We agree that the company seal shall be fixed at the end of this agreement along with our signatures, and that the contents of this document shall be strictly private until one of us dies or we terminate our association in business.
8. We agree that we shall each receive a copy of this agreement and that they shall be placed in strong envelopes and that the joints of the envelopes shall be embossed with the company seal and signed by both of us."

The effect of this agreement and the receipt signed by the deceased cannot be in doubt. The previous year the defendant with the knowledge of the deceased had unequivocally stated that the company had held 139 St. Peter's Road in trust for Mr. and Mrs. O'Flanagan. But contrary to this statement by accepting the rent in the terms of the receipt the deceased was now acknowledging that the rent of the premises belonged to the company and could be used by it to discharge its indebtedness to him.

Secondly, prior to the agreement the deceased and the defendant jointly owned the share capital of the company. By this agreement Mr. O'Flanagan agreed that on the death of a partner the partner's estate would have no claim on the company and the surviving partner would be entitled to the entire share capital in the company. Thus by this agreement Mr. O'Flanagan was agreeing that if he pre-deceased Mr. Pope neither his wife nor any of his eight children would be entitled to any share in the company's assets which consisted not only of 135A St. Peter's Road but also as he was then

acknowledging 139 St. Peter's dead.

I have the following observations to make on the agreement and the defendant's evidence in relation to it:

(a) I found the defendant's evidence unconvincing and must record a view that he was not telling the truth as to how the agreement came to be made. He failed to give any or any acceptable explanation as to why (a) he insisted on a "private meeting" with the deceased or (b) why he and Mr. O'Flanagan should agree that the surviving partner should be entitled to the entire of the company's assets. I am also quite satisfied that the defendant, contrary to what he stated in the course of his testimony, knew full well that Mr. O'Flanagan had had two major operations for cancer.

(b) I do not accept (as pleaded in paragraph 8 of the defence) that the defendant in March of 1976 wished to wind up the company and that he was prevailed upon by the deceased not to do so. I think it is much more probable that the defendant used the threat to wind up the company as a means for procuring the deceased's signature to the agreement and that he used the I.O.U.'s which the deceased had signed for the same purpose.

(c) The written agreement refers to the fact that each of the partners should receive a copy of it. No copy was ever found amongst the deceased's effects after his death and Mrs. O'Flanagan knew nothing about the agreement until the reply to the notice for particulars in this action. I think it is reasonable to assume that the defendant did not give Mr. O'Flanagan a copy of it.

(u) In March 1976 the deceased was a very sick man. He had undergone a very serious operation the previous November and a letter written by him on the 10th March a couple of days before he met the defendant shows that he had been ill in bed and had been unable to attend a business appointment.

(e) The deceased was aware that he was terminally ill with cancer and must have realised that his chances of surviving Mr. Pope were slight. He was not well off and notwithstanding this he was apparently agreeing that on his death the defendant and not his wife or any of his eight children would obtain the benefit of two valuable commercial properties. There is nothing to suggest that Mr. O'Flanagan had not the normal love and affection which a husband and father has for his wife and children and no explanation has been forthcoming as to why he should fail to give expression to

that love and affection and instead give what was virtually a gift of these properties to Mr. Pope .

(f) After Mr. O'Flanagan's death, as we will see, the defendant sought advice from his accountant as to his right to appoint a new director and issue the balance of the share capital to himself and a nominee. In doing so he did not show him the secret agreement of the 15th March, 1976. His failure to do so demonstrates a lack of confidence in its validity, which could only have arisen if it was tainted by some wrong-doing on his part.

Taking into account all the evidence in the case I think there is only one conclusion to be reached in relation to this agreement namely that the defendant must have used undue influence to procure it. The defendant has a strong and forceful personality and had obviously exercised considerable influence amounting to domination of the deceased on previous occasions. The deceased was infirm and ill when he signed it. The agreement was egregiously unfair to the deceased's wife and family. The mutual promises it contained were largely illusory in that both parties knew that it was highly probable that the deceased would predecease the defendant. Furthermore the lack of candour of the defendant raises very serious suspicions about the circumstances in which it came to be executed. It is unnecessary for me

to decide whether the relationship which existed raises any presumption as to what happened. The evidence satisfies me that I should set the agreement aside.

Because I have concluded that the plaintiffs have been able to establish that the agreement was procured by undue influence it is unnecessary for me to decide whether, apart from undue influence, the Court should by the application of equitable principles to which I have already referred set it aside on the ground that it represented an unconscionable bargain.

PART III

I now turn to consider some of the other facts of this case which are relevant to some of the issues to which the pleadings have given rise.

Firstly I must say a word about 139 St. Peter's Road.

Mr. Tunney, the purchaser of the leasehold interest from the O'Flanagans left the premises some time in June 1975 and for a considerable time they were vacant. Ejectment proceedings were taken against him and for some time the rent was paid by Mr. Tunney's mortgagees, the Lombard and Ulster Bank Limited. In 1977 it appears that the mortgagees paid a cheque for £1916 being a years rent for the premises. On the 27th May, 1977 the company's solicitors sent this to Mr. O'Flanagan but he claimed (having then fallen out again with the defendant) that he and not the company was entitled to

the rent and he negotiated the cheque and kept the proceeds. It would appear that no claim in respect of this sum has been made by the company or Mr. Pope since then.

At some date after Mr. O'Flanagan's death the defendant company obtained possession of these premises. The company reconstructed them and relet them. There are now four tenants in the premises and the premises are worth in the region of £100,000. I presume that the lettings were made by the company but there is no evidence as to whether the company or the defendant received the rents.

The tenant, Mr. Tunney, successfully sued the O'Flanagans for damages for breach of contract. I found Mrs. O'Flanagan to be a truthful witness and I do not consider that my assessment of her is vitiated in any way by the success of Mr. Tunney's claim.

As I have already pointed out the company borrowed £7,000 from the U.D.T. in the early part of 1975 and the U.D.T. obtained a charge both on 139 and 135A St. Peter's Road. The company defaulted in its repayments and ejectment proceedings were taken against it in the High Court and apparently a decree for possession was obtained on the 21st January, 1977. It would appear that the decree was not executed but I have no information as to the terms on which this was arranged.

At the time of Mr. O'Flanagan's death the company owed the U.D.T on foot of its loan £13,000 approximately. In October 1982 this had increased to £26,000 and it is now, I am told, in the region of £30,000. An account was produced which showed that Mr. Pope was personally indebted to the U.D.T. in the sum of nearly £41,500 in September, 1982. Whether the company's assets are in any way pledged to secure this indebtedment has not been established.

As to 135A St. Peter's Road, it would appear from the records kept by the company's auditors that the company purchased those premises in February 1975 for the sum of £6,886-25 and that an annual rent of £500 was thereafter payable by the tenant "Stewart Electric". This rent clearly belongs to the company. What rent the company has received or how it disposed of the rent has not been established.

As to 129 St. Peter's Road, it will be recalled that these premises were premises in which Mr. Pope carried on his newsagency business. The agreement which the partners made between themselves and then with Mrs. O'Flanagan was that the defendant would buy out his landlords interest and then having sold the premises would reinvest the proceeds in the company so that the company could buy a licensed premises. The proceeds of this sale were also to be used to repay Mrs. O'Flanagan the sum of £7,000 which she and her husband lent to the company. Mr. Pope purchased the freehold in January 1975 with a

been from the D.B.T. but apparently he never sold the premises as was agreed he never paid any sum into the company as his share of the proposed undertaking. After the death of the deceased, however, Mr. Pope called a meeting on the 25th October, 1977 and its minutes record that in consideration of the issue of 76 shares in the company which were issued to him and the payment of £2,000 by the company to him that he agreed to assign 129 St. Peter's Road to the company. No conveyance ever took place, but Mr. Pope has agreed that the premises belonged to the company and his solicitor explained that it was on his advice that no formal conveyance was executed as a sale of the premises had been contemplated. It appears from the auditors records that the company received substantial rents from these premises.

I am satisfied that these premises are the company's property and that this conclusion is unaffected by the fact that the allocation of shares to the defendant was, as I will show in a moment, an invalid one.

The original agreement between the partners and the partners and Mrs. O'Flanagan was that the defendant would buy out the freehold in 48 Sundrive Road, Kimmage and would sell the premises and use the proceeds for

invested in the company to assist in the purchase of a licensed premises. Obviously the deceased was very concerned about this part of the bargain because the defendant wrote to him as secretary of the company on the 5th April, 1974 confirming the fact that the company was to be his agent for the purposes of purchasing the leasehold of 48 Sundrive Road and then selling the property "as quickly as possible". I do not accept that the purchase and resale did not take place because the defendant's landlord refused to sell. I think the reality of the situation is that the defendant had in fact no money to purchase these premises and was unable to borrow for this purpose. It would appear that later he unilaterally decided not to do so. In the result these premises form no part of the company's assets.

I come now to consider briefly certain of the events which occurred after the agreement of the 15th March, 1976, and after Mr. O'Flanagan's death on the 15th October, 1977.

After the March meeting the deceased's and the defendant's relations returned for a while to their earlier basis. The company's auditor prepared accounts for the company for the year ending the 28th February, 1975 and the year ending 28th February, 1976, and he obtained the signature of a loan certificate from the deceased on the 22nd June, 1976 which showed that

the company owed him £13,737. It had been Mr. Fay's opinion that the company had owed part of this sum to Mrs. O'Flanagan but on Mr. O'Flanagan's instructions he changed the records so that the total sum was shown as being due to Mr. O'Flanagan personally. It is claimed in the defence that the acknowledgment in the loan certificate and the deceased's signature to the annual accounts constitute a bar by way of estoppel to the claim that the company holds the property in trust.

I cannot agree with this contention. Quite clearly the deceased and the defendant had declared that the company was a trustee of the property for the deceased and Mrs. O'Flanagan and by signing the documents to which I have referred the deceased could not in my opinion effect the beneficial interest which had been created. The only significance of these documents is, it seems to me, an evidential one but for reasons which I have already given their significance is far outweighed by the other evidence in the case. I should add that obviously Mr. Fay had doubts about the loan certificate signed by Mr. O'Flanagan as on the 22nd November, 1977 he wrote to the executors solicitors pointing out that he may have been incorrect in stating the balance due to the deceased on the 28th February, 1977 because "a portion of this amount may be due to Mrs. O'Flanagan."

After Mr. O'Flanagan's death on the 15th October, 1977 the defendant

moved very quickly. On the 18th October he called to his solicitor and to the company's auditor for the purpose of arranging that a meeting of the company be held. Mr. Fay advised him that he could call a meeting of the directors and appoint a new director under regulation 103 of Table A. Mr. Fay also advised him (wrongly as he now admits because regulation 5 of Table A does not apply to the company) that the directors could issue the balance of the share capital. A meeting of the directors was held on the 25th October attended by Mr. Pope and one Mary Durke the third named defendant in these proceedings. The minutes record that Miss Burke was appointed a director of the company and that it was resolved that twenty shares would be allotted to her and seventy-eight to Mr. Pope. In addition as I have already pointed out, the directors resolved to pay Mr. Pope the sum of £2,000 and it was noted that Mr. Pope had agreed to assign 129 St. Peter's Road to the company.

Under the provisions of the company's Regulations the appointment of Miss Burke as a director of the company was a valid one. The meeting of directors had, however, no power to allot shares to her or to Mr. Pope. It is as I have already pointed out significant that when seeking advice about the situation arising from the death of his co-director the defendant informed neither his solicitor nor his accountant of the existence of the secret

agreement of the 15th March, 1976. Mr. Fay cannot recollect when the envelope containing this secret agreement was deposited with him but it is perfectly clear that he was unaware of its contents for a considerable time after Mr. O'Flanagan's death.

The solicitors for the executor of Mr. O'Flanagan's will wrote on the 12th October, 1979 requesting that he be registered in succession to the deceased as holder of one share in the company. By a letter of the 8th December they were informed that at a meeting held on the 5th December the directors had decided not to approve the transfer. Thereafter these proceedings were issued. No reason was given as to why registration was refused. Under the company's regulations the executor was entitled to be registered and so it would appear that in refusing registration the defendant was relying on the written agreement of the 15th March, 1976. As this agreement was an invalid one I must hold that the company and the defendant wrongfully refused to register Mr. Sean O'Flanagan as a member of the company.

PART IV

I come now to the relief to which the plaintiffs are entitled.

- (1) I will declare that the premises No. 139 St. Peter's Road is now held by the company upon trust for the plaintiff Elizabeth

O'Flanagan. I appreciate that this is not in accordance with the plea in the Statement of Claim but the defendants are not in any way prejudiced by this finding.

- (2) I will declare that the company was in breach of trust by charging the premises No. 139 St. Peter's Road, Walkinstown in favour of the United Dominions Trust, and is liable in damages for this breach.
- (3) I will order that the company do convey the premises 139 St. Peter's Road, Walkinstown to Mrs. O'Flanagan free from incumbrances.
- (4) I will declare that Mrs. O'Flanagan is and has been entitled to the rent from 139 St. Peter's Road and I will direct the defendant to inform the tenants to pay the rent to her.
- (5) I will order that an account be taken of:
 - (a) all rent received by the company from the premises 139 St. Peter's Road, Walkinstown;
 - (b) all monies used by the company in repairs and improvements of a permanent and lasting nature and which enhance the value of the property;
 - (c) all acts which may have caused the value of the property to depreciate and the value of such depreciation
 - (d) an account of any mortgages or charges made on the property;

- (6) I will declare that the plaintiff Mr. Sean O'Flanagan and the plaintiff Mrs. Elizabeth O'Flanagan are entitled jointly to the nett profits from the premises up to the 15th October, 1977 after giving the allowances for sums due on the taking of the account taken at paragraph 5(b) and thereafter that the plaintiff Mrs. O'Flanagan is entitled to the nett profits from the premises.
- (7) I will order payment of the nett profits to the persons entitled thereto after the taking of the accounts as aforesaid, and after giving credit for any rent received by the deceased in respect of the said property during his lifetime.
- (8) I will grant an injunction restraining the defendants or any of them from disposing of any interest in 135A and 139 and 129 St. Peter's Road, Walkinstown without the plaintiffs' consent.
- (9) I will declare that the first named plaintiff is entitled to be registered as the owner of the share in the company owned by the deceased on the 15th October, 1977 and direct the defendants to effect such registration *for/with*
- (10) I will declare that the purported allotment of shares at the meeting *of* of the 25th October is invalid and direct the defendants to effect the appropriate amendments in the company's books and records arising from such a declaration.

(11) The plaintiffs have claimed an order that the company be wound up under Section 213 (f) (on the ground that it would be just and equitable to do so) or under Section 213 (g) (on the ground that the powers of the directors are being used oppressively) or alternatively under Section 205 of the Act. But an application to wind up the company can only be brought by way of a petition (see Section 215 of the 1963 Act) and I have no power in these present proceedings to make such an order. But it seems to me that once Mr. O'Flanagan has been registered as a member of the company and once he wishes to obtain such an order that it would be just and equitable to wind up the company (see In re Westbourne Galleries Limited 1972 2 W.L.R. 1289) but I do not think it would be appropriate for me to make any declaration to that effect in these proceedings. I have not heard any submissions on the executors rights to share in the profits of the company since the death of Mr. O'Flanagan, but I will give liberty to apply in relation to this aspect of the case.

I will make no order at present in relation to any claims for breach of trust against the company or Mr. Pope personally but I will give liberty to apply to the plaintiffs after the taking of accounts which I have ordered

have been completed.

This is obviously a case in which the accounts should be taken as
 speedily as possible and to avoid any delay, I propose to order that the
 defendant company and the defendant Mr. Pope do discover on oath all documents
 in their power and procurement relevant to the accounts to be taken, the
 affidavit to be made by the company to be sworn by Mr. Pope. The Affidavits
to be sworn with 4 weeks
 should contain references to the company's minutes, books of accounts and
 records, contracts relating to the company's premises, and any documents
 relevant to the breach of trust which has been established.

Approved
JL
1. 5. '83