McCoy - GREENE

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THE HIGH COURT

1983 No. 4502p SP

ROBERT McCOY — PLAINTIFF

and

GORDON GREENE & MAURICE COLE — DEFENDANTS

Judgment of Mr. Justice Costello delivered this 19th day of January 1984

The McCoy family is, unhappily, a divided one. It was not always so. Although the relationship between Mr. Robert McCoy and his two sons was not, apparently, very good, nevertheless, they worked together in the business which the plaintiff, very successfully, formed over the years. In the course of time, as the plaintiff got older, he wished to make provision for his family, in particular for his two sons, and he wished also to ease himself out of the business which he had built up so assiduously over the years. He had met, on a professional basis, the defendant Mr. Gordon Greene in the early 1960's and a very real friendship developed between them. He consulted Mr. Greene and he relied on Mr. Greene for advice on the business. In addition, on Mr. Greene's suggestion, Mr. McCoy had Mr. Maurice Cole employed as an adviser. Mr. Cole is an expert accountant, and both Mr. Greene and Mr. Cole became members of Mr. McCoy's Board of Directors. The minutes showed that over the years that various ideas were put forward to put into effect the general wishes Mr. McCoy had and to which I have just referred.

The position, in late 1980 and early 1981, became much more crystallized. What happened was this: Mr. Natt McCoy was growing up and had married and was at this time in his early thirties. He wished to get some security in the family business and the plaintiff was agreeable that this be done. The plaintiff also wished to have an easier life and to ease himself out of the business, as I said, and to spend more time with his wife at home. But there were problems of a practical sort and also of a financial sort on which Mr. Greene and Mr. Cole's advice was sought. One of the problems was related to capital tax. On Mr. Greene's advice, the company property had been sold and a new place purchased in the North Wall, and this turned out to be extremely good advice because it turned out to be a very successful buy. It was purchased at £70,000 and it was valued a couple of years ago at £300,000. So, Mr. Cole's expert advice on these matters or aspects of the situation was obtained. A further difficulty, however, arose, which, to a considerable extent, determined the form which the new arrangement was to take. A very unfortunate family dispute happened around about the Christmas of 1980 between Natt and his father. The disputes are not relevant for present purposes but they were so severe that Mr. Natt McCoy left the family business and absented himself from work for several weeks and very seriously considered emigrating to Canada and he informed his mother about this. His mother was very terribly upset

about this, as was her husband, the plaintiff. The consideration of their son emigrating caused the plaintiff real concern, and he took advice from Mr. Greene and from Mr. Cole about this situation. All these considerations brought Mr. Greene and Mr. Cole to certain conclusions as to how best to organise the family business, to deal with the plaintiff's wishes as to what he wanted to do, and to handle the serious family dispute that had arisen. These proposals, formulated by Mr. Greene and Mr. Cole, were put to a meeting of the Board on the 11th February 1981. I should say here that I accept these minutes as being accurate as to what took place at the meetings. Mr. McCoy is an able business man. It is no criticism of him to say that he is not conversant with the intricacies of company law or the income tax code. The proposals that were put to him, and did not come from him, had to be explained to him. A conflict has arisen in this case as to what Mr. Cole and Mr. Greene told the plaintiff. I am quite satisfied that I can accept Mr. Cole and Mr. Greene's evidence as to what they informed the plaintiff. The plaintiff was hesitant about the steps he was to take, not unnaturally because he was giving up one part of the trading operations which he had been carrying on, and allowing his son to carry on with the business, and he was giving up a considerable interest of the business he had built up in favour of his children. Mrs. McCoy wanted to be assured as to what was happening, and a meeting took place at the Yacht Club in

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which the proposals that had been put to the meeting were once again explained, not only to Mr. McCoy but also to Mrs. McCoy. The proposals were put into operation and a meeting was held to put them into operation. A new company called "81 Ltd." was formed. The directors of the company were the plaintiff, his eldest son, Natt, and the two defendants in this case, Mr. Greene and Mr. Cole. The share capital of the company was divided in six A ordinary shares and 334 B ordinary shares. The allotment of these shares was as follows - the plaintiff got two A ordinary shares, Natt got two A ordinary shares, and Mr. Cole and Mr. Greene got one each. The A shares had voting rights. The B shares did not have voting rights. The plaintiff got one B ordinary share and Natt and his sister and his brother got 331 (111 (?)) shares each. As a result of this, profits of this company would have been divided between the plaintiff's three children, but the ultimate control of the business was given to the six A ordinary shareholders. It was part of this arrangement that Natt was going to be managing director of this new company, and he took up this position. But he was to act under the Board of Directors and the Board of Directors, as I have explained, had ultimate control through the six shares. The role of Mr. Greene and Mr. Cole in this arrangement is crucial to these proceedings and I will refer to it in a moment. But first I will talk about the plaintiff's first company - Irish Pump and Tank Co. Ltd. Its name was

changed to Commons Holdings Ltd. The proposals resulted in this - that Mr. McCoy divested himself of some of his shares in this company by way of a gift, and the plaintiff ended up with fifty per cent of the shares, and his wife with five per cent, and his three children with fifteen per cent each of the shares, that is to say forty-five per cent of the shareholding. The directors of Commons Holdings had been Mr. McCoy and members of his family and Mr. Cole and Mr. Greene, but after the dispute Mr. Cole and Mr. Greene resigned on the 25th April 1983. At the present time Mr. McCoy has exercised the control he has as a result of the shares in the company and has appointed himself and his wife as directors and his daughter and son-in-law and an outside accountant, Mr. Dowd, as directors. The scheme was that Commons Holdings would hold the premises near the quays, the real property, but that the assets and liabilities, other than the mortgage liability, would be transferred to the new company. It was an important part of the proposals which Mr. Greene and Mr. Cole had worked out that the original company would be a property owning company, and that it would be managed by the "81 Co." and be Irish Pump and Tank Ltd. which had been set up but had been dormant. This was a wholly owned subsidiary of the plaintiff's original company, but the shareholding in Irish Pump and Tank was transferred to the new company so that it became a wholly owned subsidiary of the new company. The significance of revitalizing this was to overcome

the family dispute. It was agreed that the plaintiff would, in fact, manage the affairs at Irish Pump and Tank Ltd., that is to say, the operating, the unloading operations carried on at the quay side, and that the other operations which were originally carried on by the original company would be carried on now by the new company, of which Mr. Natt McCoy was the managing director. It was so hoped that by splitting management, that Mr. McCoy would come straight from the home to the quays and not to the office and that Mr. Natt McCoy would be left with a free hand to run the other part of the business.

My findings of fact in relation to what happened are as follows:- I accept the evidence of Mr. Greene and Mr. Cole; both their affidavit evidence and their oral evidence. I accept that the new arrangement was made perfectly clear to the plaintiff by them. I believe that he understood perfectly well that he was loosing control of the company which he had previously controlled exclusively himself, and I believe he fully understood that the management of the business was being split between himself and his son as indicated. I am satisfied that he was not told by either Mr. Cole or Mr. Greene that he could get back the two A shares which they were taking under the agreement, and I am satisfied that, in particular, Mr. Cole explained to him what his function as chairman would be; if there was a division of the members of the company who held the A shares, that he would

have a casting vote. He was not told he would have ultimate control as chairman. Mr. McCoy is an able man and I think he understood what was happening - that he was giving up control - and I think the major problem of this case was that he had serious regrets later on.

I said I would return to the role of Mr. Greene and Mr. Cole in the company. They were the directors of the old company and they were now taking shares in the new company. It is true they have been allotted A ordinary shares, one each, in the new company and so on liquidation of the company they would be entitled to one thousandth part of the assets of the company. I think it was not adverted to at the time that they were liable to pay £1 for each of the shares, but what has happened in practice is that they obtained the A shares without any financial consideration for them. It is clear to me that the way they obtained the A shares and the purpose of the A shares was as follows. They offered themselves as adjudicators of any dispute that would arise between the plaintiff and his children, in particular, Natt. In the new arrangement it was made absolutely clear to Mr. McCoy that they, in fact, were in a position to adjudicate, that the power was given to them so to do, and I believe this was done with Mr. McCoy's willing co-operation because he saw it as a way out of difficulties he was encountering with his son, and that the son would not emigrate as he was saying he was going to do. I am quite satisfied there was no question of

their getting these shares on any express agreement, that they would return these if requested to do so.

I will come now to what occurred after September 1981. The differences which had previously existed between Mr. McCoy and his son, Natt, surfaced very seriously at Christmas of that year. Within three months of the arrangement being put into operation, a dispute centred around the employment of Robert Senior. I have nothing to say about whether Mr. Robert McCoy or Mr. Natt McCoy was correct about this. Maybe Mr. Robert McCoy was right about Mr. Senior's capacity. That is not relevant. What is relevant is that Mr. Robert McCoy acted in a way which indicated that he thought he had power to run the "81 Company" and act against Mr. Natt McCoy as managing director. This caused a most serious row between the father and son and the result was that the father left the Irish Pump Maintenance Company and has not since worked with the Maintenance Company. This was made known to Mr. Greene and Mr. Cole and they endeavoured to find a solution for it, and a meeting was held on the 10th of February, 1982. This was a most angry meeting and at that meeting Mr. McCoy threatened to break his son's legs. This is indisputable. It was a threat which was not an idle one as events established later showed, and a threat which Mr. Greene and Mr. Cole took seriously. In view of it, it was decided that it was better that the parties would not meet at the meetings of the

Board of Directors and no further meeting of the Board of Directors took place until September 1982. The situation did not improve - in fact it deteriorated. It deteriorated because June got sucked into the dispute between her father and brother and she took her father's side. She was at that time secretary, and Mr. Greene and Mr. Cole and also Natt believed she was giving information about what was going on to her father and also not co-operating with her brother in the way her brother, as managing director, considered proper. The situation was deplorable, and on the 14th of September a meeting was held to try and resolve it. The question of Mrs. June O'Reilly's dismissal arose and the question of the new member of the board, Robert Junior, was raised. The position of the daughter exacerbated the condition. It affected Mr. Robert McCoy's relationship with his son Robert because Robert had taken Natt's side and the family were now split down the middle with Mrs. McCoy doing her best to keep some family unity. The division continued and on the 14th March of 1983 the company formally dismissed June as director. After this Mr. Robert McCoy assaulted his son in the loading bay of the premises. On the 24th May he assaulted his son Robert and he threw about the office furniture in the company premises. He also took part of the organisation of the staff who were protesting because of the dismissal of June. It was a situation which was disastrous as far as the company was concerned. On the 20th of April,

the defendants had written to the plaintiff's solicitor what, I think, is a reasonable letter. Mr. Greene and Mr. Cole were trying to figure a way of salvaging things. Most unfortunately there was no reply to this letter and no reply to take up the suggestion was made. Because of the seriousness of the situation, steps were then taken which subsequently resulted in the institution of these proceedings, and steps taken to remove Mr. McCoy from the "81 Company".

The conclusions which I have come to are as follows: It is claimed in these proceedings, firstly that Mr. Cole and Mr. Greene held the A ordinary shares in respect of which they were registered as trustees for Mr. McCoy and so Mr. McCoy should have the shares transferred to him. I am satisfied that there was no trust arising from the two A shares of the "81 Company" allotted to the defendants, for reasons I have given. I am satisfied that the shares were given to the two defendants for the purpose which they gave in evidence, namely - so that they could adjudicate between the plaintiff and his son if a dispute arose. It was then suggested that, if I were to hold that no express trust existed, that on equitable principles a resulting trust arose. In the present case I am of the view that in fact although there was no financial consideration given by Mr. Greene and Mr. Cole for the issue of the £1 shares which they obtained, that there was in fact a concession given because they were there not only as directors but as

adjudicators in family disputes and there was a concession for the shares they obtained. If I am wrong in that view, the presumption of a resulting trust can be rebutted. The defendants have amply shown that it is rebutted.

The second basis on which the case is put on the behalf of the plaintiff is a different one. It is said that even if the defendants do not hold the "A" shares as trustees, that the plaintiff is entitled to have this transaction set aside on the ground of undue influence or because the bargain was an unconscionable one. Referring to the principles which I have set out in a case of mine - the O'Flannagan Case (28th April 1983) - the plaintiff asked me to set aside the allotment of shares to the defendants and ask, in effect, that the shares be given back to him. On the question of undue influence - a transaction can be set aside if undue influence can be expressly established. But I am quite satisfied, on the evidence, that there was no undue influence by Mr. Cole or Mr. Greene. They were acting as advisers and, in Mr. Greene's case, as a friend. They were in no way endeavouring or trying to influence the plaintiff in their favour, so they could attain one thousandth part of the assets. This certainly was not part of the discussion they had with Mr. McCoy. This was to give effect to his consideration, so that there was, in fact, no undue influence excercised by them on the plaintiff. I very much doubt that the circumstances of this case gives rise to any presumption of undue influence.

but even if it did, it seems to me that Mr. McCoy's will was not overborne, that the excercise of his agreeing with this arrangement was a perfectly free one. Mr. McCoy freely excercised control in giving up part of his equity in his business and there was no question of his will being overborne. So the defendants fall back on another doctrine; that this was an unconscionable bargain. Again I need not rehearse what the principles applicable are; they are set out in the O'Flannagan Case to which I have referred. The burden of showing that the bargain was a fair one is on the person benefiting from it. The benefits which Mr. Greene and Mr. Cole obtained from this bargain are highly questionable and the burdens were very high indeed. If I am wrong in that, and I do not think I am, the burden of showing that it was a fair one has been amply discharged by them. As far as the plaintiff was concerned, the bargain was one which he had agreed to. So far as the defendants were concerned, if they were getting a benefit from it, it was very minimal indeed. They have shown that the bargain was certainly not an unconscionable one, and the principles of equity are not applicable in favour of the plaintiff. So, my conclusion is that the points raised by the plaintiff are not valid ones. I am satisfied that the agreement cannot be set aside in any way.

There is one final aspect and that is the part of the agreement relating to the new arrangment, that all the assets of Commons Holdings

would be transferred to the "81 Company", and all the liabilities, a sum of £19,000, owed by Commons Holdings be transferred. I will make a declaration if the defendants want me to that this should be transferred to the "81 Company". I, therefore, refuse the application in the summons.

It may perhaps be going beyond the province of a judge by expressing the hope, now that the legal issues have been clarified, that the family disputes may be overcome and this very fine business be continued for the benefit of all the members of the McCoy family.

Approved BC
15.11.84