defendants and Marion. He also found that the guarantees were executed in reliance upon a statement on behalf of NZI that they would not be enforced except in the case of fraud or misappropriation by wilful misconduct by a defendant.

Previous Decisions

The judge referred to the leading English decisions on economic duress and adopted the statement by Justice McHugh, then of the NSW Court of Appeal in a 1988 decision:

> "The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct but the categories are not closed."

It was clear from the judge's findings that pressure applied by NZI had induced the defendants to enter into the guarantees. The only further question was whether that pressure amounted to unconscionable conduct because clearly it was not unlawful.

Unconscionable Conduct by the Lender

The judge found that NZI had demanded the personal guarantees after inducing the defendants to change their position in reliance on its representation that there would be no such demand. NZI had taken advantage of the defendants' special vulnerability or misadventure in a way that was unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing.

No Affirmation of Guarantees by Defendants

The judge held that the failure of the defendants to object to the guarantees or to take any step to set aside the guarantees until NZI commenced proceedings resulted from the misrepresentation as to the circumstances in which they would be enforced and provided no ground for finding that the defendants had affirmed the guarantees.

General Guidelines for Borrowers and Lenders

The NZI decision provides another specific example of the type of conduct that may constitute economic duress. American judges pay great attention to such evidentiary matters as the effectiveness of any alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received and the speed with which the victim has sought to avoid the agreement. A number of those questions were considered by the judge in this case. However, it is clear that each case will be decided on its own particular facts.

The prospect is that economic duress will be raised as a defence to the enforcement of agreements more often in the future. Considerable care needs to be taken before taking advantage of the position of another party in a way which may merit the description "illegitimate" or "unconscionable".

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Engineers' Duties to Inform Clients

Westmount International Hotels, Inc et al v Sears-Brown Associates P.C. (1985) Court of Appeals of New York 65 N.Y.2nd 618

Although not a compelling precedent for Australian courts, this recent decision of the Court of Appeals of New York, in which it was found that professional engineers were obliged to provide all relevant facts to their client, could be of interest in appropriate circumstances.

Sears-Brown Associates P.C. engineers were engaged by hotel owners to advise whether a new ballasted roof could be installed on their hotel. The engineers advised the hotel owners that the roof would not meet the requirements of the New York State Building Construction Code and advised that the roof should not be installed. The engineers had come to this conclusion by correctly applying one of two methods of analysis permissible under the Code. However, the engineers failed to inform the hotel owners of the second method of analysis available.

The hotel owners brought an action for "engineering malpractice" for the engineers' failure to inform the hotel owners of the alternative method.

In defending the action, the engineers sought summary judgement arguing that professionals do not commit malpractice when they choose between acceptable alternatives. In denying this motion, the Court of Appeals held that it is perfectly acceptable for the defendant engineers, hired to give professional judgment, to use the test they considered best, give only their conclusions and not to inform the client of any alternatives, if deciding whether a ballasted roof *should* be installed. However, if engaged to advise if such a roof *could* be installed, the client should be informed of the alternative methods of analysis which was more likely to produce a favourable finding.

- **Margaret Lothian, Consultant, Phillips Fox, Solicitors, Melbourne**