LOW PRIORITY

NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND 21/6 C.A. 336/90

BETWEEN GEORGE ALLAN DOUGLAS and NORMA DOUGLAS, of Muriwai, Auckland both retired

1067

Appellants

AND NZI BANK LIMITED a duly incorporated company having its registered office at Auckland, Financier

Respondent

Coram: Cooke P
Hardie Boys J
Gault J

Hearing: 22 May 1991

Counsel: Ms Sian Elias Q C and Mrs Eugenie Laracy for Appellant
Mr L Herzog for Respondent

Judgment: 20 June 1991

JUDGMENT OF THE COURT DELIVERED BY GAULT J

On 19 October 1990 in the High Court at Auckland Master Hansen ordered summary judgment against the appellants as joint and several guarantors of a loan made to Lingfield Holdings Limited by the respondent (hereafter "the Bank").

The affidavit evidence, which included a further affidavit which we gave leave to be filed in this Court on the application of counsel for the appellants and without opposition from Mr Herzog, disclosed that the appellants are the parents of Scott Nelson George Douglas a qualified solicitor but described in the proceeding as a company director. He and another solicitor Mark Lowndes who was in private practice owned directly or indirectly all of the shares in Berkeley Properties Limited later known as Multiple Applications Limited. That company in July 1987 agreed to purchase a commercial property at Andromeda Crescent, East Tamaki for $750,000 with settlement due by 31 May 1988. It became apparent that the company would not be in a position to settle by the agreed date and an extension of time to 30 November 1988 was negotiated subject to Scott Douglas and Mark Lowndes giving to the vendor personal guarantees of punctual payment by the company. Efforts were made to sell the property prior to the postponed settlement date but they were unsuccessful.

One proposal for sale was by syndication. A brochure was prepared it seems sometime in 1988. This contained the proposal for acquisition of the property for $895,000 by a company in which syndicate members would subscribe for shares. It was envisaged there would be ten shares. The initial contribution was $23,122.00 per share. The stated intention was to borrow on first mortgage

$630,000 being two-thirds of a valuation of $945,000 and a further $75,000 on second mortgage.

In the brochure the property was described as being satisfactorily leased with an initial annual rental of $98,374.00 exclusive of GST. Interest costs were budgeted to exceed rental income so that annual contributions from members were anticipated. The brochure also stated:

> "Borrowings will be jointly and severally guaranteed to the lenders by the shareholders. There will be a deed between the shareholders establishing that as between themselves, however, each shareholder is liable only for his or her proportionate share."

A copy of this brochure was sent to the appellants in August 1988 (the reference to August 1987 in the affidavit of Mrs Douglas seems to be in error). According to her affidavit they did not read it and when contacted by their son on the telephone said they were not interested.

On 5 December 1988 the vendor served a settlement notice under the Property Law Act 1952 upon Multiple Applications Limited as the purchaser had by then become.

By early December Scott Douglas appears to have succeeded in persuading his parents to help him. His mother's affidavit says that although the appellants had said they were not interested in investing in the property

their son rang back later in the year and tried to persuade them to change their minds. They told him they were quite happy to lend him the money if he needed it for the property but were told that it would help him and Mark Lowndes to have a spread of people with a share in the property because that would assist the sale of other shares. Arrangements therefore were made for them to take one half of one share. The outlay of approximatelty $12,000 was to be reduced by an amount of $3,000 which Scott Douglas and Mark Lowndes owed the appellants as a result of previous assistance.

Some others were also attracted to the syndication scheme and, with assistance from financial advisors, Scott Douglas and Mark Lowndes secured loan offers from the Guardian Trust Company Limited of $400,000 to be secured by way of first mortgage and from the Bank of $308,750 to be secured by a second mortgage. Both offers were conditional upon personal guarantees being given by the shareholders of the company Lingfield Holdings Limited which was the vehicle for the syndicate's acquisition of the land.

For the purpose of enabling their son to subscribe on their behalf for the one half share the appellants, at their son's suggestion, signed general powers of attorney in his favour. These were prepared by the firm of solicitors of which Mark Lowndes was a member (Lowndes & Co). They were signed in Australia but witnessed in New Zealand by a solicitor after he had contacted the appellants

by telephone and secured their approval to that course.

The appellants sent to Scott Douglas a request dated 21 December 1988 to their bank to pay to Lowndes & Co Trust Account the amount required for their share.

The Bank after acceptance of its loan offer, sent mortgage instructions to the firm of Lowndes & Co.

Scott Douglas in due course, without informing his parents, signed a Term Loan Agreement dated 23 January 1989 and a Deed of Guarantee and Indemnity dated 20 January 1989 on behalf of the appellants as their attorney. By those documents he purported to bind his parents as joint and several guarantors and principal debtors in respect of advances by the Bank to Lingfield Holdings Limited without limit.

The signatures of Scott Douglas as attorney were witnessed by Mr McLean of Lowndes & Co. He certified in the document that he had explained to the guarantors the general nature and effect of the contents of the Deed which included a clause reading:

> "The Guarantor hereunder confirms that he/she/it has prior to the signing of this Deed of Guarantee and Indemnity been advised that he/she/it is entitled to take independent legal advice concerning the obligations and liabilities created by this Deed and having declined to take such independent legal advice had the general nature and effect of the obligations and liabilities created by this Deed explained to him/her/it and further acknowledges that whilst no monetary or material consideration has been received in consideration for the giving of this deed the Guarantor hereby offers this Deed and

securities (if any) in support of the obligations of the Principal."

At about the same time Scott Douglas is said also to have executed guarantees on behalf of his parents in favour of the Guardian Trust Company Limited as required to procure the first mortgage finance of $400,000 for Lingfield Holdings Limited. The appellants say they were not informed of this and did not authorise any guarantees.

As alleged in the Statement of Claim Lingfield Holdings Limited and the appellants (and the other guarantors) each failed to pay instalments of $4,695.57 due to the Bank on 23 July 1989, 23 October 1989, 23 January 1990 23 February 1990, 23 March 1990 and 23 April 1990. As a result of those defaults the Bank gave notice calling up the full balance due together with interest. It is said that the inability to pay resulted from the failure of the tenant to pay the rent under the lease of the property.

On the Bank's claim Master Hansen ordered summary judgment in the sum of $339,312.53 together with interest on $308,750.00 at the rate of 21.5% from 24 April 1990 to the date of payment.

In the notice of opposition the appellants raised a number of grounds by way of defence to the Bank's claim and these were expanded in a statement of defence that was filed. They denied that the Term Loan Agreement and

Deed of Guarantee and Indemnity were executed by them and in the alternative they contended that if the execution by Scott Douglas as their agent is relied upon the documents are not binding because their execution was without authority and in circumstances constituting fraud on the power. They also raised unconscionability of the transaction, oppressiveness under the Credit Contracts Act 1981, lack of disclosure under the same Act, negligence and mistake.

Ms Elias told us that all these matters were argued before the Master. In his judgment he found it unnecessary to deal with them all. He referred to a concession by counsel that all of the defences relied upon the Bank having constructive notice of Scott Douglas's want of authority or fraud. Any concession probably did not relate to all of the defences but nothing turns on that at the present time. The Master referred to the Certificates of Non-Revocation of the Powers of Attorney that were completed at the time of execution of the documents and to s.135(3) of the Property Law Act 1952 which provides that such certificates shall be taken to be conclusive proof of the non-revocation of the power of attorney at the time when the act was done in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of the death of the donor of the power or other revocation.

The Master then examined the four matters said to have put the Bank on constructive notice of Scott Douglas's want of authority and concluded that none can "possibly give rise to constructive notice of the attorney exceeding his authority in any way, or, alternatively, that his actions were fraudulent". In support of that conclusion, and in rejecting the alleged failure to make disclosure under the Credit Contracts Act he referred to the decision of Fisher J in National Australia Finance Limited v Fahey [1990] 2 NZLR 482 in which it was held that both as to authority and as to credit contract disclosure there is no need to go behind an agent acting under a power of attorney which on its face gives the necessary authority.

In this Court Ms Elias advanced argument on the same grounds but, by reference to the further evidence, her submissions more sharply focused upon the issue of fiduciary duties.

The Master did not accept that there was a conflict of interest between Scott Douglas and his parents arising merely from the fact that the son held more shares in Lingfield Holdings Limited than his parents so as to give rise to a duty upon the solicitor Mr McLean who was acting for Lingfield Holdings Limited, Scott Douglas and, of course, the Bank to ensure that the appellants were independently advised. We are not satisifed that was a correct view, but the further evidence presents a very much

firmer basis for the appellants' contentions.

It was the argument for the appellants that the successful syndication of the property was a matter of some importance and urgency for Scott Douglas and Mark Lowndes towards the end of 1988. They had personally guaranteed the punctual payment of the purchase price. The financing of the Lingfield Holdings Limited syndicate by The Guardian Trust Company Limited and the Bank was essential if they were to be relieved of their guarantee obligations and to avoid loss by their company Berkeley Properties Limited of monies already paid. The new borrowing was conditional upon the guarantees of the shareholders of Lingfield Properties Limited. Scott Douglas and Mark Lowndes, therefore, had a clear interest in procuring the guarantees. It was contended also that the difference between the price paid for the property by Berkeley Properties Limited and the price at which it was sold to Lingfield Holdings Limited reflected a substantial undisclosed profit but when the holding costs are taken into account that may not have been the case.

It was submitted, nevertheless, that Mark Lowndes had a substantial personal interest in the transaction in which his firm was acting. His interest was in conflict with that of the appellants. He knew that Scott Douglas also had a personal interest in conflict with his parents. On the appellants' contention that his firm was

acting also for them in the transaction, they were owed fiduciary duties requiring good faith, the fullest disclosure and a clear recommendation to obtain independent advice: Farrington v Rowe McBride & Partners [1985] 1 NZLR 83, Day v Mead [1987] 2 NZLR 443. Mark Lowndes could not avoid the obligations arising from his position as a member of the firm by having an employee Mr McLean handle the transaction - Sims v Craig Bell & Bond (unreported) C.A. 262/90, 6 June 1991.

The protection from the consequences of an agent's lack of actual authority by reliance upon a power of attorney or other written authority sufficiently wide on its face extends only to those dealing with the agent in good faith. That appears from the terms of s.135(3) of the Property Law Act: see also Hambro v Burnard [1904] 2 KB 10, 23. There is, therefore, force in the submission that a solicitor dealing with an attorney whose interest he knows conflicts with that of his client cannot in good faith rely upon a power without enquiry as to the client's actual authority. That will be so a fortiori when his own interest also conflicts with that of his client.

It was argued further that the knowledge of Lowndes & Co is to be attributed to the Bank as principal. That is supported by the decision in this Court in Jenkins v NZI Finance Ltd (unreported) C.A. 214/88, 9 November 1989 (p.22). Ms Elias went further and submitted that

breaches by Lowndes & Co of fiduciary duties owed to the appellants are to be fixed upon the Bank as the instructing principal. She relied upon Bank of Credit and Commerce International S.A. v Aboody [1989] 2 WLR 759. That was a case of undue influence over a wife by a husband who was held to have been acting for the bank to procure execution of documents. In the present case there is no allegation of undue influence and the principles applicable are not necessarily the same, as is said in the judgment where the principles of undue influence are compared with those of "abuse of confidence" by a solicitor whose interest conflicts with those of his client (pp.777, 778). It is there said:

> "It will thus be seen that in some respects the position of a party who is able to rely on the abuse of confidence line of authority is much stronger than that of a party who has simply to rely on the law of undue influence."

The advantage is in not having to prove that the transaction was manifestly disadvantageous. Mrs Aboody in that case failed on the evidence to establish manifest disadvantage. Had she succeeded the transaction would have been set aside so attributing to the Bank the undue influence of the agent.

In so far as Lowndes & Co were acting as solicitors for the Bank in procuring the appellants' guarantees the Bank, which is deemed to have the same

knowledge as the solicitors, must accept the consequences of their acts constituting breach of fiduciary duty.

The appellant's argument to a considerable extent rests for its strength upon the claim that Lowndes & Co acted for the appellants in the transaction. Mr Herzog said there is no evidence that this was the case. Certainly in her affidavit Mrs Douglas said:

> "I had no communication from Scott or from Lowndes & Company, which appears to have acted for Lingfield Holdings Limited and for my husband and me in the transactions, about any of these matters. I never instructed Lowndes & Company to act on my behalf."

This was not commented upon in the only affidavit in reply made by the Auckland Credit Manager of the Bank. There are also indications in the evidence consistent with Lowndes & Co having acted for the appellants. The powers of attorney were prepared by Lowndes & Co. Mr McLean witnessed the signatures of their attorney on the documents. The funds to purchase the half share were paid by the appellants into the trust account of Lowndes & Co.

Even if Lowndes & Co were not acting for the appellants in the transaction, Mr McLean took upon himself the obligation imposed by the Bank to certify that the general nature and effect of the obligations and liabilities created by the Deed of Guarantee and Indemnity were

explained to the appellants and they had declined after advice to take independent legal advice. That certificate was given. The evidence does not establish how Mr McLean approached this duty to the appellants he undertook. The probability is that he considered it was sufficient to give the advice and explanation to the attorney though his certificate does not say that. It is not established whether the advice and explanation were given in a manner clearly distinguishing between the separate capacities in which Scott Douglas was signing.

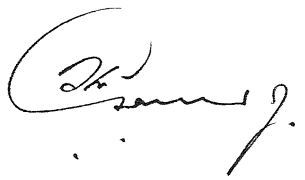
On the affidavit evidence presently available it cannot be said that this defence is wholly untenable and the case is, therefore, an appropriate one for trial at which the factual assertions upon which it relies can be tested in the proper way and the further facts not yet available can be established. The scope of fiduciary duties depends upon the relationship in which they are said to arise. Clearly it will be of importance to establish whether Lowndes & Co had responsibilities to the appellants as solicitors acting for them in the transaction or whether the relationship went no further than explaining the transaction for the purpose of providing the Bank with the certificate. The knowledge, actual and constructive of Mark Lowndes is of importance as is the manner in which his employee, Mr McLean, went about discharging his obligation in respect of the certificate.

On the view we have taken it is unnecessary at this stage to deal with other matters raised in the course of submissions. However brief reference to one should be made. Ms Elias argued that quite apart from the conduct of its solicitors, the Bank separately stood in a fiduciary relationship to the appellants. She maintained that the information in the possession of the Bank was sufficient to constitute constructive notice of absence of actual authority for Scott Douglas to bind the appellants. On the affidavit evidence available there is nothing to indicate that the Bank acted other than in good faith. However, the extent of the information as to the circumstances surrounding the transaction which was available to the Bank at the time may be the subject of further evidence.

Mr Herzog for the Bank placed considerable weight upon the fact that the brochure outlining the syndication proposal clearly set out the requirement for guarantees which he said indicated that the appellants well knew what they were doing when they gave to their son the general powers of attorney. The affidavit evidence at present available from the appellants is that they did not read the brochure and did not know that guarantees were required. They say further that they would not have given authority to their son to enter into guarantees on their behalf. That evidence will be tested by cross-examination in due course.

This matter developed in this Court in such a way as to lead us to take a different view from the Master. We are satisfied that there is an arguable defence that the fiduciary duties arising out of the relationships in which Lowndes & Co were involved meant that it is not enough for the Bank simply to rely upon the power of attorney and certificates of non-revocation.

Accordingly, the appeal is allowed, the order for summary judgment is set aside and the case is remitted to the High Court to be tried in the ordinary way. The appellants are entitled to costs in this Court and in the High Court. The order for costs in the High Court is quashed and the appellants are awarded the same sum ($1,500) for costs in that Court. In this Court the respondent is ordered to pay to the appellants $2,500 with disbursements, including travelling and (if necessary) accommodation expenses of one counsel, to be settled by the Registrar.



Solicitors

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