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(3)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.867/82

1237

BETWEEN NATIONAL BANK OF NEW ZEALAND LIMITED a duly incorporated company having its registered office in Wellington and carrying on business as Bankers

Plaintiff

A N D PAUL NEWTON EDWARDS formerly of Auckland, Factory Manager but now of Sydney, New South Wales, Australia

First Defendant

AND ANDERS WERNER NILSSON of Michigan City, Indiana, United States of America, Company Director
a n d
ULLA KRISTINA NILSSON of Michigan City, Indiana, United States of America married woman

Second Defendants

Hearing: 4 September 1984

Counsel: A D Banbrook for plaintiff
B Stewart for first defendant

Judgement: 4 September 1984

(ORAL) JUDGMENT OF HENRY J.

In 1980 the Plaintiff, to which I shall refer as "the Bank", included amongst its customers the Second Defendants, Mr and Mrs Nilsson and their associated company,

1980 and who appears to have been careful to make appropriate records, as one would have expected of an officer in his position. At this same interview on 23 July the purpose of Mr Edwards' approach, namely to take over the indebtedness of the Nilssons, was implemented. Initially the sum of $1000.00 was paid by Mr Edwards, and for the balance of $13,000.00 a loan agreement was entered into for that amount and which was to be repaid by Mr Edwards at the rate of $250.00 per month. The Bank also required, and following confirmation by telephone that it was available later obtained, a guarantee of the loan by the Nilssons, that forming the security for the loan. The loan agreement itself is simple and in clear, unequivocal terms.

As a consequence of entering into that agreement, Mr Edwards drew a cheque against his account for the sum of $13,029.52. It was then paid in to extinguish the Nilssons' liability. Automatic poayments covering the $250.00 per month were authorized and were in fact paid for some six months after which period of time default occurred, the reason being put forward by Mr Edwards as being the onset of some marriage problems for him and his moving to Australia for some three months.

It is common ground between the parties that the amount now due and owing pursuant to that loan agreement totals $21,502.64.

The sole defence raised is that the loan agreement was brought about by the undue influence of the Bank, that claim being based on the allegation that the Bank was under a special fiduciary relationship to Mr Edwards which it breached, entitling him in effect to set aside the loan agreement. Reliance is placed for that submission on the principle referred to in the two English Court of Appeal cases, that in National Westminster Bank v Morgan [1983] 3 All ER 85, and that in Lloyds Bank Limited v Bundy [1974] 3 All ER 757. I probably need refer only to one passage in the latter case, which sets out the principle in question. At p.767 Sir Eric Sachs said (and I quote) :

> "Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and whee the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.
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> Confidentiality, a relatively little used word, is being here adopted, albeit with some hesitation, to avoid the possible confusion that can arise through referring to 'confidence'. Reliance on advice can in many circumstances be said to import that type of confidence which only results in a common law duty to take care - a duty which may co-exist with but is not co-terminous with that of fiduciary care. 'Confidentiality' is intended to convey that extra quality in the relevant confidence

> that is implicit in the phrase 'confidential relationship' and may perhaps have something in common with 'confiding' and also'confidant', when, for instance, referring to someone's 'man of affairs'. It imports some quality beyond that inherent in the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arm's length. . . .
>
> It was inevitably conceded on behalf of the bank that the relevant relationship can arise as between banker and customer. equally, it was inevitably conceded on behalf of the defendant that in the normal course of transactions by which a customer guarantees a third party's obligations, the relationship does not arise. The onus of proof lies on the customer who alleges that in any individual case the line has been crossed and the relationship has arisen."

As is there made clear, each case of course must turn on its own facts. The circumstances in both the English cases are far different from those in issue here and each has its own important features.

Looking at the evidence as a whole, I am here satisfied that no more happened than was detailed by Mr Varga. This was a simple loan transaction initiated by Mr Edwards a then friend of the Nilssons, but being people with whom he subsequently fell out for reasons which are not at present entirely clear. The loan agreement itself, a copy of which was given to Mr Edwards, is, as I have said, in my view clear and unambiguous in its terms, and sets out quite clearly the obligations which were being undertaken by Mr Edwards. At the time this was signed he

himself was under no pressure of any sort from the Bank, and indeed there was no undue pressure even on the Nilssons which it could be said he was endeavouring to meet or to avoid. I am satisfied that he knew full well what he was doing, the implications of what he was doing, and the obligations he was thereby undertaking. I do not accept that he was ever told by Mr Varga that he need pay only so long as he wished to the monthly instalments of $250.00, and that any recovery, should he cease to pay, would then be solely under the Nilssons' guarantee. Nor do I acccept that he was of that understanding himself at the relevant time. Even on Mr Edwards own evidence, there is not, in my view, established the sort of relationship which could bring into play the duty alleged. He, to use his own words, took over the debt, and that to help out a friend. There was, as I view the evidence, no question of him seeking advice from the Bank in the accepted sense that that term is used, neither is there any suggestion that Mr Varga acted as a confidante of Mr Edwards.

Some three factors in particular were relied upon as going to establish the alleged relationship. They included the fact that Mr Edwards was not fully informed of the extent of the borrowing which had been undertaken by the Nilssons. I think the short answer to that is that prior to signing the loan agreement he knew the exact details of that amount, and indeed the loan moneys

were arranged to cover its repayment. Second, it was suggested that he had a lack of knowledge of the implications of what he was signing and what the agreement really meant. As I mentioned earlier, I am satisfied that he did know and I find nothing in the evidence to suggest that Mr Varga either believed otherwise or had any cause to believe otherwise. Thirdly, the question of conflict of interest was mentioned. In my view, so far as the dealings of the Bank is concerned with both the Nilssons and with Mr Edwards, no such conflict could be said to have arisen. This, as I see it, was a simple banker-customer relationship, and no more. In my view no other relationship existed nor was any abused. I have therefore reached the clear view that the evidence cannot and does not establish the existence of any fiduciary duty entitling the First Defendant to relief on the grounds which have been put forward.

There being no dispute as to indebtedness otherwise, there must accordingly be judgment for the plaintiff in the sum of $21,502.64. The Plaintiff is entitled to costs according to scale, together with disbursements and witnesses' expenses as fixed by the Registrar.

J

Solicitors:

Hesketh & Richmond, Auckland, for Plaintiff

Malloy Moody & Greville, Auckland, for 1st Defendant