IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.37/84

BETWEEN LARRY STUART PALMER

of Taupo, Company Director and JENNIFER MAUDE PALMER his wife

Plaintiffs

A N D BANK OF NEW ZEALAND

a Body Corporate constituted under the Bank of New Zealand Act 1979 and having its registered office in the City of Wellington and carrying on business as Bankers

Defendant

Counsel: G.J. Ferguson in Support
A.F.S. Vane to Oppose

Hearing and Judgment: 19 June 1984 in Chambers at Hamilton

ORAL JUDGMENT OF GALLEN J.

The plaintiffs seek an order for an interlocutory injunction restraining the defendant bank from proceeding further with a proposed mortgagee sale of those premises at 6 Peach Grove, Taupo, which is the place of residence of the plaintiffs.

The plaintiffs in this case allege that Mr Palmer in particular has had a long and close association with the defendant bank. Mr Palmer states that as a customer of the bank in Havelock North over a period of years, he built up a particular business relationship as a result of which he sought the advice of the bank on business matters and relied upon the financial advice that he received. In early 1981 he alleges that he became interested in entering into partnership with a Mr Flanders in a bakery business in Taupo. Mr Palmer says that he discussed the whole proposal with the Manager of the defendant bank at Havelock North and he claims that he was advised on the figures and information then made available, that the opportunity was, to use his own term, "a useful one". He claims that he was given a personal letter to deliver to the Manager of the Taupo branch of the bank, as well as the usual documentation which is made available to customers when they move from one branch of the bank to another.

Mr Palmer says that he then began to rely on the Manager of the defendant's branch in Taupo in connection with his business proposals. He refers to many visits to the bank and again repeats that he relied upon the bank for advice. The plaintiffs financed their involvement in the business in Taupo by the sale of a residential property in Havelock North and contemporaneously with the establishment of the partnership business, they purchased a house property

in Taupo, the subject of these proceedings and in doing so relied upon a comparatively modest advance from the defendant bank which was appropriately secured by a registered mortgage.

Mr Vane for the defendant points out that the whole proposal in respect of the business involved one transaction in which various steps were envisaged and completed by the parties: a company required to be formed, a debenture executed and he says guarantees were - as would be common in such a situation - contemplated. A company was formed, both plaintiffs Mr and Mrs Palmer are shareholders in that company and both are directors. The correspondence exhibited to the affidavits indicates that there was some negotiation with solicitors over the execution of various documents. The only correspondence relating to a guarantee refers to Mr Flanders.

In December 1981 a guarantee was prepared by the defendant bank and at a meeting arranged by the bank, was executed by the plaintiffs. The plaintiffs maintain that they were not aware that the guarantee so executed gave the bank recourse through the quite separate mortgage which secured the advances made by the bank, over their house property. The plaintiffs did not seek or receive separate advice in connection with this particular aspect of the transaction.

The business was a failure and the company is indebted to the bank in a very substantial sum. The defendant bank gave notice to the plaintiffs in 1982 that it intended to exercise its rights to recover the sum guaranteed and in particular would, if necessary, rely upon the mortgage over the plaintiffs' house property. Subsequently this year after the issue of a further notice, the defendant bank has taken steps to realise on its security and the plaintiffs now seek an injunction to prevent a mortgagee sale.

The plaintiffs do not take exception to the manner of exercise of the rights claimed by the defendant bank, but rather impugn the validity of the whole transaction and in doing so they rely upon three separate causes of action.

The first depends upon allegations of the exercise of undue influence and a breach of fiduciary duty and arises out of that line of authority which is perhaps best illustrated by the decision of the Court of Appeal in Lloyds Bank Limited v. Bundy (1975) 1 Q.B. 326. In submissions, Mr Ferguson put forward the proposition that the circumstances in this case were such as to give rise to a serious question to be tried on principles expressed in that and subsequent cases. Mr Vane on the other hand, endeavoured to distinguish Bundy's case and also National Westminster Bank v. Morgan (1983) 3 All E.R. 35. He placed considerable reliance on the decision of the Court of Appeal in The National Bank of New Zealand Limited

v. Hogan an unreported judgment delivered on 17 May 1982 (C.A. 186/81). The general principle for which Bundy's case is authority is set out in particular in the decision of Sir Eric Sachs and depends upon the establishment of a special relationship for which he uses the term "one involving confidentiality" and he makes it clear that there is an additional element in the relationship to that which would arise where a party acts on the advice of some other person in circumstances which may give rise to tortious liability. In National Westminster Bank v. Morgan, the same term is used. There is an emphasis on the fiduciary aspect. It is also clear that in both cases it is expressly stated that the circumstances of the individual case will always be of the greatest significance. In the end, the answer is a question of fact as to whether or not the requisite relationship has been established.

On the material available to me, I am in no position to come to any conclusion which would definitively hold whether or not the relationship had been established, but it does seem to me that there is sufficient to at least raise the possibility that such a relationship existed. It is now well accepted that the relationship of banker and customer can give rise to such a relationship. The plaintiffs allege here that it did and I do not think that there is sufficient material for me to hold for the purposes of these proceedings, that it did not. In saying so, I do not overlook the material presented on behalf of the bank.

In detailed, clear and helpful affidavits, the bank's account of the relationship and transaction are set out. These documents express a diametrically opposite view to that put forward by the plaintiffs and with some justification Mr Vane makes the point that there is an absence of particularity in the plaintiffs' material. While this is true, I think the plaintiffs have established that there is a serious question to be tried on this aspect of the matter, an observation which carries within it the necessity to determine the factual position which can only be done in the substantive proceedings.

I should say that Mr Vane also relied upon the decision of the Court of Appeal in Hogan's case and I accept of course the authority of that decision. However that case too depends upon its own facts. There are differences between the situation revealed there and that in this case. We do not know to what extent Mr and Mrs Hogan or either of them claimed to have the kind of relationship upon which the plaintiffs rely here, but there are also other factors of some significance, perhaps the principle one being that the guarantee in this case had the effect which the plaintiffs claim was unknown to them of giving the bank immediate recourse through the existing mortgage designed to secure other moneys.

I do not need to consider the other two causes of action upon which the plaintiffs seek to rely, but merely

observe in passing that I should have thought that the material before me probably did not indicate that there was a serious question to be tried in respect off the second, but it may be that there is such a question in respect of the third which could raise some rather difficult questions of law bearing in mind the provisions of the Contractual Mistakes Act 1977.

That brings me to the question of the balance of convenience. There can of course be no doubt that the defendant bank is well able to meet any damages which might ultimately be held payable by it. By contrast, the plaintiffs could not do so, their only asset being the house property the subject of these proceedings and that on the papers is insufficient to yield enough to satisfy the bank's claim. However such a situation must be very common in cases relating to securities over house properties and it would be an illusory right if persons in the position of the plaintiffs could never seek this kind of assistance because of their limited means, these being essentially the reason why the action has been taken in the first place. I think this is the kind of situation where it is desirable as far as possible to preserve the status quo. If the house were to be sold, it might be difficult to effectively compute any damages to which the plaintiffs might ultimately be held to be entitled. The affidavit of Mr Watson indicates that they might well be unable to finance the purchase of

another property and the loss of a home is something which may be difficult to put into financial terms. By contrast, the loss to the bank is essentially the accruing interest on moneys to which they may be held to be entitled. Mr Vane indicated that if I were minded to grant the interlocutory injunction which has been sought, that it would be appropriate to require the payment of capital. This is a not uncommon condition in cases of this kind. Mr Ferguson states that his clients are not in any position to meet such a requirement. I think I must take the realities of the situation into account. In cases where the right itself is not in issue but only the manner of its realisation, there is ample authority to the effect that the amount in issue must be paid into Court or otherwise secured. The same principle does not apply in cases where the right itself is in issue. This is one of those cases, but it is desirable that where questions of the status quo become decisive, that the interests of both parties should be protected.

I am prepared to grant the interlocutory injunction sought but one of the terms which will be imposed is that the plaintiffs meet the interest on the amount at issue as it accrues. I also make the observation that it is highly desirable that this matter should be dealt with as urgently as possible. A further condition will be that if either party seeks discovery, it must be sought within 14 days of the date of this judgment. If interrogatories are sought,

then they must be sought within 1 month of the filing of the affidavit of documents on behalf of the party against whom interrogatories are sought to be delivered. If interrogatories are not sought within this period, the matter must be set down for hearing, if necessary, unilaterally.

There will be an order in those terms. Costs will be reserved.

Solicitors in Support: Messrs Clifford, Devine and Partners, Hastings

Solicitors to Oppose: Messrs R.H. Le Pine and Company, Taupo