

X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.424/83

Britten v. Ltd
576

BETWEEN AD VENTURE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there as Advertising and Marketing Agents

Plaintiff

AND KENNETH ARNOLD MORLEY of 149 Portland Road, Remuera, Accounts Executive

First Defendant

AND FRANCIS XAVIER CHANG of 17 Camellia Place, Mt Roskill Company Director

Second Defendant

Hearing: 11th May 1984

Counsel: Yolland for Plaintiff
Viskovic for First Defendant

ORAL JUDGMENT OF SINCLAIR, J.

An action was commenced by Ad Venture Ltd against Kenneth Arnold Morley and Francis Xavier Chang claiming the sum of \$14,325 being money due by Chang to the Plaintiff in respect of certain business transactions entered into between those parties.

Mr Morley's involvement comes about by reason of the fact that on 9th September, 1982 he executed a guarantee in favour of the Plaintiff which is in the usual form and relates to the guarantee being given in respect of the Plaintiff's forbearance to sue in respect of the amount of \$14,325.

As so often happens in actions of this nature, the debt was not met and Mr Morley was called upon to honour his guarantee, the ubiquitous Mr Changhaving taken advantage of the intervening period to absent himself.

Judgment was duly entered and then a bankruptcy petition was issued and served on Mr Morley. He now seeks to set aside the judgment which was obtained pursuant to R.236 of the Code of Civil Procedure.

The writ was served upon Mr Morley on 10 May, 1983. Judgment was entered against him on 5 July, 1983. A bankruptcy notice was served in respect of that judgment on 28 September, 1983 while the bankruptcy petition was served upon him on 15 December of that year. It was not until 28 March, 1984 that the present motion was filed. Quite frankly the delay, to my mind, is not explained. Mr Viskovic points to paragraph 12 of Mr Morley's affidavit stating that all his life he had suffered from an unreasoning fear of solicitors and of courts and that that phobia on his part was the sole reason why he had taken no steps in the proceedings before the late stage of filing the present motion. That cannot, in my view, amount to a legal and satisfactory reason for the delay in these circumstances. But what is necessary before the judgment can be set aside is for Mr Morley to show that he has a substantial ground of defence before the Court will act under R.236. This goes back to cases as far back as Smith v. Dobbin (1878) 37 L.T. 777.

What is the defence which is now put forward? This is what appears from his affidavit. In paragraph 10 he refers

to the signing of the guarantee and then goes on to say that he was at the time of the affidavit informed that he had no legal responsibility towards the Plaintiff, but that at the time of the signing of the guarantee he was not aware of that, and in any event he was, to use his own words, "subjected to considerable moral pressure to sign by both the Plaintiff and the said Francis Xavier Chang". There is nothing more than that. There is not one word as to the nature of the moral pressure; there is not one word as to the name of the person in the Plaintiff company who exerted the pressure and the nature of that pressure, nor is there any indication that Morley in any way was obligated to Chang. In fact that seems quite unlikely in view of the fact that in paragraph 3 of his affidavit Morley states that he first met Chang in September, 1981 merely one year before the signing of the guarantee.

In all the circumstances I cannot spell out any legal defence at all. This may be said to be a defence of duress, but where are the facts which would, even prima facie, suggest that such a defence was available to Morley? There are none; there is nothing in the affidavit which remotely amounts to undue influence and I cannot possibly hold that there has been made out any defence at all, let alone a substantial one.

The motion must be dismissed and according it is with costs to the Plaintiff of \$100. The bankruptcy petition which was issued against Mr Morley was adjourned to a date to be fixed to coincide with the date of the hearing of this motion. It is not appropriate to deal with the

bankruptcy petition on this day, but now the bankruptcy petition will be set down for hearing on Wednesday, 30th May 1984 at 10 a.m.

P. D. King

SOLICITORS:

Yolland & Romaniuk, Auckland for Plaintiff

Richard S. Phillips, Parnell for First Defendant