6/12 N2LR X

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

A.61/83

1481

BETWEEN NORMAN CHARLES COXHEAD of Ngaere, Farmer, and GLORIA PAMELA COXHEAD his wife

Plaintiffs

A N D BEVERLEY MIRIAM WALKER of Ngaere, Widow

Defendant

Hearing: 27, 28 and 29 August 1984

Counsel: R C Laurenson for plaintiffs
Deidre Milne for defendant

Judgment: 29 NOV 1984 November 1984

JUDGMENT OF VAUTIER J.

The plaintiffs in this action have claimed the sum of $15,000.00 as payable to them by the defendant in terms of a Deed entered into between the parties whereunder the plaintiffs, described therein as lessees, agreed to surrender to the defendant, described as lessor, their rights under an agreement to lease contained in an agreement for sale and purchase of certain land. Interest is also claimed.

The defendant does not deny entering into the deed, but claims in her Statement of Defence that she did so under a mistake as to the nature of the agreement to lease referred to and under a mistake as to its effect, which mistake was known to the plaintiffs and which resulted in the conferment of a benefit which was substantially disproprortionate to the consideration received by her for the surrender. Alternatively, she claimed that she had entered into the deed by reason of the undue influence of the plaintiffs. On the basis of the allegations as to mistake, relief was sought in terms of the Contractual Mistakes Act 1977. Alternatively, it was claimed that the deed should be declared void on equitable grounds.

The background and most of the salient facts can be stated without difficulty, because they were not in dispute. Initially, in the year 1966 the plaintiffs, then both aged about 26, entered into a sharemilking agreement with the defendant's husband who had for many years been engaged in dairy farming on land consisting of some 138 acres near Stratford. Part of the land was at that time held by Mr Walker on leasehold title. He was then aged about 62. Then in 1970 the plantiffs entered into a lease of the property on a 5 year term, with a right of renewal for a further 3 years. The land at this time was held by Mr Walker under three separate freehold titles. During the term of the lease the plaintiffs themselves leased another 78 acres from a Mr Tecofsky.

Then on 28th February 1975 the plaintiffs agreed to purchase the land of Mr Walker, then aged 71. Mr Walker had five sons but none of them, it seems, wished to carry on the family dairy farm. The purchase price was $112,334.00. The defendant says that she took no part in the discussions or negotiations relating to this sale. The plaintiff, Mr Coxhead, as all the evidence confirmed, was on very good terms with Mr Walker - as of course would be expected from their long continued association. When the question of sale came up for discussion, according to Mr Coxhead, Mr Walker first spoke of a price of $50,000.00, and Mr Coxhead told Mr Walker it was worth much more than that - possibly $80,000.00 to $90,000.00. Mr Walker then arranged a family conference and following this Mr Coxhead was informed that the price asked was $850.00 an acre, which meant the total purchase price would be well over double what had been initially suggested. Although believing that the price was too high, Mr Coxhead went ahead in an endeavour to arrange first mortage finance from the Rural Banking Corporation. Objection was taken by the Corporation, however, to the proposed purchase price as too high and it was recommended that a substantial reduction be negotiated. Following this, a reduction to $813,77 per acre was negotiated which, according to Mr Coxhead, was still considered too high but by way of offsetting this certain other terms were agreed upon. Mr Walker had from the outset stipulated that an area of 10 acres on which stood his own homestead with its surrounding gardens should be excluded from the sale. Under the terms of the agreement these 10 acres were to be surveyed

off at the vendor's cost. Clauses 12 and 29 of the agreement then made the following provisions regarding these 10 acres:

> "12. IN event of Vendor selling the said 10 acres hereinbefore referred to other than to the Purchasers the Vendor and the purchasers shall bear half the cost each of a proper farm fence between the said 10 acres and other lands sold hereunder.
> ...
> 29. AS part of the consideration for sale and purchase herein the Vendor for himself and his executors and administrators agrees to lease to the Purchasers and their respective executors and administrators for a period of twenty (20) years from 1.7.75 whilst the Purchasers are registered proprietors of the adjoining land hereby sold to them the pasture lands forming part of the area of 10 acres to be surveyed off and retained by the Vendor and being part of Sect. 21 Block VI Ngaere S.D. at a rental of $1.00 per annum Purchaser to pay proportion of rates levied on the 10 acres, to maintain road fences and manure pastures and further that should the said 10 acres be offered for sale to other than a son of the Vendor's then the Purchasers shall be given first option to purchase such 10 acres at a figure to be agreed upon failing agreement to be fixed by arbitration and these provisions shall not merge with the Transfer."

The agreement also provided for $60,000.00 of the purchase price being provided by means of a second mortgage back to the vendor at an interest rate, with prompt payment, of six-and-one-half per cent for the first 5 years, which Mr Coxhead agreed was a favourable rate at that time and designed to assist the plaintiffs to get themselves established, and as a further compensatory factor to offset the

high price held out for. The defendant herself was not of course in a position to contradict any of those statement, but they were not contraverted on her behalf, and they were indeed supported to a substantial extent by evidence of Mr Thomson, the solicitor who had acted for many years for her husband (and later the plaintiffs also) and by the correspondence and documents emanating from the Rural Banking Corporation.

No difficulty arose concerning what was meant by "the pasture lands" because the homestead and its gardens were fenced off although the 10 acres themselves were not so fenced off from the remainder of the farm. The plaintiffs thus, after the purchase, continued to use the land in question - some 8 acres - in conjunction with their dairy farming operations just as they had done in the past with their lease of the farm. This land was of particular value to them because it was only some five chain from the cowshed, and it lay in a sheltered valley and provided good safe calving paddocks which did not bog-up in winter-time when used for that purpose. Seven to eight cows could be carried right through on these 8 acres.

The lease from Mr Tecofsky contained an option to puchase, and in February 1981 Mr Coxhead gave notice of intention to exercise that option with settlement at 30th June 1981. It should here be mentioned that Mr Coxhead had earlier arranged to obtain water for this land which was on the

opposite side of the road from the land purchased from Mr Walker, and he had agreed to extend this water supply so that it was available as a supply for the 10-acre area including Mr Walker's homestead. Mr Coxhead also effected some improvements on the 8-acre area.

Not long after the purchase, namely on 23rd October 1975, Mr Walker died leaving a will in which the defendant was appointed executrix. She was given only a life interest in the realty but she had the right, if she desired to reside elsewhere, to have another property purchased out of the funds of the estate. Until the year 1981 however, she continued to reside in the farm homestead with one of her sons, Mr Dennis Walker, whose occupation was that of Manager of a local dairy factory. A residential section had indeed been earlier surveyed off the farm in a position adjoining the homestead area so that he could make his home there, but in 1981 the house built on this was being occupied by a son of Mr Dennis Walker.

The good neighbourly relations which had existed in Mr Walker's lifetime did not altogether continue as regards the plaintiffs and the defendant following Mr Walker's death. Mrs Walker, according to Mr Coxhead, adopted the approach simply of telling him about things she wanted him to do, instead of asking him if he would undertake them for her. There had, it was acknowledged by Mr Coxhead, been an oral

agreement made ancillary to the arrangement recorded regarding the 8 acres of pasture land, whereunder, in addition to the nominal rental and payment of rates on the whole 10 acres, the plaintiffs were to supply a beast a year to the Walkers, to be killed for meat. Only one such beast was supplied. According to Mr Coxhead, this was because Mr Walker encountered a situation with this first supply of members of the family taking the best cuts of meat, and he was told by Mr Walker that the supply of the animal in subsequent years was not required. While not seeking to deny specifically that Mr Coxhead was told he need not supply further beasts in this way, Mrs Walker claimed that none of the meat from the beast supplied was given to any member of the family and that they had their own source of supply. The cessation of the supplying of the beast was one of the matters concerning which the defendant later consulted Mr Thomson. There were also some disagreements over fencing, about cows getting into the defendant's garden and also it seems over the allocation of moneys paid in respect of mortgage interest. Mr Thomson's file records showed he was consulted about such matters by Mrs Walker in October 1977 and again in August 1980, and after the latter occasion Mr Coxhead was advised that the higher interest payable after 5 years under the terms of the agreement for sale and purchase had come into operation.

Then in about February 1981 Mr Thomson was consulted again by Mrs Walker. She then told him that she

intended to sell the 10-acre property at Ngaere because she wished to purchase a residential property in New Plymouth and had decided on the purchase of a display home which she particularly wished to have, and which according to Mr Thomson she was "determined to buy". He had several attendances with her, during which he again went over the terms of the agreement for sale and purchase with her, pointing out that in terms of Clause 29 she was obliged, before selling, to ascertain whether any member of her family wanted the property and if not to offer it first to the plaintiffs. His recollection was that on this occasion he went through the whole clause with her. According to Mrs Walker's evidence, her reason for wishing to sell at this stage was that she was having trouble with her back, and her son had expressed an intention to leave and set up a home of his own, and she would be unable to manage the garden on her own.

It so happened that at about the same time the plaintiffs themselves were also thinking about selling. Mr Coxhead said that he had looked at two farms in about January 1981. He had then, however, consulted Mr Thomson who had advised him strongly against any such move, telling him that he would be much better advised to stay where he was, bearing in mind his equity and the favourable rates of interest under the mortgages he then had. This Mr Thomson confirmed. The plaintiffs had a family of four sons, one of whom was unable to work, and they wished to obtain a larger property to form a

family unit. The defendant, when she came to give evidence, admitted that prior to her entering into the deed regarding the surrender of lease Mr Coxhead had informed her he was "considering buying a larger property because he wanted to keep all the boys at home". According to Mr Coxhead, however, Mrs Walker did not advise him of her plans to sell and that an agreement for sale and purchase had actually been drawn up. This Mrs Walker disputed. She admitted however that she did not, she thought, when entering into the agreement seek Mr Thomson's advice, and the agreement prepared regarding her purchase contained a clause making it conditional upon the purchaser getting vacant possession of the whole 10 acres and also their getting "legal access to the water supply from the neighbouring property" which was, of course, the supply from the plaintiffs' property. Mr Coxhead described how he first learned of those matters from the intending purchasers themselves. Mrs Walker herself claimed that she at the time knew nothing about the lease of the plaintiffs having to be "bought out".

The upshot of all this was that a discussion took place between Mr Coxhead and Mrs Walker wherein he told her that he wanted $15,000.00 to surrender the lease. An appointment was then arranged for that same day with Mr Thomson for them both to attend so that matters could be finalised. Mr Walker attended with her son, previously mentioned, and they spent half an hour or so discussing the matter with Mr Thomson

in the absence of Mr Coxhead. Mrs Walker's version of the interview differed considerably from that of Mr Thomson. According to her, he told him she thought the sum held out was unfair and excessive. She said he would not comment and she was hoping he would. Immediately after this however, she said that Mr Thomson said "Anyway, I think Mr Coxhead is selling his farm and in that case it releases the lease". Mr Thomson in his evidence confirmed that there was some mention to Mrs Walker, either at this meeting or earlier, of the possibility of the plaintiffs' selling and of the fact that this would have the result of her mortgage moneys being released, thus enabling her income to be considerably increased. Apart from this, however, he said that he was simply told of the parties having agreed between themselves on the $15,000.00 figure and at no stage was his opinion sought as to whether it was a proper figure. He did, however, suggest that an increased interest on the mortgage should be paid to compensate Mrs Walker for her loss of income from the $15,000.00. She also accepted that at some stage he suggested to Mrs Walker that she get a valuer's opinion (as the defendant herself had, he said, stated on another occasion that he had done). As Mr Thomson put it, however, he had "two very self-willed people" in his room that day, and the matter accordingly was left to proceed on the basis upon which the parties themselves arrived at.

Another solicitor employed by the firm was left to draw up the actual deed, which was in these terms :

"THIS DEED made the 10th day of APRIL 1981 BETWEEN BEVERLY MIRIAM WALKER of Ngaere, Widow (hereinafter called "the Lessor") of the one part AND NORMAN CHARLES COXHEAD of Ngaere, Farmer, and GLORIA PAMELA COXHEAD his wife (hereinafter called "the Lessees") of the other part

WHEREAS pursuant to Agreement for Sale and Purchase dated the 28th day of FEBRUARY 1975 between the Lessor's late husband CHARLES WILLIAM WALKER as Vendor and the Lessees as Purchasers the said CHARLES WILLIAM WALKER agreed to lease and the Lessees agreed to take portion of the land containing 4.0479 hectares more or less being Lot 1 on Deposited Plan 11528 being part Section 21 Block VI Ngaere Survey District and being all the land described in Certificate of Title VOLUME D2 FOLIO 1117 (Taranaki Registry) (hereinafter called "the Demised Land") for a term of 20 years from and including the 1st day of JULY 1975 upon such further terms as are set out in the said Agreement for Sale and Purchase

AND WHEREAS the Lessees are indebted to the Lessor in the sum of (now) FIFTY-SIX THOUSAND DOLLARS ($56,000.00) as is evidenced by Memorandum of Mortgage Registered No.226131.5 (Taranaki Registry)

AND WHEREAS the Lessor is the registered proprietor of such land

AND WHEREAS the Lessor has agreed to sell such land to certain third parties with settlement on 30th June 1981 with vacant possession to be given on such date

AND WHEREAS the Lessees have agreed to surrender their rights and interest in such land for the residue now to come upon the terms hereinafter following

NOW THIS DEED WITNESSES THAT IN CONSIDERATION of the sum of FIFTEEN THOUSAND DOLLARS ($15,000-00) paid to the Lessor by the Lessess and in pursuance of the premises the Lessees HEREBY SURRENDER AND ASSIGN to the Lessor the Land TO THE INTENT that the said term of years thereby created may merge

and be extinguished in the fee simple of the land as of the 30th day of JUNE 1981

AND THE PARTIES HERETO FURTHER EXPRESSLY AGREE:

1. THAT the aforesaid consideration of FIFTEEN THOUSAND DOLLARS ($15,000-00) shall be paid and satisfied by the Lessor reducing the principal sum under the said Mortgage Registered No. 226131.5 such reduction to take effect as from the date of actual repayment of the whole of the principal sum whether on the 1st day of JULY 1985 or earlier

2. THAT the Lessees shall pay interest as provided under the said Mortgage on the full principal sum owing thereunder no account being taken of the aforesaid reduction of $15,000-00

3. THAT the parties will enter into and duly execute all Variation of Mortgage and other documents required to make such reduction in the principal sum legally effective

4. THAT the Lessess will give vacant possession of the land on the 30th June 1981

AND THE LESSEES HEREBY FURTHER ACKNOWLEDGE that they were granted first option to purchase the said land in terms of Clause 29 of the aforesaid Agreement for Sale and Purchase AND that they declined to so purchase the land.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

SIGNED by the said)
BEVERLY MIARIAM WALKER)"Beverly Miriam Walker"
as Lessor in the presence of :-

sgd: "J G TOEBES"
Solicitor
STRATFORD

SIGNED by the said)
NORMAN CHARLES COXHEAD) "N COXHEAD"
and)
GLORIA PAMELA COXHEAD) "G COXHEAD"
as Lessees in the presence of :-

sgd: "J G TOEBES"
Solicitor
STRATFORD. "

It is to be noted that there is an obvious drafting error in the operative clause following the reference to the consideration, but no point was taken on behalf of the defendant as to this. The true intention is, of course, made clear elsewhere in the document.

Not very long after the execution of this document the plaintiffs did indeed buy another property, the agreement for sale and purchase being dated the 4th June 1981. They proceeded to sell the former Walker property by selling separately the portions comprised in the different titles (together with the land purchased from Mr Tecofsky, as previously mentioned), the agreements being entered into in May and June 1981, all for settlement on the customary 1st July. When they came to settle these sales, however, they were met with the defendant's refusal to accept the sum of $41,000.00 in discharge of the mortgage to the Walker estate, provided for by Clause 1 of the Deed of 10th April 1981, and her insistence on recovering the full $56,000.00. The plaintiffs at first sought to retaliate by refusing to give up possession to the purchasers from the defendant of the 8 acres, they being still in possession at this stage. The situation, however, was eventually overcome for both sides by an agreement they reached, whereby the $15,000.00 (which Mr Coxhead had been compelled to borrow to enable him to settle with his purchasers and the vendor of his new property) was held in trust by the defendant's solicitors pending the determination of the dispute between the parties.

It was then discovered that an error had been made in relation to the agreement for sale and purchase into which the plaintiffs had entered in 1975. Because they held the leasehold land from Mr Tecofsky, an application to the Administrative Division of the Supreme Court for the consent of the Land Valuation Committee was necessary in terms of s.23 of the Land Settlement Promotion and Land Acquisition Act 1952. Reference to that Act was made in the agreement, and application was duly made for such consent and it was in fact obtained. What was overlooked, however, was that an express order of consent was necessary not only as regards the purchase of the farm itself but also in respect of the leasing of the 8 acres and the option to purchse provided under Clause 29. The defendant in her Statement of Defence, has formally denied the validity of the agreement to lease and the plaintiffs, as part of the relief they claim, seek an order in terms of s.7 of the Illegal Contracts Act 1970 validating the contract embodied in Clause 29. At the hearing, Mrs Milne did not present any submissions against the Court so acting.

Having regard to the matters to which the Court under s.7(3) is required to consider before granting such relief, and to the decisions of the Court of Appeal in Ross v Henderson [1977] 2 NZLR 458, [1979] AC.196; Harding v Coburn [1976] 2 NZLR 577 and Hurrell v Townend (1982) 1 NZLR 536, I conclude that this is very clearly a case where such relief should be granted.

The objectives of the enactment in question could not be said here to have been actually obssructed in any way by what occurred. The whole of the terms of the agreement in question were placed before the Committee and the consent which was given involved consideration of the use of a total of 216 acres including the leased land. There was thus only the comparatively small additional area of 8 acres involved, and this was land which the plaintiffs had in any event been leasing previously and could have continued to lease for a further 3 years if they had not been purchasing. An order validating the terms of Clause 29 of the agreement for sale and purchase dated the 28th February 1975 is accordingly made.

I proceed now to deal with the defences specifically pleaded. In opening, Mrs Milne stated that the defendant would rely upon the contention that the agreement embodied in Clause 29 was in fact not an agreement to lease at all, but only a licence. On this basis she contended that there had therefore arisen a case of mutual mistake, coming within s.6 (1) (a) (ii) of the Contractual Mistakes Act 1977, in respect of which the Court could grant relief in terms of s.7 of that Act. In her closing submissions however, Mrs Milne conceded that she was in a difficulty in advancing this basis for the defence and counterclaim, in that there was no evidence that either party entered into the deed on the 10th April 1981 with any thought in mind as to in which particular legal category the agreement embodied in Clause 29 of the

agreement for sale and purchase fell. I must say in any event that I am quite unable to accept the suggestion that the agreement amounted to a licence only. It is true that the use of the term "lease" and "rental" does not conclude the matter. As Somervell LJ said in Facchini v Bryson [1952] 1 TLR 1386, at 1389 :

> "It has been said more than once that it is not a mere question of words. If, looking at the operative clauses in the agreement, one comes to the conclusion that the rights of the occupier, to use a neutral word, are those of a lessee, the parties cannot turn it into a licence by saying at the end 'this is deemed to be a licence'; nor can they, if the operative paragraphs show that it is merely a licence, say that it should be deemed to be a lease."

It is accepted, I think, that the consideration of first importance is whether exclusive possession is granted. There is certainly nothing here to indicate that the right of exclusive possession, which would ordinarily be deduced from the use of the words "lease" and "rental", was not intended to be conferred. There is, further, the definite fixed term and the imposing of obligations usual in a lease of farmland - viz., keeping in repair of fences and applying manure. The nominal rental figure, while in some degree aiding the argument for a licence, has of course to be considered in relation to all the other factors involved, including the benefits Mr Walker would be likely to consider he gained by having his land properly farmed and the rural setting around his home preserved by someone in whom he obviously had confidence and trust.

The references to executors and administrators are also quite inconsistent, in my view, with any notion of a personal licence. While it is true that the right of assignment which is here absent is ordinarily to be implied in a lease, this is only in the absence of provisions to the contrary (as is stated in Hinde, McMorland & Sim's Land Law, Vol.I, para. 5.099). It is very common, of course, for such right to be negatived or restricted in leases. Looking at the matter in the way referred to in the case to which Mrs Milne referred, Shell-Mex and B P Limited v Manchester Garages Limited [1971] 1 WLR 612, I conclude that there was here an agreement to lease and not simply a licence.

A further point raised by Mrs Milne was as to whether, assuming there was an agreement to lease, this being unregistered would bind a subsequent purchaser. This was not pursued. It was further submitted that the reference in Clause 12 to the vendor selling indicated an intention that the lease should come to an end on such a sale, and that accordingly there was in fact nothing for the plaintiffs to surrender or sell when once a sale had been entered into by the defendant. With this I cannot agree. Sales of property subject to outstanding leases are, of course, commonplace. No real benefit at all would have been conferred upon the plaintiffs by Clause 29 if the vendor could have forthwith brought its operation to an end by selling the 10 acres.

Again of course there is, in any event, no evidence at all of Mrs Walker proceeding under the misapprehension of her having such a right and not knowing of it - and this Mrs Milne was constrained to concede.

A further submission, being that the defendant entered into the agreement in the mistaken belief that the right under the lease being surrendered had a value of $15,000.00 whereas the plaintiffs knew this was not the case and that the defendant wrongly believed that it was, must also fail for like reason. There was simply no evidence at all to support anything of that kind. There was evidence relating to Mr Coxhead's computation o the value, on the basis of the estimated production to be gained from the land for the residue of the term. This could only operate to provide confirmation of Mr Coxhead's belief that what he was surrendering was of the value for which he held out. There was no separate valuation at that stage. There was, moreover, nothing whatever to show that Mrs Walker actually turned her mind to the question of the real value of the plaintiffs' rights under the agreement. Her only concern seems to have been that she should not have been asked to pay so much because of the generous way in which she believed the plaintiffs had been treated by her husband.

In the end, the submission under the heading of mistake upon which Mrs Milne really placed reliance, was her final one which was that the defendant entered into the deed in

the mistaken belief that the plaiintiffs intended to remain on the land and that therefore their lease had a period to run and its surrender had a value therefore of $15,000.00 whereas the plaintiffs, knowing that the defendant so believed, had already decided to sell and were aware that their rights came to an end upon such sale.

The defendant's own admission of, and the evidence of Mr Thomson confirming, the mention made to her as to the plaintiffs' desire to get onto a larger farm, of course creates some difficulty for the defendant right at the outset in advancing such an argument. In relation to this suibmission Mrs Milne referred me to an article in the New Zealand Universities Law Review, Vol.9, p.390, by D J Stephens, which I have read with interest.

It is first necessary, of course, to reach a conclusion as to what were the actual facts: Mrs Milne submitted that there were factors which could justify the Court in rejecting Mr Coxhead's assertion that he did not decide to sell until ater Mrs Walker sold her land. She referred to his having referred twice initially to his first inspection of the farm he ultimately bought as being on 29th May 1981, and then later saying that it was the 24th April 1981. I have reconsidered this point in my re-reading of the evidence, and I do not think that this was anything other than a genuine mistake in recollection.

Mr Coxhead was, in fixing this date, clearly trying to relate it back from the date when he went into possession, and his later evidence made it clear that there was a little confusion in his mind regarding the time lapse from his first inspection to the date when he signed the agreement, and the date when he went into possession. In relation to this aspect and the matter generally, I am influenced by my observation that Mr Coxhead appeared throughout to give his evidence in a frank, straightforward manner. He did not hesitate in giving answers which could in a measure be regarded as unfavourable to his case. It must also I think be remembered, in relation to this matter of the closeness of the date of sale by him to the date of execution of the surrender, that the whole situation was one which only fortuitously happened to operate to the advantage of the plaintiffs. It was not of his creating. If Mrs Walker had not decided she wanted to sell and proceeded with the purchase of another property, the plaintiffs would have had to decide whether to stay where they were or to sell and thereby lose the value of the very favourable occupancy rights they had over 8 acres of good land. They might indeed have decided to sell, and the Walker estate would then have gained. It is the kind of situation which can arise again and again. The house purchaser who buys before selling his own house risks the making a present of a substantial profit to somone to whom he has to sell his own house in haste to enable him to avoid defaulting on his purchase. Advantages of his own purchase may well outweigh this risk.

It would be quite unreal and wrong in my view for the Courts, in the guise of applying the Contractual Mistakes Act 1977, to embark upon a process of endeavouring to deduce what were the various thoughts in the minds of the contracting parties which most influenced them into contracting on particular terms. The statute cannot be sensibly interpreted in my view otherwise than on a basis of there being clear evidence pointing to the actual mistake which is relied upon, and to the erroneous belief being a material factor in the party seeking relief entering into the contract which he concluded, and showing the statutory conditions to be precisely met. There must, surely, I think, be words or actions which enable the Court to draw logical and sustainable conclusions as to such matters.

All that can be said with any confidence here in my view is that Mrs Walker was, as Mr Thomson said, determined to get the New Plymouth house because of its advantages from her point of view. There is nothing whatever to indicate the extent if any to which the likelihood or unlikelihood of the plaintiffs selling in the near future influenced her thinking. She might, of course, have done better by waiting longer to see if the plaintiffs really were intending to sell. Mr Coxhead might well, in that event, have over-played his hand by holding out for the $15,000.00 and have eventually decided to sell and lose out altogether as regards his rights in the leased land. It has, of course, also to be remembered that disposing of his interest under the agreement to lease,

as Mr Laurenson pointed out, placed the plaintiffs in a much more favourable position to buy another property because they thereby increased their equity in the land they owned by $15,000.00.

I can find no basis here for the application of either s.6(1) (a) (i) or s.6 (1) (a) (iii) of the Contractukal Mistakes Act 1977. It is not possible to refer here to any evidence to show that Mr Coxhead was "mistaken about the same matter of fact or of law", or indeed, that he was mistaken about anything, or knew anything of the existence of any mistake.

There remains for consideration the question of alleged undue influence operating to render the deed subject to being declared void on equitable principles. It is necessary for this purpose for me again to reach conclusions as what on the balance of probabilities constitute the true facts surrounding the execution of the deed on the 10th April 1981. It must first be noted that Mrs Milne disclaimed entirely any suggestion that the defendant should be regarded by reason of her age as not mentally alert or easily influenced. Any submission along those lines would indeed have been entirely refuted by the demeanour of the defendant in the witness box. She there exhibited complete alertness, a very clear appreciation of all that was said and an ability to express herself clearly and forcibly.

As I have already indicated, however, much of her evidence, and to some extent that of her son Mr Dennis Walker, was in conflict with that of Mr Coxhead and also that of Mr Thomson. By necessity I must form a view as to which evidence should be preferred. I am constrained to regard that of Mr Coxhead and Mr Thomson as the more reliable and accordingly that which I must accept. I say this not only by reason of my general assessment of the witnesses when giving their evidence but because so much of what Mrs Walker and Mr Denis Walker put forward was not put in cross-examination either to each of the other two witnesses. Moreover, Mrs Walker, while very emphatic as to many matters, struck me as being vague about other matters which one would expect her to remember equally well. It is my conclusion that she was fully advised by Mr Thomson as to the contents and effect of Clause 29 of the agreement, and that she proceeded with the sale of the 10 acres to the Sulzbergers because she was determined to acquire the property in New Plymouth. As she herself put it, "I felt I couldn't afford to lose out on that place". She was, for this reason, placing herself in the situation of dealing at the same time both with the vendor of the New Plymouth property and the persons interested in buying the farm property. The fact that agreement was reached so quickly regarding the $15,000.00 lease surrender deal, once it became apparent that the sale of the 10 acres might be in jeopardy if she did reach agreement with the plaintiffs,

indicates very clearly in my view that the only real pressure to which she was subject was her own desire to conclude matters in the way she wanted them concluded. As is almost inevitable in such circumstances, with two parties dealing at arm's length as these two parties were, Mr Coxhead, I conclude, appreciated the situation and saw no need to come down on what he thought was a fair price for the surrender of the lease.

It is convenient here to refer to the evidence of value introduced on behalf of the defendant. A registered valuer, Mr A M Dick, working on the usual basis of a present value of a fair market rental for the land in question, furnished the opinion that the surrender value of the agreeent to least in April 1981 was $9100.00. He conceded, however, that he had made no allowance in this figure for any special value which the land in question might have to the plaintiffs because of their dairying operations on the adjoining land. He simply took into account in a general way in assessing the current market rental that an adjoining owner could be one of the prospective lessees. He agreed that the land would have a greater value to the plaintiffs than purely market value.

In relation to this aspect of the matter, it is necessary to keep in mind what was said in relation to the topic of undue influence by McMullin J. in O'Connor v Hart [1983] NZLR 280 at 289 :

> " It is, of course, plain enough that inadequacy of consideration itself will not in most cases constitute unfairness. Opinions as to value of land are notoriously various. Valuers may genuinely differ in their assessments. As Sir Ernest Pollock MR said in York Glass Co Ltd v Jubb (1925) 134 LT 36:
>
> > ". . . in the difficult matters of valuation . . . quot homines tot sententae is an obsevation which must not be overlooked" (ibid, 39).
>
> The Courts will not protect a fool from his bargain nor intervene in a transaction merely because it is unreasonable. Adequacy of consideration has never been a fundamental of a valid contract."

If, of course, a gross inadequacy or a gross overpayment is revealed this may be , as he goes on to point out:

> "... an important ingredient in considering whether a person did exercise any degree of judgment in making a contract, or whether there is a degree of unfairness in accepting the contract...."
>
> (per Page Wood VC in Wiltshire v Marshall (1866) LT 396, 397.).

The evidence here does not in my view go nearly far enough to warrant the conclusion that there was here a gross inadequacy of consideration as regards the defendant. The advantages which Mrs Walker obtained must be considered. Not only was her much-desired purchase facilitated in all respects (Mr Coxhead agreed, it should be mentioned, to supply the water to the Sulzbergers), but she of course obtained the release of the option given to the plaintiffs whereby they

could, in the circumstances here pertaining, have purchased the 10 acres at a price fixed by arbitration and she also was given the right to receive interest on the $15,000.00 up to the time when the mortgage on the plaintiffs' farm was repaid.

As regards the figure of $15,000.00, not surprisingly - although I attach no real weight to this point - the plaintiffs' counsel also brought out in evidence the fact that the defendant's solicitors had objected to this matter being litigated in the District Court upon the basis that they were not prepared to agree that the value of the lease was less than $12,000.00.

I had occasion to consider the various authorities on the question of undue influence in a recent judgment upon which Mrs Milne placed some reliance - Loe v Tylee (unreported) A.58/84 Hamilton Registry, judgment of 13th August 1984. So that the considerations to which I have had regard in this case may be clearly seen, I repeat here my references in that judgment to authority and quotations from various judgments. I said there (at p.27) :

> " It is unnecessary for me in this judgment to refer at length to the authorities relating to the question of the jurisdiction of the Court, in the exercise of its general equitable jurisdiction to set aside unconscionable bargains. The authorities are collected and discussed in the recent judgments of the Court of Appeal in the case of Moffatt v Moffatt (unreported) CA.197/82, judgment 18th April 1984.

" They were also discussed in the first decision of the Court of Appeal in O'Connor v Hart [1983] NZLR 280. In the judgment of McMullin J in Moffatt v Moffatt (supra) a decision of the High Court of Australia in Blomely v Ryan [1956] 99 CLR 362 was referred to as illustrating the wide range of factors to which the Court may have regard, and the following passages are quoted:

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."
>
> (per Fullagar J., p.405)

> "This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantae of the opportunity thus placed im his hands."
>
> (per Kitto J., p.415)"

Frequent reference is of course made in relation to cases of this kind to what was said by Lord Denning in Lloyds Bank Ltd v Bundy [1975] 1 QB 326 at p.339 :

> "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own

> ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself."

My consideration of the authorities also causes me to express my full agreement with the way in which the matter was expressed by Hardie Boys J in Teawhi Riki and Others v Hedley John Charles Codd [1980] 1 NZCPR 242, where the matter was put thus :

> "It is inequality of bargaining power that lies at the heart of this equitable doctrine. That can arise from a great variety of circumstances. If it exists, and if the transaction is for an inadequate consideration, and if the party disadvantaged has not had independent advice, then the party in the stronger bargaining position is not permitted to retain the benefit of the transaction unless he can show that it is all 'fair, just and reasonable'. It is not a matter of showing that he has acted honestly or honourably. Although that may be relevant, it is not the crux of the matter. It is the result of the transaction that is relevant rather than the motives of the parties." "

Mr Laurenson correctly pointed out that where there is no special relationshp between the parties, undue influence must be proved as fact and will not be presumed.

Cheshire & Fifoot: Law of contract (6th New Zealand edn.) at p.245), and the dicta in Allcard v Skinner (1887) 36 Ch.D. 145 (at p.181 per Lindley LJ) show that neighbours or tenants cannot be regarded as falling into the class of persons whose relationship to the plaitiff imposes a special duty upon them. Mr Laurensen referred to the following passage in Kerr on the Law of Fraud and Mistake (7th edn.) at p.225 :

> "The fact that a transaction may have been improvident or precipitate, or may have been entered into without independent professional advice, is as immaterial as mere inadequacy of consideration, if the parties were on equal terms and in a situation to act and judge for themselves, and fully understood the nature of the transaction, and no evidence can be adduced of the exercise of undue influence or oppression."

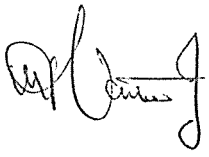
There has, I am aware, been criticism by legal writers of the wide statements contained in the judgment of Lord Denning in Bundy's case, and that it is sometimes spoken of as a high-water mark case on this topic of "unconscionable bargains". I must say that after full consideration I have come to the conclusion that the case for the defendant in my view falls well short of coming within the scope of this equitable doctrine. There really cannot be said here, I conclude, to be any circumstances which placed Mrs Walker at a special disadvantage in dealing with Mr Coxhead. The only "pressures" to which she was subject were those which she created for herself by not seeking her solicitor's advice before involving herself in the contract with the Sulzbergers, and by reason of her own desire to avoid missing out on the

property on which she had set her heart. It would be going far beyond any decision of which I am aware to hold that pressures of such a nature could form a basis for setting aside a contract as oppressive or unconscionable. It must be remembered that Lord Denning himself earlier in his judgment said: "... no bargain will be upset which is the result of the ordinary interplay of forces". The only matter referred to as regards Mr Walker's health was her reference to trouble she had had with a back condition. There was, as I have earlier indicated, not the slightest suggestion or indication that she was "in any inferior bargaining position" because of anything to do with her health or her then age of 75. There was no evidence whatever to indicate that she was under any financial pressure and certainly nothing to suggest that Mr Coxhead could exercise any personal influence over her decision. She had her son, aged 52, and well able, I judge, to advise her on the ordinary pros and cons of the matter which was being negotiated and settled. She had previously discussed what she was proposing to do with him. Even more important, of course, is the fact that on all the evidence I am unable to conclude that in the circumstances as they prevailed on the 10th April 1981 there was really anything unfair about the arrangement which was concluded. There is no basis on the evidence, as I have earlier found, for evaluating the fairness of the terms of the deed by having regard to what happened later. There is a complete absence of evidence to show exercise of undue influence or oppression.

I accordingly conclude that the plaintiffs are entitled to recover the sum of $15,000.00 from the defendant, and there will be judgment in their favour against the defendant for this sum. This judgment will also incorporate the order, previously referred to, for the validation of Clause 29 of the agreement.

The plaintiffs are entitled to interest which I award at the rate fixed in terms of the Judicature Act 1908 from the 1st July 1981 down to the date of this judgment. Presumably, the moneys held have been earning interest at a greater rate, but the Court's powers are limited to the exercise of the discretion in terms of the statute. There may have been some arrangement between the parties about the question of interest, but I have no record of this being mentioned to me. If there was, it should of course operate in substitution for interest recoverable in terms of this judgment.

The plaintiffs are also to have costs, according to scale, with allowance for 2 extra days, together with disbursements and witnesses' expenses to be fixed by the Registrar.



Solicitors:
Govett Quilliam & Co., New Plymouth, for plaintiffs
Sorley & Co., Stratford, for defendant