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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No A 140/82

398

BETWEEN MALCOLM HOWARD GIBSON
of Christchurch, company
director, and CHRISTINE
MAY GIBSON of Christchurch,
sales representative

Plaintiffs

A N D DEALER DISCOUNTING (CANTY)
LIMITED a duly incorporated
company having its registered
office in Christchurch and
carrying on business there
and elsewhere as a money-
lender

First defendant

A N D HAROLD THOMAS DEAN of
Christchurch, company
director

Second defendant

A N D LESLIE DUNCAN of Darfield,
repossession agent

Third defendant

Hearing : 7, 8 March 1984

Counsel : K N Hampton for plaintiff (Mrs Gibson)
K J Jones for first and second defendants
G S Brockatt and M P Handley for
third defendant
R A MacDuff (Given leave to withdraw)

Judgment: 3/4/84

JUDGMENT OF WHITE J

This was an unusual and complicated case.
For that reason it is necessary, I think, to deal with
the course of the proceedings and refer to the pleadings
in some detail.

When the case was called Mr Hampton intimated that he was appearing for Mrs Gibson. He added that while Mr Gibson was aware of the hearing he had no instructions from him. In answer to my question I was informed that the position was that it was accepted that Mr Gibson could not succeed in the present proceedings. In my view the matter should have been brought to the attention of the Court and dealt with formally before the substantive hearing. In the circumstances I simply record the position as stated by counsel and proceed on the basis proposed. There was no objection from other counsel.

It was common ground that Mr Gibson had been in business retailing caravans and spa pools through his company, Malcolm H Gibson Ltd. Hire purchase arrangements were made with the first defendant. Mrs Gibson's case was that while she was the nominal secretary of the Company she had played no part in the running of the business. She worked but was engaged as an employee in independent employment. During the relevant period in 1981/82 she had been aware of a build-up of pressures in her husband's business but it had come as a complete shock when she was informed on 10 May 1982 that he had admitted to substantial fraudulent dealings involving some hundreds of thousands of dollars through arranging fictitious hire purchase agreements. On 10 May 1982 and succeeding days discussions had taken place with the second and third defendants regarding the taking over by

the first defendant of the business with the intention of "trading it out" of its difficulties and endeavouring to avoid police involvement and prosecution. She said that in the state of shock she was in she had agreed to help by giving security over her assets when it was put to her that it was necessary to make it clear to creditors that the Gibsons were not obtaining anything from the fraudulent dealings and that the first defendant needed the security to enable it to continue to trade. Mrs Gibson's case was that she had signed documents to avoid her husband being prosecuted and imprisoned. As matters developed it had become clear that the business could not trade out of its difficulties and following the signing of the documents the first defendant had taken steps to sell the matrimonial home. At that stage the present proceedings were issued.

The writ and original statement of claim were filed on 29 June 1982. On the same day an ex parte motion for an interim injunction was filed in this Court to prevent the sale of the matrimonial property. An interim injunction was granted and an order made that the plaintiffs move again before 9 July 1982, on notice, for an interim injunction. In terms of that order a notice of motion was heard by Casey J on 6 July 1982 and an order was made extending the interim injunction pending the trial of the action. The learned Judge referred to the affidavits filed by Mrs Gibson and the second and third defendants in support of and opposing

the injunction respectively. It was noted by Casey J that Mrs Gibson had deposed that "she was put in a position of having to sign" the deed and affidavit "or see her husband go to gaol". Casey J also observed that the allegations were denied by the defendants although Mr Dean had "conceded that the illegality or fraud" alleged against Mr Gibson "was fairly faced up to in discussions" after the matters had been discovered. It was noted that on the affidavit evidence Mr Dean and Mr Duncan had asserted that they had not gone beyond that point and had denied that there was any question of stifling a prosecution or holding out any threat to Mr and Mrs Gibson. The learned Judge concluded that the matter could not be decided on the affidavits and he noted Mr Jones' proper concession that there was "a substantial issue for trial".

I note that a further order was made by consent amending the name of the first defendant to Dealer Discounting (Canty) Limited. My reasons for judgment have been intituled accordingly.

Other events which need to be recorded are that on 16 July 1982 Mr Gibson was adjudicated bankrupt and on 17 September 1982 he was prosecuted and convicted and sentenced to two years' imprisonment. During the period Mr and Mrs Gibson separated. The bank had called up the mortgage on the matrimonial home. Following that event the plaintiffs and the first defendant had agreed

that the property should be sold. This had been done, without reference to the Court, one half of the proceeds had been paid to the Official Assignee and the other half was being held, earning interest, pending the decision in these proceedings. As I have already pointed out this arrangement should have been referred to the Court for formal approval.

Apart from the half share in the matrimonial property the other item which Mrs Gibson claimed was the Chevette motor car sold by the first defendant to Mr Duncan on 10 September 1982 and since then registered in the name of Mrs L S B Duncan.

I turn now to the pleadings and the deed which was entered into on 12 May 1982. It was not disputed that the plaintiffs agreed (inter alia) to the following :

- (i) They acknowledged that they were each jointly and severally liable in respect of advances made by the first defendant to Malcolm H Gibson Ltd and Malcolm Howard Gibson.
- (ii) They transferred and assigned to the first defendant all their interest in caravans owned by them and by Malcolm H Gibson Ltd
- (iii) They transferred to the first defendant the interest in the leasehold premises at 105 Manchester Street together with all plant and stock of spa pools and other assets for a consideration of \$35,000.

- (iv) They transferred and assigned to the first defendant all their interest in all motor vehicles owned by them.
- (v) They agreed to grant a mortgage over the matrimonial home securing advances made from time to time by the first defendant.
- (vi) They agreed to give an instrument by way of security over all furniture and furnishings appliances and all other contents of the matrimonial home.
- (vii) They appointed the third defendant to be their attorney if necessary to execute the mortgage and instrument by way of security.
- (viii) They agreed to pay interest on the balance owing to the first defendant at the rate charged by the first defendant to dealers in relation to advances from the first defendant.

It was also admitted by all defendants that as alleged, pursuant to the deed, Mrs Gibson delivered to the first defendant her Chevette 1979 motor car on 14 May 1982 but the alleged value of \$6,000 was denied by all defendants.

In para 5 of the amended statement of claim the plaintiffs claimed they executed a power of attorney appointing the second defendant their attorney to sell the matrimonial home. This was denied by the first and second defendants and denied by the third defendant as a matter outside his knowledge.

In para 6 of the plaintiffs' amended statement of claim they alleged that the first and/or second defendants are taking steps to market the property. That was denied by the first and second defendants and by the third defendant as a matter outside his knowledge.

In para 7 of the amended statement of claim the plaintiffs claim that the deed and power of attorney were executed by the plaintiffs by reason of threats to prosecute Mr Gibson for fraud or, alternatively, to refer to the police allegations as to fraud made against Mrs Gibson, which threats amounted to duress and/or improper pressure. The allegation was denied by the first and second defendants and by the third defendant as a matter outside his knowledge.

As a first cause of action the plaintiffs sought the following relief against each defendant :

- (i) A declaration that the deed and the power of attorney were void and/or voidable.
- (ii) An order for the delivery up and cancellation of the deed and power of attorney.
- (iii) An order for the return of the 1979 Chevette motor vehicle.
- (iv) An injunction enjoining the first and/or second defendants from proceeding with the sale of the matrimonial home.

For a first alternative cause of action the plaintiffs alleged in para 8 of the amended statement of claim that the deed and power of attorney were executed by the plaintiffs pursuant to an express and/or implied agreement that if the deed and power of attorney were executed by the plaintiffs the first and/or second and/or third defendants would not prosecute Mr Gibson for fraud or alternatively refer to the police allegations as to fraud relating to the conduct of Mr Gibson. The same claim (quoted above) in respect of the first cause of action was made in respect of the first alternative cause of action.

All defendants denied the allegations in para 8 of the amended statement of claim.

For a second alternative cause of action the plaintiffs alleged in para 9 of the amended statement of claim that the deed constituted a credit contract in terms of s 3 (1) (b) of the Credit Contracts Act 1981. All defendants denied the allegation.

It was alleged in para 10 of the amended statement of claim that the deed was oppressive in one or more of the following respects :

- (i) Mrs Gibson acknowledged liability in respect of advances made by the first defendant in respect of which she was not personally liable.

- (ii) Mrs Gibson, by way of partial discharge of liability with respect to such advances, transferred to the first defendant her motor car, a chattel which was personally owned by her.
- (iii) Mrs Gibson agreed to grant a mortgage over the matrimonial home and an instrument by way of security over all furniture furnishings and appliances and other contents of the matrimonial home with a view to securing advances in respect of which she was not personally liable.
- (iv) The indebtedness in respect of which Mrs Gibson accepted liability was declared to be repayable upon demand.
- (v) The deed provided for interest payments at a rate which was not specified otherwise than by reference to the first defendant's usual rate.
- (vi) The usual rights to which Mrs Gibson would have been entitled as a guarantor were excluded by reason of the provisions of the deed.

The first and second defendants denied the allegation and the third defendant denied the allegation as a matter outside his knowledge.

In para 11 of the plaintiffs' amended statement of claim the plaintiffs claimed that the deed was entered into by reason of oppressive means employed by one or more of the defendants, as alleged in para 7 of the amended statement of claim and they relied also on the

speed at which the transaction was entered into. These allegations were denied by all defendants.

In para 12 of the amended statement of claim it was alleged by the plaintiffs that the first and/or second defendants intended to exercise rights under the deed with a view to selling the matrimonial home and applying the proceeds thereof to Mr Gibson's indebtedness and that of his company, and that the power of attorney was required to be executed by reason of that intention. That allegation was denied by the first and second defendants, and by the third defendant as outside his knowledge.

In para 13 of the amended statement of claim the plaintiffs alleged that the first and/or second defendants, by reason of their intention to sell the matrimonial home and the taking possession of the Chevette motor car exercised and intended to exercise rights under the deed in a manner which was oppressive, having regard to matters referred to in paragraphs 10 and 11 and "indications given to the plaintiffs prior to the execution of the said deed and shortly thereafter that it was not intended that the matrimonial home be sold or that the Chevette motor car be permanently removed from the possession or ownership of the plaintiff, Christine May Gibson".

Based on the above allegations under the third alternative cause of action the plaintiffs claimed against the three defendants :

- (a) An order that all obligations outstanding under the deed be extinguished.
- (b) An order that the deed and power of attorney be set aside.
- (c) An order directing the return of the Chevette motor car to Mrs Gibson
- (d) An order directing the second defendant to refrain from exercising the power of attorney.

For a fourth alternative cause of action the plaintiffs alleged in para 14 of the amended statement of claim that the deed constituted, in terms of s 8 (1) of the Moneylenders Amendment Act 1933, a contract for the repayment by a borrower or borrowers of money lent to him either by a moneylender, or a contract for the payment of interest on money so lent, and a security in respect of money so lent. This allegation was denied by all defendants.

In para 15 it was alleged that no note or memorandum in writing signed personally by the borrower or borrowers in terms of s 8 (1) of the Moneylenders Amendment Act 1933 was sent or delivered to the borrower or borrowers within 7 days of the making of the said deed. This allegation is denied by all defendants.

In para 16 it was alleged that the power of attorney constituted a security in respect of a contract

for the repayment by a borrower or borrowers of money lent to him or them in terms of s 8 (1) of the Moneylenders Amendment Act 1933. The allegation was denied by all defendants.

In para 17 it was alleged that before the power of attorney was executed no note or memorandum in compliance with the provisions of s 8 of the Moneylenders Amendment Act 1933 had been sent or delivered to the borrower or borrowers. This allegation was denied by all defendants.

In para 18 it was alleged that the transfer of the Chevette motor car referred to in para 4 hereof was by way of security for the payment by a borrower of money lent to her by a moneylender in terms of s 8 (1) of the Moneylenders Amendment Act 1933. This allegation is denied by all defendants.

In para 19 it was alleged that before the Chevette motor car was delivered to the first and/or second and/or third defendants no note or memorandum as to the said contract or security was delivered or sent to the borrower or borrowers in accordance with s 8 of the Moneylenders Amendment Act 1933. This allegation was denied by all defendants.

Based on these allegations the plaintiffs sought against all defendants :

- (i) A declaration that the said deed and the said power of attorney are unenforceable in terms of s 8 of the Moneylenders Amendment Act 1933.
- (ii) An order for the return of the Chevette motor car.
- (iii) An injunction restraining the first and/or second defendants from proceeding to a sale of the matrimonial home.

In para 8 of their statement of defence the first and second defendants claimed that should it be held that there was any failure to comply with either the Moneylenders Amendment Act 1933 or the Credit Contracts Act 1981 (which was denied) the first and second defendants were entitled to relief under the Illegal Contracts Act 1970.

In his opening Mr Hampton summarised Mrs Gibson's claims, which were in the alternative, as stated in the amended statement of claim as follows :

1. An allegation of duress or improper pressure having regard to the circumstances in which the deed was entered into, and in particular that Mr Gibson was liable to be prosecuted and imprisoned if she did not do what was proposed.
2. An allegation of illegality in that the agreement was entered into to stifle a prosecution.

3. An allegation that the deed was oppressive under the Credit Contracts Act 1981 and that accordingly the obligations under the deed should be extinguished.

4. An allegation of breaches of s 8 of the Moneylenders Amendment Act 1933 in that certain notices required had not been prepared and delivered.

The viva voce evidence heard before me was that of Mrs Gibson and the plaintiffs' solicitor, Mr Kiesonowski, who had been consulted by the plaintiffs before the documents were signed. That evidence was led to support Mrs Gibson's case, already summarised, that the only reasonable inference was that the effect of what took place should be regarded as duress, illegality, improper pressure or "oppressive" in terms of the Credit Contracts Act.

At the close of the evidence called by Mr Hampton Mr Brockett (supported by Mr Jones) moved for a non suit in respect of the first and second causes of action. Counsel for the defendants having indicated that they did not intend to call evidence, I heard the argument and refused the application. My reasons are recorded. In short I came to the conclusion that it had not been shown that there was no evidence or no sufficient evidence before the Court. In my view there is evidence relevant to the issues arising in respect of the alternative causes of action to be considered.

It should be added that Mr Hampton had submitted that he was entitled to rely on the affidavit evidence called in support of the motion for an interim injunction. As recorded I took the view that the affidavit evidence should be ignored in considering the non suit application. There was agreement between counsel, however, that in considering whether any of the plaintiffs' causes of action had been established the affidavit evidence should be considered. I agreed. Mr Hampton did submit that the affidavit evidence of Mr Dean and Mr Duncan should be weighed in the present proceedings bearing in mind that they had not been called and accordingly had not been cross-examined. On the view I take of the evidence I do not think cross-examination would have thrown any further light on the matter. That conclusion receives some support, I think, from the fact that there was no request to cross-examine either of the witnesses on their affidavits when the application for the injunction was heard.

As I have said it was agreed that the affidavit evidence should be taken into account with the viva voce evidence in considering the issues. The affidavits of the second and third defendants can be summarised as follows

Mr Dean, a director and principal shareholder of the first defendant in his affidavit dated 6 May 1982,

referred to the result of investigations which revealed that approximately \$200,000 owing to his company on hire purchase documents "might not be supported by genuine sales". Mr Gibson had admitted that there were agreements "which were unsupported by actual chattels and in relation to fictitious purchasers". Mr Dean said he had asked the plaintiffs whether they would be prepared to give security over the assets of Malcolm H Gibson Ltd to ensure repayment in respect of the amount ultimately found owing in respect of all advances. He stated that there were no threats and that he had been advised on that aspect of the matter that if security were given it must be on an entirely voluntary basis by the plaintiffs after receiving independent legal advice. Mr Dean said that having regard to the amounts owing, he was prepared to treat the matter as a civil matter between the company and the plaintiffs. He said that Mrs Gibson, who was secretary of the company, did not appear to be surprised at the extent of the indebtedness to the first defendant. He stated that the assets over which security was to be given, including the house, had been recently acquired. The plaintiffs had both agreed that the assets of the company and their own assets would be available to satisfy what was owing.

Mr Duncan, the third defendant, also filed an affidavit, dated 6 July 1982, stating that he had put before the Gibsons the results of investigations he had made on the instructions of the first defendant. Having at first denied fictitious transactions, Mr Gibson had later

admitted the truth of the allegations. Mr Duncan said that Mrs Gibson "seemed to be shocked" and "could not accept" what Mr Duncan was saying. Mr Duncan confirmed that Mr Gibson said he would secure and do everything in his power to satisfy his debt to the first defendant and that Mr Dean had indicated to Mr Gibson that he was not interested in a prosecution.

The steps taken to have a document drawn up to give effect to an agreement reached at the first defendant's solicitor's office were described. The document had then been sent to the plaintiffs' solicitor and was duly executed and returned by the plaintiffs' solicitor following execution by the plaintiffs. It was not executed under seal by the plaintiffs as director and secretary until 24 May 1982. It was subsequently stamped, the date 3 June 1982 having been inserted inadvertently rather than the date the document was executed by the first defendant.

Mr Dean deposed that it was hoped that following a sale of the property and other assets an acceptable arrangement could be made with the creditors, but investigations have revealed that the circumstances were such that it would be impossible to reach an acceptable arrangement. A meeting that had been arranged for 28 June was therefore cancelled. Mr Dean stated that he had invited Mr Gibson to see his solicitor and discuss Mr Dean's recommendation that he should file in bankruptcy

so that there could be an equitable distribution. During June, Mr Dean said the plaintiffs agreed that they would sell the property having regard to their financial position and their debt to the ANZ bank.

Mr Hampton's broad submission regarding duress illegality and oppressive conduct was that the fundamental question was not whether Mrs Gibson understood what was proposed at the time the agreement and power of attorney were signed but why she signed them. He submitted that the circumstances as described by Mrs Gibson in her evidence and that of her solicitor, supported in material respects by the evidence of Mr Dean and Mr Duncan, established one or more of the four causes of action. Mr Hampton submitted it was clear Mrs Gibson signed not primarily because there were prospects of "trading out" but because if she did not sign, bankruptcy and prosecution for serious fraudulent dealings would follow. These circumstances, it was contended, constituted threats to persuade the plaintiffs to do what was proposed without delay. It was submitted that what occurred amounted to oppressive circumstances and illegality.

Mr Jones and Mr Brockett also relied on the circumstances revealed by the evidence but with a different emphasis. It was submitted that the reasonable inference to be drawn was that there were no threats regarding bankruptcy or prosecution. On the contrary, it was contended

the evidence showed that the second and third defendants had been advised before they interviewed Mr Gibson that no arrangements should be entered into with the Gibsons until they had received independent legal advice. It was submitted that there was no evidence from the plaintiffs as to stifling a prosecution and that the circumstances did not justify such an inference.

Referring to the authorities on which Mr Hampton had relied, it was submitted that these authorities were distinguishable having regard to the facts. In the present case it was submitted the parties were on equal terms and had received legal advice before the documents in question were signed. It was claimed that "the primary motivation" for entering into the contract was the expectation that the business could trade out of its difficulties and repay its full indebtedness. It was pointed out that the plaintiffs' solicitor had advised them not to sign unless they were confident that the business could meet its indebtedness over a period. Further, Mr Jones submitted that the plaintiffs had been content to sign having regard to their confidence in being able to repay and that it was only when that was found to be unrealistic that they changed their minds and brought the present proceedings.

Summing-up the first and second defendants' position under this head, Mr Jones submitted that what was done was understandable in the circumstances and was an

appropriate action subject to taking the precautions Mr Dean took in accordance with legal advice. I think that proposition does sum up the attitude of the defendants but that is not the end of the matter. In my opinion Mr Hampton is also correct in submitting that the position as far as Mrs Gibson was concerned must be weighed having regard to the circumstances as they affected her at the relevant time including the circumstances in which advice was given.

Mr Brockett referred first to Cumming v Ince (1847) 11 QB 112, 116 E R 418, a case relied on by Mr Hampton. He submitted the case was distinguishable. In the present case it was submitted Mrs Gibson met Mr Dean and Mr Duncan on "equal terms" and saw Mr Kiesonowski and was advised. Notwithstanding advice she signed. Mr Brockett also referred to the circumstances and submitted that Mrs Gibson understood the serious situation and that if she wanted to help there was little option but to sign. The important circumstance was that the position was explained by her own solicitor and because she had wanted to do all she could to help she had decided to sign. Mr Brockett submitted that Mrs Gibson was capable of acting on "equal terms and did so.

Mr Hampton in replying to the submissions made as to advice given to the Gibsons by their solicitor contended that the circumstances in which Mr Kiesonowski was consulted required to be examined. He had had no prior

knowledge of the circumstances when the interview took place and he read the agreement for the first time. Mr Kiesonowski did not know Mrs Gibson's position and made it clear he would have to examine the facts before he could give an opinion on signing the agreement. All the solicitor had done was read and explain the document. At that stage in considering the position of the plaintiffs Mr Kiesonowski did not give advice nor was he asked to do so, regarding Mrs Gilmer's personal position.

The test, Mr Hampton submitted, was whether the coercive effects of what had gone before was still affecting Mrs Gibson. He accepted that she could be said to have capacity (mental) but capacity had to be looked at in the sense of judging whether Mrs Gibson was able to make a free and willing agreement. In considering whether "she was in a position of meeting on equal terms" it was submitted the evidence showed that was not the case. In giving evidence she said - "I signed the deed because as far as I could see I had no alternative. If I didn't sign the deed my husband would go bankrupt and go to gaol and a lot of people would lose an awful lot of money". In my view the following sentence in her evidence was also of significance : "Once I had signed the deed at Mr Kiesonowski's office, from there I don't know where I went, presumably back to work, but that week is such a blank it is very hard to recall that". It was pointed out that Mrs Gibson had not been cross-examined regarding this aspect of her evidence and Mr Hampton submitted it was not now open to the defence on the evidence to say the

primary reason for signing the deed was to allow the business to trade out of the difficulties. It was submitted also by Mr Hampton that the fact that Mrs Gibson continued to carry out other family responsibilities at this time did not establish that she was not under the coercive effect of what had happened in considering her actions regarding the deed. Mr Hampton pointed out that Mrs Gibson had said, "At the meeting I was shocked at what I thought was going to happen; it just hit home to me that I was going to lose my home and there was nothing I could do about it". Mr Hampton submitted that the only reasonable inference was that Mrs Gibson signed because the coercive effects of events were pressing upon her.

I have not overlooked Mr Brockett's argument as to the Chevette car which it was claimed was purchased for \$6500, but the evidence showed that the purchase was arranged by trading in two cars one owned by Mrs Gibson and the other in her husband's name, in the wheeling and dealing carried on by Mr Gibson.

As I understood him Mr Brockett did not argue that the deed in question was not a credit contract. He did submit, however, that if it should be held that the circumstances amounted to oppression as required by the Act then the provisions of s 14 should be applied.

His submission was that if the arrangement was to be reopened under the Credit Contracts Act the evidence showed that the third defendant had paid the first defendant \$4,900 for the car and the vehicle had been transferred into his wife's name. In the circumstances it was submitted that an equitable result would be to order the payment of \$4900. As to the other matters Mr Brockett submitted that the third defendant was not a party, that duress had been denied by him and that he had done no more than point out the serious position which Mrs Gibson herself fully appreciated. In my view that was correct and a reasonable attitude to adopt in the circumstances. Mr Duncan's evidence supported the evidence of Mrs Gibson that she was indeed deeply affected by the revelations of fraudulent dealing. I accept that evidence.

It is necessary to examine the principles to be applied in some detail.

Mr Hampton relied on Seear v Cohen and anor (1881) 45 LT 589. The headnote sets out the facts briefly. The defendants gave promissory notes to the plaintiff who was the trustee in bankruptcy of C, in payment of an alleged purchase by them of the bankrupt's stock in trade and to enable a composition to be paid. Before the promissory notes were given, the plaintiff by his agents

made representations to the defendants that criminal charges "could, and were about to be brought against the bankrupt C who was the son of one defendant and nephew of the other". The evidence of the defendants was that they believed the representations to be true and would not have given the promissory notes but for that belief. In an action by the trustee against the defendants as makers of the promissory notes a jury found for the plaintiff. On motions heard before Denman J, Huddleston B and Hawkins J it was held that judgment should be entered for the defendants on the ground that they had been induced to enter into the contract by duress and threats of criminal proceedings and that it was not necessary that any particular charge under the Debtor's Act should have been specified, or that any ground for such a charge should have existed in fact. It had been argued for the plaintiff that the defendants gave the promissory notes without reference to the alleged threat of criminal proceedings and that no promise to stifle or withdraw the proceedings was part of the agreement.

It can be seen that some of the issues in the present case arose in Seear's case

Denman J considered the question of a threat to prosecute and said :

"It must be regarded as the law that if a man asserts to the father of a debtor that his son is liable to a criminal prosecution, and the father is led by reason of that assertion to suppose that the fact is so, and by reason of that belief is led to give a promissory note, or to bind himself for the payment of a composition by the son, then in that case the transaction is not a fair one. It is not to be looked at as a voluntary act, but as a case of extortion, whether the facts are in accord with the assertion or not."

The learned Judge then referred to Williams v Bayley 1866 LR 1 HL 200, 216, 14 LTR NS 802 and observed that, applying the principle stated by Lord Westbury in the House of Lords, "whether a particular form of prosecution is pointed out or not, whether there is or is not in fact any real ground for instituting a criminal proceeding, yet, if the man is induced by threats of that kind, the contract is not enforceable in equity, and the defence of duress is a good one". The learned Judge went on to make it clear that the decision was reached on the basis that the defence was "that the defendants were not free agents, but were coerced and forced into this bargain by reason of a representation, true or false, made by the plaintiff, or by persons acting for him, that the son was liable to a criminal prosecution; that they believed this, and that they would not have signed the promissory note unless they had believed it. The other members of the Court concurred.

The decision of Porter J, as he then was, in Mutual Finance Ltd v John Wetton & Sons Ltd (1937) 2 KB 389, 395, was also relied on. After referring to Williams v Bayley, at p 216, where the principle was stated, the learned Judge said :

"Not only is no direct threat necessary, but no promise need be given to abstain from prosecution. It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire was known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place."

I note that Porter J referred to Kaufman v Gerson (1904) 1 KB 591, as another example of the principle applied in Williams v Bayley. In Kaufman the underlying threat was the prosecution of a husband. I note also that at p 396 Porter J expressed the view that the principle would apply "where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution of the person implicated, and were known and intended to have been so influenced by the person in whose favour the undertaking was given".

Regarding legal advice, Mr Hampton submitted that in a situation where the threat which is made is of substance the fact that independent legal advice was obtained or was available is not a bar to the defence

of duress. He relied on Cumming v Ince (1847) 11 QB 112, 120; 116 ER 418, 421. The headnote states (inter alia) "that the consent of counsel furnished no conclusive proof that an agreement was not void by duress".

The facts, in that case, as was pointed out, were different. As to the principles Lord Denman CJ, at p 421 (Vol 116 in the English Reports) said that "great weight" should be given to such considerations as "the necessity of abiding by engagements made by those who represent the interests of parties litigating in Courts of Justice". He added that such engagements no doubt "ought to be held decisive in any ordinary legal proceeding when both parties are competent and free to exercise their judgment". In Cummings case the plaintiff had been confined in a mental institution having been alleged to be "a lunatic and threatened with the consequences of that allegation". It was in those circumstances that the learned Lord Chief Justice said : "...the parties cannot be considered as meeting on equal terms". But it is important to note that he then referred to duress at p 421 as follows :

"...if we can assume that the plaintiff was in possession of her right reason, she was the proper person to retain the deeds then in her power, and ought not to have been deprived of them. And, if she was induced to resign them by fear of personal suffering brought about by her confinement in a lunatic asylum by the act of the defendants,

the resignation would appear to be brought about by a direct interference with her personal freedom. Is this not truly described as duress? And was the contract which resulted made with her free will? That her counsel exercised a sound discretion, and did their best for their client's interest, we do not for a moment doubt."

Continuing, the learned Judge made the assumption that the plaintiff's counsel had acted for her "believing her of sound mind", and "from the same fear of inconvenience and disease, as likely to arise from her confinement, which affected the mind of their principal, their proceeding ought to be considered as enforced by the same duress".

It will be seen when the reasoning is stated that the case underlines the necessity of considering the circumstances in which legal advice was given and supports the view that in the present case the fact that the plaintiffs saw their solicitor should not be regarded as decisive as far as Mrs Gibson was concerned.

During the argument in this case it seemed to me that, as indicated by the pleadings, the examination of the nature of the contract regarding duress and oppressive conduct was relevant also to the third cause of action under the Credit Contracts Act 1981.

In para 7 of the statement of claim the alleged threats were claimed to amount to duress and/or improper pressure. The claim under the second alternative cause of action was/^{that}the deed constituted a credit contract in terms of s 3 (1) (b) of the Act and it was alleged that the deed was oppressive in one or more respects. These allegations are set out fully above in the summary of the pleadings. In addition there were allegations of oppressive conduct, likewise set out above, and relief specifically provided by the Act was sought.

Section 3 (1) (b) of the Act provides :

"A contract under which a person forbears or agrees to forbear from requiring payment of money owing to him in consideration of a promise by another person to pay, or to procure the payment of, in the future and in respect of the forbearance, a sum or sums of money exceeding in aggregate the amount of the first-mentioned money..."

Mr Hampton submitted that the deed was a credit contract within s 3 1 (b) of the Act. This was not disputed but it is of some importance to refer to Mr Hampton's submissions as to the nature of the deed in the context of the statute. In particular Mr Hampton submitted that the deed was a forbearance in respect of the first defendant to sue in consideration of various situations including the payment of the sums of money to be ascertained and, in terms of clause 5

of the deed, interest on the balance owing. It was submitted that it was not just an arrangement to repay but also to pay interest "exceeding in aggregate the first mentioned amount". It was further submitted that in fact the whole deed was a credit contract in terms of the Act because clause 3 provided for payment of certain of the moneys in certain ways (referring to caravans, lease and vehicles) so that they can be sold by the first defendant and the proceeds so received, credited against the amount owing, thus covering part of the arrangements for repayment of the moneys owing under the agreement. Similarly, it was submitted that clause 4 dealt with other security which was given over the house and chattels to secure a part of the moneys owing to the first defendant and clause 5 provided for interest to be paid. It was contended that the three clauses all related in general terms to the extension of credit and how indebtedness will be repaid.

In his argument regarding the Credit Contracts Act Mr Jones did submit there were some anomalies. He referred to s 53 and suggested that the position which inevitably arises is that a set of standards are applied of which persons concerned may not have been aware when contracts were entered into. The way Mr Jones put it was that the Court should consider a distinction in the fact situation comparing the position before and after 1 June 1982, the fact situation in the present case having been in May 1982 when the Act was not in force.

Although the Act did not come into force until after the deed was signed it should be noted also that the Act had been under consideration and public scrutiny for some years and was in fact enacted on 16 September 1981. Section 53 of the Act makes it clear that the Act shall apply in respect of every credit contract, whether made before or after the commencement of the Act. (There are some exceptions which do not apply in the present case).

The meaning of a credit contract is defined in s 3. The definition which is comprehensive need not be quoted.

The broad intention of the statute is stated in the Long Title which I quote in part :

"An Act to reform the law relating to the provision of credit under contracts of various kinds in order to -

- (a) Prevent oppressive contracts and conduct."

Clearly, the object was to ensure that persons providing credit would be subject to the same requirements and that the new statute would provide a code.

The meaning of "oppressive" is defined in s 9 as follows :

"In this Act, the term 'oppressive' means oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice."

As far as the word "oppressive" was concerned Mr Jones said he did not disagree with Mr Hampton as to the meaning of the definition. He submitted that the words used in the Act contemplated behaviour which was extreme and that whether behaviour was or was not oppressive must be considered in light of the circumstances at the time. The latter comment was in accord with s 11 containing the guideline that "no contract term or act" shall be considered to be oppressive if "it would not have been considered oppressive at the time at which and in the circumstances in which it was made or performed". The guidelines also provide (see s 11 (2) (a) that the Court shall have regard to "all the circumstances relating to the making of the contract, the exercise of the right or power conferred by the contract, or the inducement to enter the contract..." Broadly speaking, it can be said that the guidelines are in accord with the cases referred to in considering circumstances which amount to duress.

Under s 10 there are provisions for re-opening credit contracts where in any proceedings the Court considers that :

- (a) A credit contract, or any term thereof, is oppressive; or
- (b) A party under a credit contract has exercised, or intends to exercise, a right or power conferred by the contract in any oppressive manner; or
- (c) A party under a credit contract has induced another party to enter into the contract by oppressive means - the Court may re-open the contract.

Mr Jones, in line with his earlier argument, submitted that the position in the present case was very different from where a moneylender lends to an illiterate borrower and that in the present case the creditor was seeking to protect his legitimate position which was readily apparent to the plaintiffs who showed no reluctance to enter into the agreement. It was submitted that what the defendants had done was not out of the ordinary in the circumstances. Should the Court decide that the contract should be re-opened Mr Jones submitted that s 14 (2) became relevant. The subsection reads as follows :

"Without limiting subsection (1) of this section, where it appears to the Court that any person has shared in the profits of, or has any beneficial interest in (whether prospective or otherwise) a re-opened credit contract (whether or not the person is a party

to the contract) the Court may make such orders in respect of that person as it thinks fit."

Mr Jones submitted that the evidence established that Mrs Gibson had enjoyed a share of the benefits arising from the operation of Mr Gibson's business operations and that the Court was entitled to look at that fact in determining whether she should now be entitled, in effect, to realise a profit from the situation. This was not a matter on which there was supporting evidence and, in my view, ^{there was} reason to take the matter into account in favour of the defendants pursuant to s 14 (2).

In reply to the assertion of "undue haste" in arranging the deed and power of attorney Mr Jones submitted that the criterion of s 11 (2) (a) and the particular facts must be taken into account. It was submitted that it was vital for the defendants to take immediate steps to try and secure the loss due to Mr Gibson's fraudulent activities. It was submitted that urgent action was understandable and in light of the legal advice the plaintiffs had it was submitted that "the constraints of time were not significant". It was significant he submitted that Mr Kiesonowski had not complained or requested further time to consider the matter. As to that it must be noted that Mr Kiesonowski did raise this question with his clients

but it is correct that he did not raise it with the defendants' solicitors. While the pressure of time was a circumstance of importance in my opinion, I agree the fact that the defendants acted promptly was understandable. Accordingly I do not attach the weight to that fact which it would have had there been no reasonable explanation for urgency. Mr Jones went on to repeat his submission that the primary point in his argument was that the plaintiffs wanted to trade out of the position they were in. Weighing the evidence as to what was predominant in the mind of Mrs Gibson, for the reasons I have given I am not persuaded that that was so.

Mr Hampton submitted that the Court should exercise its power to re-open the contract.

Mr Hampton referred to s 10 (1) (a) of the statement of claim which it was submitted was established by the evidence of Mrs Gibson and was also self-evident having regard to the terms of the deed itself and the nature of the obligations being imposed on Mrs Gibson. It was pointed out that she was obliged in terms of the deed to assume responsibility for the company, which was not her indebtedness, and obliged to help by transferring her car and the mortgage over the house. It was again emphasised that her indebtedness was repayable on demand with interest chargeable at the rate from time to time being charged by the company.

Mr Hampton submitted that other grounds in s 10 could be invoked as claimed in para 11 of the statement of claim an allegation made pursuant to s 10 (1) (c).

It was submitted that there was a third ground for having the contract re-opened under s 10 (1) (b) as alleged in para 13 of the amended statement of claim covered by earlier submissions on the facts. In all the circumstances brought forward in evidence, and having regard to the deed itself and the imposition of indebtedness which did not relate to Mrs Gibson, it was submitted that the contract should be re-opened, that the powers under s 14 (1) (d) (e) and (f) should be exercised and that all the obligations of Mrs Gibson under the contract should be extinguished under s 14 (1) (e). Similarly it was submitted the power of attorney should be set aside and there should be an order directing the return of the motor vehicle under s 14 (5) (b).

Having regard to the principles fully reviewed above and the provisions of the Credit Contracts Act I have come to the conclusion that the appropriate course is to deal with the matter in accordance with the statute.

As noted above the Credit Contracts Act applies to all credit contracts and the prevention of oppressive contracts and conduct is the first object of the Act. In short the Act provides a code but in doing so it is left to the Court, subject to "guidelines", to decide whether in the particular circumstances a contract or any term of a

contract is oppressive and should be reopened. In determining the question whether the deed or any term of it in this case was "oppressive" as defined at the time at which, and in the circumstances in which it was made or performed, the Court shall have regard (inter alia), pursuant to s 11 (2), to "all the circumstances" there stated, and, under subsection (2) (c) to "such other matters as the Court thinks fit". For the reasons I have given I find that the deed was "oppressive" as far as Mrs Gibson is concerned and should be reopened. In my view the allegations in para 7 of the amended statement of claim, repeated in para 11, were established. In short, in considering duress, and applying the test as expressed for example by Porter J in Kaufman v Gerson, I am satisfied that Mrs Gibson was "in substance influenced by the desire to prevent the prosecution of the person implicated" and, that in the circumstances the defendants knew and intended the plaintiffs to be so influenced. I refer again to the words of Denman J in Seear's case, that in the circumstances the signing of the promissory note was "not to be looked at as a voluntary act but as a case of extortion, whether the facts are in accord with the assertion or not". Further, I am satisfied in the circumstances of this case that the fact that the plaintiffs signed after consulting their solicitor was sufficient to show that there was no duress. For similar reasons I consider the deed was oppressive as defined in the Credit Contracts Act.

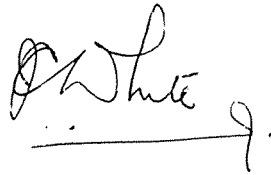
The power of the Court in reopening a credit contract, as stated in s 14 (1) is to "make such orders as it thinks necessary to remedy the matters that caused the Court to reopen the contract. Having regard to the fact that the position of Mr Gibson, as a party, does not arise the appropriate course seems to be to make orders in respect of Mrs Gibson under s 14 (1) (d) (e) and (f) as proposed including an order that the power of attorney given by Mrs Gibson be set aside.

As far as the car is concerned I have noted Mr Brockett's submission. While the car was in Mrs Gibson's name the evidence suggests that its value at the relevant time may not have been \$6500 and that when it was acquired one of the vehicles traded in belonged to Mr Gibson. Further the return of the vehicle may not be practicable. The order of the Court is that in respect of the motor vehicle the defendants pay to Mrs Gibson the sum of \$5000.

I have not overlooked Mr Jones' submission seeking to invoke s 7 of the Illegal Contracts Act 1970. That section is "subject to the express provisions of any other enactment" and having dealt with the present case under the Credit Contracts Act, which is a code in itself giving the Court its jurisdiction and discretions, I do not consider that the Illegal Contracts Act has any application.

For similar reasons it is unnecessary to refer further to the second and fourth causes of action.

If necessary I shall hear counsel as to the form of the order and as to costs, or memoranda may be submitted.



A handwritten signature in cursive script, appearing to read 'R A Young Hunter & Co', with a horizontal line underneath it.

Solicitors for the plaintiffs : R A Young Hunter & Co
(Christchurch)

Solicitors for the first and second defendants : White Fox & Jones
(Christchurch)

Solicitors for the third defendant : Brockett Cameron & Co
(Christchurch)