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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP.99/86

IN THE MATTER OF The Property Law Act 1952

AND

IN THE MATTER OF Mortgage H.620453 (South
Auckland Registry)

1005

BETWEEN JULIE ELIZABETH HEDLEY
of Rotorua, Married Woman
Plaintiff

A N D BROADBANK CORPORATION LIMITED
a duly incorporated company
carrying on business as a
Finance Company in Rotorua
and elsewhere throughout New
Zealand and having its
registered office in Auckland
Defendant

Hearing: 25 July 1986

Counsel: W.G.C. Templeton for Plaintiff
C.A. Johnston for Defendant

Judgment: 26 July 1986

JUDGMENT OF GALLEN J.

In these proceedings, the plaintiff seeks an interim injunction preventing a mortgagee sale of a house property in Rotorua. The background to the application is as follows.

In early August 1985, officers of the defendant Corporation became suspicious about certain loan transactions where it was thought there may have been some irregularity. The plaintiff's husband, Mr Simon James Hedley who was then employed by the Corporation, was thought to have had some involvement and he was suspended by the defendant Corporation until such time as there had been an opportunity to properly investigate the concerns of the Corporation. Mr Hedley consulted his solicitor, Mr Timi Wi Rutene and on 8 August 1985, Mr Wi Rutene telephoned the Area Manager for the defendant Corporation, Mr Pickering. Mr Wi Rutene indicated that he was authorised to make a statement by which Mr Hedley confessed that he had opened fictitious accounts and misappropriated moneys from the defendant company. He also indicated that Mr Hedley was prepared to sell what assets he had including his house and car to repay the moneys which he had taken from the Corporation.

The Manager was informed that the course of conduct followed by Mr Hedley had commenced with a taking of some \$19,000 to meet a shortfall in the purchase and erection of his house property. On the same day, Mr Wi Rutene wrote to the Rotorua Manager of the defendant Corporation, setting out certain details of the transactions. A reference was made to assets of Mr Hedley which he was prepared to make available and the letter concluded in the following terms:-

"Naturally Mr Hedley realises how foolish he has been and has instructed us to advise that he will make

full repayment of all monies missing by your Company in respect of his activities - he will require some time to sell his dwellinghouse and the car to realise this.

We have made him fully aware of his predicament as his activities have been "criminal" - he however now feels totally relieved that the position has come to a head and that he must face the consequences. We trust however that the transgressions can be kept "domestic" and that your company will consider clemency insofar as the abovenamed is concerned."

Subsequently a meeting was held at Mr Wi Rutene's office. This meeting was attended by Mr Hedley with Mr Wi Rutene and by Mr Pickering and a Mr O'Rourke, representing the defendant Corporation. At this meeting, Mr Hedley was given written notice terminating his employment. There was some discussion over the realisation of assets including the proposal to sell Mr Hedley's house property. Mr Wi Rutene deposed that the company representatives appeared grateful that Mr Hedley had divulged everything to them and that there was no mention of court or police involvement. Mr Wi Rutene said that his reference to the matter being kept as domestic in the letter of 8 August, was intended to suggest that the police would not be involved. He says that subsequently, no comment was made by representatives of the Corporation, that the matter would be reported to the police and he says that he was left with the clear impression that it was not the intention of the Corporation to report the matter to the police. He says that he arrived at that conclusion because of the actions of the representatives of the Corporation and the manner in which the discussions were conducted which he understood to be in

accordance with the terms of his letter. It is however conceded that at no time was any representation to that effect given by any representative of the defendant Corporation.

Although reference had been made by Mr Wi Rutene of the intention of Mr Simon Hedley to sell his house property, no suggestion had been given as to security. The National Credit Manager for the Corporation instructed the solicitors for the Corporation to prepare an on-demand mortgage. He considered that if Mr Hedley was prepared to give security, the defendant Corporation would have a means of preventing Mr Hedley from later resiling from his indicated intention of selling the property. The question of a mortgage or security was not however discussed with Mr Wi Rutene or with Mr Hedley.

A meeting was held at Mr Wi Rutene's office on 13 August 1985. This meeting was attended by Mr McLeod, the Credit Manager for the defendant Corporation; Mr Darlow the Corporation's solicitor and Mr Pickering, the Area Manager. Also present were Mr Wi Rutene and Mr Hedley.

Mr McLeod says that the purpose of the meeting was to obtain further disclosure from Mr Hedley and to see what arrangements could be made to effect repayment of the misappropriated funds. The mortgage prepared by Mr Darlow was produced. Mr Darlow says that he was not then aware of the extent of Mr Hedley's misappropriations and was not able to

complete the document for a fixed sum. It was therefore prepared as a current account mortgage and no sum was inserted as being the amount owing. Mr Wi Rutene says that he was not aware that there would be a mortgage produced on that day for signature.

The house property was and is in the names of both the plaintiff and her husband and accordingly, the mortgage needed to be signed by the plaintiff. Mr Wi Rutene states that the implication at the meeting conveyed by the representatives of the defendant Corporation was that the execution of the mortgage would resolve the matter, but that if it was not signed, the defendant Corporation would take other action.

All parties are agreed that up to this time, the plaintiff was not aware of any of the matters under discussion. She did not know that her husband had been involved in misappropriations. She did not know that these matters were under investigation, or even that a meeting was being held. If the matter was to proceed it was therefore necessary for her to be told and for her to sign the mortgage. The plaintiff says and it is not disputed, that on 13 August at about 11 a.m. she was telephoned by her husband, Mr Simon Hedley. At the time she was preparing lunch for her 4 year old daughter. The plaintiff had a part time job which commenced at 2.30 p.m. in the afternoon. She was also 4¹/₂ months pregnant, carrying her second child. She said she was told

that her husband wanted to see her at Mr Wi Rutene's office immediately. He would not discuss the matter on the telephone and did not explain to her what the problem was. The plaintiff immediately went to town and met her husband outside Mr Wi Rutene's office. While sitting in their car, he told her for the first time that he had misappropriated a considerable sum of money from the defendant Corporation.

The plaintiff and her husband then saw Mr Wi Rutene on the street and went with him to his office. The representatives of the defendant Corporation had by this time left. Mr Darlow said that they considered it not proper that any of them should see the plaintiff in connection with executing the mortgage and they did not see her. Mr Wi Rutene says that on leaving his office, the demand was made by the Corporation representatives that he and Mr Hedley were on the instructions of the defendant's representatives, to obtain the plaintiff's signature on the mortgage and that that should be done before the defendant's representatives left Rotorua.

Mr Simon Hedley says that his understanding was that the defendant's representatives were due to leave Rotorua at midday which was approximately 45 minutes away. The plaintiff in her affidavit, says that she understood there was approximately an hour before the defendant's representatives were due to leave. Mr Wi Rutene refers to the time as being comparatively short. The affidavits filed on behalf of the

defendant on the other hand, suggest that they were not leaving Rotorua until rather later in the day. Be that as it may, I think I am obliged to accept for the purposes of these proceedings that the plaintiff's understanding based on reasonable grounds, was that only a very short time was allowed for consideration of the matter.

The plaintiff says that she was told by Mr Wi Rutene that the defendant Corporation required a mortgage signed by both to secure outstanding moneys which she was told were around \$50,000. She says that Mr Wi Rutene told her that the only thing to do was to sign the mortgage, which would result in the matter being kept domestic and out of the hands of the police. She says that she saw Mr Wi Rutene for only some 10-15 minutes; that she was not offered any independent advice and that there was no discussion about her independent property rights. She says that she was still in shock from hearing of her husband's activities.

Mr Hedley also says that he told the plaintiff that it was his understanding if the mortgage was signed, no complaint would be made to the police. Mr Wi Rutene says that the plaintiff was induced to help by being told that the mortgage was the last detail in the scheme required by the defendant to avoid involvement of the police. He says that the plaintiff was in tears; that she was shown the mortgage and told that she could not be forced to sign it, but that if she wanted to help her husband, then she had little alternative but

to sign. Mr Wi Rutene also says that he informed her that if she did sign, the property could be sold by the defendant Corporation. He confirms that there was no discussion as to whether or not the plaintiff should get independent advice. The plaintiff therefore signed the mortgage.

On the following day Mr Wi Rutene wrote to the plaintiff's parents. In that letter he sought assistance from Mr Hedley's parents and stated that the defendant Corporation was prepared to defer any court proceedings provided its losses were repaid or secured to its satisfaction. The sum of \$25,000 was in fact advanced by Mr Hedley's parents to assist him and this was paid to the defendant Corporation. Although Mr Wi Rutene refers to a clear impression, it is agreed and indeed the correspondence confirms, that the defendant Corporation through its representatives, never made any representation as to whether or not the matter would be placed in the hands of the police and in due course, it was so placed, as a result of which Mr Hedley was prosecuted.

The house has not been sold and the defendant Corporation now seeks to sell it in terms of the mortgage. A date for the sale has been set for 15 August. The plaintiff has commenced proceedings, alleging that she was subject to undue influence from the defendant Corporation in signing the mortgage and as further or alternative causes of action, that in the circumstances she is entitled to have the mortgage contract reopened pursuant to the Credit Contracts Act 1981 and

that the mortgage being a controlled credit contract, the particulars required by the Credit Contracts Act 1981 were not disclosed so that the mortgage could not be enforced. This application has been brought to prevent the threatened mortgagee sale, at least until such time as the substantive proceedings have been dealt with.

The principles relating to undue influence have been recently considered by the House of Lords in National Westminster Bank v. Morgan 1985 A.C. 686. Lord Scarman who gave the decision in that case, referred to the comments of Lord Shaw in Poosathurai v. Kannappa Chettiar 1919 L.R. 47 Indian Appeals 1 at p.3 and in particular the following:-

"It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. Where the relation of influence, as above set forth, has been established, and the second thing is also made clear, namely, that the bargain is with the "influencer," and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. These general propositions are mentioned because, if laid alongside of the facts of the present case, then it appears that one vital element - perhaps not sufficiently relied on in the Court below, and yet essential to the plaintiff's case - is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue."

Lord Scarman said:-

"The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other.....Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence."

Without coming to a conclusion as to whether it did or not, I think that the situation in this case was such that the relationship between the defendant and the plaintiff could well have been one which could have given rise to the application of the doctrine. The plaintiff was taken by surprise with a deeply distressing situation which reflected upon her husband and could have had a direct bearing on the welfare of herself and her family. She was not independently advised. Indeed she does not seem to have been advised at all because Mr Wi Rutene specifically states that he was acting on behalf of the plaintiff's husband. From her point of view, if there was a bargain at all, which seems unlikely, it would have been deeply disadvantageous. She had rights in the property which could have secured her home and that of her children. These she gave away in return for nothing at all. However, the defendant says that in this case, there was neither domination nor relationship between the parties and relies specifically upon the fact that the representatives of the defendant company

were not present when the plaintiff signed the mortgage, nor did they have any direct communication with her.

As against that, Mr Templeton for the plaintiff puts a stress on the fact that without any suggestion made by Mr Hedley, the defendant had through its solicitors prepared a mortgage which required the signature of the plaintiff and had brought it to Rotorua, presumably for that purpose. He says clearly therefore they had the intention of having the mortgage signed.

Secondly, he says that the evidence establishes that some pressure was placed upon the plaintiff by the defendant and that this must be taken into account even if it was applied indirectly through Mr Wi Rutene or Mr Simon Hedley. The suggestion was made that the defendant imposed pressure in relation to the possible prosecution of Mr Simon Hedley.

I accept as Mr Johnson has said, that there is no evidence to establish that the defendant or any of its representatives ever made any representations, promises or threats in relation to prosecution and the plaintiff could not on the material before me, establish that this constituted any pressure in respect of the mortgage. However, it is I think open to argument that the letter from Mr Wi Rutene of 8 August, raised the prospect that Mr Hedley hoped if he were co-operative, that the defendant might not see it as necessary

to report the matter to the police. The defendant did not answer this suggestion, but the fact that it had been raised meant I am sure, that it was at least in the contemplation of all parties. Under those circumstances, it is arguable that the defendant's failure to reject the proposal was in the circumstances an element imposing pressure on the plaintiff at the time the mortgage was signed.

Mr Johnson referred me to authorities of which Ward v. Lloyd (1843) 134 E.R. 1109 is an example where the court was not prepared to set aside a transaction obtained by a threat of prosecution unless it was proved that there was an agreement to abstain from prosecuting upon the security being given. I accept of course that submission and as I have already noted, the evidence falls short of establishing not only that there was an agreement, but even that there was a threat. However, I do not base my conclusion in this case on any concluded arrangement but take into account the perhaps inchoate threat of prosecution as being one of the surrounding circumstances bearing on possible undue influence.

In any event there is additional material. The affidavits filed on behalf of the plaintiff suggest that a time limit was imposed and a decision required within a very short time. This is denied by the defendant but I cannot resolve that kind of conflict on affidavit material and am satisfied that there is sufficient in the plaintiff's affidavit to

properly raise time pressure as a serious possibility. That is I think a significant factor. Further, Mr Wi Rutene specifically stated in his second affidavit that he, with Mr Simon Hedley, were on the instructions of the defendant's representatives to obtain the plaintiff's signature on the mortgage. It must therefore be at least open to the plaintiff to argue that Mr Wi Rutene was acting directly as agent for the defendant in his negotiations with the plaintiff. He states that he was not at least initially acting on her behalf and his obligations to his client, Mr Simon Hedley, might have been a further inducement to act as agent for the defendant. The circumstances of the meeting of Mr Wi Rutene and the plaintiff and the statements made were certainly such as to raise at least the possibility of the imposition of very great pressure on the plaintiff. If Mr Wi Rutene could be said to have acted as agent for the defendants, then the defendant is responsible.

Finally and I think perhaps even more significantly, the defendant had clearly decided before any discussion with Mr Wi Rutene or Mr Hedley, that it was desirable to obtain a mortgage. It had after all been prepared in advance. The mortgage would have been of no benefit to the defendant if it were not signed by the plaintiff and it was accordingly very much in the defendant's interests that the plaintiff should sign. The defendant was fully aware of the surrounding circumstances and in particular, that the plaintiff was quite

unaware of any part of the situation as it had developed. No person present (including the defendant's representatives) was aware of the amount and the plaintiff was therefore to the knowledge of the defendant, being asked to accept an obligation for an undisclosed amount where her home and the security of herself and her family were at stake. Moreover, if the evidence of Mr Wi Rutene and Mr Simon Hedley is correct, the material was put to the plaintiff under such time constraints that it would have been practically impossible for her to be independently advised, nor was there any suggestion that she should be independently advised.

Having regard to those circumstances, I am satisfied that the plaintiff is able to raise a serious question to be tried based on her allegations of undue influence and the vitiating effect of the circumstances on the transaction.

The plaintiff also relied upon certain causes of action based upon the provisions of the Credit Contracts Act 1981. Mr Johnson took the preliminary point that on the evidence before me, it could not be established that the transaction was a credit contract within the meaning of the definitions contained in the Act. In particular, he said that there was no evidence that in terms of s.3 (1) (b) of the Act, the plaintiff was required to pay a sum of money exceeding in aggregate the amount originally owing. The actual mortgage document and its terms were not before me or revealed in the

affidavit evidence. While no doubt unlikely, it is possible that having regard to the circumstances of this case the security related only to the amount outstanding and made no provision for interest, but on this I cannot speculate. I should therefore be inclined to the view that Mr Johnson is right on the material before me. However, it is unnecessary for me to come to any conclusion on this aspect of the matter in view of the result at which I have already arrived in relation to the allegations of undue influence and of course, if the matter finally proceeds to a substantive hearing, there will be nothing to stop the plaintiff proceeding on this aspect of the matter and proving the terms of the arrangement to a sufficient extent to allow the arguments to be dealt with.

That leaves the question of balance of convenience. Mr Johnson submitted strongly that this is a case where if the plaintiff ultimately succeeds, she can be fully compensated in damages. He pointed out that the sum involved would be able to be precisely calculated and there is no question but that the defendant is well able to meet any award which may be made against it. While that argument is not without merit, I do not think that it fully recognises the situation of the plaintiff. It is her home which is at stake. If her home is sold and she is ultimately successful in her contentions, it would in my view be very difficult to adequately calculate the damages to which she is entitled. I do not think that it is possible to overlook the fact that there can well be a degree of emotional

attachment to a home. I do not have sufficient material before me to come to any conclusion as to how difficult or otherwise it may be for the plaintiff to re-house herself and her children. Calculating what may be an appropriate figure to compensate her for the difficulties and distress of a period of homelessness could not be regarded as an easy matter. On the other hand, I cannot see that the defendant would be any worse off by delay other than its inability to use such funds as it may recover from the sale of the house for its lending purposes. I suppose it may be not unreasonable to take judicial notice of the fact that the amount which it could expect to recover by way of interest is likely to be rather larger than the interest contemplated by the Judicature Act. On the other hand, I do not know at this stage whether or not the mortgage made any provision for interest. This was a relevant factor in terms of the argument raised by the plaintiff in respect of the Credit Contracts Act. If the defendant considered it unnecessary to recover interest in respect of its security, it could scarcely complain if it is unable to use the money at least in the meantime. If it ultimately succeeds, then it will be able to sell the property and is still covered as to its principal sum. The loss which it may have made in terms of the use of the money is capable of precise calculation.

Mr Johnson pointed out that the plaintiff's circumstances are not such as to suggest that she would be in

any position to meet any damages awarded against her. I accept this is so. I note also that Mr Johnson submitted that the plaintiff has to some extent benefited by the fraud of her husband to the extent that the home was purchased by the injection of some capital fraudulently acquired, but this too involves speculation. I do not know the basis on which the purchase was financed. It may be that a substantial proportion of the purchase price was furnished by the plaintiff.

Having regard to all the surrounding circumstances, I am satisfied that the balance of convenience favours the plaintiff. There will accordingly be an order in terms of the notice of application. The question of costs is reserved.

TJ Gallin

Solicitors for Plaintiff: Messrs Sellar, Bone and Partners,
Auckland

Solicitors for Defendant: Messrs Grove, Darlow and
Partners, Auckland
