IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

PCB RJS

CP 7/88

Set 2

UNDER the Declaratory Judgments Act 1908

IN THE MATTER of Memorandum of Mortgage No 87938.2 from ROBERT EDWARD FULLER and ELLEN ANTICA FULLER as Mortgagor to JOHANNES JOSEPHUS MARIA VERDONK and MAUREEN ROSALIE VERDONK Mortgagee dated 21st September 1987 affecting the land in C/T 9D/734 (Wellington Registry)

BETWEEN ROBERT EDWARD FULLER and ELLEN ANTICA FULLER both of Masterton, Retired

Plaintiffs

A N D JOHANNES JOSEPHUS MARIA VERDONK of Rotorua, Carpenter and MAUREEN ROSALIE VERDONK of Rotorua, Married Woman

Defendants

Hearing: 24 March 1988 (at Wellington)

Counsel: J N Lamborn for plaintiffs
J V B McLinden for defendants

Judgment: 24 March 1988

ORAL JUDGMENT OF GREIG J

This is an application filed to-day and heard at short notice for an interim injunction to stop a mortgagee's sale which is to take place to-morrow.

The background, which I think it is appropriate to touch on in this case, is that the defendants, the mortgagees now, obtained judgments against the plaintiffs' son. The judgments were given first of all by consent on 20 May 1987 arising out of the sale of the defendants' property to the son for which they were not paid. That was a judgment for $95,000 with

interest of $21,678.64 and costs. There then remained other matters for hearing arising out of other contractual transactions in which the defendants were the lessors. After a hearing before Davison CJ judgment was given on 26 August 1987 for three sums, namely $7450, $4,260 and $100,700, payments together with interest at 11 per cent calculated from 4 April 1984.

In September 1987 the defendants had acted against the son in execution by way of a bankruptcy petition. The total of the judgment debts was $281,040.37 together with interest. The son then went to his parents to seek help from them. According to their evidence, they refused at first but within a day or so relented and agreed to enter into a transaction. This was a transaction which bears the date 16 September 1987 and is in form of a deed between the son as debtor, the plaintiffs as guarantors and the defendants as creditors. It is not clear who prepared this and the other accompanying documents but it seems as if they were prepared in advance, subject to the agreement of the parents.

The essence of the arrangement is a compromise of the judgment debts for payment of a sum of $230,000 by payment of $120,000 on 16 September 1987, which apparently was paid, and then by a payment of $50,000 on 16 December 1987 and a further payment of $60,000 on 16 March 1988. It was a term of this arrangement that the parents guaranteed the compromise and the judgment debt if the compromise arrangement was not complied with and, in support of that, were to give a mortgage over their home in Masterton, otherwise unencumbered, for the sum of the two later instalments of the compromise amount, together with interest at 25 per cent, reducible to 20 per cent for prompt payment. The payments under the mortgage coincide in time, at least, with the payments of the compromise.

I note that there is a difference, of course, between the mortgage liability and the compromise liability because the

mortgage carried interest. Likewise, there is an interest rate that is far greater than the amount allowed in the judgments and on the judgments.

The plaintiffs had no direct dealings with the creditors, according to the evidence, or indeed with their solicitors. Their dealings were with their son's solicitor. It seems that at the time the documents were signed the son was also present. The son gave an assurance that he would meet all the payments. He assured his parents that he had some $70,000 to be paid to him by Inland Revenue Department and it seems this was confirmed by the solicitor. It is plain from the evidence that the parents were told and indeed understood that their property would be subject to sale if things went wrong. The son signed at this time an undertaking to give them a mortgage over his property in Masterton and that he would agree to the sale of his house if problems developed. There is a reservation in that that he could not assure his parents that there would be enough to repay. There was then prepared an acknowledgment by the parents, the plaintiffs, that they had been advised that they should seek independent legal advice but they stated that they did not wish to, but acknowledged that they were aware that if there was default their home could be sold to satisfy the debt.

On 16 December the payment of $50,000 was not made. The next day a notice under s 92 was served on the plaintiffs. Their evidence is that they gave it to their son who assured them again that all would be well. At the beginning of February the plaintiffs were advised by the defendants' solicitors that they were proceeding with the sale. They received two letters at the beginning of February and then another later, at the beginning of March. In the meantime the son made an offer to pay the $50,000 late but this was refused. It is not clear whether there was a formal offer to make payment. The defendants' solicitors deny that there was any tender. There is no evidence on this at all but I am inclined to think that the offer of $50,000, even if it had

been a tender of the money, would not have been sufficient to remedy the default.

There are no hard and fast rules which describe and define the circumstances of undue influence. Lord Scarman, in National Westminster Bank v Morgan [1985] 1 All ER 821, at 831, said this:

> "There is no precisely defined law seting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case."

Earlier in his judgment in that case, a judgment, with which the other Lordships agreed, there is a quotation, at p 830, from Lindley LJ in Allcard v Skinner 36 ChD 145, when he describes the equitable doctrine as being concerned with transactions "'not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act...'".

Clearly the parents in this case were influenced by their son's predicament as it was relayed to them; equally, the parents entered into a foolish transaction, one which put at

risk their home. There is no evidence that they have any other property or assets of any substance and I assume, therefore, that this is their only substantial asset. It was foolish and disadvantageous but was it unduly influenced by the son? I must bear in mind that there was a solicitor involved, not the creditors' solicitor but the son's solicitor, and there is no and there can be no suggestion, I think, that that solicitor can be infected in any way by any influence which might have been brought to bear by the son himself. The parents were given some advice and did acknowledge their awareness of what was to happen.

Mr McLinden in the course of his submissions to me has made comment as to at least the possibility of collusion as between the debtor and the guarantors in this case. Unlike some other cases, the plaintiffs are not attacking their son's conduct and indeed the son joins with them in corroborating the evidence that they give. I do not think, however, that there can be any real basis for suggestion of any collusion in the sense that the evidence given by the plaintiffs is to be discounted or disbelieved. I incline, however, in the end to the view that this is not a case of undue influence and that the application of the doctrine in the circumstances does not lead the Court to impeach the transaction on those grounds.

If I am wrong in that, however, I think that there is another aspect of this case which is against the plaintiffs. It is the aspect which Mr McLinden described as the "lack of privity of contract". That may not be quite the correct phrase to use. The essence is, however, that there is nothing to bind the creditors, the defendants, to any influence, which emanates solely from the son or from his relationship. It is said, correctly, that they are parties to the deed and parties to the arrangement. They are the mortgagees. They are the beneficiaries of the guarantee. That cannot be the answer to the matter. Otherwise every case of guarantee would involve, as it were, a vicarious liability of the beneficiary, the creditor,

for the influence which is imposed by the other party, the debtor.

There is another situation in which there can be vicarious liability and that is if the debtor, the person who has influenced the plaintiff, can be said or can be inferred to be the agent of the creditor. There are two recent English cases reported side by side in the All England Law Reports, each falling on one side or the other of the line on which liability depends. These are Kingsnorth Trust Ltd v Bell [1986] 1 All ER 423, and Coldunell Ltd v Gallon, at p 429.

There is no evidence in this case that the son could be said to be the agent of the defendants in obtaining the guarantee or the mortgage and I do not think that it would be proper to infer an agency out of the evidence before me. It is important in this regard that the son's solicitor was also involved in the matter, giving advice, and that I think tends to break any possibility of a chain which could amount to agency in the case. On that ground too the plaintiffs must fail to pass the threshold.

It is not necessary for me to deal with the question of the balance of convenience but I should make some observations about that. It must generally be the case that where the mortgagor of a home raises an arguable case to stop a mortgagee sale that the balance of convenience should favour that mortgagor. The balance is as between money, the amount owing under the mortgaage, on the one hand, and a home - and a home must always be more valuable and its loss be uncompensable in comparison to the principal sum and any other moneys due under a mortgage. I think that applies here, even though it is plain that the defendants have suffered greatly themselves over a long period of time and are still waiting for full payment.

There are two other matters in this case which have been pressed upon me. One is delay. Clearly the plaintiffs have

waited until the eleventh hour to make this application. They have known since 17 December 1987 that there was a threat of sale. Even although there is no clear evidence on this, I think it can be taken, at least in partial excuse of the delay, that the parents would have relied upon the continued assurances of their son that things would be put right. I do not think that the delay alters the balance of convenience.

The other matter is the question of damages. With the evidence before me, although there is an undertaking as to damages, I think it is unlikely that the plaintiffs could meet any damages. The damages will arise because of the inability of delay to achieve from the sale of the property only to pay the mortgage. The plaintiffs seem to have nothing other than the property and so there is nothing to meet that potential loss. On the other hand, there is some evidence that the son has some assets and some equity of assets which may be able in time to provide the balance of loss, if there is any. In the result I would have found that the balance of convenience favoured the plaintiffs but I have found that they have no arguable case and therefore their application is refused.

The defendants have been successful. In the circumstances I see no reason why costs should not follow the event. This is a matter that has been done at very high speed with some urgency and at a distance. There will be an order for costs against the plaintiffs in the sum of $1,000, together with disbursements.

Solicitors for the plaintiffs: Haddon Marshall & Co (Palmerston North)

Solicitors for the defendants: Gawith & Co (Masterton)

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ORAL JUDGMENT OF GREIG J

Solicitors have received their judgments Sent on the 28.3.88