

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

16/4 CP 88/93

BETWEEN

R

Plaintiff

AND

MONEY MARK CORPORATION
LIMITED of Auckland,
 Finance Company

Defendant

Hearing: 1 April 1993

Counsel: H A Evans for Plaintiff
 N R W Davidson for Defendant

Judgment: 1 April 1993

ORAL JUDGMENT OF HOLLAND J.

The papers in these proceedings disclose a very sad tale. The plaintiff is a single woman who, according to the evidence of a psychiatrist, has functions in the IQ range of 75 to 85. He has said that her limitation in her reasoning and ability to explore issues would be readily apparent to anyone within the normal range of intellectual capacity.

She has purchased a week of time share in a property at Mount Hutt in Canterbury from the developers of the time share operation, a company called Paradise Holidays Limited, now in liquidation. In order to pay for the purchase of her time share unit she entered into a third mortgage with the defendant, a finance company in Auckland. The mortgage is for \$11,000 with interest at

22% per annum with a penalty rate of an additional 4% per annum.

The plaintiff says that the representative of Paradise Holidays Limited persuaded her to buy the time share so that she would be able to use it for skiing. She was allocated the 48th week in the year which is late November, long after skiing is closed at Mount Hutt.

She is in default under the mortgage and the defendant has issued a Notice under the Property Law Act, indicating that it intends to exercise its power of sale. The plaintiff seeks an interlocutory injunction restraining the defendant from proceeding with the exercise of its power of sale.

The plaintiff has presented her case for an interlocutory injunction on several fronts:-

- 1) That the defendant is only an equitable mortgagee and cannot exercise a power of sale as such.
- 2) That the defendant has acted in an unconscionable manner to such an extent that the mortgage transaction should be set aside.
- 3) That the defendant has acted and is acting in an oppressive manner under the Credits Contracts Act 1981.
- 4) That the defendant has breached S.9 of the Fair Trading Act 1986.
- 5) That the defendant is in breach of the Contractual Remedies Act 1979.

There is not the slightest doubt that the plaintiff should not have entered into the transaction to purchase this time share unit. While she is employed, her income

is limited. She has in the past been supported by her parents who have no doubt been motivated to give this young woman her independence notwithstanding her intellectual disabilities.

As is often the case the primary party against whom she makes the allegation, namely, Paradise Holidays Limited, is in liquidation. The Court has not been told what the state of that company liquidation is but it may well be that there is nothing for creditors in that liquidation.

The unconscionability relied upon by the plaintiff is directly related to the purchase of the time share unit. She was dealing with an employee or agent of Paradise Holidays Limited who should have realised that she should have independent advice before entering into the transaction because of her obvious disabilities.

If in fact she is correct in saying that he represented to her that she would be able to use the unit for skiing and the unit allotted to her was in the 48th week of the year, that person may well be liable in deceit. In any event Paradise Holidays Limited would appear on the papers presently before the Court to be in breach of contract so as to give the plaintiff a remedy under the Contractual Remedies Act and the Fair Trading Act but such remedies are of little avail to the plaintiff if Paradise Holidays Limited has no assets with which to meet any claim.

In order to sheet those causes of action home to the defendant the plaintiff must establish a material misrepresentation made by the agent of the defendant or

There is nothing in the evidence to place the defendant on guard as to the limited intellectual capacity of the plaintiff. In my view there was no occasion for the defendant to take any particular steps to have her protected. It may be that the solicitor who witnessed her signature was put on guard or should have been put on guard, but there is no evidence to that effect. There is simply nothing linking the defendant with the plaintiff other than the fact of the mortgage.

Although that mortgage is at a very high interest rate it was a third mortgage and it cannot be said that the rate of interest of 22% per annum on a mortgage entered into as a third mortgage in August 1990 was an unconscionable rate of interest. There is nothing that can be alleged by way of unconscionability against the mortgagee.

Insofar as the allegation is that the defendant is an equitable mortgagee, I am satisfied the plaintiff has not got an arguable case. The defendant is not an equitable mortgagee in the ordinary sense. It is a true mortgagee holding a memorandum of mortgage as well as a loan agreement. The memorandum of mortgage has not been registered under the Land Transfer Act, but it can be, and it has not been demonstrated to me that there is any way that the mortgagee cannot exercise its power of sale.

The evidence also falls short of establishing any disparity of consideration in relation to the original transaction. I must assume from the very fact that these proceedings have been brought that the interest in the time share unit purchased by the plaintiff cannot now be

sold for \$11,000 but there is no evidence as to its value or any evidence indicating that the purchase price which the plaintiff paid was anything other than the true value. Even, however, if there were a substantial disparity in the consideration any element of unconscionability in this regard is restricted to dealings between the plaintiff and Paradise Holidays Limited.

It follows that the plaintiff has failed to establish an arguable case for any of the causes of action against the defendant and the application for an interlocutory injunction is dismissed.

Costs are reserved. If the defendant seeks costs a memorandum may be placed before me with a memorandum in reply by the plaintiff. Although costs normally follow the event and only earlier this week I have ordered substantial costs against an unsuccessful plaintiff on an application for an interlocutory injunction because of the quite considerable costs incurred with the urgency of these proceedings, it may be that the defendant will not seek an order for costs or will be able to agree with the plaintiff on what in the circumstances may be regarded as a reasonable sum.

A D Holland

Solicitors:

Anthony Harper, Christchurch, for the Plaintiff
Simpson Grierson Butler White, Auckland, for the
Defendant

