IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-5666

BETWEEN	HOWARD ARTHUR SEXTON, IN HIS CAPACITY AS EXECUTOR AND TRUSTEE IN THE ESTATE OF THE LATE ALWINE ALITEA NORAH CLARIDGE Plaintiff
AND	TITIRO TRUSTEE COMPANY LTD First Defendant
AND	RICHARD JOHN CLARIDGE Second Defendant

Hearing: 17, 18 and 28 March 2008

Counsel: G J Kohler for Plaintiff
G C McArthur for Defendants

Judgment: 16 May 2008

JUDGMENT OF HEATH J

This judgment was delivered by me on 16 May 2008 at 2.30pm pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Tetley-Jones Thomas Sexton, PO Box 111, Auckland
Tim Hart, PO Box 231, Whangamata
Counsel:
G J Kohler, PO Box 4338, Auckland
G C McArthur, PO Box 1011, Tauranga

Introduction

[1] In late 1997 and early 1998 Mr Richard Claridge (Richard), approached his step-mother (Mrs Alwine Claridge) to obtain money to assist him to acquire a property at Onemana, near Whangamata. As a result of some discussions with her, Richard drew a document called a "Deed of Gift and Agreement" (the Deed). The document was drafted without the benefit of legal advice and was signed on 14 January 1998 at a rest home at which Mrs Claridge then resided.

[2] The Deed was executed by both Richard and Mrs Claridge. Richard was stated to be "acting for Midridge Family Trust" (the Trust). Before and after the Deed was signed, Mrs Claridge "advanced" a total of $107,800 to the Trust: a schedule of the payments appears at para [18] below.

[3] Titiro Trustee Co Ltd is the trustee of the Trust. Richard is the primary beneficiary of the Trust. He is also the shareholder and director of Titiro. The Whangamata property was purchased in Titiro's name.

[4] Mr Sexton, an Auckland solicitor, is the executor and trustee of the estate of the late Mrs Claridge. Mrs Claridge died on 15 May 2003, aged 93 years. Mr Sexton brings this proceeding to recover the sum of $108,000 from Titiro and Richard. Mr Sexton alleges that the Deed is ineffective in its terms, that Richard exerted undue influence over his step-mother to obtain the money and that the Deed is invalid because Mrs Claridge lacked contractual capacity at the time it was executed.

[5] Titiro and Richard defend the proceeding on the basis that the Deed evidences an enforceable gift. Alternatively, Richard brings a claim under the Law Reform (Testamentary Promises) Act 1949 to obtain an award in a sum equivalent to the amount advanced.

The factual matrix

[6] Richard's father married Mrs Claridge in November 1977, a little over two years after Richard's mother died. Mrs Claridge had known Richard's father for some time. When they married, Mrs Claridge was 67 and her husband was 73 years of age. Richard's father predeceased his wife. He died on 20 January 1997, about one year before the Deed was signed.

[7] Mrs Claridge began to exhibit signs of physical frailty and memory difficulties not long after her late husband's death. She moved into St Andrews Rest Home and Hospital on or about 10 February 1997. The rest home was situated in Glendowie, not far from the former matrimonial home.

[8] On 24 February 1997, Mrs Claridge executed an Enduring Power of Attorney, in favour of Richard and others, so that they could deal with her property, if she were to lose capacity to transact business on her own behalf.

[9] Richard began to spend more time with his step-mother after she moved into the rest home. Mr Sexton does not contest Richard's assertion that he visited Mrs Claridge on many occasions and provided various types of assistance to her. I am satisfied that, in general terms, Richard acted as a dutiful son and cared for his step-mother in a loving way.

[10] In late 1997, Richard and his wife (then living in Auckland) decided to move to Whangamata, for lifestyle purposes. An agreement for sale and purchase of a property at 111 Titiro Place, Onemana was entered into. Richard intended to borrow some money to acquire the Onemana property, but he also needed to find another source of funds to provide his own equity contribution.

[11] Richard deposed that, following a discussion with Mr Clive Ellis, a taxation consultant who had acted for Mr Claridge's father and (Richard believed) Mrs Claridge for a number of years, he decided to approach his step-mother to see if she was prepared to make funds available to him. Before approaching her, Mr Claridge

says he ascertained from Mr Ellis that Mrs Claridge "had more money than she would ever be able to spend in her lifetime".

[12] Richard was aware that his step-mother had "slightly more than $200,000 cash". He needed to borrow a little over $100,000. Richard gave evidence that he went to see Mrs Claridge at the rest home and told her that he was in the process of buying a house in Onemana and "needed to borrow a little over $100,000 to do that". He said that he told her that he had spoken to Mr Ellis, who had suggested that he ask her if she would be prepared "to gift that sum to [him] or failing that allow [him] to borrow it from her". Richard deposed that Mrs Claridge asked him whether she could afford the money. Richard responded with the advice he says that was given to him by Mr Ellis about the state of her finances.

[13] In evidence in chief, Richard contended that Mrs Claridge freely agreed to gift the money to him. He says that he told her that an agreement would be drawn up "as [he] did not want people accusing [him] of stealing money from her".

[14] Under cross-examination, Richard's evidence was not so clear. On at least three occasions he spoke of having asked Mrs Claridge to lend him money, as opposed to gifting. He was also unable to point to a specific occasion on which he had discussed the proposed detail of the Deed with Mrs Claridge and she had agreed to specific terms. Although the first tranche was advanced on 31 December 1997, Richard was unable to recall any specific discussions with his step-mother before it was paid to Titiro.

[15] Making due allowances for the ten years that have passed since the transaction took place and Mr Sexton's inability to call any witness to challenge Richard's recollection, I do not regard Richard's evidence as reliable. In the absence of independent oral or documentary evidence confirming Richard's account of the events surrounding the Deed's execution and the advance of the money, I prefer to draw inferences from other evidence I find credible and reliable. While not a rule of law, that approach is a cautious one that has been applied in many similar cases where a person in Richard's position may give self-serving evidence, albeit on an honest but mistaken basis.

[16] In drafting a document to evidence the transaction, Mr Claridge had dual objectives. Not only did he want to make it clear that Mrs Claridge was gifting money to him but also he wanted to avoid the need to pay gift duty. The lack of clarity in the Deed arises more from a desire to meet those inconsistent intentions than from any inadequacy in Richard's drafting techniques.

[17] The Deed refers to both a past advance and to intended future advances. It purports to evidence a loan by Mrs Claridge to Richard and a later gift, to be achieved by forgiveness of debt. At the time gifts were intended to take effect, all of the money would have been transferred to Titiro to settle the purchase of the Onemana property.

[18] Three cheques were drawn on Mrs Claridge's bank accounts to make up the sum of $107,800 advanced, one of which pre-dated the Deed's execution:

a) A cheque dated 31 December 1997, drawn on Mrs Claridge's ASB account, in favour of the Trust in the sum of $20,000.

b) A cheque dated 16 January 1998 drawn on Mrs Claridge's ASB bank account in favour of the Trust, in the sum of $38,000.

c) A cheque dated 19 January 1998 drawn on Mrs Claridge's BNZ account in favour of the Trust, in the sum of $49,800.

[19] Not long after the Deed was signed, a discussion took place between Richard and Mr Sexton. Mr Sexton expressed concern about the nature of the transaction that Richard described to him.

[20] Richard's evidence was that Mr Sexton had telephoned him to talk about the Glendowie house (then being rented on behalf of the estate of his late father) and, during the course of that conversation, he had told Mr Sexton about the Deed and "suggested it should be noted in [his step-mother's] Will". Mr Sexton did not recall those specific words being used, but I find it likely that they were, having regard to Richard's conduct and the events that followed.

[21] On 26 February 1998, at 2.02pm, Richard's solicitor sent a copy of the Deed by facsimile, to Mr Sexton. The solicitors said that Richard would be bringing the original of the document to Mr Sexton's office "in the near future". In fact, Mr Sexton had an appointment to see Richard and Mrs Claridge at his office, at 2.30pm, that day.

[22] There is a conflict in the evidence as to what happened when Mr Claridge arrived with his step-mother at Mr Sexton's office. I am satisfied that Mrs Claridge was not well and that her physical state and mental faculties were such as to cause concern to Mr Sexton about Mrs Claridge's transaction with Richard.

[23] Because of the undoubted effects of the passage of time on memory, I prefer to rely on the terms of a letter sent by Mr Sexton to Richard's solicitor on 2 March 1998, shortly after the consultation on 26 February 1998:

> [Richard] called on Thursday afternoon, 26 February, and brought Mrs Claridge with him. I discussed the agreement with Mrs Claridge who didn't know who had prepared it and thought that I had. In response to a question "Has Richard got the money now?, she said "I don't know". A further question was "Did you have any independent advice before signing it?" and her response was "I didn't have any". This was also confirmed by Mr Richard Claridge who also said he prepared the document.
>
> Mrs Claridge is either 88 or 89 years, she is quite vague and her physical health is weak. She can only walk with difficulty.
>
> Mr Richard Claridge has considerable contact with her. Under all the circumstances, the purported arrangement is seriously questionable. We write to record the position.
>
> On questioning Mr Richard Claridge, it appears that Mrs Claridge has made available $108,000. We understand that this is more than half her assets. As you may know, she is residing in St Andrews Hospital and paying full fees. Whatever else may be the position, if her remaining funds become exhausted, then of course there will be a claw back on this arrangement with Mr Richard Claridge and his trust.
>
> In our view, there should be a mortgage from the trustees of the Midridge Family Trust with Mr Richard Claridge as guarantor to Mrs Claridge of the amount of the advance. We requested [Richard] to discuss the matter further with Mr Knight.

Neither Richard nor his solicitor responded to that letter. I am satisfied that Richard received a copy of it.

The issues

[24] There are five issues for determination:

a) Does the Deed comply with the formal requirements of a deed set out in s 4 of the Property Law Act 1952, now s 9 of the Property Law Act 2007?

b) Does the Deed evidence a gift or a loan? If it were a gift then it is legally possible to make an enforceable promise to gift in the future? If a promise to gift a sum of money in the future is legally effective, ought the Deed to be rectified to reflect the fact that it does not deal with the gifting of the third sum of $27,000?

c) Did Richard exercise undue influence over his step-mother when he obtained the money from her? Or, is the transaction (otherwise) unconscionable?

d) Did Mrs Claridge lack contractual capacity when she signed the Deed on or about 14 January 1998?

e) If Mr Claridge does not succeed on each of the issues set out above, can he establish a claim, for the same amount, under the Law Reform (Testamentary Promises) Act 1949?

The terms of the Deed

[25] The "Deed" stated:

> This agreement is made this 14th day of January 1998 between **Alwine Aletia Norah Claridge** and **Richard John Claridge acting for Midridge Family Trust.**
>
> I **Alwine Alitea Norah Claridge** gift to the **Midridge Family Trust** the sum of $7,000.00 (Seven Thousand Dollars). This sum is in addition to $20,000.00 (Twenty Thousand Dollars) that I gifted on 31.12.1997.

> This money is for the benefit of Midridge Family Trust, the Trust of which **Richard John Claridge** is both "the Settlor" and "the Appointor".
>
> I hereby authorise the Midridge Family Trust to have the use of the sum of $81,000.00 Eighty One Thousand Dollars (referred to as the principal) from my various bank accounts on the following terms.
>
> The Trust agrees to pay to me the sum of $438.75 per month from the date of advance of the principal sum $81,000.00 until 30.12.98 on pro rata basis.
>
> On the anniversary of my gift made on 31.12.97, I also **gift** from the principal sum of $81,000.00 to the above Trust, a further sum of $27,000.00 (Twenty Seven Thousand Dollars).
>
> From 31.12.1998, the anniversary of my first gift, the Midridge Family Trust agrees to pay to me the sum of $292.50 monthly for the term of 12 months.
>
> On the anniversary, 31.12.99, I also gift to the Midridge Family Trust, a further sum of $27,000.00 (Twenty Seven Thousand Dollars). The Trust agrees to pay me the sum of $146.25 per month for 12 months.
>
> In the event of my death on or before the 31.12.2000, the above agreement will cease on date of death and any principal outstanding is forgiven by me and not recoverable by my executors in my Estate.
>
> This agreement is entered into in appreciation of the love and care and attention given to me by my son **Richard John Claridge** over the years.

[26] The objective, when interpreting a written instrument, such as a deed, is to ascertain the intentions of the parties from the totality of the words used by them, having regard to the circumstances in which they were used: *National Bank of New Zealand Ltd v West* [1978] 2 NZLR 451 (CA) at 455 and Laws NZ, *Interpretation of Deeds and Other Documents* at para 44. Generally, an instrument is to be construed according to "the strict plain and common meaning of the words where they are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates": *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189,196 (CA).

[27] The subjective intentions of the parties are irrelevant to the interpretation exercise (*Edwards v O'Connor* [1991] 2 NZLR 542 (CA) at 549) but it is permissible to look at the surrounding circumstances in which the Deed was prepared and signed in order to interpret it: for example, see *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 (SCNZ).

The formalities of a deed

[28] At the time the Deed was signed, the controlling law was the Property Law Act 1952. While there are no material differences between the relevant provisions of that Act and the Property Law Act 2007, I refer to the provisions in force at the time the Deed was executed.

[29] Section 4 of the 1952 Act states:

> **4 Formalities of deed**
>
> (1) Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, the witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation.
>
> (2) Except where the party to be bound by a deed is a corporation, sealing is not necessary.
>
> (3) Formal delivery and indenting are not necessary in any case.
>
> (4) Every deed executed as required by this section shall be binding on the party purported to be bound thereby.
>
> (5) Every deed, including a deed of appointment, executed before the commencement of this Act which is attested in the manner required or authorised by any enactment providing for the execution and attestation of deeds in force at the time of execution, or at any time subsequent thereto, shall be deemed to be and to have been as valid and effectual as if it had been attested as required by this section.

[30] Laws NZ, *Interpretation of Deeds and Other Documents*, at para 2, explains the nature of a deed as follows:

> **2. Definition of a deed.**
>
> A deed is an instrument in writing on paper or parchment, signed and attested in the manner required by law, whereby an interest, right or property passes or an obligation binding on some person is created, or which is an affirmance of some act whereby an interest, right or property has passed. It is not necessary that the instrument should describe itself as a deed. Nor is every instrument that has been executed with the formalities required for a valid deed necessarily a deed. Conversely, the fact that a document describes itself otherwise than as a deed does not mean that it is not a deed.
>
> For an instrument to constitute a deed two requirements must be satisfied. First, a deed to which an individual is a party must be signed by the party to

> be bound, and attested by at least one witness; and, if the deed is executed in New Zealand, the witness must sign and add his or her place of abode and calling or description. Sealing is not required except where the party to be bound by the deed is a corporation; and formal delivery and indenting are not required in any case.
>
> Secondly, the instrument must be intended to take effect as a deed. The question to be asked is, what was the intention of the parties? The instrument must be considered as a whole in its factual matrix and having regard to the object. Whether the document is intended to have present effect as a deed can be determined only by the objects of the parties as reflected in the instrument and considered in its factual setting. (footnotes omitted)

[31] So far as the formalities are concerned, the question is whether, in terms of s 4(1), the witness added to her signature her "place of abode and calling or description".

[32] The Deed was witnessed by another resident of the rest home, Ms Henshaw JP, a retired school teacher. At the time, Ms Henshaw was approaching 100 years of age. She signed in what appears to be an unsteady hand. Her name, address and occupation were added, in hand, by Richard, under her signature.

[33] Mr Kohler, for Mr Sexton, submits that, while the Deed was signed by Ms Henshaw, as a witness, she did not add to her signature her "place of abode or calling or description" as required by s 4(1). That, he submits, invalidates the Deed. In contrast, Mr McArthur, for Richard, submits that, by adding of Ms Henshaw's place of residence and occupation under her signature, Richard can be seen as acting as her agent for that limited purpose.

[34] The requirement that the address and occupation of the attesting witness be stated in the deed is imperative, rather than directory: see *Hetherington v Samson* (1878) 4 NZ Jur NS SC 84, held to apply in the case of a deed under the 1952 Act in *Kerr v Meates* (High Court Christchurch, A 136/88, 24 May 1990, Eichelbaum CJ). There does not appear to be any authority on whether it is necessary for *the witness* personally to write his or her address and occupation; certainly, none was cited to me.

[35] In the absence of authority, it is necessary to determine the question by reference to the purpose of the statutory formalities.

[36] The starting point is the requirement that addition of address and occupation are imperative obligations: *Hetherington v Samson* and *Kerr v Meates*. However, the concluding words of s 4(1) of the 1952 Act make it clear that "no particular form of words shall be requisite for the attestation". The object of the attestation clause is to protect against the possibility of fraud by having someone else witness the signature of a party to a deed.

[37] Confirmation that Mrs Claridge signed the Deed is apparent from Ms Henshaw's signature. The adding of her name, address and occupation by Richard was designed to identify the witness. I infer, from the unsteady nature of Ms Henshaw's signature, that she would have had difficulty in adding those details herself in any legible form.

[38] In my view, provided execution by the witness can be proved to the Court's satisfaction by other means, there is no warrant to deny the Deed effect solely because another has added the address and occupation as required by s 4(1). If that were not the law, it would not be possible for any illiterate person to witness a deed. Usually an illiterate person would sign "X" and it would be necessary for someone else to add the details required to comply with s 4(1).

[39] I hold that the Deed was not invalid for lack of compliance with the formalities of s 4(1).

Was the advance a gift or a loan?

[40] The terms of the Deed are set out in para [25] above. Does the Deed, interpreted in accordance with the principles set out in [26] and [27] above, evidence a loan or a gift, or a mixture of the two?

[41] The Deed attempts to deal with the inconsistent concepts of loan and gift to reflect Richard's overall desire to obtain the benefit of the advance without any need

to repay but also to avoid the need to pay gift duty. Richard's own evidence (see para [46] below) demonstrates that the terms of the arrangement, as he understood them, were not (and probably could never have been) brought home to Mrs Claridge in a manner that enabled her to make an informed decision whether to loan or gift, even assuming that she did not require independent advice before deciding what to do.

[42] What is clear is that three payments were made to Richard, on behalf of the Trust, which together totalled $107,800. What is also clear is an intent, at the end of each calendar year, for Mrs Claridge to gift $27,000 of that sum to Richard. Those three gifts would total $81,000, the principal sum set out in the Deed. The original $20,000 was intended to have been gifted immediately, together with an additional sum of $7000.

[43] The loan element of the transaction is evidenced by the obligations to pay interest.

[44] Richard's claim for rectification is based on the fact that the final intended gift of $27,000 was inadvertently omitted from the Deed. He seeks to have the Deed rectified to include that obligation to gift.

[45] Mr Sexton's claim for $108,000 is based on four gifts being made by Mrs Claridge to Richard, together totalling $108,000, even though the actual amount advanced was $107,800. To the extent that the claim relies upon a final gift that is not recorded in the Deed, if the Deed were effective, rectification should be ordered.

[46] At the conclusion of Richard's evidence I endeavoured to test my understanding of the transaction by questioning him closely about it. The exchange between Richard and myself was recorded as follows:

> THE COURT: We start with the Deed of Gift page 43 of the bundle. Now as I read that there is a programme to provide money putting it neutrally totalling $81,000. Is that correct?…..It was acknowledging that Mrs Claridge had given me the $107,800.

Can you tell me how you calculate $107,800 by reference to page 43?…..Well when it was to round up the $27,000 gifting over a period of time and to simplify it.

Let's go through it in the second paragraph we have the $7000 which is in addition to the $20,000 of 31 December so a total of $27,000?….Correct.

In the fifth paragraph starting with the words "on the anniversary" there is a reference to another $27,000?….Correct.

So that makes $54,000?….Correct.

In the paragraph starting "on the anniversary 31 December there is another sum of $27,000?….Correct.

Making a total of $81,000?….Correct.

Where in that document do I find difference between $107,800 and $81,000?….There is no definite mention but it does say following paragraph "In the event of my death…READS…in my estate".

There is provision for the payment of interest?….Correct.

Did you pay interest?….Yes.

In the Deed we agree that there is express reference to $81,000 worth of principal. Is that right?….Correct.

So where do I find evidence of an express agreement from Alwine Claridge to gift to you the difference between $107,800 and $81,000?….That's the poor wording in the document that it is not recorded later on.

So that in effect is what you say ought to have been in the document but was not?….No originally yes but at the end of the day if I have to pay it back then I will pay it back plus the $5000.

If I can ask you to look at exhibit 1 at page 3 this is the document as I understand it that you instructed Mr Knight to prepare to reflect your agreement with Mrs Alwine Claridge?….Yes.

If the original Deed were intended to refer to $107,800 why is this document limited only to $81,000?….Because at that time I still believe that Alwine could legally give me $27,000 each year.

$27,000 was gifted immediately to you?….Yes.

That left $81,000 as a loan on which you paid interest at stipulated rates?…..Yes.

Mrs Alwine Claridge needed to expressly forgive the remaining debt as each year went by. Is there any evidence demonstrating that she made a decision at the end of each of the relevant years to make that gift?….No.

Your case as I understand it is entirely reliant on the Deed of Gift of January 1998 being treated as an enforceable declaration that she was gifting all money to you?….Correct of her clear intent.

…

> THE WITNESS: Should Alwine have passed away or if she had become incapacitated and a power of attorney had to be registered well then we would come into whatever situation at that time.
>
> THE COURT: Doesn't that implicitly accept that there is a debt unless in the future she gifts otherwise the estate would also be bound by the gift?….I hadn't discussed.
>
> What I'm trying to understand is why you thought if she died and you're dealing with the executor that the debt would be repayable whereas if you deal with her its not?….The way I looked at it was should Alwine keep living and I look after the affairs fine she doesn't mind giving me $27,000 but if she died at any time my feeling was I had to pay back whatever was outstanding. At that point in time I was happy to do that.
>
> That sounds to me as if you were treating the $27,000 as a payment for ongoing care?…Correct. I did that right to the end.
>
> I don't dispute that it's clear you did a lot of good things for your step mother can I ask one last question on that issue. Did you ever put that concept effectively the $27,000 for helping to look after her to Alwine Claridge directly?….That was my intent up here with the loving care and attention.
>
> That's the last sentence of the Deed at page 43?….Yes.

[47] The critical question is whether Mrs Claridge was able to make an enforceable promise that she would gift money to Richard in the future. Richard has acknowledged that there is no evidence that Mrs Claridge expressly confirmed her intent to gift at the end of each calendar year, when he intended the gift to take effect. If Mrs Claridge could not make a legally binding promise to gift in the future, the Deed must be treated as evidencing a loan.

[48] A similar issue arose in *Commissioner of Inland Revenue v Morris* [1958] NZLR 1126 (CA). Ironically, the issue in that case was whether an alleged waiver of payment of a debt constituted a gift for estate duty purposes.

[49] Mrs Morris, by a deed made on 29 May 1946, agreed to transfer a debenture to her son. The debenture secured a principal sum of just over £10,000. The son agreed, from 1 April 1946, to pay to his mother the sum of £250 per annum during her lifetime "except in so far as for any specific half year the [mother] shall waive payment". Subsequent documents were executed by Mrs Morris purported to release payment of the debt. The Commissioner was contending that the "waiver"

constituted a release of the debt, something which had the effect of a gift in favour of Mrs Morris' son. In *Morris*, the likelihood of the gift being valid was greater because Mrs Morris took steps at the end of each period to "waive" payment of the debt.

[50] After Mrs Morris' death, the question was whether the total of the 10 half yearly payments of £125 each were dutiable. In the Court of Appeal, Gresson P and Cleary J, in a joint judgment, expressed the general principle and issue as follows, at 1132-1133:

> It was not disputed that it is a well-established principle of law that the release of a debt amounts to a gift, and that such a release is ineffective unless it is made under seal, or unless some valuable consideration is given in return for the release. Neither of these conditions was present in this case. There is an exception to the rule in that the holder of a bill of exchange or a promissory note may unconditionally renounce his rights by writing or by delivery of the instrument to the person liable; but the exception is by virtue of statute, and has no application in this case. The issue here is whether what we call "the proviso" operates to permit a parol waiver. It is therefore upon this proviso – its exact terms, its meaning, and its effect – that consideration must be concentrated.
>
> …
>
> The question then is whether it is competent for parties by deed to provide for a parol release to be given in the future notwithstanding the rule of law that a unilateral discharge is ineffective unless it is made under seal or unless there is something which will constitute consideration in law, or to put it another way (since the releases alleged in this case amount to gifts) the rule that a voluntary release of a debt owing at law is void if not made by deed.

[51] Their Honours answered that question as follows, at 1134-1135:

> … The rule at common law that if the original contract for the payment of a sum certain were under seal it could be altered or discharged only by deed and that a subsequent parol contract afforded no defence to an action on the covenant became modified in equity to the extent that a parol alteration or rescission was effectual provided it was founded on consideration.
>
> *So it is therefore no longer law that such a contract under seal can only be altered or rescinded by a deed; a parol release or rescission of a specialty contract is effectual if founded on or accompanied by consideration: Steeds v Steeds (1889) 22 Q.B.D. 537; Berry v Berry [1929] 2 K.B. 316.*
>
> We will examine later the question whether the conduct of the deceased gave rise to any equitable estoppel; but, considering the circumstances of this case quite independently of that question, *in our opinion, it was not competent for the parties to provide in a manner which would be legally effective that what*

> *the law has laid down as essential could in their particular case be dispensed with. It appears to us to make too great an inroad upon the integrity of a rule which has stood through the centuries, and which, though it has been modified somewhat, has been so modified only where there has been consideration. It is not the policy of the law to allow people unrestricted freedom in regard to the contracts they may make. There are not wanting down the years expressions in numerous judgments that, notwithstanding the intention of parties, deeds are not to have effect as prevailing over any rule of law: Parkhurst v Smith* (1741) Willes 327; 125 E.R. 1197; Doe d. *Mitchinson v Carter* (1798) 8 Term. Rep. 300; 101 E.R. 1400; *Hybart v Parker* (1858) 4 C.B. (N.S.) 209; 140 E.R. 1063; *Hilbers v Parkinson* (1883) 25 Ch.D. 200. In *John Lee & Son (Grantham) Ltd. v Railway Executive* [1949] 2 All ER 581 the Court refused to uphold a clause exonerating the defendants from liability; it was extravagantly widely expressed and was given a more restricted meaning. Denning L.J. remarked: "There is the vigilance of the common law which while allowing freedom of contract watches to see that it is not abused. It would therefore be a very serious question whether the defendants are free to exempt themselves in the wide terms which are here contended for. It seems to me preferable that a limited construction should be put on the clause so that it should be valid" (ibid., 584).
>
> *In our opinion,* therefore, *although the deed of May 29, 1946, purported to deal with private rights, it nevertheless sought to exclude a long-established rule of law – one which can fairly be regarded as for the common good. The voluntary discharge of a specialty debt cannot be effected by word of mouth, and to provide in the deed which creates the obligation for the voluntary discharge by parol is to do no more than antecedently provide that the parties may do something which the law does not permit them to do. It is accordingly of no effect.* Upon the basis therefore that the proviso is to be construed as one permitting parol waiver, in our opinion, it is ineffective in law.
>
> *Our conclusion, therefore, is that the set of words which we have called the proviso is not a resolutive condition at all, but is no more than an expression of agreement between the parties which purports to enable the obligee at any time thereafter to release or forgive any half-yearly instalment of interest in a manner which the law does not recognize as effective.* (my emphasis)

[52] Notwithstanding those findings the majority considered that, by his conduct, the son should not be able to claim the benefit of any waiver that may have occurred. That finding was based on equitable estoppel. That aspect of *Morris* does not arise in this case.

[53] North J took a more narrow view of the issue, holding that a parol release of the debt was ineffective. At 1137, His Honour said:

> I am disposed to think that if the law had permitted a debt to be voluntarily released by parol, then, as a matter of construction, the covenant could fairly

> be read as comprehending both an informal and a formal release. This, however, is not the case, for the law is clear that the release to be effective must be enshrined in a deed. In these circumstances, as both parties are to be deemed to know the legal requirement, I think that it must be presumed that they intended that the release would be given in a form recognized by law. This Mrs Morris failed to do, and therefore, in my view, her several oral intimations to her son that she released him from the payment of debts which had already accrued are ineffective in law. When, in the course of argument, I raised this point, Mr Parcell, for the respondents, replied that if this had been the intention of the parties there was no need to include in the deed the words as to waiver – for every creditor may voluntarily release his debtor in proper form. With respect, I do not think that this is an adequate answer. It should not be overlooked that the parties to the deed were mother and son, and the topic of a possible waiver of the half-yearly payments – or some of them – must have been the subject of discussion. In the circumstances, it is not surprising that a reference to this topic appears in the deed. I do not consider that the language used was sufficiently precise to justify the conclusion that the parties intended that the release could be given orally. If such had been their intention, surely they would have used language which clearly showed that they intended to modify a rule, which, as my brethren have said, had stood through the centuries.

[54] The effect of the majority judgment in *Morris* is to hold, in the absence of equitable conduct disentitling relief, that it is not legally permissible to release a debt at some time in the future unless specifically confirmed, orally or in writing, at the time. The rule of law discussed in *Morris* is premised on the assumption that some action is required by a donor to confirm a gift at the time it is intended to be made. Because there is no consideration for a gift, it is open to any person who intends to gift in the future to change his or her mind before the time at which it was intended the gift take effect. That is consistent with the submission advanced to me by Mr Kohler that a gift of future property is incomplete and ought not to be enforced by a Court. I hold that, in the absence of evidence that Mrs Claridge confirmed the intended gifts at the time they were to be effected, the future gifting is unenforceable. Because the claim for rectification relates to the last of the intended gifts, the claim by Richard for the Deed to be rectified becomes moot.

[55] Those findings invalidate any alleged gift on 31 December 1998, 31 December 1999 and 31 December 2000. But they do not affect the validity of the gift made contemporaneously with the execution of the Deed. That gift totals $27,000. That gift remains valid unless there are other grounds to defeat it. For that reason it is necessary to consider the balance of the claims by Mr Sexton.

Did Richard unduly influence his step-mother?

[56] Undue influence is a term easily misunderstood. Its development in New Zealand law is discussed in Burrows Finn and Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, 2007) at 12.3.1, p 350:

> Undue influence is a much-used phrase, but its precise nature remains a matter for dispute. Some authorities tend to treat the doctrine as being concerned with "excessively impaired consent", but others treat it as involving the improper abuse or exploitation of those whose consent has been impaired. In New Zealand both approaches can be found, but the latter is the more widely accepted view.

[57] I find that Richard (however he may have rationalised his conduct to himself) exercised an improper degree of influence over his step-mother when obtaining her consent to transfer over half of her wealth to him so that he could acquire a property for his and his wife's benefit.

[58] In the circumstances of this case, there is no need for extensive citation of authority. In my view, the case falls squarely within the principles set out in *Royal Bank of Scotland PLC v Etridge (No 2)* [2002] 2 AC 773 (HL), as approved in *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA). The following passage from Lord Nicholls of Birkenhead's opinion is apposite:

> [10] … The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner* (1887) 36 Ch D 145, [1886-90] All ER Rep 90 a case well known to every law student, Lindley LJ ((1887) 36 Ch D 145 at 181, [1886-90] All ER Rep 90 at 98) described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 3 All ER 933 at 936, [1961] 1 WLR 1442 at 1444–1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.
>
> [10] The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type (see Treitel, *The Law of Contract* (10th

> edn, 1999) pp 380–381). For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may (see *National Westminster Bank plc v Morgan* [1985] 1 All ER 821 at 829–831, [1985] AC 686 at 707–709).
>
> [11] Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

[59] The factors on which I rely to find undue influence on the part of Richard are:

a) Mrs Claridge was vulnerable at the relevant time. That vulnerability was evidenced by her age (88 years), her need for residential care, her physical and mental frailty, a diagnosis of dementia and an impaired memory. Two days before Mrs Claridge signed the Deed, at 6.30pm, she suffered a fall, leaving her with some physical ailments. One of the factors identified as contributing to that incident was a loss of confidence. Another, identified in a note written the day before the Deed was signed, was "dementia".

b) The existence of a relationship of trust and confidence between Mrs Claridge and her step-son in relation to financial and care arrangements demonstrate an opportunity for Richard to exert influence over his step-mother. Richard's position, as one of Mrs Claridge's attorneys under an enduring power of attorney signed on 24 February 1997, is evidence of that trust and confidence.

c) The transaction was to Mrs Claridge's significant disadvantage and to Richard's benefit. On Richard's own case she was, to his knowledge, gifting away over 50% of her assets, without reference to other potential beneficiaries of her estate and without knowledge of her potential costs of care in the future.

d) The transaction was not (and could probably not have been) adequately explained to Mrs Claridge. Mrs Claridge was not given an opportunity to take independent advice before entering into the transaction. The idea of gifting originated from Richard. Despite his reliance on Mr Ellis for suggesting that course of action, Mr Ellis did not confirm what Richard says he said to him.

[60] For those reasons, I find that Richard unduly influenced Mrs Claridge to enter into the Deed. Therefore, the gift of $27,000 made contemporaneously with execution of the Deed is also invalid.

Did Mrs Claridge lack contractual capacity on or about 14 January 1998?

[61] There is evidence suggesting a gradual decrease in cognitive functions, including a diagnosis of dementia, from the time Mrs Claridge made a Will on 2 September 1996. When she saw Mr Sexton in February 1998 she was having what I would term a "very bad day". Mr Sexton's appraisal of her condition is set out in his letter of 2 March 1998: see para [23] above.

[62] Nevertheless, I am not satisfied that the evidence establishes that, in December 1997 and January 1998, Mrs Claridge lacked capacity to enter into a formal legal arrangement. This finding is not inconsistent with my views on undue influence. I consider that Mrs Claridge may well have been capable of making an informed decision, with the benefit of independent legal advice, had she been afforded an opportunity to obtain it.

The Law Reform (Testamentary Promises) Act 1949 claim

[63] Richard endeavours to maintain his right to the money based on a claim for relief under the Law Reform (Testamentary Promises) Act 1949.

[64] I am not satisfied there is evidence to support this claim. The type of services to which Richard can refer fall within the natural incidents and consequences of life

when a dutiful step-son is caring for his mother. In my view, there was nothing in his conduct or in the conduct of his step-mother that could justify my finding an implied promise that he receive the equivalent of what he alleged was gifted as a testamentary promise: see, generally, *Re Welch* [1990] 3 NZLR 1 (PC) at 7-8.

[65] As Sir Robin Cooke said, delivering Their Lordships' advice in *Welch*, it would strain the scope of the 1949 Act to bring within its jurisdiction the natural incidents and consequences of a relationship between mother and step-son.

Result

[66] For those reasons, judgment is entered in favour of the plaintiff. I enter judgment against Titiro in the sum of $108,000 being the amount of the alleged gift. I award interest at the rate of 7.5% per annum from the date of issue of the proceeding. That will take account of interest on the debt paid before that time.

[67] I am not prepared to enter judgment against Richard for the amount claimed. There is, in my view, no legal basis to do so. I record, however, that Richard did accept that he was liable to repay another debt of $5000 not claimed in this proceeding.

[68] The counterclaim is dismissed. Judgment is entered in favour of the plaintiff on the counterclaim.

[69] One set of costs is awarded in favour of the plaintiff against both defendants (jointly and severally) on a 2B basis, together with reasonable disbursements. Both defendants are liable to costs because each failed on claim and counterclaim respectively. Costs and disbursements are to be fixed by the Registrar.

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P R Heath J

Delivered at 2.30pm on 16 May 2008