IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-001515

BETWEEN	ANZ NATIONAL BANK LIMITED Plaintiff
AND	PHILIP JOLIAN CAVANAGH First Defendant
AND	HELEN CLAIRE RUTHERFURD Second Defendant

Hearing: 25 November 2008

Appearances: S J Telford for Plaintiff
B O'Callahan and J Puah for Second Defendant

Judgment: 27 August 2009 at 2:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 27 August 2009 at 2:30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Morgan Coakle, PO Box 114, Auckland 1140 for the plaintiff
Carter & Partners, PO Box 2137, Auckland 1140 for second defendant

[1] ANZ National Bank Limited (ANZ) has issued this proceeding to recover money advanced under a loan to the defendants. The loan was applied in the purchase of a residential property by the second defendant (Ms Rutherfurd).

[2] ANZ has applied for summary judgment against Ms Rutherfurd for the unpaid balance of the loan following sale of the property and crediting sale proceeds. It also applied for summary judgment against Mr Cavanagh, but does not pursue that application as Mr Cavanagh has been declared bankrupt.

[3] Ms Rutherfurd opposes the application. She says that she was tricked into purchasing the property for an inflated sum from an associate of Mr Cavanagh (Mr Raghu Aryasomayajula). ANZ accepts for the purpose of the present application that Ms Rutherfurd was the victim of a fraud practised on her by Mr Cavanagh and Mr Aryasomayajula. It transpires that the property had a market value $300,000 less than the purchase price.

[4] Ms Rutherfurd claims that ANZ at the time of the loan knew of facts which should have put it on notice that Mr Cavanagh had exercised undue influence in getting her to purchase the house. Further, ANZ should have ensured that Ms Rutherfurd obtained independent advice before entering into the loan agreement and the mortgage. In these circumstances, she contends that it would be unconscionable to allow ANZ to sue her for the loan shortfall (which is attributable to the inflated purchase price). Ms Rutherfurd says that these matters cannot be resolved summarily.

[5] ANZ says that it was unaware of any undue influence exercised by Mr Cavanagh, or indeed any facts which would make it unconscionable to exercise its rights under the loan agreement and mortgage. It says that the facts on which Ms Rutherfurd relies are not sufficient to impute knowledge to it, and that it was under no duty to advise Ms Rutherfurd as to the risks of taking out the loan, or to refuse to advance the money she was seeking.

Factual background

[6] In or about late November 2006 Mr Cavanagh approached Ms Rutherfurd about a house purchasing plan that he and Mr Aryasomayajula had developed. Mr Cavanagh was a registered land agent working with an Auckland real estate company at the time. The plan put to Ms Rutherfurd was that Mr Cavanagh and Mr Aryasomayajula would locate a suitable property, arrange the finance to buy it, assist her to develop and sell it, and then repeat the process with a further property. The objective was to assist her to build up equity.

[7] Ms Rutherfurd says that she was told that Mr Cavanagh and Mr Aryasomayajula had helped several young persons in this way, and would receive real estate commissions on the sales and a share in profits from the development. She also says that she told Mr Cavanagh that she had no assets and her income was fully committed. She claims he told her they would ensure that she would not have to pay more than she could afford, that the resale value would always be worth more than any borrowings, and that if the market changed they would buy the property themselves and cover all liabilities.

[8] Mr Cavanagh introduced Ms Rutherfurd to an ANZ mortgage manager, Mr Jake Aho. Through him Ms Rutherfurd sought pre-approved finance from ANZ for purchase of a property. On 12 March 2007 Mr Aho advised Ms Rutherfurd that ANZ had given conditional pre-approval to borrow $427,000. She was earning $50,000 at that time.

[9] On 5 April 2007 Ms Rutherfurd entered into an agreement to purchase 50 Temple Street, Meadowbank, from Vijay Enterprises Limited for $850,000. Although she did not realise it at the time that company was owned by Mr Aryasomayajula and the market value of the property was about $550,000.

[10] On 11 April 2007 Ms Rutherfurd and Mr Cavanagh submitted a joint application to ANZ for a loan of $800,000. It appears that the increase in the loan amount was discussed with ANZ beforehand. In a diary note dated 10 April 2007 Mr Aho sought approval for the increase (he did not have discretion to approve the

new amount) and a waiver of a bank policy requirement for a registered valuation for loans above $650,000 in the Auckland residential market. In the diary note Mr Aho recorded that Mr Cavanagh had become a joint applicant. The application was supported by evidence of both applicants' income. In Ms Rutherfurd's case this comprised confirmation of her salary (both current and under new employment she was to start on 30 April 2007) and her most recent bank statement. In Mr Cavanagh's case it comprised his 2006 financial accounts, a tax invoice from his employer showing his income for the current year and recent bank statements which also showed funds available to meet the balance of the purchase price (the deposit).

[11] ANZ's diary notes also record a decision by Mr Aho's superior (Ms G Love), made prior to approval of the loan, to waive the bank's policy of requiring a registered valuation for lending over $650,000 in the Auckland residential market. The stated justification for the waiver was that the purchase price was consistent with comparable sales in the area. Mr Aho says that comparable sales information was obtained from the Quotable Value website and was taken into account when considering the application.

[12] Ms Rutherfurd says that Mr Cavanagh arranged for a Mr Andrew Lemalu of Andrew Lemalu Law to act for her on the purchase. On 20 April 2007 Mr Cavanagh collected Ms Rutherfurd and took her to the offices of Andrew Lemalu Law. They met Mr Aryasomayajula outside the offices, and he went in with them. Ms Rutherfurd assumed he was there because he was Mr Cavanagh's business partner. She learned later that Mr Lemalu also acted for Mr Cavanagh and Mr Aryasomayajula and their companies.

[13] Ms Rutherfurd and Mr Cavanagh signed the ANZ loan agreement in the presence of a legal executive. Ms Rutherfurd also signed a formal authority to allow Andrew Lemalu Law to complete registration of the transfer and a mortgage to the ANZ, and a separate waiver of independent legal advice given to Andrew Lemalu Law. She says that the legal representative told her that Mr Cavanagh was a party to the loan agreement at the bank's insistence because she could not afford to service a loan of $800,000 on her own, but did not discuss the documents in any detail.

[14] Ms Rutherfurd and Mr Cavanagh defaulted on the loan repayments within a few months. By agreement with ANZ they sold the property in December 2007 for $575,000, leaving the shortfall on the loan for which ANZ is now seeking judgment.

Principles for summary judgment

[15] The application was made under r 136(1) (now r 12.2) of the High Court Rules. The relevant part reads:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[16] The principles that the Court applies when determining an application for summary judgment are well established. They can be found in the early leading cases of *Pemberton v Chappell* [1987] 1 NZLR 1 and *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA), and more recently in *Jowada Holdings Limited v Cullen Investments Limited* CA248/02, 5 June 2003. The principles of particular relevance to the application are:

a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence: the Court must be left without any real doubt or uncertainty in the matter;

b) The Court will not hesitate to decide questions of law where appropriate;

c) The Court will not attempt to resolve genuine conflicts of evidence on material facts or to assess the credibility of a statement said to give rise to a dispute of fact, provided there is a plausible basis for it: *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 (PC).

d) The Court must balance caution in avoiding any prejudice to a defendant against a robust and realistic attitude where required by the facts of the case.

e) Where a plaintiff makes out a prima facie case, to resist that claim the defendant must show an evidential basis for assertions which could provide a tenable defence; they must pass "the threshold of credibility": *Reeves v One World Challenge LLC* [2006] 2 NZLR 184, 199 (CA).

The application, the opposition, and the essential issue arising

[17] ANZ seeks recovery of the balance of its loan advance and interest due in accordance with the loan agreement signed by Mr Cavanagh and Ms Rutherfurd on 20 April 2007. It has established a prima facie case for the sum for which it seeks judgment (the balance of $276,436.76 outstanding as at 27 February 2008), its entitlement to interest under the loan agreement and its entitlement to costs on an indemnity basis.

[18] Ms Rutherfurd does not dispute the fact of the loan, or the terms of the loan agreement or the mortgage. However, she says that she has an arguable defence that ANZ knew or ought to have known that the transaction as a whole, and the loan agreement and mortgage in particular, were procured by undue influence or fraud on the part of Mr Cavanagh and Mr Aryasomayajula. She contends that ANZ's knowledge put it on inquiry and under a duty to raise its concerns with Ms Rutherfurd or require her to take independent advice. She claims that only in that way could ANZ reasonably be satisfied that she was aware of the risks she was running by entering into the transaction and that she did not have any other rights in the matter.

[19] The essential issue for determination on this application is whether ANZ had knowledge of facts which ought to have put it on notice that Ms Rutherfurd was acting under undue influence or other unconscionable behaviour on the part of Mr Cavanagh and Mr Aryasomayajula.

The nature of undue influence

[20] Before turning to the essential question of ANZ's knowledge, I will mention briefly the legal elements of a claim for undue influence. It is important to keep in mind that the undue influence is said to have been exercised by Mr Cavanagh and Mr Aryasomayajula.

[21] The leading New Zealand case on undue influence is *Wilkinson v ASB Bank Limited* [1998] 1 NZLR 674. In the main judgment in that case Blanchard J accepted the two-fold classification of undue influence, given by the House of Lords in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 189-190, as being either actual or presumed. Blanchard J referred (at 679) to the analysis of presumed undue influence:

> a) It arises where there is a relationship of trust and confidence between complainant and wrong-doer such that it is fair to presume that the wrong-doer abused that relationship in procuring the complainant to enter into the impugned transaction.
>
> b) Where such a relationship is established, it is then for the wrong-doer to show that the complainant entered into the impugned transaction freely (for example, by showing that complainant had independent advice).
>
> c) Certain relationships (such as solicitor and client) give rise to the presumption as a matter of law. In other cases it will be for the complainant to prove their trust and confidence was reposed in the wrong-doer.

[22] In the present case Ms Rutherfurd has given evidence of the circumstances under which she entered into the transaction. She says that she was given assurances that Mr Cavanagh and Mr Aryasomayajula would make all the necessary arrangements to purchase the property (including arranging finance) and would ensure that she was not at risk in the transaction. She says that she had no

experience with, or knowledge of, purchasing or developing property and accepted what she was told, trusting in the expertise of Mr Cavanagh and Mr Aryasomayajula. She says she was unaware of the precise business relationships between Mr Cavanagh and Mr Aryasomayajula or that Mr Andrew Lemalu acted for them and their companies. She says that she trusted everyone implicitly. In those circumstances it is at least arguable that Ms Rutherfurd's relationship with Mr Cavanagh raises a presumption of undue influence in the transaction generally, extending to her entry into the loan agreement and mortgage.

Does this affect ANZ?

[23] The next stage of the inquiry is whether, on the basis of this presumed undue influence by Mr Cavanagh, the loan agreement and mortgage should be set aside as against ANZ as a creditor.

[24] Blanchard J in *Wilkinson v ASB Bank Limited* identified two circumstances where a transaction procured by undue influence could be set aside against a creditor bank. His comments were made in the context of undue influence between married parties, but he noted the comments of Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* that the principles could apply "to all other cases where there is an emotional relationship between cohabitees" (at 680). Although the Court in *Wilkinson* was addressing a claim under a guarantee, I consider that it is at least arguable that the same principles can apply to a transaction under which the complainant has incurred obligations as a principal debtor. However, I note it will be necessary to keep in mind that some of the factors which justify the intervention of equity in respect of a guarantor are unlikely to be present when the complainant has undertaken the primary obligation: see for example *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200.

[25] The first circumstance identified by Blanchard J where a transaction involving undue influence might be set aside was the "very rare occurrence" where the wrong-doer was acting as agent of the bank. The second circumstance, which is potentially applicable in the present case, is where the bank has actual or constructive notice of undue influence exercised or of a misrepresentation made by

the wrong-doer (and, consequently, of the other party's equity to set aside the transaction). He cited a passage from the judgment of Lord Browne-Wilkinson in *Balclays Bank v O'Brien* as the rationale for this second circumstance. The relevant passage for the purpose of the present application reads at 195:

> The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

[26] After referring to this underlying rationale, Blanchard J referred to the comment of Lord Browne-Wilkinson that a combination of two factors puts a creditor on inquiry where a wife stands surety for her husband's debts. The first was where the transaction on its face was not to the financial advantage of the wife. The second was the fact that in such transaction there was a substantial risk that the husband had committed an illegal or equitable wrong (entitling the wife to set the transaction aside). The latter picks up on the comments of Lord Browne-Wilkinson that the informality of business dealings between spouses raises a substantial risk that the husband has not accurately informed the wife of the nature of the liability she is undertaking.

[27] Blanchard J next set out the steps Lord Browne-Wilkinson considered that it was reasonable for a creditor (who had been put on inquiry) to take to satisfy itself that the wife's agreement to stand surety had been properly obtained. The essence of these steps was to bring home to the wife the risk she was running by standing as surety and to advise her to take independent advice.

[28] After reviewing English authorities subsequent to *Barclays Bank v O'Brien* and *CIBC v Pitt*, and to authorities in Australia and New Zealand, Blanchard J noted (at 690) that the key issue was where the loss, incurred as a consequence of undue

influence or unconscionable behaviour, should lie. Where a third party is involved Blanchard J noted that this requires a balancing of competing interests. After acknowledging that each case would turn on its own facts and circumstances, he set out a number of observations (falling short of definitive statements of principle) which could help to determine where the equity might lie. As these observations are given in the context of a guarantee they must be read with caution in the present case. Nevertheless, as counsel for Ms Rutherfurd placed considerable weight on them, I will set out the main observations of potential application in the present case, and then consider whether they apply in this case. They are (690 – 692):

> 2. The questions initially to be asked … are: (i) whether there was between the guarantor and the principal a relationship under which the guarantor generally reposed trust and confidence in the principal debtor; and thus (ii) whether there was at the time when the guarantee was in contemplation a presumption of undue influence or misrepresentation. If the financier was aware of facts giving rise to that presumption, it must show that it took adequate steps in the circumstances to allay any reasonable suspicion of undue influence or misrepresentation: would an observer, knowing only what the financier knew, have concluded that reasonable suspicion of undue influence or misrepresentation remained when the guarantee was signed?
>
> 3. Undue influence on a guarantor is likely to be presumed if the following features are present:
>
>   - limited commercial ability of the guarantor;
>   - absence of a more than minimal financial stake by the guarantor in the enterprise guaranteed; and
>   - a relationship involving an emotional tie or dependency on the part of the guarantor towards the principal debtor.
>
> …
>
> 6. In order to allay reasonable suspicion a prudent course for the financier is to insist that the guarantor be given advice by an independent solicitor and to obtain from the solicitor a certificate that the effect and implications of the documents have been explained and that the guarantor appeared to have understood the explanation.
>
> 7. If a guarantor declines to get independent advice (and the financier would be wise to have this recorded in writing signed by the guarantor), a prudent financier will endeavour to ensure that someone, preferably a solicitor, explains the documents and their consequences. The financier may be able by that means to obtain reasonable satisfaction that the guarantor has understood the

> transaction. Unless it can be shown that an explanation was given, it may be hard to argue plausibly that the guarantor did understand. In that circumstance, without proof that the guarantor knew what he or she was doing, the financier will be unable to remove the suspicion and so overcome the presumption. ….
>
> …
>
> 9. While it is prudent for the financier to insist that the guarantor is advised by a solicitor who is not acting for another party to the transaction, it is not for the financier to tell a solicitor how to perform his or her duties or, in other than exceptional cases, to inquire about the independence of the solicitor or the adequacy of the advice. But if an outside observer, knowing only what the financier knows, would conclude that the solicitor's independence has been compromised, the financier may not be able simply to rest on the certificate. ….
>
> 10. There may be rare cases where the substance of the transaction or a term of the guarantee or security is so disadvantageous that no solicitor could properly advise signature. A financier will be unwise in these exceptional circumstances to rely upon the appearance of independent advice. At the very least, it should consider obtaining a certificate from the independent solicitor that the particular matter has been pointed out to the guarantor.

The Bank's knowledge

[29] There is no suggestion that ANZ had actual notice of the genesis of the relationship between Ms Rutherfurd and Mr Cavanagh, or the statements and assurances that she alleges. However, counsel for Ms Rutherfurd submitted that ANZ was put on notice by various unusual elements in this transaction:

(a) The central role of Mr Aryasomayajula, director and shareholder of the vendor and close business associate of Mr Cavanagh.

(b) Mr Cavanagh's role in the purchase and loan (as real estate agent acting and subsequently as co-borrower under the loan agreement).

(c) The borrowers' inability to service the loan.

(d) The lack of a registered valuation (contrary to the bank's lending policy).

(e) The knowledge of the solicitor acting for ANZ of the business relationship between Mr Cavanagh and Mr Aryasomayajula.

[30] The first circumstance raised by counsel for Ms Rutherfurd is the central role taken by Mr Aryasomayajula, director and 99 percent shareholder of the vendor. ANZ acknowledges that Mr Aryasomayajula introduced Ms Rutherfurd and Mr Cavanagh (through Mr Aho), that he sent their loan application to the bank, and that he requested waiver of the registered valuation requirement. Mr Aho says, however, that he understood Mr Aryasomayajula to be a real estate agent and a property developer but was unaware at the time of the loan transaction that he had any interest in the property. Counsel for Ms Rutherfurd argued that this should be a matter of constructive knowledge because it was a matter of public record in the Companies Office. I do not accept that. Although there is a dispute on the evidence as to whether Mr Aho knew at that time of the business relationship between Mr Cavanagh and Mr Aryasomayajula (a matter I will come back to), Mr Aho had no reason to investigate the ownership or management of the vendor. I see nothing in the fact of an introduction of a potential customer to raise any doubts about the transaction. Nor is it inconsistent with an entirely innocent interest that after introducing them, he continued to help. He was not present at the one meeting that Mr Aho had with Ms Rutherfurd and Mr Cavanagh. There was no reason for Mr Aho not to inquire further.

[31] Mr Cavanagh's role, taken on its own, is similarly unexceptional so far as ANZ is concerned. Mr Aho can be taken to have known at the time of processing the loan application that Mr Cavanagh was the real estate agent acting on the sale (Mr Aho had a copy of the agreement for sale and purchase recording Mr Cavanagh's role). There could be any number of reasons for Mr Cavanagh to assist Ms Rutherfurd's purchase. All this suggests is that there was some arrangement between them (and Mr Aho states he understood that both Ms Rutherfurd and Mr Cavanagh were to live in the property).

[32] Counsel for Ms Rutherfurd placed considerable weight on what he submitted was an apparent inability of the borrowers to service the loan. He argued that the bank must have known that Ms Rutherfurd and Mr Cavanagh could not meet the

initial monthly servicing cost of $6,300. He said that Ms Rutherfurd's income was not supported by her bank statement (it showed a fortnightly deposit of $1,370 which did not equate with the net income of $3,811 shown on the loan application) and Mr Cavanagh's 2006 business accounts showed a before tax income of $26,870 which was a far cry from the gross income of $7,268 per month recorded in the loan application. He submitted that Mr Aho's explanation that Mr Cavanagh's stated income was not out of the ordinary, and it was usual for agents to put as much personal expense as possible into their accounts to reduce taxable income, was not credible.

[33] I do not accept that there was anything in this point. Ms Rutherfurd's income was clearly put forward on the basis of the annual salary of $62,000 which she was due to receive in the new job commencing on 30 April. This equates to $5,166 gross per month, which is the sum shown in the loan application. Mr Cavanagh's 2006 financial statements show total income of $87,439. This equates to the gross income entered in the loan application of $7,268 per month as base salary and a tax calculation was produced showing the net of tax figure recorded in the loan application. Although there is some merit to the argument that insufficient account has been taken of the expenses charged against that income in Mr Cavanagh's financial accounts, the accounts show that Mr Cavanagh took drawings in that year of $94,692, and had taken $74,886 the previous year. Mr Aho adds that he made his own assessment of living expenses (in accordance with the bank's guidelines at an increased amount to that shown in the loan application) and was satisfied that there was a monthly margin in excess of $500. This assessment was no doubt further supported by Mr Cavanagh's gross earnings for the year to 31 March 2007 ($116,227.77) as recorded as in a tax invoice produced immediately before the loan application was submitted.

[34] The issue is whether, on an objective assessment, these figures should have alerted ANZ to the possibility that Ms Rutherfurd did not appreciate her risks in this transaction. I find that they do not do so.

[35] The next issue is whether the request to waive a registered valuation should have put ANZ on inquiry. There are two aspects to this. First, Mr Aho says that the

request was made by Mr Aryasomayajula. Mr Aho understood that that was so that Ms Rutherfurd and Mr Cavanagh could avoid the cost of obtaining a valuation. I find nothing in this, in light of the fact that ANZ did not know of Mr Aryasomayajula's interest in the vendor, to put ANZ on inquiry. The second aspect is that the request was contrary to ANZ lending policy. However, Mr Aho states that the requirement for registered valuations is regularly waived by the bank where comparable sales information supports the sale price. He says that Mr Aryasomayajula told him that comparable sales in the area would support the sale price, that he obtained comparable sales information, posted them on to the bank's system, and forwarded the request to his manager. The manager sought verification of the property, but after receiving that waived the requirement. I do not consider that the request for waiver, of itself, should have put the bank on inquiry. ANZ was entitled to waive its own policy. There were grounds for doing so. There was nothing to suggest that Ms Rutherfurd was relying on ANZ to act in accordance with its policy. The only information ANZ received (the request from Mr Aryasomayajula) was to the contrary. As I have said, there was no reason for the bank to consider that Mr Aryasomayajula had a conflicting interest.

[36] The last matter advanced by counsel for Ms Rutherfurd was the knowledge of the solicitor acting (for both parties) on the mortgage transaction as to the business relationship between Mr Cavanagh and Mr Aryasomayajula. Counsel submitted that that knowledge was imputed to the bank. He accepted in principle that the knowledge that could be imputed was confined to facts learnt by the solicitors in the course of carrying out their mandate for the bank: *Waller v Davies* [2005] 3 NZLR 814 at [131]–[133]; *Burmeister v O'Brien* [2008] 3 NZLR 842 at [68]-[85]. He argued, however, that even in the context of the limited mandate of preparation of mortgage documents, this knowledge had to extend, to the solicitor's knowledge of the business relationship between Mr Cavanagh and Mr Aryasomayajula. He further relied on the decision of this Court in *Bowkett v Action Finance Limited* [1992] 1 NZLR 449 where the Court found that a solicitor's knowledge was to be imputed to the financier even where the solicitor had encouraged the party providing security for a loan to seek independent advice.

[37] As stated in *Burmeister* at [68], the starting point for analysis must be the scope of the solicitor's agency, interpreted in a commercially realistic way. In this case Andrew Lemalu Law's instructions were set out in a letter from ANZ dated 18 April 2007. They were to explain the meaning and effect of the loan agreement, to ensure that the borrowers signed the agreement and the mortgage, to ensure that proper disclosure was given, to obtain the necessary authority to register the mortgage, and to attend to registration. In response to these instructions Mr Lemalu, on behalf of his firm, provided the bank with his certificate that the nature, effect and implications of the documents had been explained to the borrowers, and they appeared to have understood the explanation.

[38] I turn now to consider what knowledge Andrew Lemalu Law acquired in the course of carrying out its mandate. Ms Rutherfurd describes in her affidavit what happened at the only meeting she had with Andrew Lemalu Law. It appears that a legal executive and Mr Lemalu were present, but it is not clear whether they were both present for the whole of the meeting. She says that the meeting and signing were extremely rushed. The legal executive showed her where to sign the loan agreement, an e-dealing authority, and a waiver of independent legal advice form. She says that the meeting seemed mostly to be about other things that Mr Cavanagh and Mr Aryasomayajula were doing (which had nothing to do with her). She regarded her signing of the documents as an incidental part of the meeting. She says that "the legal representative" told her that Mr Cavanagh was on the loan documents at the bank's insistence because she could not afford the loan of $800,000 on her own, but says that they did not discuss the documents in any depth so that she could understand the contents and the issues. She says that it was not disclosed that Andrew Lemalu also represented Mr Aryasomayajula and Mr Cavanagh and their companies, and there was no reference to any conflict of interest nor any suggestion that she should take independent advice. She recalls Mr Lemalu mentioning that Mr Aryasomayajula had a valuation of the property, but no discussion as to the value of the property or whether the valuation reflected that value.

[39] At most Ms Rutherfurd's evidence invites an inference that the solicitor knew that Mr Aryasomayajula had a financial interest in the transaction (his presence in the meeting and the mention of a valuation). She does not suggest, however, that

any information was imparted in the meeting itself as to the nature of the financial interest, and particularly as to Mr Aryasomayajula's involvement in the vendor company. Indeed, Ms Rutherfurd is adamant that she had no knowledge of this (and she could not take that position if it had been raised in the meeting). She goes further and says that the greater part of the meeting was to do with other matters, not affecting her. In those circumstances, I find that even if the solicitor did have other knowledge about Mr Cavanagh or Mr Aryasomayajula, it was not information that he acquired in the course of carrying out his mandate from ANZ. This can be contrasted with *Bowkett* where the solicitor learnt information, in inquiry from Mr and Mrs Bowkett senior, which gave her grave concern.

[40] I agree with counsel for ANZ that the facts in the present case are quite different from those in *Bowkett*:

a) In that case the financier was deemed to know that the parties providing the mortgage (who were the parents of the borrower) had no hope of servicing the mortgage from their resources and that the son was either bankrupt or about to go bankrupt. The information imputed to the solicitor was attained at a meeting for the purpose of signing the mortgage, in the course of acting on the financier's instructions (the Court noted that the solicitors had grave reservations about the transaction).

b) The Court also found that the financier was materially improving its position as against the son by exchanging past indebtedness for the security of the parents' home.

[41] Counsel for Ms Rutherfurd sought to argue that the solicitor was "seriously conflicted" and should have referred Ms Rutherfurd away for independent advice. That may be an issue as between the solicitor and Ms Rutherfurd, but I do not regard it as a fact arising out of the solicitor's mandate sufficient to put it on inquiry. ANZ gave Andrew Lemalu Law clear instructions to explain the transaction, and required a solicitor's certificate that this had occurred and the borrowers appeared to have understood the explanation. In the absence of any other factors which would give it

reason to question that certificate, it was entitled to assume that these steps had been taken.

[42] I find that in the absence of actual knowledge of facts to put it on inquiry, it was reasonable for ANZ to rely on Andrew Lemalu Law to suitably advise Ms Rutherfurd or to refer her away for independent advice: *Wilkinson* at 689 citing *ASB Bank Limited v Harlick* [1996] 1 NZLR 655. As was said in *Wilkinson* (also at 689):

> Sympathy for a victim of undue influence or misrepresentation should not lead a Court into the error of imposing upon lenders an unrealistic standard.

[43] I have also considered whether the cumulative effect of each of the allegedly "unusual" aspects of the transaction should have put ANZ on notice. The question to be asked is whether, knowing of all of these matters, a reasonable banker would have formed a view that the relationship between Ms Rutherfurd and Mr Cavanagh was one of such trust and confidence as to give rise to a presumption of undue influence. I am not persuaded that it was. The mortgage transaction, on its face, was to Ms Rutherfurd's financial advantage. She was seeking the loan to purchase the property. This was not a case where she was providing security for an advance being made for somebody else's benefit (as in *Bowkett*), nor of guaranteeing the obligation of another party without benefit to herself. Mr Aho had met with Ms Rutherfurd and Mr Cavanagh, and she had given Mr Aho no reason to believe that she was acting under Mr Cavanagh's influence. I do not accept that the loan was only explicable in terms of undue influence (as counsel for Ms Rutherfurd invited me to find). On its face it was a joint enterprise with apparent benefit to Ms Rutherfurd (ownership of the property).

[44] Based on the same analysis, I do not consider that it would be unconscionable for ANZ to rely on its rights under the loan agreement and the mortgage. This is not a circumstance which calls loudly for equitable relief in relation to ANZ (*Bowkett* at 462). On the information known to ANZ the transaction was not as obviously uncommercial as counsel for Ms Rutherfurd contended.

Suitability for summary judgment

[45] Counsel for Ms Rutherfurd put forward three matters which he submitted made the case unsuitable for summary determination. First he said that there was a dispute of material fact. Secondly he said that there were two matters which required further investigation.

[46] The alleged dispute concerns what Mr Aho knew of the business relationship between Mr Cavanagh and Mr Aryasomayajula. I am not persuaded that there is any credible basis for this dispute. Ms Rutherfurd's stepfather has given evidence that he spoke with Mr Aho after the deception had come to light. He says that Mr Aho had told him that he was aware of the relationship. Mr Aho acknowledges that he said this, but says that he was speaking as to his knowledge at that time (the time of the conversation with the stepfather). He has stated unequivocally that he knew nothing at the time of the entry into the loan agreement and the mortgage, and there is no evidence to the contrary. I am not persuaded that there is a sufficiently plausible basis for the alleged dispute.

[47] The first matter said to require further inquiry concerns other business Mr Aryasomayajula introduced to ANZ through Mr Aho. I do not see that this is a matter requiring any further inquiry. Mr Aho has acknowledged some four introductions, and says that this was the first. Counsel for Ms Rutherfurd suggested that an inquiry into these introductions could reveal that Mr Aho knew more about Mr Aryasomayajula's involvement than he has acknowledged. There is no evidential basis for drawing such an inference.

[48] The last matter raised was the need to investigate the circumstances under which Andrew Lemalu Law obtained Ms Rutherfurd's waiver of independent legal advice. I regard that as a matter between Ms Rutherfurd and Andrew Lemalu Law rather than a matter affecting ANZ's rights under the loan agreement.

Decision

[49] Ms Rutherfurd does appear to have been a victim in the transactions in respect of 50 Temple Street. However, it is quite a different thing to say that ANZ has a responsibility for the predicament in which she has been left. I find that the facts known to ANZ would not have put a reasonable banker on notice of undue influence on the part of Mr Cavanagh, nor make it unconscionable for ANZ now to exercise its rights under the loan agreement. I am not persuaded that there is any dispute on material fact or further inquiry needed which would make this matter unsuitable for summary judgment.

[50] I find that Ms Rutherfurd does not have an arguable defence to ANZ's claim. This includes costs on an indemnity basis pursuant to clause 12 of the mortgage given by Ms Rutherfurd. ANZ would ordinarily be entitled to costs on a 2B basis. As counsel did not address me on costs, I direct that they file a memoranda if costs cannot be agreed. Counsel for ANZ is to file any memorandum within fourteen days. Counsel for Ms Rutherfurd is to respond within a further seven days.

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Associate Judge Abbott