IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-007866

BETWEEN	ANZ NATIONAL BANK LIMITED Plaintiff
AND	HARVEY SMITH First Defendant
AND	LYNDA JANE STOWERS Second Defendant

Hearing: 21 July 2009
(Heard at Auckland)

Appearances: Ms E Tobeck for Plaintiff
Mr J Fredrickson for Second Defendant

Judgment: 2 September 2009 at 2.30 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE
[Amended]

This judgment was delivered by me on
***02.09.09 at 2.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Counsel:
Morgan Coakle, P O Box 114, Auckland
Wood Ruck Manukau, P O Box 76 014, Manukau City

Background

[1] The plaintiff ('ANZ') seeks summary judgment against Ms Stowers in the sum of $375,144.70 together with additional amounts for interest and costs. The proceeding arises out of the fact that on 10 July 2007 Ms Stowers and the first defendant ('Mr Smith') borrowed $753,750 from the ANZ for a period of three years on the basis that they would make principal and interest repayments throughout the term. To secure the loan the defendants executed a mortgage over a property that they acquired at 385 Chapel Road, Dannemora. The defendants defaulted on the loan and demand was made. Notice under s 119 of the Property Law Act 2007 was given and the property was sold by auction in 2008 with the amount of $462,000 being recovered.

[2] Ms Stowers filed a notice of opposition that did not contain an adequate statement of the grounds of opposition, relying as it does on a statement that the grounds are contained in an affidavit. She also filed an affidavit in which she gave the background to her entering into these transactions. She was a friend of Mr Smith and his wife. She got to know him 10 years ago and said that she formed a 'strong relationship of trust with him' as a result of being in a karaoke business with him. She used to look after their children and they helped her at a time when she was separated in 2003. She said she 'thought of Harvey (Mr Smith) and Anne-Elise as a brother and sister'. In or about May or June of 2007, Mr Smith asked her if she would add her name to documentation for a loan he was applying for. She said that he told her:

a) The other signatories of the loan would be Mr Smith and his brother Timothy Smith;

b) She would be 'notionally liable' for 1/8th of the amount they were borrowing;

c) In six months time her name would be removed from the loan agreement and Anne-Elise would be substituted, at which point her

liability for the loan would cease. This was apparently done for tax reasons;

d) The house at 385 Chapel Road, Dannemora would be a security for the loan.

[3] Ms Stowers said she never spoke to any employee of the plaintiff. She said 'I understood that Harvey was acting for the bank in procuring my signature'. She does not say why she thought that. She accepts that in July 2007 Mr Smith, his brother Timothy Smith and she all went to the law firm Insight Legal to sign the loan agreement. They were the lawyers for Mr Smith, Ms Stowers did not have a lawyer. I set out further pertinent details of the meeting with the lawyer below. Ms Stowers stated that she did not realise the significance of this transaction until she was served with the loan documents. It was only after she instructed her lawyer that she found out she was a tenant in common of the property, owning 1/8, with Mr Smith owning the remaining 7/8th and with the transferor being Mr Smith's brother, Timothy Smith. She referred to the loan amount being $753,750 but said she did not believe the property was ever worth anywhere near the amount of the mortgage. In a second affidavit which she filed, Ms Stowers said she had discovered a file note recording what the solicitor had said to her when she went to sign the loan agreement on 10 July 2007.

[4] The file note is in handwriting and is difficult to read but it seems to say:

> Linda confirm
>
> Explained borrowing was to them both and bank didn't care about house/home(?)[1] ownership was.

[5] She also made comment on the solicitor's certificate, which the solicitor provided to the bank and which I refer to below, claiming this confirmed that Insight Legal was 'acting for the plaintiff in regard to the execution of the loan agreement and purchase of the property on 10 July 2007'.

[1] Question mark indicates uncertainty about word in question.

[6] For the bank, it was accepted that it arranged for a solicitor at Insight Legal to give advice to Ms Stowers before taking her signature on the loan documents. I will further consider just who the bank was acting for later in my judgment. But it is sufficient to note at this point that in addition to acting on the execution of the loan agreement, the solicitor appears to have acted for Mr Smith and Ms Stowers on the related transaction to purchase the residential property.

[7] The instructions that the bank gave the solicitors, relevantly, provided:

> 10. You must:
>
> (a) Explain the meaning and effect of all lending/facility agreements; and
>
> (b) Ensure the Customer signs all lending/facility agreements (and if provided for in the agreements, that any guarantors, etc, also sign the agreements); and
>
> (c) Ensure that the Customer's attention is drawn to any securities disclosure clauses set out in the lending/facility agreements, and you explain the nature and effect of those clauses; and
>
> (d) Ensure that any certificates contained in the lending/facility agreements or otherwise provided with these instructions are completed and signed by the relevant parties.

[8] Ms Stowers and Mr Smith signed the loan documents at the offices of the solicitors. Ms Stowers' account of what happened at the meeting with the lawyer was this:

> 10. I understood from what the solicitor who handled the signing of the documents told me that I would be liable for 1/8 of the loan. I was certainly never told:
>
> (a) I was signing documents for a property transfer;
>
> (b) My liability under the agreement was an all obligations liability;
>
> (c) Insight Legal owed me a fiduciary duty that obligated them to advise them to seek independent legal advice;
>
> (d) Insight Legal had a conflict of interest in acting for and advising me in relation to the loan agreement;
>
> (e) That I should seek independent advice;
>
> (f) That as well as acting for me, the solicitor was also acting for the plaintiff in the execution of the loan agreement. In this

> regard I refer to exhibit '(b)' annexed to the affidavit in support of summary judgment where Gordon Stuart Mackay, principal of Insight Legal, confirms he acted for the mortgagee plaintiff.
>
> 11. I signed two of three documents and clearly understood that they all related to the loan agreement. No one advised me otherwise.

[9] Some of the contents of this passage are plainly inadmissible containing as they do legal assertions or submissions that have no place in affidavits. But the balance of the deposition, which is available as evidence, makes it clear Ms Stowers accepts that she went to the appointment with the solicitor. She apparently agrees that she signed the documents in the presence of the solicitor and that he gave her some advice. She makes a limited comment on the solicitor's certificate but does not directly contradict the contents of the certificate so far as it certifies that the nature, effect and implications of the agreements and related documentation had been explained to her. Ms Stowers has deposed that she "understood", from what the solicitor told her, she would be liable for $1/8^{th}$ of the loan. She does not actually state in a forthright fashion whether the solicitor told her that would be the case. Again this is a defect in the affidavit.

[10] The terms of the instructions that the bank gave to the solicitor were explicit in relation to the contents of the certificate that he was required to sign after execution of the loan documents. The solicitor, a Mr Mackay, signed a certificate to the following effect:

> **Documents explained:** the nature, effect and implications of the provisions of the securities deeds and agreements have been explained to each party and they appeared to have understood the position.

[11] I interpolate that if the solicitor in fact gave advice of the kind that Ms Stowers alleges, then that advice would have been both wrong and contrary to the certificate that the solicitor signed and sent to the bank.

[12] The result of these dealings was that Ms Stowers, a low income solo-mother, acquired a debt of several hundred thousand dollars arising from a transaction which seems to have brought her little or no benefit.

Undue influence

[13] The equitable jurisdiction, which will be exercised to set aside dealings where there had been undue influence, arises for consideration where there has been an abuse of trust and confidence: *Royal Bank of Scotland Plc v Etridge* (No 2) [2002] 2 AC 773 at [11]; as cited in *Rawleigh v Tait* [2008] NZCA 525(CA) and *UDC Finance Ltd v Down* [2009] NZCA 192 CA. However, this principle is not confined to such cases and includes situations where a vulnerable person has been exploited. In *Royal Bank of Scotland*, Lord Nicholls stated at [11] that:

> Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence of vulnerability on the one hand and ascendancy, domination or control of the other.

[14] For the purposes of summary judgment I am prepared to proceed on the basis that the relationship between Ms Stowers and Mr Smith in the circumstances of this case provides a sufficient suggestion of undue influence being practised to resolve the question of whether Ms Stowers has an arguable defence.

[15] It would not be enough in a situation where Ms Stowers was a friend of Mr Smith and they agreed to enter a property transaction together; or where Mr Smith, using the advantageous position of his friendship with her, persuaded her to enter the transaction. But, if Mr Smith was a trusted advisor and Ms Stowers depended on him for advice, which he gave, this might be sufficient in the circumstances to push a case alleging undue influence "across the line".

Burden of proof

[16] It is necessary to briefly consider the issue of the burden of proof. In an application for summary judgment, the onus is on the plaintiff (ANZ) to prove that Ms Stowers has no arguable defence. The plaintiff has established a prima facie case against Ms Stowers for summary judgment. The onus therefore passes to her to provide an evidential basis to support the defence of undue influence

[17] With regard to the applicable burden of proof, in *Royal Bank of Scotland,* Lord Nicholls stated at [14] and [21]:

> [14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

[18] And further on:

> [21] As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

[19] When dealing with tri-partite arrangements, typically between creditor, bank and guarantor, it is necessary be clear about how a party who is not the source of the operative undue influence, becomes fixed with its consequences. In *Royal Bank of Scotland* case Lord Nicholls said:

> 40 The traditional view of equity in this tripartite situation seems to be that a person in the position of the wife will only be relieved of her bargain if the other party to the transaction (the bank, in the present instance) was privy to the conduct which led to the wife's entry into the transaction. Knowledge is required: see Cobbett v Brock (1855) 20 Beav 524, 528, 531, per Sir John Romilly MR, Kempson v Ashbee (1874) LR 10 Ch App 15, 21, per James LJ, and Bainbrigge v Browne 18 Ch D 188, 197, per Fry J.

[20] I interpolate that in this case, in my view, the bank did not have actual knowledge. The bank does not appear to have known much at all about Ms Stowers. There is no evidence it knew about the alleged close and trusting friendship or the relationship between Mr Smith and Ms Stowers being, as Ms Stowers described it, as akin to that between a brother and sister.

[21] All the bank knew was that they were co-borrowers under a loan agreement and co-purchasers of a property. Therefore, the bank did not know of the actual

nature of the relationship between Mr Smith and Ms Stowers, which the second defendant relies upon as evidence establishing the foundations of undue influence.

The possibility that the bank is fixed with the consequences of Mr Smith as agent of the bank?

[22] If the bank did not actually know of the circumstances of alleged undue influence, could it be fixed with the consequences of it anyway because the person exerting the undue influence was its agent?

[23] Mr Fredrickson referred me to the Supreme Court judgment *in Dollars and Sense Finance Limited v Nathan* [2008] NZSC 20. He submitted that, based on this authority, I could conclude that Mr Smith was the agent of ANZ in procuring the signature of Ms Stowers in this case. If Mr Smith obtained the signature of his co-debtor as a result of undue influence, then, Mr Fredrickson submitted, the bank as his principal would be liable for the consequences of his misconduct.

[24] In *Dollars and Sense* the plaintiff was a finance company. It required a mortgage over the borrower's parents' house as a security for a loan which the company proposed making to their son. Dollars and Sense instructed a solicitor to act on their behalf. The solicitor prepared the security documents including the mortgage. He gave the documents to the son to have them executed. The son obtained the signature of the father to the mortgage but the mother would not sign it. The son forged the mother's signature and then sent the documents back to the solicitor. The solicitor then noted that the signature had not been witnessed and sent them back to the son who procured a friend of his to purportedly witness the signatures.

[25] In due course the loan fell into default and the financier sought to enforce the mortgage. The mother sought the removal of the mortgage from the register on the basis that it had been procured by fraud. She sought to attribute the fraud to the financier by asserting that it had appointed the son as its agent for the purposes of obtaining the signatures.

[26] The Supreme Court approached the matter on the basis that it had to determine the scope of the task that the agent was appointed to perform. In doing so it would consider the matter in a 'commercially realistic way according to the circumstances'. It accepted that the financier did not authorise the forgery. But the Court concluded that the appropriate enquiry was to assess the nature of the tasks to be performed on behalf of the principal and, further, how the use of the agent for that purpose created risk for the third party. In *Dollars and Sense*, the Court held at [40]:

> Without a sufficiently close connection between the task for which an agent was engaged and the unlawful action of that agent, so that the wrong can be seen as a materialisation of the risk inherent in the task, it will be neither fair nor proper to impose vicarious (strict) liability on a principal who has not necessarily been guilty of any personal negligence and so would not be directly liable to the claimant. Strict liability of this kind is exceptional and is not to be imposed unless fully justified by these considerations.

[27] In another part of this judgment, at [41], the Supreme Court concluded that a fraudulent act may be done within the scope of an agency, even if done exclusively for the benefit of the agent.

[28] Assuming that the *Dollars and Sense* type reasoning applies to cases in which undue influence is at issue (rather than only to cases of fraud for the purposes of the Land Transfer Act 1952 as in the *Dollars and Sense* case), it would, in my view, still not assist the second defendant. There are valid arguments set out in *Royal Bank of Scotland*, at [76] and following, which make it clear that a solicitor who gives advice to someone in the position of a wife following the receipt of instructions from the bank to do so is not functioning as the agent of the bank. I accept that while there are differences between the present case, which does not involve a wife, and the *Royal Bank of Scotland* type situation, the same considerations apply.

[29] In this case, the ANZ specifically instructed a lawyer to procure the signatures of the parties. There is no evidence that the bank requested or required Mr Smith to obtain the signature of Ms Stowers. A submission that it did is logically incompatible with the bank acting to arrange for the solicitor to obtain the signature of Ms Stowers. There being no dispute that the bank retained a solicitor to perform

this task, Ms Stowers is not able to establish as part of a defence that the bank used Mr Smith as its agent for the same purposes.

Constructive notice

[30] If my foregoing conclusion is correct, the only route by which the bank etc can be fixed with the consequences of undue influence is by constructive notice . In *Royal Bank of Scotland v Etridge (No 2)* 2001 UKHL 41; [2001] 4 All ER 449 it was said:

> But *O'Brien*'s case has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party. (at [40])

[31] And an example of this is where the following circumstances are present:

> "Therefore in my judgment a creditor in put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."

[32] If these circumstances exist there is a limited duty on the bank:

> 54 The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

[33] The reason why the status of the wife is relevant has been explained in the cases. The fact that the emotional and other ties inherent in the marriage relationship raise clear risks that the wife has been the subject of improper influence and that factor, when combined with the fact that a guarantee is usually an inherently disadvantageous type of transaction, mean that a bank is placed on notice. To say the bank is put on notice means that if it does not then take adequate precautions for the protection of the wife's interests, the transaction with the wife is presumed to have been procured by undue influence.

[34] The next enquiry is whether the bank should be imputed with notice that Mr Smith had misused a position of influence to obtain Ms Stowers' agreement to join the loan transaction as a co-debtor. As Lord Nicholls observed in *Royal Bank of Scotland* at [40]:

> … [A] party to a contract may loose the benefits of his contract, entered into in good faith, if he *ought* to have known that the other's concurrence had been procured by the misconduct of a third party.

[35] In *Royal Bank of Scotland,* Lord Nicholls (at [44]) quoted Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 196, stating that a combination of two factors puts the creditor on inquiry when a wife offers to stand surety for her husband's debts:

> (a) The transaction is on its face not to the financial advantage of the wife; and
>
> (b) There is a substantial risk in transactions of that kind, that, in procuring the wife to act as a surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

[36] The statement of principle cited in [35] was adopted by the New Zealand Court of Appeal in *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 680:

[37] In *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 the Court of Appeal said:

> [50] The Etridge approach was worked out with particular reference to what was practicable in relation in the context of the lending practices of High Street banks in the United Kingdom. This Court noted in Wilkinson (at 689) that banking practice in New Zealand is broadly similar to that in the United Kingdom. Given this, it is likely that the Etridge principles will be applied here, at least in banking cases. A final decision on this point should, however, be left for a case in which the issue more clearly arises for decision and the Court has the benefit of full information as to industry practice.

Possible application of constructive notice in this case

[38] The *Royal Bank of Scotland* case was concerned with a wife guaranteeing the debts of her husband. In the present case, the defendant was not the wife of the plaintiff. It is true that in his speech Lord Nicholls considered that the constructive

notice point should not be confined to cases involving husbands and wives or those in other sexual relationships (see, especially [44]-[47], [82], [86]). But the majority of their Lordships appear to have so confined it. The relationship in this case would not seem to fall within that approach.

[39] As to whether the transaction was disadvantageous, the contract here was not one of guarantee. In this case, there were some indications on the face of the transaction that it was disadvantageous to Ms Stowers. While Ms Stowers became jointly and severally liable for 100% of the loan, her fraction of ownership of the house was $1/8^{th}$, with Mr Smith owning the remaining $7/8^{th}$. The bank knew this was the arrangement that was being entered into. Ms Tobeck says it is the bank's standard practice to make loans of this type on a joint and several basis and it would never loan money on the basis that one party would be liable to repay only $1/8^{th}$ of loan monies. I interpolate that while that may be true, it would not affect the issue of whether the bank in an appropriate case ought to view a transaction as being apparently skewed heavily in favour of one side rather than the other. But to continue, it is possible that the advantage Ms Stowers conferred on Mr Smith was the *quid pro quo* for still other transactions about which the bank knew nothing. Further, while it is true that Ms Stowers assumed liability for an equal share of the loan, her position was not entirely disadvantageous in that it was Mr Smith who was to have the primary responsibility for paying back the loan.

[40] While it is correct that Ms Stowers did not sign a guarantee, because of the essentially disadvantageous aspects of the transaction in this case, there is no reason in principle to treat it differently from a case involving a guarantee.

[41] As to the other matter that Mr Fredrickson stressed, there is no evidence that the bank knew Mr Smith had engineered the transaction, which involved him buying a house from his brother.

[42] The purchase price of the transaction in which the defendant was involved was much higher than the value of the house when acquired by Mr Smith's brother. The transaction was not explicable on other plausible grounds.

[43] In the *Royal Bank of Scotland* case, the House of Lords determined at [44] that, because of the presence of elements of disadvantage and risk to the wife, in cases where a wife offers to stand surety for her husband's debts, the bank, without more, will be put on enquiry. The case where a wife stands as surety will therefore be one where a legal presumption comes into effect. No such presumption arises in a case like the present and the case has to be determined on its own facts.

[44] Ought the bank, then, to have viewed the circumstances of this transaction as giving rise to serious questions as to whether the co-debtor, in entering the transaction, was actuated by undue influence? A number of possible hypotheses can be advanced which might explain a transaction of this kind. In the circumstances of this case, and given the lack of actual information available to the bank, the transaction may simply be one that the co-debtor entered into as an act of imprudent generosity.

[45] Overall, in my view, the facts known to the bank and the inferences from them do not justify a further inference that the transaction was one calling for enquiry on the part of the bank on the basis that it was likely to have resulted from undue influence being exerted on Ms Stowers by Mr Smith. That being the case, it is not strictly necessary to go on and consider the issue of legal advice. But, in case I am wrong in reaching the conclusion I have just set out, it will be helpful to do so.

Independent advice

[46] If Ms Stowers had been able to persuade the Court that the bank was in fact put on enquiry that the transaction was brought about by undue influence, then it would be necessary to go further and consider the additional element in the case, that is, the giving by the solicitors of advice to Ms Stowers. I address this issue for completion.

[47] The two issues that arise in this part of the judgment are firstly, the circumstances in which the bank instigated the giving of the advice; and, secondly, the quality of that advice.

[48] In *Royal Bank of Scotland* the House of Lords dealt with a situation where a wife sought to resile from the transaction with the bank on the grounds that her husband unduly influenced her. The House of Lords confirmed (at [40]) that the traditional view of equity in tripartite situations of this kind is that a person in the position of the wife will only be relieved of her bargain if the bank was privy to the conduct which lead to the wife's entry into the transaction. Moreover there was no obligation on one party to a transaction to check whether the other parties' concurrence had been obtained by undue influence.

[49] The traditional view was challenged by the House of Lords in *O'Brien*. The conclusion in that case was that a party in the position of a bank, in a situation where a wife signed a guarantee while apparently acting under undue influence, could escape liability by taking steps to reduce or even eliminate the risk of the wife entering into a transaction under a mis-apprehension or as a result of undue influence on the part of her husband. The *O'Brien* measures, required in tripartite transactions were confirmed, at least in the case of guarantees by wives, in *Royal Bank of Scotland.* Such guarantees were seen as involving special considerations. The obligation on the part of the bank was to take the necessary steps to eliminate or reduce risk whenever a wife offered to stand surety for her husband's debts (at [44]). The obligations of the bank were to take reasonable steps to ensure that the wife was advised in a meaningful way about the practical implications of the proposed transaction (at [54]). Ordinarily, if advice is given by a solicitor acting for the wife and that solicitor confirms that he has advised the wife appropriately, the bank's position will be protected.

[50] As to the quality of the advice, the law was stated in *Royal Bank of Scotland*, at [78], in the following terms:

> [78] In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly. I have already mentioned what is the bank's position if it knows this is not so, or if it knows facts from which it ought to have realised this is not so.

[51] In my view, the limits of the bank's responsibility would seem to be the taking of steps to bring about the debtor's retainer of a solicitor. The bank obviously

needs to be satisfied that the solicitor actually advised the debtor pursuant to the retainer. But the central feature of the retainer is that regardless of the role played by the bank instigating the creation of the retainer, it is the debtor who retains the solicitor and not the bank: *Royal Bank of Scotland* at [74].

[52] The scope of what the solicitor is required to do will be determined by the express and implied terms of the contract of retainer, ethical obligations and fiduciary obligations. The subjects on which the solicitor must advise will, in general, be those that meet the standard of a reasonably competent solicitor acting in the circumstances of the case. The fiduciary obligations include taking care to ensure that the solicitor is not subject to a conflict between his duties on the one hand and his obligations to the client on the other. Because there may be further chapters to come in this particular book, it is probably wise not to comment in detail on what was called for in this case. Close consideration should have been given, though, to whether it was desirable for the solicitor to act for both Mr Smith and Ms Stowers, given the divergence of their interests when it came to responsibility for the bank loan. I do not know if that in fact occurred, but if it did, it would merit further examination.

[53] Beyond that, once the bank had taken steps to ensure that Ms Stowers consulted the solicitor, it had no obligation to 'audit' the standard of the professional advice and services that the solicitor gave to her. In *Royal Bank of Scotland,* Lord Nicholls said at [56]:

> [56] Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.

[54] The policy reasons underlying this approach are set out in detail in *Royal Bank of Scotland* at [64] and following.

[55] In this case the solicitor confirmed, by way of certificate, that he had acted and that he had, critically, explained the effect of the 'securities, deeds and agreements'. My conclusion is that the bank was entitled to proceed with the loan transaction on the strength of the certificate so given.

Was the Bank liable for the solicitor's negligence?

[56] Mr Fredrickson also submitted;

> 8. The solicitor was the bank's agent for the transaction. The bank as principal may be vicariously liable in negligence for the negligent misrepresentation of its agent (the solicitors) provided the representation was made by the agent within his or her authority, whether express, implied, or apparent. However the starting point for any analysis of vicarious liability is the scope of the agency.

[57] I reject this submission because, as I have explained elsewhere, the solicitor was not retained as an agent of the bank.

The involvement of the solicitor

[58] I noted at paragraph [10] that the borrowers signed the loan agreement at the offices of a firm of firm of solicitors, one of whom certified to the lending bank as to the advice he gave Mr Smith and Ms Stowers. The involvement of the solicitor is an important element when considering a defence of undue influence.

[59] Mr Fredrickson submitted:

> 1. *Etridge* supports the proposition that any deficiencies in advice given are a matter between the third party and the solicitor and that the bank is entitled to proceed on the assumption that a solicitor advising a third party has done his job properly. [2] However, negligent advice can be imputed to the bank as principal under *Etridge* if the bank knows that the solicitor has not given proper advice or if it is aware of facts from which it ought to have realised that proper advice had not been given. [3]

[60] Mr Fredrickson then went on to refer me to what the bank's letter of instruction required the solicitor to do. He instanced, for example, that one of the obligations of the solicitor was to:

> (ii) Ensure the meaning and effect of the relevant documents to the loan agreement were explained to Ms Stowers.

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[2] *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, para [78]

[3] *Royal Bank of Scotland Plc v Etridge (*No 2) [1998] 4 All ER 705, para [78] and [57]; Burrows, Finn & Todd, *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 396.

[61] After setting out in his submission the various instructions that the bank gave to Insight Legal and making reference to the certificate that I have referred to in [60], Mr Fredrickson said that the solicitor did not do what he was required to do. He said that the solicitor did not advise Ms Stowers that she was purchasing a house. He submitted that she was under a misapprehension as to her share of the loan liability and that there was no reference at all – presumably in the file note – to the fact that Ms Stowers was advised to seek independent advice. Other criticisms were made as well.

[62] The certificate that the solicitor gave, with one exception, could fairly be understood as meaning that the bank solicitor had given Ms Stowers advice in the areas that Mr Fredrickson said were inadequate. There is one exception to that and that is the complaint about independent advice, which I will refer to shortly. On the issue of the solicitor's certificate, the *Royal Bank of Scotland* case is again instructive. In that case, a submission had been made, at [76], that:

> … [76] A certificate furnished by the solicitor to the bank should not prejudice the position of the wife when, as happened in several cases, the contents of the certificate are untrue. If the solicitor has not given the wife any advice, her rights should not be diminished by the solicitor telling the bank that she has been fully advised.

[63] Lord Nicholls said, at [77] and [78]:

> [77] I cannot accept this analysis. Confirmation from the solicitor that he has advised the wife is one of the bank's preconditions for completion of the transaction. But it is central to this arrangement that in advising the wife the solicitor is acting for the wife and no one else. The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. The solicitor is not accountable to the bank for the advice he gives to the wife. To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice.
>
> [78] In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly. I have already mentioned what is the bank's position if it knows this is not so, or if it knows facts from which it ought to have realised this is not so.

[64] Neither of the two exceptions referred to in the latter passage, with regard to situations where the bank should be on notice, were present in this case.

[65] Even if the solicitor in this case did not carry out his professional, ethical and contractual obligations, and even if he gave a false certificate which mis-stated the nature of the explanation he gave to Ms Stowers, in my view, if the bank did not know of these failings (if such they are) then the bank had met its obligations. The bank did so by instructing a solicitor who was the holder of a current practising certificate, and whom it had no basis for regarding as being other than reputable, to carry out well known tasks that solicitors perform every day when taking the signature of borrowers. It is not the bank's role to enquire into and audit the quality of the advice given.

[66] Further, decided authorities are to the effect that any deficiencies in the quality of the advice given by the solicitor are a matter between Ms Stowers and the solicitor and do not vitiate the bank's loan contract and security documents: see *Royal Bank of Scotland* at [75] – [78].

[67] My understanding of the authorities is that the process of requiring a borrower in the position of Ms Stowers to obtain legal advice is seen as a satisfactory way of balancing the interests of the borrower with the requirements of lending money. This approach seeks to avoid a situation where the process required to borrow money is over-complicated, onerous and expensive to the point where it would constitute a barrier to providing credit. The enquiry is whether the bank has taken reasonable steps. To quote again from the speech of Lord Nicholls in *Royal Bank of Scotland* at [54] and [55]:

> [54] The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.
>
> [55] This is the point at which, in the O'Brien case, the House decided that the balance between the competing interests should be held. A bank may itself provide the necessary information directly to the wife. Indeed, it is best equipped to do so. But banks are not

> following that course. Ought they to be obliged to do so in every case? I do not think Lord Browne-Wilkinson so stated in O'Brien. I do not understand him to have said that a personal meeting was the only way a bank could discharge its obligation to bring home to the wife the risks she is running. It seems to me that, provided a suitable alternative is available, banks ought not to be compelled to take this course. Their reasons for not wishing to hold a personal meeting are understandable. Commonly, when a bank seeks to enforce a security provided by a customer, it is met with a defence based on assurances alleged to have been given orally by a branch manager at an earlier stage: that the bank would continue to support the business, that the bank would not call in its loan, and so forth. Lengthy litigation ensues. Sometimes the allegations prove to be well founded, sometimes not. Banks are concerned to avoid the prospect of similar litigation which would arise in guarantee cases if they were to adopt a practice of holding a meeting with a wife at which the bank's representative would explain the proposed guarantee transaction. It is not unreasonable for the banks to prefer that this task should be undertaken by an independent legal adviser.

Was the plaintiff given independent advice?

[68] Mr Fredrickson was critical of the provision of advice by Insight Legal because he alleged that Ms Stowers was not advised to seek independent advice. Although the exact meaning of this submission was not clarified, I understand that Mr Fredrickson was saying that the advice given needed to be independent in the sense that it was provided by a solicitor who was not acting for the co-borrower in the transaction.

[69] There does not seem to be any authority on the point in New Zealand. Once again I turn to the case of *Royal Bank of Scotland,* where some of these issues were explored. What becomes clear is that in the United Kingdom there is no requirement that the husband (being for these purposes the relevant status of the co-owner in the United Kingdom line of cases) and the wife obtain advice from a separate solicitor. Indeed, the process that was envisaged in the *Royal Bank of Scotland* case was that the same solicitor would act for both spouses but that the solicitor would interview the wife separately from the husband when giving his advice about the nature and effect of the transaction and its desirability.

[70] In this case, the bank's standard instructions did not call for such a separate interview to be conducted and therefore the certificate does not provide any

reassurance that this occurred. No affidavit was produced from the solicitor who interviewed Ms Stowers and provided the bank with a certificate.

[71] Whether the New Zealand law will recognise a general obligation on the part of a solicitor to advise in a separate and private interview is not something I would prefer to express an opinion upon in the circumstances of this case. Certainly, though, it is arguable that in this case the arrangements for advice did not achieve the desired result. That is, they do not appear to have resulted in the co-borrower being shielded in a realistic and practical way from the putative influence of the co-borrower. That circumstance gives rise to serious questions as to whether the process was of any value in achieving the objective of providing the second defendant with an opportunity to make a considered decision as to whether the transaction was in her best interests, based upon advice obtained in the absence of moral pressure from her co-borrower.

[72] Were this issue a live one in the present proceedings, I would have concluded that the defendant therefore had an arguable defence. However, as I have concluded this is not the type of transaction where the bank was put on enquiry as to the existence of undue influence. Therefore the point has not been reached where the Court must determine whether any presumptive undue influence was cured by the provision of effective and meaningful independent legal advice.

Conclusion

[73] The bank had no actual knowledge of the special features of the relationship between Ms Stowers and Mr Smith which would fix it with responsibility for the consequences of what are claimed to have been Mr Smith's undue influence.

[74] Mr Smith was not the agent of the bank for the purpose of obtaining execution of the loan documents and therefore the bank is not liable as principal for his actions.

[75] This is not a case where the parties were husband and wife (whether as married or as parties to a de facto relationship). That as a minimum would seem to

be necessary before the lender is taken to be "on notice" of the possibility of undue influence – at least if the formulation in the *Royal Bank of Scotland* case is adopted.

[76] Nor was the transaction obviously disadvantageous to Ms Stowers as the *Royal Bank of Scotland* requires before constructive notice is engaged.

[77] The alleged shortcomings in the legal advice that the solicitor gave to Ms Stowers are not to be laid at the doorstep of the bank.

[78] There is, therefore, no reasonably arguable case that Ms Stowers has a defence that would justify the Court in dismissing ANZ's application for summary judgment. That application is granted. The plaintiff will have judgment in the following terms:

a) Judgment in the amount of $375,144.70;

b) Interest at the rate of 8.4% on the above amount from November 2008 until today's date.

[79] Counsel should confer on the matter of costs. I expect that there will be no difficulty in reaching an agreement as to where liability for costs should lie and the basis upon which costs should be awarded. Counsel should then file a consent memorandum. If, despite my expectation, the parties are unable to agree on the matter of costs, I will hear oral argument at 9 a.m. on a date to be allocated by the Registrar.

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J.P. Doogue
Associate Judge