IN THE COURT OF APPEAL OF NEW ZEALAND

CA609/2007
[2008] NZCA 525

BETWEEN	BEVERLEY RAWLEIGH Appellant
AND	DEREK MAXWELL TAIT Respondent

Hearing: 25 September 2008

Court: Arnold, Ellen France and Baragwanath JJ

Counsel: B P Henry and T L V Walker for Appellant
M Ring QC and A B Darroch for Respondent

Judgment: 3 December 2008 at 11 am

JUDGMENT OF THE COURT

A Appeal dismissed.

B Memoranda to be filed as to costs by respondent within 14 working days and by appellant within a further 14 working days.

REASONS OF THE COURT

(Given by Baragwanath J)

[1] Mrs Beverly Rawleigh appeals against a decision of the High Court that the respondent, her solicitor Mr Derek Maxwell Tait, is not liable to her for failing to give her advice: HC WN CIV 2003-485-1924 19 October 2007. Mrs Rawleigh and her husband visited Mr Tait on 1 October 1997 regarding a proposed guarantee to IBM New Zealand Credit Ltd (IBM) of a $1.4m credit facility taken out by a

computer company, Ultra Net Pacific Ltd (Ultra Net). Mrs Rawleigh later concluded that Ultra Net had been bought by her husband as part of a scheme to deprive her of rights to matrimonial property. Mr Tait admits that he breached his fiduciary duty in not advising her about the significance of the fact that he was concurrently advising her husband concerning the guarantee. But Mallon J found that the breach did not cause Mrs Rawleigh any loss.

Factual context

[2] During their lengthy marriage Mrs Rawleigh and her husband had built up significant assets. She and her husband held equal shares in Rawleigh ML Marketing Ltd (Rawleigh Ltd). According to her evidence, prior to 1997 she had been a very successful businesswoman, running throughout New Zealand the family marketing company Rawleigh Ltd in which she and her husband held equal shares. The Judge found that the relationship between Mrs Rawleigh and her husband was always tumultuous and deteriorated when in early 1997 Mrs Rawleigh discovered her husband was having an affair with the Fiji manager of the business, Mrs Stubbs. A medical certificate issued in April 1998 (admitted into evidence by consent) did not substantiate the condition of post traumatic stress disorder which Mrs Rawleigh asserted. However, the certificate did record that Mr Rawleigh had been physically abusive to his wife, especially from about August 1997, and that she had lived under threat of such abuse from him for several months, if not years. The Judge concluded that from before the events of 1 October 1997, on which this appeal turns, Mrs Rawleigh had been subject to at least some level of threats and abuse from her husband. A fortnight after the events of 1 October she required emergency medical attention.

[3] Following her discovery of her husband's affair there developed what the Judge appears to have accepted was a bitter matrimonial dispute. Mrs Rawleigh made statements about Mrs Stubbs which resulted in a letter from Mrs Stubbs' lawyers asking her to refrain from accusations that were damaging the Rawleigh business. In March 1997 solicitors for Mrs Rawleigh, who held instructions from her throughout the period including 1 October, wrote to the financial controller of the

Australian subsidiary of Rawleigh Ltd. In the letter they warned of a potential claim by Mrs Rawleigh as a 50 per cent shareholder in the Rawleigh companies, for an injunction against transfer of assets from Australia to Vanuatu. Mrs Rawleigh also instructed the ANZ Bank in Fiji that property owned by Rawleigh Ltd's Fiji subsidiary was not to be used as security for loans without her consent. Mr Rawleigh instructed that bank that it was not to give any information to his wife. In July he instructed ANZ Bank in New Zealand to cancel Mrs Rawleigh's credit card. Mrs Rawleigh issued proceedings in Fiji against the Fiji subsidiary, Mr Rawleigh, Mrs Stubbs and others. The proceedings were settled in August 1997. Mrs Rawleigh said she decided to settle because "my marriage is important to me".

[4] In the course of the dispute, Mr Rawleigh embarked on a plan to remove assets from the jurisdiction of the New Zealand courts. The Ultra Net venture was part of that plan. Ostensibly its purpose was to buy from IBM computers which would be sold through the Rawleigh's network of sales people. In reality Mr Rawleigh's intention was to remove matrimonial property by creating a large debt to IBM and siphoning off Ultra Net's cash to Vanuatu.

[5] In June 1997 Mr Rawleigh applied to ANZ for finance of $500,000 for the Ultra Net venture. The loan was approved and on 21 July 1997 Mr and Mrs Rawleigh as directors of Rawleigh Ltd signed a resolution agreeing to the facility. The loan agreement was secured by a debenture over Rawleigh Ltd's assets and existing personal guarantees from Mr and Mrs Rawleigh. The agreement provided that they were to "acknowledge" that they "ha[d] been advised by the Bank to seek independent legal advi[c]e before signing the Loan Agreement". It did not require that to be done before a solicitor. Since $200,000 of the loan was drawn down on 30 September 1997 the agreement must have been signed. But the document cannot now be found and there was no evidence as to the circumstances of its execution.

[6] Mr Jordan, who was financial controller at Rawleigh Ltd, advised Mr Rawleigh against the Ultra Net venture for reasons of both business utility and legality and resigned in July 1997 when his advice was not accepted. He was aware that Mr Rawleigh had been physically mistreating his wife. Mr Jordan said that

Mrs Rawleigh called him to say that her husband was trying to force her to sign a guarantee and was trying to take her to see a solicitor called Max Tait who was not her husband's usual solicitor. Mr Jordan advised her not to sign the guarantee and that if she had to sign she should write the words "under duress" under her signature.

[7] By late September 1997 computers had been delivered by IBM and Mr Rawleigh was anxious to secure the execution of his wife's personal guarantee which IBM required, to ensure that they were not taken back.

[8] Prior to 1 October Mr Rawleigh had made two attempts to obtain his wife's signature to the IBM guarantee. On about 26 September 1997 Mr and Mrs Rawleigh visited Mr William Bevan at the Whitireaia Community Law Centre in Porirua. Mr Bevan declined to witness Mrs Rawleigh's signature because the document evidenced a commercial transaction which fell outside the class of work which the Law Centre was authorised to perform. He suggested that the couple go around the corner to have the document witnessed by a local solicitor, Mr Peter Harrison. Mr Bevan's refusal annoyed Mr Rawleigh. Mr Bevan said that Mr and Mrs Rawleigh did not seem to be the happiest couple he had met but they did present as a couple. He did not recall any threatening or abusive conduct directed at Mrs Rawleigh; the only aggression from Mr Rawleigh was directed at Mr Bevan for not dealing with his request.

[9] Mr Harrison said that on a date he could not recall Mr and Mrs Rawleigh turned up at his office without an appointment. Mr Rawleigh wanted Mr Harrison to witness a guarantee which Mr Rawleigh said was to be signed by Mrs Rawleigh. Mr Harrison recognised Mr Rawleigh as someone with whom he had had previous professional dealings. While he was unable at trial to recall the details, they were enough to make him feel he could not give independent advice. He explained that position, which was accepted by Mr Rawleigh, and the couple left.

The events of 1 October 1997

[10] There was a fundamental conflict in the evidence as to the events of 1 October. It is to be emphasised at the outset that the allegations made by

Mrs Rawleigh against Mr Tait were vehemently denied by Mr Tait, whose account was accepted by the Judge. Mr Henry accepted that Mrs Rawleigh's evidence could not be relied upon because, he submitted, she had the confused recall of a woman suffering post traumatic stress caused by continuous violence from her husband. The significance of Mrs Rawleigh's account of events is that it sheds some light on the extent of her distressing condition and on why, before this Court, Mr Henry made no submission of negligence in the advice Mr Tait gave her. The submission was confined to breach of an antecedent fiduciary duty to satisfy himself that she was fit to make an independent decision and had received sufficient information to be equipped to do so.

[11] Mrs Rawleigh pleaded that on 1 October Mr Rawleigh forcibly made her attend Mr Tait's office and that Mr Tait permitted her to execute to the guarantee notwithstanding that he:

> 14.1 At all material times was acting for W T Rawleigh.
>
> 14.2 Was aware the Plaintiff had no interest as a director or shareholder in Ultranet Pacific Limited.
>
> 14.3 Had the knowledge that:
>
> 14.3.1 The Plaintiff did not want to sign the IBM guarantee.
>
> 14.3.2 It was in the interests of his client W T Rawleigh that the Plaintiff sign the IBM guarantee.
>
> 14.3.3 It was contrary to the interests of the Plaintiff to sign the IBM guarantee.
>
> 14.3.4 W T Rawleigh had on numerous occasions beaten the Plaintiff due to her refusal to sign documents relating to Ultranet Pacific Limited.
>
> 14.4 Aware W T Rawleigh was outside his door waiting for her to sign the IBM guarantee and physically intimidating her in that the Defendant and the Plaintiff knew he would act violently towards her again if she did not sign the IBM guarantee.
>
> 14.5 Aware that the Plaintiff's free will to refuse (as the Defendant knew she wished to) to sign the IBM guarantee was overborne by the pressure of W T Rawleigh and the imminent continuance of physical violence if she refused.

She further pleaded that Mr Tait knew that Mr Rawleigh forced her to act against her will in signing the IBM guarantee.

[12] In her written brief Mrs Rawleigh deposed to two visits to Mr Tait's office. She said she believed that the first occasion related to signature of the resolution agreeing to the ANZ loan. She spoke of walking out of Mr Tait's office, refusing to sign and being dragged back, and then signing the document. She said that following the refusals by Messrs Bevan and Harrison to witness the IBM guarantee, she feared for her life. She said that at the time she signed the guarantee her husband was outside the door. Mr Tait had sent him out of the room because he had pushed her into a chair and was demonstrating very angrily towards her. He was furious that she was refusing to sign the guarantee and Mr Tait knew this. She said she told Mr Tait on several occasions at great length that she and her husband were having a matrimonial dispute; she said Mr Tait was acting for Mr Rawleigh at the time and was looking after his interests and not hers. She said she told Mr Tait that she was not a shareholder or a director of Ultra Net and that she did not want to sign the guarantee. She said that she wanted to write "signed under duress" on the document which Mr Jordan had told her to do. Mr Tait would not let her do that. She finally relented because she was helpless. She had been beaten, her husband was right outside the door and would beat her if she did not do what he wanted her to do.

[13] The Judge accepted Mr Tait's evidence that the first and only occasion on which Mrs Rawleigh visited him was on 1 October at about 4pm.

[14] The Judge further accepted Mr Tait's version of the 1 October episode, which was supported to a degree by his legal secretary and his receptionist. She found that the meeting lasted between half an hour and an hour. Mr Tait did not know the purpose of the meeting when the appointments were made. He first saw Mr and Mrs Rawleigh together, and then individually with the door closed while the other waited in the reception area. They presented as a couple and wished to sign a guarantee in a business venture in which they were both involved. They gave no outward indication of anything untoward and there was no physical or verbal abuse or threats from Mr Rawleigh directed at Mrs Rawleigh in Mr Tait's presence. When they were together Mr Tait advised them not to sign the guarantee because of its unlimited nature. He repeated that advice more than once when he met Mrs Rawleigh on her own. Despite that advice, both were willing to sign the guarantee and each signed the disclaimer he had prepared. Among the factors

leading to the Judge's conclusion was Mr Henry's acceptance that Mrs Rawleigh's evidence was too unreliable to be preferred over that of Mr Tait. The Judge agreed with that assessment.

[15] A letter from IBM to Mr and Mrs Rawleigh enclosing the guarantee required for Ultra Net had stated:

> Before signing the guarantee we recommend that you take it to a solicitor and obtain independent advice as to the nature of the obligation you are entering into. The solicitor must complete, sign and date the certificate contained in the guarantee (at page 7). If you choose not to take independent legal advice, you must sign and date the enclosed Guarantor's Acknowledgement of Decision not to take Legal Advice.

[16] Mr Tait prepared and had executed by both Mr and Mrs Rawleigh a document recording his advice. Hers was in the following form:

> **RE: GUARANTEE AND INDEMNITY TO IBM NEW ZEALAND CREDIT LIMITED**
>
> I have requested you witness my signature to the above Guarantee and Indemnity document and to certify that you have explained the contents to me.
>
> I confirm and certify that you have explained to me the nature and effect of this Guarantee document and the obligations imposed thereunder have been fully explained to me before execution thereof. I acknowledge that I have understood the nature and effect and obligations of the Guarantee.
>
> I confirm that you have advised me not to sign the document as you have advised it is not in my interests to do so and that the obligations imposed thereunder will be detrimental to me.
>
> I further confirm that I have advised you I wish to sign the document despite your advice, whether you witness it or not, by obtaining another witness if necessary.
>
> [signed]……
> Beverley Margaret RAWLEIGH

[17] Having secured that acknowledgement, Mr Tait witnessed Mrs Rawleigh's signature to the guarantee. He also certified to IBM that Mrs Rawleigh, together with her husband, had received independent legal advice in respect of the loan facility or had agreed to waive that requirement. IBM later secured summary judgment against Mrs Rawleigh on the guarantee for $1,155,461.50 plus interest.

[18] Mrs Rawleigh claims that sum and the loss of half of the value of substantial matrimonial assets, plus general or punitive damages.

The solicitor's duty

[19] We accept Mr Ring QC's submission that the obligations of a solicitor in such circumstances fall to be considered in two stages. The first is the fiduciary duty to avoid conflict of interest that has not been explained to and accepted by the client. He accepted that Mr Tait had breached that duty. The second is the professional duty of care, owed in contract and in tort. We would emphasise that Mrs Rawleigh's pleading and Mr Henry's conduct of the case both in the High Court and on appeal were based exclusively on the former.

[20] Mr Tait admitted in evidence that he breached his fiduciary duty, by failing to advise Mrs Rawleigh that there was a conflict of interest. Before agreeing to advise her, Mr Tait should first have explained the nature, effect and implications of the conflict of interests: *Taylor v Schofield Peterson* [1999] 3 NZLR 434 at 439 – 440 (HC). The explanation would have included the fact that he was advising Mr Rawleigh, who would benefit from her signature to a guarantee of the liabilities of a company in which she held no shares and of which she was not a director, and would suffer disadvantage and no benefit from such transaction. Only after giving such explanation could she be able to consider, on an informed basis, whether to consent to Mr Tait's acting for her.

[21] But Mr Ring submitted that the breach of fiduciary duty did not cause loss to Mrs Rawleigh because such advice would have made no difference: Mrs Rawleigh would have gone ahead and signed despite it. That submission was accepted by the Judge, whose finding is challenged on appeal.

[22] Mr Henry cited as stating the principles *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (HL). The leading speech of Lord Nicholls at [60] cited Fletcher Moulton LJ in *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 730 as summarising the principles applicable to cases where a solicitor is advising a person who may have been subject to undue influence:

> All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.

Lord Nicholls continued:

> [61] Thus, in the present type of case it is not for the solicitor to veto the transaction by declining to confirm to the bank that he has explained the documents to the wife and the risks she is taking upon herself. If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect. But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.
>
> [62] That is the general rule. There may, of course, be exceptional circumstances where it is glaringly obvious that the wife is being grievously wronged. In such a case the solicitor should decline to act further. In *Wright v Carter* [1903] 1 Ch 27 at 57–58, Stirling LJ approved Farwell J's observations in *Powell v Powell* [1900] 1 Ch 243 at 247. But he did so by reference to the extreme example of a poor man divesting himself of all his property in favour of his solicitor.

[23] Mr Henry further submitted, and we accept, that in terms of the criteria in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953 (CA) adopted in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 189 (HL) Mrs Rawleigh has established that this is a case of "Class 1: Actual undue influence".

[24] He argued that Mr Tait's fiduciary duty required him to make such enquiry as would allow him to understand Mrs Rawleigh's actual position so as to equip him to give her appropriate advice. Since the phenomenon of undue influence of a husband on a wife is well known, he should have taken greater care to investigate whether that was her position. To comply with the *Coomber* standard – that the advice should be removed entirely from the suspected atmosphere – it was not enough that Mr Rawleigh should be outside the room during Mr Tait's interview of Mrs Rawleigh. To dispel the risk of undue influence Mr Tait ought to have seen

Mrs Rawleigh on a separate occasion and wholly removed from her husband, rather than have simply sent him into another room.

[25] He submitted that Mr Tait should have probed more deeply to discern the nature and extent of the pressure from her husband and its consequences upon her.

[26] He emphasised:

(a) Mr Rawleigh wished his wife to execute a guarantee in favour of what was a creditor of her husband's company, in which she had no interest as shareholder or director, matters of which Mr Tait was unaware;

(b) Mr Tait made no enquiry as to the true nature of the transaction or whether it possessed any benefit for Mrs Rawleigh;

(c) Mr Tait made no enquiry as to the nature of the relationship between Mrs Rawleigh and her husband.

[27] He submitted that had Mr Tait not breached his fiduciary duty to explain the nature, effect and implications of the conflict of interests, and had he met the standards of *Coomber* as to seeing Mrs Rawleigh at a time and place clearly removed from her husband's presence, she would have felt able to confide the true position to him.

Discussion

[28] There was no evidence as to the standards of care adopted by prudent legal practitioners in circumstances such as these. It is ultimately for the Court to determine where those standards should be set. In *Etridge*, in considering the question of what standards should be imposed upon banks in relation to whether a wife's consent is procured by undue influence, the House of Lords referred to the role of the solicitor. Lord Nicholls stated:

> [53] My Lords, it is plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves whether a wife's consent is being procured by the exercise of undue influence of her husband. This is not a step the banks should be expected to take. Nor, further, is it desirable or practicable that banks should be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence. … [T]he circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts. Many, if not most, wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation. In any event, solicitors are not equipped to carry out such an exercise in any really worthwhile way, and they will usually lack the necessary materials. Moreover, the legal costs involved, which would inevitably fall on the husband who is seeking financial assistance from the bank, would be substantial. To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.
>
> [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.

[29] The position of a bank, which will generally be able to rely on the fact that an independent solicitor has advised the guarantor, is very different from that of the solicitor, who must accept the primary responsibility for protecting the client's interests. But the authorities show that the starting point is a presumption of capacity and autonomy. In *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 this Court at [23] cited *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) where Lord Jauncey of Tullichettle said at 648:

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

The High Court had considered that it was not enough for the solicitor to advise orally and in writing against an improvident transaction. He should either decline to act at all for the plaintiffs, or give them whatever candid and forthright advice was

needed to bring home to them its significance and risks. This Court, however, allowed the appeal, being of the opinion, inter alia, that:

> [27] … in substance the letter gave [the clients] sufficient reasons to satisfy any duty there might have been to bolster with adequate reasons the advice not to proceed.

[30] Here the advice given by Mr Tait was no less clear. While we now know that Mrs Rawleigh was suffering from her husband's undue influence, there was nothing about either Mrs Rawleigh's demeanour, the events at Mr Tait's office or the transaction itself to give rise to suspicion.

[31] For that reason there was no occasion for Mr Tait to apprehend that he should take more than the simple precaution of seeing Mrs Rawleigh alone. Nor in our view was there breach of fiduciary duty by reason of failure by Mr Tait to probe more deeply. The man with a red flag in front of the motor car was dispensed with to ensure reasonable traffic flow. Were this Court to raise the standard of care owed by solicitors to family members who on the face of it are willingly seeking to support a venture by another member, the problems referred to by Lord Nicholls at [53] of *Etridge* would arise. The inevitable consequence is that there will be losses, sometimes tragic, as in this instance. While in a very real sense that is regrettable, it is justified in the light of the overall public interest in not extending the duty of care to an unattainable standard.

[32] The remaining question is whether Mrs Rawleigh should be compensated for loss of the chance that, had Mr Tait complied with his admitted breach of fiduciary duty to explain the significance of his role as her husband's advisor, she might have disclosed to him that she was acting under the influence of her husband. As a result of her findings recorded at [14] above the Judge concluded:

> … Mrs Rawleigh presented to Mr Tait with no outward sign of marital disharmony and no lack of enthusiasm when in Mr Tait's office with the door closed. Although she had confided in Mr Jordan, who was already aware of her marriage difficulties, and her doctor, she seems to have put a brave face on matters to the solicitors, Mr Bevan, Mr Harrison and Mr Tait, that she saw at this time. It cannot be inferred that if Mr Rawleigh was not on the premises where Mrs Rawleigh was taking independent advice that she would have disclosed to the solicitor her distress at what her husband was forcing her to do. Whether she did so would likely depend on whether she

> felt safe to do so – on the evidence that seems unlikely. The absence of Mr Rawleigh from the premises would not necessarily assure her of her safety.

[33] Mr Ring marshalled various perceivable benefits to Mrs Rawleigh of signing the guarantee. These included concurrently avoiding loss of the $1.2m worth of computers supplied by IBM to an operation that was already running and developing the new business, which included expanding the general Rawleigh customer base by 2500 members. We add that, being unaware of her husband's scheme to remove what was presumptively matrimonial property from New Zealand, Mrs Rawleigh could well have considered that she was enhancing her own fortunes.

[34] Also of relevance is Mrs Rawleigh's prior execution of the ANZ commitment and of guarantees of $500,000 in June 1998 (of a loan to a Rawleigh company, Watkins & Co Ltd), of $180,000 in September 1998 (to refinance much of the ANZ indebtedness in respect of Ultranet), and of some $76,000 in April 1999 (a guarantee for ANZ Fiji).

[35] We have examined with anxious care whether, in view of Mr Tait's admitted breach of his fiduciary duty, the Judge's conclusion that Mrs Rawleigh would inevitably have executed the guarantee is correct. We have concluded that we would independently have reached the same conclusion as the Judge, whose advantage of seeing and hearing the witnesses is of particular value in such a case. Whether as a result of her husband's domination or otherwise, it is clear that Mrs Rawleigh would have executed the guarantee even if Mr Tait had provided the explanation to which she was entitled. Mr Tait did, after all, advise Mrs Rawleigh not to execute the guarantee, albeit for another reason, and she rejected his advice.

[36] It is unnecessary to consider the difficult argument on the cross-appeal, that even if Mr Tait were held not to be liable, there was no loss because IBM had such knowledge of Mrs Rawleigh's position that it could not have enforced its guarantee. Since IBM was entitled to rely on Mr Tait, that argument appears implausible.

Result

[37] It follows that the appeal fails and must be dismissed. We will receive memoranda as to costs.

Solicitors:
Dennis J Gates, Hibiscus Coast for Appellant
Duncan Cotterill, Nelson for Respondent