IN THE COURT OF APPEAL OF NEW ZEALAND

CA97/2008
[2009] NZCA 329

	BETWEEN	GLADWEN FRANCES MCINTYRE, HELEN JEANNETTE CAMPBELL AND BRIAN RICHARD SMYTHE BEING THE TRUSTEES OF THE GLADWEN FRANCES MCINTYRE FAMILY TRUST Appellants
	AND	NEMESIS DBK LTD A DULY INCORPORATED COMPANY AND ANTHONY GILBERT STALLARD AND WILLIAM ALEXANDER COOK BEING THE TRUSTEES AND EXECUTORS OF THE ESTATE OF ALEC HASTWELL Respondents

Hearing: 24 February 2009

Court: O'Regan, Robertson and Arnold JJ

Counsel: P S Davidson and J Fyfe for Appellants
G P Barkle for Respondents

Judgment: 28 July 2009 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay to the respondents costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by O'Regan J)

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Introduction

[1] The principal issue in this appeal is whether the appellants, the trustees of the Gladwen Frances McIntyre Family Trust (the trustees), were acting under duress when they agreed to important variations to agreements relating to a joint venture between them and Mr Hastwell, who is now deceased. In the High Court, Mallon J found they were not: *McIntyre v Nemesis DBK Ltd* HC NSN CIV 2005-44-558 13 February 2008. The appellants appeal against that decision.

[2] Before turning to that issue and the subsidiary issue on appeal, we will set out the factual and legal background to the dispute.

Facts

[3] Mrs Gladwen McIntyre purchased a property in Richmond in 1970, and lived in a house on the property from then on. In 1991, Mr Alec Hastwell, an acquaintance of Mrs McIntyre, proposed that the two of them enter into a joint venture to subdivide and develop the property. Mrs McIntyre agreed in principle.

[4] In 1993 two formal agreements relating to the joint venture were finalised. Under the first agreement (the transfer agreement), Mrs McIntyre sold a half share in the property to Mr Hastwell's adopted daughter, Ms Clark. Ms Clark's interest was later transferred to Mr Hastwell and, for ease of reference, we will refer to the property as if it were owned by Mr Hastwell throughout. Under the transfer agreement, the property was valued at $245,000. But because Mrs McIntyre retained ownership of the house (valued at $45,000), the sum paid for the half share was $100,000. Mr Hastwell had the right to require Mrs McIntyre to buy his share of the land if it remained unsubdivided five years after the date of the agreement. Mrs McIntyre did not have a corresponding put option.

[5] The second agreement between Mrs McIntyre and Mr Hastwell provided the terms on which the joint venture was to proceed (the joint venture agreement). Its aim was expressed to be to subdivide the land in order to generate the maximum profit (cls 2 and 3). Both parties were required to contribute equally in order to pay all bills (cl 5) and meet all the costs of the development (cl 7). The parties also agreed to share equally in the profit and risk of the development (cl 15). Mr Hastwell was appointed as the manger of the development (cl 10). His remuneration was provided by cl 8(c):

> At the completion of the last stage of subdivision Hastwell shall be entitled to take one (1) unallocated lot of his choice and this shall constitute his only claim to remuneration for managing and supervising the work of the subdivision (or in his absence him paying for this to be competently carried out) and this lot shall not be counted as one of those to which he is entitled by ballot nor in the computation of value distributed between the parties pursuant to Clause 7.

[6] The parties could agree to revoke Mr Hastwell's appointment as manager but his entitlement to the section would remain (cl 10).

[7] In 1995, Mrs McIntyre transferred her assets into a family trust. Mrs McIntyre was a trustee, along with her solicitor, Mr Brian Smythe, and her cousin, Ms Helen Campbell. Ms Campbell was experienced in resource management issues and had been a member of the Tasman District Council (the Council). From this point on, the trust (through its trustees) became a partner in the joint venture, instead of Mrs McIntyre. Mr Hastwell transferred his interest to Nemesis DBK Ltd in early 2002.

[8] The expectation of the parties was that the subdivision would take about three years to complete. As already noted, there was an "out" for Mr Hastwell after five years. As it happened, the development consumed around 11 years.

[9] The extended delays that plagued the subdivision were predominantly due to a myriad of disputes with the Council over planning and consent issues. These disputes were often not resolved until after Mr Hastwell had commenced legal proceedings. Over this period, Mr Hastwell's relationship with the Council became dysfunctional; indeed in early 1997 he was threatened with a trespass order. The extent to which this relationship deteriorated is illustrated by the name Mr Hastwell chose for his company: Nemesis DBK Ltd. "DBK" were the initials of the relevant Council Manager, Dennis Bush-King.

[10] As the project laboured on, and in particular from 1998 onwards, Mr Hastwell began to express concerns over the amount of time and effort he was expending on the project. In particular, he adopted the position that the level of remuneration originally agreed upon had become insufficient.

[11] In May 1998, Mrs McIntyre and Mr Hastwell agreed in writing to change the basis of Mr Hastwell's remuneration. The effect of the change was to allow Mr Hastwell to be allocated a section in the subdivision of his choice from the areas of subdivision which were ready to proceed, rather than from the last stage of the subdivision as initially agreed. The sections were allocated to (and then sold by) Mr Hastwell in 2002.

[12] Thereafter Mr Hastwell still endeavoured to improve the basis of his remuneration. He sought further sections and hourly remuneration. On a number of occasions, he canvassed the possibility of winding up the joint venture or of disposing of his half share. He wrote to the trustees a number of times, raising the possibility of withdrawing from the joint venture or ceasing to be manager of the project. The appellants say these indications were threats. On 14 February 2001, Mr Hastwell wrote to the trustees, purporting to give formal notice that he wished to withdraw as manager.

[13] Mr Hastwell did not, however, formally withdraw as manager. On 11 May 2001, a meeting was held between him and the three trustees, during which he presented his demands for increased remuneration. We will return to discuss what happened at this meeting in detail later. The upshot was that the trustees agreed to additional remuneration: Mr Hastwell would receive two further sections for his work during the years from 1997 to 2001; and payment for his management services post-September 2001 would be "worked out on a goodwill basis". This agreement was confirmed in subsequent documents and correspondence, including a handwritten note taken by Mr Smythe in the course of a meeting between Mr Smythe, Mr Hastwell and Mr Stallard (Mr Hastwell's solicitor). Both Mr Smythe and Mr Hastwell signed the note. For ease of reference, we will refer to the various oral and written agreements to increase Mr Hastwell's remuneration as the variation agreement. The appellants now challenge the variation agreement's validity.

[14] The parties were initially unable to agree on the rate at which to pay Mr Hastwell for his management services and work on the joint venture. The trustees proposed an hourly rate of $30; Mr Hastwell asked for $60. In the end, the joint venture's accountant, Mr Woodhouse, was asked to decide on a fair and reasonable rate of remuneration. He settled on $60 per hour, and the trustees abided by that determination, on the condition that future invoices were to be approved by the trust prior to payment.

[15] The subdivision was finally completed in around September 2004, when the last ten lots became available for sale. At that time another issue arose between the parties about the calculation of the final balancing payment.

Issues

[16] In the High Court, a number of causes of action were advanced. On appeal, however, the parties agreed upon two issues for this Court's determination.

[17] As mentioned earlier, the primary issue concerns the circumstances in which the appellants agreed to Mr Hastwell's demands for increased remuneration. The appellants contend that the variation agreement is not binding because it was entered into under economic duress.

[18] A subsidiary issue relates to the correctness of the final division of the proceeds from the subdivision. The appellants argue that the value of Mrs McIntyre's house block should not have been included in the total value of the subdivision for the purposes of the final balancing payment.

ISSUE 1: ECONOMIC DURESS

The test to be applied

[19] Contractual duress is the imposition of improper pressure by threats that coerce a party to enter a contract. Contracts that have been procured by duress are voidable at the discretion of the coerced party (*Pao On v Lau Yiu Long* [1980] AC 614 at 634 (PC)), unless that party has subsequently affirmed the contract: see, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (QB). While originally duress was restricted to threats of physical injury, it has subsequently expanded to encompass both threats in relation to property and the exertion of economic pressure. The duress alleged in this case falls into the final category, namely economic duress.

[20] Duress involves two fundamental elements, as identified by Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400 (HL). First, there must be the exertion of illegitimate pressure on a victim. Secondly, the imposition of that pressure must have compelled the victim to enter the contract. These were the elements endorsed by the Privy Council in *Attorney-General for England and Wales v R* [2004] 2 NZLR 577 at [15] and by this Court in *Haines v Carter* [2001] 2 NZLR 167 at [108] and [112].

[21] In *Pharmacy Care Systems Ltd v Attorney-General* CA198/03 16 August 2004 at [98] (*Pharmacy Care (CA)*), this Court identified seven features of economic duress:

> First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

[22] Although the Court referred to these as "elements", they are not elements in the ordinary sense. The sixth, for example, merely identifies a legal consequence of a contract having been procured through duress; similarly, the seventh presupposes that contractual duress has in fact already occurred. The enunciated elements are therefore best regarded as legal propositions of relevance to duress.

[23] This summary in *Pharmacy Care (CA)* at [98] has been criticised as adding undue complexity to the ingredients identified by Lord Scarman in *Universe Tankships*: see Bigwood "When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress Law in New Zealand" (2005) 21 JCL 208.

[24] The Supreme Court, in refusing leave to appeal in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (*Pharmacy Care (SC)*), took the view that the law relating to duress had been "sufficiently clear and settled" by the Privy

Council in *Attorney-General for England and Wales v R* (albeit that the case was decided under the law of England, not that of New Zealand).

[25] In light of the Supreme Court's endorsement of *Attorney-General for England and Wales v R* and that case's adoption of the formation set out in *Universe Tankships*, we propose to apply the test in the latter case, rather than adopting the more detailed elements from *Pharmacy Care (CA)*. We consider that the duress alleged in this case is best analysed under the following headings:

(a) Was there a threat against, or the exertion of illegitimate pressure on, the trustees?

(b) If so, did that threat result in the trustees being coerced into entering into the variation agreement?

(c) If the result of that analysis is a finding that there was duress, did the trustees affirm the variation agreement?

(a) Was there a threat or the exertion of illegitimate pressure?

Legal test

[26] The fact that one party to a contract has exerted pressure on the other does not, on its own, amount to duress: pressure (and even threats) is commonly exerted in commercial dealings: see the comments of Kirby P in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 106 (CA). A claim of duress cannot succeed unless there has been the exertion of *illegitimate* pressure.

[27] In the present case, the allegation is that Mr Hastwell threatened to stop managing the subdivision unless his remuneration was increased, when he was contractually bound to do so. Counsel for the trustees, Ms Davidson, said this was a threat to breach a contract, which is illegitimate pressure.

[28] There is some academic debate as to whether a threat to breach a contract is necessarily illegitimate pressure. The alternative views are well articulated by Bigwood and Halston. Bigwood argues that a threat to breach a contract should be seen as necessarily illegitimate: see "Economic Duress by (Threatened) Breach of Contract" (2001) 117 LQR 376 and *Exploitative Contracts* (2003) at 329 – 344.

[29] Halston argues against so pure an approach: see "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 LQR 649. At 662 he submits that:

> To regard all threats to breach a contract as illegitimate would certainly protect against opportunism, but would purchase this protection at too great a cost. Contractual flexibility would have to be sacrificed and meritorious, non-opportunistic modifications would be rendered unenforceable.

[30] In *Attorney-General for England and Wales v R* at [16], Lord Hoffman, delivering the advice of the Privy Council, observed: "Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate". This observation must be understood against the background of Salmon J's comments at [115] of the High Court judgment in that case (HC AK CP 641/98 6 December 2000), where he said:

> There are no definitive criteria for determining whether pressure is legitimate or illegitimate. The criterion most commonly resorted to is that of "lawfulness". Thus, where the pressure consists of an unlawful act or a threat to commit an unlawful act, then prima facie the pressure is illegitimate. Although the criterion of lawfulness is useful, it cannot be definitive. If it were, the inquiry would be directed to the lawfulness of the pressure rather than to its legitimacy. It follows that some instances of unlawful pressure may be legitimate and that some instances of lawful pressure may be illegitimate. An example of the former might be a party's threat to break a contract when a change in circumstances beyond their control has meant that they are genuinely unable to perform. An example of the latter might be a party's threat to disclose information which would discredit the victim.

[31] In this appeal, we will proceed on the basis that a threat to breach a contract is unlawful and generally illegitimate, though, for reasons which will become apparent, our decision to do so is not material to the outcome.

[32] Having said that, we observe that care must be taken to distinguish between (illegitimate) threats and (legitimate) warnings. Where one party warns the other

that, as a matter of commercial reality, it will not be able to perform its contractual obligations unless changes are agreed to, this does not amount to a threat.

High Court judgment

[33] In the High Court, Mallon J found that:

(a) The subdivision took much longer than anticipated. Mrs McIntyre wished to continue with the subdivision (with Mr Hastwell's involvement) and it was accepted by the trustees that Mr Hastwell should receive greater remuneration. There was nothing unusual or illegitimate about the agreed remuneration being varied to recognise that matters had turned out differently from what the parties had expected (at [190]).

(b) It was not correct to characterise Mr Hastwell's earlier communications as "threats" (at [191]).

(c) The letter of 14 February 2001, read as a whole, was not illegitimate pressure: rather, it raised Mr Hastwell's desire to withdraw as manager and the possibility that he be bought out, which was a "sensible suggestion" (at [193]).

(d) The agreement to increase Mr Hastwell's remuneration reached at the meeting on 11 May 2001 was a considered and deliberate decision by the trustees. Although the decision was made at the culmination of what was a very intense meeting, nothing was done immediately, or even a week or two afterwards, to back out of the variation agreement in principle on any basis (at [202] – [203]).

(e) The trustees did not attempt to withdraw from the variation agreement because they remained of the view that the best outcome for Mrs McIntyre was to complete the subdivision and keep Mr Hastwell

involved. This was achieved by agreeing to pay Mr Hastwell additional remuneration (at [204]).

Factual issues before us

[34] The focus of the argument before us was on the letter of 14 February 2001 and the meeting of 11 May 2001. However, before we consider them, it is important to understand the relevant background. In particular:

(a) As noted earlier, the basis of Mr Hastwell's remuneration had already been altered once, in May 1998: see [11] above.

(b) There was correspondence in August 2000 in which Mr Hastwell put forward a number of proposals, including one relating to an increase in his remuneration as manager. On 9 October 2000, and after some discussion, Mr Smythe wrote on behalf of the trustees accepting Mr Hastwell's proposals, including that relating to remuneration.

(c) Mr Hastwell then wrote a further letter on 17 October 2000, taking umbrage at a statement in the 9 October 2000 letter that the proposals were agreed to on the basis that Mr Hastwell would continue to provide regular written reports and "continue to apply competent management skills to the many issues involved". This letter was not, however, given to any of the trustees until February 2001. We discuss it further below.

[35] Another important matter of context is Mr Hastwell's manner. All parties accepted that he was excitable and difficult, and this sometimes made dealing with him unpleasant. His conduct towards Mrs McIntyre in meetings and discussions with her was described as sometimes amounting to bullying. This is not reflected in the tone of the correspondence between them, however. It is clear that Mr Hastwell's acrimonious dealings with the Council did not assist the progress of the subdivision, and, to some extent, Mr Hastwell was aware of this. Nevertheless, the High Court Judge found at [170] that Mr Hastwell did not deliberately delay

progress of the subdivision or deliberately cause unnecessary costs to be incurred. She found that he acted in what he believed to be the best interests of the joint venture, although he was frustrated with the lack of progress and with the Council's approach and attitude to the subdivision.

The 14 February 2001 letter

[36] The letter of 14 February 2001 begins:

> This letter is to give formal notice that I wish to withdraw as manager of the McIntyre Trust & Hastwell Joint Venture subdivision project and will not be available on a regular basis after eight weeks from today.

Later, after lamenting the inadequacy of the reward to him from the original contractual arrangements, Mr Hastwell says:

> This can no longer go on. At age 72 I want my life back.

[37] The letter specifically says that Mr Hastwell is not invoking the sunset clause (although he was not able to do so in any event) but does say he is open to offers to being bought out.

[38] Ms Davidson said the express reference to withdrawing from management responsibilities could only be seen as a threat on Mr Hastwell's part to breach his management contract.

[39] Counsel for the respondents, Mr Barkle, said the 14 February letter should be seen as an expression of frustration by Mr Hastwell, and a complaint that the amount of work involved now greatly exceeded the worth of the remuneration he was getting. He said that this, and the 17 October letter which was handed over as a draft with it (see below), had to be seen in context.

The 17 October 2000 letter (delivered on 15 February 2001)

[40] There is no doubt that this letter was written in anger (see [34](c) above) and its tone is intemperate. It is not clear why Mr Hastwell held on to it for almost four

months after writing it. Ultimately, it was handed to Mr Smythe on 15 February 2001, along with the 14 February letter. It traces the history of the subdivision and the work which Mr Hastwell had done and the toll it had taken on him. It then outlines "the damage this continuing and now-unwanted involvement is doing, at 71 years of age, to my life and aspirations to go voyaging on my yacht before it is too late". To this end, Mr Hastwell makes the following statement:

> I am ABSOLUTELY NOT prepared to sacrifice yet another cruising winter and therefore you may interpret this that I will not continuously 'apply competent management skills to the many issues involved' as you Trustees now put it. If I am here I will do my best and can offer no more.

[41] At the end of the letter, there is a reference to formal notice being given, "in terms of the sunset clause", that Mr Hastwell wishes to dispose of his share in the subdivision at valuation and that, as required, he formally offers it to the trust. He then points out that, if the trust does not take up the offer, he will have the opportunity to buy its interest.

[42] Ms Davidson argued that this letter was an example of Mr Hastwell's manipulative tactics (because it referred to invoking the sunset clause when the time to do so had lapsed) and that there were clear statements that Mr Hastwell was no longer prepared to continue as manager.

[43] On 1 March 2001, Mr Smythe wrote to Mr Hastwell, referring to a number of Mr Hastwell's recent letters. He said that he had noted the "draft letter (invoking 'sunset clause')… and placed it on file". Mr Smythe's letter finished by thanking Mr Hastwell for his "frank and open letters and the detail they contained". It was not clear whether Mrs McIntyre ever saw the 17 October letter.

11 May 2001 meeting

[44] Two meetings took place on 11 May 2001. The focus in the present case is on the second, at which Mr Hastwell and all three trustees (Mrs McIntyre, Mr Smythe and Ms Campbell) were present. Mr Smythe recorded the discussion in a file note. In particular, he recorded the proposal discussed in relation to Mr Hastwell's remuneration, which was as follows:

(a) For the first four years, he would receive the remuneration originally agreed upon (ie one section);

(b) For the second four years, he would receive two sections; and

(c) For the period beyond September 2001, his remuneration was "to be worked out on a goodwill basis."

(Because Mr Hastwell had an undivided half interest in the property that was being subdivided, each section he received as additional remuneration was effectively only an additional half share in that section.)

[45] Mr Smythe's file note then recorded the following:

> On reflection, this basis for A. H. remuneration was unanimously agreed.

[46] The evidence from the trustees was to the effect that Mr Hastwell's conduct at this meeting was unpleasant, demanding and bullying. Ms Campbell described his constant repetition of his complaints about the inadequacy of his compensation as "like Chinese water torture". Ms Campbell and Mr Smythe said they persuaded Mrs McIntyre to agree to increased remuneration so that the development could be finished, though she was not happy about it.

[47] The information provided by Mr Hastwell before the meeting showed that, without change to the basis for remuneration, his efforts were being rewarded at a rate of $24.75 an hour (he later corrected this to $22), of which he was effectively paying half.

[48] There was further correspondence and discussion after that meeting, which were said to have involved more threats on the part of Mr Hastwell. The trustees' case was that an all day meeting occurred in November 2002, in which Mr Hastwell threatened to abandon the joint venture and demanded to be paid an hourly rate from September 2001. However, the trial Judge found that this meeting had not occurred, principally because there was no record of it (Mr Smythe had file notes of all other meetings).

17 January 2003 meeting

[49] The next significant event occurred on 17 January 2003, when Mr Hastwell and his lawyer, Mr Stallard, met with Mr Smythe. It seems that Mr Hastwell had taken umbrage at a letter sent by Mr Smythe and as a result was refusing to sign a sale and purchase agreement for a section being sold by the trustees. The withholding of the signature was used as leverage to get the basis of Mr Hastwell's remuneration recorded in writing, and Mr Smythe did this in a handwritten note which he signed on behalf of the trustees and Mr Hastwell signed on behalf of Nemesis DBK. This recorded the earlier agreement as to the entitlement to two (unidentified) additional lots in the subdivision. However, in the handwritten note, the lots were recorded. This resolved in Mr Hastwell's favour which lots he would secure as remuneration, in a manner which was contrary to Mrs McIntyre's wishes. There was also agreement that if an hourly rate for work after September could not be agreed, the rate would be decided by the accountant for the joint venture, Mr Woodhouse. Mr Woodhouse later determined that the rate should be $60 an hour and this was accepted: see [14] above.

Evaluation

[50] The case for the trustees is essentially that, although each of the individual items of correspondence or individual meetings may not have itself constituted illegitimate pressure, the cumulative effect of Mr Hastwell's bullying manner, his difficult dealings, his constant complaints about remuneration and his statements that

that he would not continue unless paid more amounted to illegitimate pressure on the trustees. We see the matter in rather less black and white terms.

[51] The High Court Judge exhaustively examined the evidence and concluded that the 14 February letter did not amount to illegitimate pressure and that the agreement reached at the 11 May meeting was freely entered into. She did not make a particular finding on the overall course of conduct as Ms Davidson suggested she should have.

[52] Taken at face value and when read in combination, the 14 February letter and the 17 October/15 February letter indicate an intention on the part of Mr Hastwell to discontinue meeting his contractual obligation to manage the development on the basis provided for in the joint venture agreement. Whether those statements should be taken at face value is a matter of dispute.

[53] The contractual background to the assessment of that issue is cl 10 of the joint venture agreement, which provided:

> …the parties hereto may agree to revoke the manager's appointment, but Hastwell's right to a section… shall remain, in which case the parties shall meet and resolve a new management practice…

[54] Given that provision, the ongoing relationship envisaged by the joint venture agreement and the prolonged problems with the subdivision, it was not necessarily illegitimate for Mr Hastwell to seek a change of management terms. Clause 10 envisaged that if the parties agreed to a change, they would meet to resolve a new management practice. It was not inconsistent with the joint venture agreement for one party to initiate a process aimed at agreeing such a change.

[55] We accept that this may be an overly benign interpretation of Mr Hastwell's statements in the 14 February and 17 October/15 February letters. As we have said, they do contain statements indicating a cessation of performance of management functions, which, in turn, would suggest that Mr Hastwell was applying illegitimate pressure on the trustees to change the management arrangements.

[56] But if the trustees, particularly Mr Smythe, had interpreted what was said as a threat by Mr Hastwell to abandon his contractual obligations, one could have expected that this would have been raised and an indication given as to the importance to the trustees of the continued performance of the contract and the inevitable loss which would arise if Mr Hastwell reneged on his obligations. There is nothing of this kind in the record.

[57] Ms Davidson said the 11 May meeting was also indicative of illegitimate pressure from Mr Hastwell: see [46] above. However, Mr Smythe's contemporary record does not appear to be consistent with illegitimate pressure or threats having been made. Rather, it records that having reflected on Mr Hastwell's proposal for increased remuneration, the trustees decided the right thing to do was to accept it. There is nothing in the file note to indicate any protest. Mr Smythe explained that the lack of any form of resistance in dealing with Mr Hastwell was because resistance was counterproductive. He said the trustees let Mr Hastwell have his way because there was no other alternative but to do so. But that does not explain why, in a file note which Mr Hastwell would never see, Mr Smythe made no mention of any illegitimate pressure or coercion. The file note is indicative of the trustees making an assessment of the kind that parties in relational contracts have to make from time to time as matters that were not envisaged when the contract was signed come to light.

[58] We are mindful of Ms Davidson's submission that Mr Hastwell's overall course of conduct has to be considered, not just particular incidents. The emphasis of the appellants' case was on the vulnerable position of Mrs McIntyre and the badgering and bullying manner in which Mr Hastwell dealt with her. But the party to the joint venture was the trust, not Mrs McIntyre alone. In her evidence, Mrs McIntyre explained that one of her reasons for setting up the trust was her hope that if she were no longer the sole decision-maker in respect of her interest in the joint venture, she would find it easier to deal with Mr Hastwell. Ms Campbell and Mr Smythe had to agree to changes in the joint venture arrangements. It is notable that they prevailed upon Mrs McIntyre to agree to increased remuneration at the 11 May meeting, but she was said to have been unwilling.

[59] Having carefully considered the evidence, the parties' submissions and the Judge's views on this issue, we conclude that, although Mr Hastwell's conduct was reprehensible in many respects, it did not amount to, and was not construed by the trustees as, a threat to breach the contractual obligation to provide management services by simply stopping work. He was clearly disgruntled that the subdivision had gone badly and the amount of time involved in bringing it to fruition had exceeded both sides' expectations. He was concerned that the result was that the remuneration to which he was entitled under the contracts did not reflect the additional work that was required. This led him to express his sense of grievance in an extravagant and repetitive manner, with a view to persuading the trustees to agree to amend the contract to increase the remuneration. In doing so, he sought to bring matters to a heads by indicating that he could not, or would not, continue as manager.

[60] Whether outright resistance to his claim for better remuneration would have led him actually to do this is, of course, unknown. One would expect that if there had been resistance to Mr Hastwell's claim, his obligations under the contract would have been pointed out to him and the possibility of enforcement action would have been highlighted. This did not occur.

[61] We share the view of the High Court Judge that the 14 February letter and the conduct of the 11 May meeting did not amount to illegitimate pressure. And we conclude that, viewed overall, Mr Hastwell's pursuit of a change in the basis of his remuneration, though forceful and repetitive, did not cross the line between forceful and illegitimate pressure. However, we accept that the conclusion is a finely balanced one. For reasons which will become apparent, it is not essential to the resolution of the appeal.

(b) Did that threat result in compulsion or coercion?

[62] Our analysis of this issue proceeds on the assumption that, contrary to the view just expressed, the conduct of Mr Hastwell did constitute illegitimate pressure.

Legal test

[63] If it can be established that an illegitimate threat was made, or illegitimate pressure exerted, duress will be established if this threat or pressure coerced entry into the contract.

[64] Coercion, for the purposes of duress, is difficult to define adequately. Many cases take the position that duress will be established only where the victim's free will was "overborne" and therefore entry into the contract was not voluntary: see, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* at 720; *Pao On v Lau Yiu Long* at 636; and *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 345 (HC). This terminology is, however, apt to mislead. As William Young J noted in *Haines v Carter* at [112], duress does not require that the victim was "psychologically crippled"; nor does it require a finding that the victim was completely deprived of any free will.

[65] The "overborne will" formulation was used in this Court's decision in *Pharmacy Care (CA)* at [98]: see [21] above. We have already noted (at [23] above) the criticism of that particular passage. The Privy Council decision in *Attorney-General for England and Wales v R*, which the Supreme Court said had settled the law (in *Pharmacy Care (SC)*), used the phrase "compulsion of the will" (at [15]), adopting that term from the *Universe Tankships* case.

[66] When reference is made to Lord Scarman's judgment in *Universe Tankships*, it becomes clear that the term "compulsion of the will" is not intended to be synonymous with overbearing of the will in the sense described at [64] above. Lord Scarman put it this way at 400:

> Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical alternative.

[67] We adopt the *Universe Tankships* approach, given the approval it received (albeit indirect, by reference to *Attorney-General for England and Wales v R*) from the Supreme Court in *Pharmacy Care (SC)*. In assessing the "no reasonable

alternative" test, we adopt this Court's observation in *Pharmacy Care (CA)* at [96] that that test:

> … reflects Patrick Atiyah's suggestion that duress is ultimately concerned with "the permissible limits of coercion in our society", and "the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards" ("Duress and the Overborne Will Again" (1983) 99 L.Q.R. 353 at 356; and see [*Universe Tankships*]). Whether there was a reasonable alternative will then depend on all the relevant circumstances, including the characteristics of the victim, the relation of the parties, and the availability of professional advice to the victim.

Coercion in this case

[68] The consideration of whether there was coercion in fact focuses on the availability of alternatives. Other factors that are relevant to the analysis (see *Pao On v Lau Yiu Long* at 635) are whether the person said to have been coerced:

(a) Did or did not protest;

(b) Was independently advised (see *Pharmacy Care (CA)* at [96]); and

(c) After entering the contract, took steps to avoid it.

[69] We will consider these factors in turn.

Alternative courses

[70] The High Court Judge found that there were a number of alternative courses open to the trustees, namely:

(i) Finding a buyer either for the trustees' interest or the entire subdivision;

(ii) Buying out Mr Hastwell's interest in the subdivision;

(iii) Finding another manager.

[71] Ms Davidson took us through the evidence on each of these possibilities and submitted that none was more than theoretical or illusionary. We evaluate each in turn.

(i) Finding a buyer

[72] A proposed sale to an Invercargill investor had fallen through after Mr Hastwell rejected it. The Judge found that there had been no attempt by the trustees to find other buyers and no attempt to persuade Mr Hastwell to accept the Invercargill investor's offer, which was at a price close to the valuation obtained in October 1991. She said that, if the trustees wanted to bring an end to Mr Hastwell's continued involvement for greater remuneration, greater efforts to find a buyer ought to have been made. She rejected the contention that the subdivision was "hexed" (as Mrs McIntyre had described it).

[73] Ms Davidson said that, after the Invercargill investor's offer fell through, there were no expressions of interest by any party in buying the uncompleted subdivision. She said it was not reasonable for the Judge to suggest that the trustees should have made greater efforts to sell the subdivision which was, at the time, (to use her words) "a dog". She said it was not open to the Judge to hold, on the evidence before her, that a buyer could have been found.

[74] With respect to the Judge, we accept Ms Davidson's submission that there was nothing in the evidence to indicate that an attempt to find a buyer for the uncompleted subdivision in mid-2001 would have justified the effort. We consider that the trustees were entitled, on the basis of the fate of the Invercargill offer and the difficulties which were being experienced with the Council, to regard that possibility as not realistic, in that the return which could be expected was so far below the return likely to result from the completion of the subdivision as to make it unattractive. Mr Hastwell himself was of the view that there was unlikely to be any interest, given the difficulties with the Council.

(ii) Buying Mr Hastwell's interest

[75] The Judge said that the purchase of Mr Hastwell's interest was an option for the trustees if they had considered that to be the best course. She accepted that Mrs McIntyre was careful with her money and did not like financial risk, and that Mr Hastwell knew that Mrs McIntyre would be unlikely to want to buy his interest. However, having considered the value of other assets owned by Mrs McIntyre and the debt she had incurred in connection with the partnership, the Judge concluded that purchasing Mr Hastwell's interest was a commercial option which had to be considered in the context of what was a commercial venture.

[76] Ms Davidson described the Judge's conclusion as "fanciful". She said that Mrs McIntyre was using debt to finance her contribution to subdivision expenses, with the proceeds of sales being used to reduce her overdraft. She accepted that at times the account was in credit, but said that the loan facility remained until the last sections were sold in 2004. She said it would have been imprudent for Mrs McIntyre to increase her borrowing, given that she had only national superannuation and a war widow's pension as income to service any increased debt.

[77] We agree with the High Court Judge that, if the matter is looked at in purely commercial terms, the purchase of Mr Hastwell's interest may have been viable. We acknowledge that Mrs McIntyre was not experienced in commercial matters, was elderly and on a limited income, and was not comfortable with the increased financial risks to which she would have been exposed. That would have made this option unattractive to her. But the trustees' alternatives must include steps which could reasonably have been taken on a commercial basis, as the Judge found.

(iii) Changing the manager

[78] The Judge said that a further option available to the trustees was forcing a change of manager. She said that, while Mr Hastwell had decided against handing over the management to a resource management consultant, Mr Bacon, in April 2001, the trustees could have made greater efforts to ensure that he did. She said that

cl 10 of the joint venture agreement provided that Mr Hastwell's management could be revoked by agreement, and it was open to the trustees to accept Mr Hastwell's suggestion that he withdraw as a manager, rather than agreeing to pay additional remuneration.

[79] Ms Davidson said the attempt to pass over management to Mr Bacon failed, and when subsequently day-to-day management was passed over to a Mr Jones, Mr Hastwell could not let go. She said it was unfair for the Judge to say that the option of forcing a change of manager existed, given that both parties to the joint venture needed to agree to a change of manager, and there is nothing to suggest that Mr Hastwell would have done so.

[80] Mr Barkle said that a change of manager all but happened before the 11 May meeting, and subsequently there was a change of manager to Mr Jones. He said this showed this was a realistic option which could have been further explored by the trustees. The fact was that they considered it better to keep Mr Hastwell involved and motivated by increasing his remuneration, rather than forcing a change of management.

[81] We accept that both parties needed to agree to a change of manager, but we consider that further exploration of this course of action was an option available to the trustees. Mr Hastwell's point was that he wanted to be relieved of the burden of management so he could go sailing, and one way of achieving that was to relieve him of management responsibilities and engage another manager. We agree with the Judge that, on the evidence available, this option was not fully explored by the trustees and, given the availability of Mr Bacon and Mr Jones, it was not a possibility that could be ruled out without further exploration with Mr Hastwell.

Protest in this case

[82] As we noted earlier, there is nothing in the contemporary records or file notes which indicates that the trustees were coerced into agreeing to the realised basis of remuneration. There was no protest expressed at Mr Hastwell's behaviour. The explanation given for this, that it was necessary to keep Mr Hastwell onside, did not

convince the High Court Judge and does not convince us. While reaction to illegitimate pressure may require a subservient response, we would not expect to see similar reticence about expression of real views on internal file notes which are not being shared with the party exerting the illegitimate pressure. The file notes contain no suggestion that the trustees felt coerced in this case.

Independent advice

[83] Mr Smythe, an experienced property solicitor, was a trustee and also provided legal advice to Mrs McIntyre and to the trustees after they took over Mrs McIntyre's interest in the joint venture. Ms Campbell was also able to bring her experience of resource management matters to bear.

[84] In *Pharmacy Care (CA)* at [94], this Court identified "the characteristics of the victim" as a relevant factor in assessing coercion. In the same case at [104], the Court said the fact that the alleged victim's lawyer had not been influenced by the threatening conduct was a factor in the Court's finding that that conduct had not caused the alleged victim to enter into the contract that was in issue in that case.

[85] In this case, Mr Smythe was obviously aware of the binding nature of Mr Hastwell's contractual obligations and able to advise Mrs McIntyre. He was not bullied by Mr Hastwell. And his contemporaneous file notes or communications with his client do not support the proposition that he was coerced by Mr Hastwell's conduct into agreeing that the trustees would accept the variation agreement.

Efforts to avoid the contract

[86] We will deal with this issue later, when we come to consider affirmation. For present purposes, it can be said that no effort was made to avoid the contract on the grounds of duress until legal proceedings were issued after Mr Hastwell's death.

Overall evaluation: coercion

[87] The High Court Judge concluded that the trustees agreed to Mr Hastwell's claim for more remuneration not because there was no alternative, but because it was the best outcome available. She emphasised the fact that both Mr Smythe and Ms Campbell were experienced in their fields and, in Mr Smythe's case, a lawyer of considerable experience.

[88] We have taken a different view on one of the alternatives which the Judge said was available to the trustees, but we agree with her overall assessment that the agreement to pay greater remuneration was because this was seen as the best way of bringing the joint venture to completion, rather than because there was no option available to the trustees.

[89] We see it as significant that it was the independent trustees, Mr Smythe and Ms Campbell, who persuaded Mrs McIntyre to agree to the increased remuneration at the 11 May meeting. This was not a situation where Mrs McIntyre was cowed into acceptance: on the contrary, she was resisting it.

[90] The assessment made by Ms Campbell and Mr Smythe was realistic in the circumstances: Mr Hastwell was difficult and sometimes unpleasant, but his intimate knowledge of the subdivision and the Council's requirements was important, and it was obvious that he was very unhappy at how the delays in the completion of the subdivision had impacted on the attractiveness of the remuneration to which the parties had originally agreed.

[91] In short, we find that the trustees agreed to the change in remuneration because they chose that as the best option, not because they were coerced into doing so by Mr Hastwell's conduct.

(c) Affirmation

[92] Our conclusions on earlier issues make it unnecessary to deal with this aspect in detail, but it was fully argued and, in case a further appeal is being considered, we set out our view.

[93] The High Court Judge did not specifically deal with affirmation, given her conclusion that there was not economic duress. However, she did observe at [203] that the trustees had ample opportunity to back out of the variation agreement.

[94] Ms Davidson said that steps taken by a victim while still under the influence of pressure from another party do not amount to affirmation: *Haines v Carter* at [116]. She said that any steps taken by the trustees prior to the calculation of the balancing payment at the conclusion of the joint venture fell into that category, and could not be considered to be affirmation. She said that when the balancing payment came to be calculated, the trustees did not agree to the proposed calculation, and thus they had not affirmed the variation agreement.

[95] Mr Barkle argued that the commercial imperative of keeping Mr Hastwell involved had disappeared well before the time came for the calculation of the balancing sum in 2004. He said that Mr Hastwell had relinquished management in December 2002, and steps taken after that should be seen as affirmation. Similarly, he said that steps taken after the delivery of titles for the fourth stage of the subdivision should be seen as affirmation, because once titles were delivered, the trustees' reliance on Mr Hastwell disappeared.

[96] Mr Barkle pointed out that even when the parties were in dispute about the calculation of a balancing payment, the issues which the trustees sought to place before the arbitrator (an arbitration was initially planned but did not proceed) did not make any reference to duress. So their resistance to the calculation of the balancing payment could not be seen as an assertion of duress. The first time duress was explicitly raised was after Mr Hastwell's sudden death in June 2005.

[97] In his article "Duress and the Overborne Will Again" (1983) 99 LQR 355, Atiyah said that the law of contractual duress requires society to face the difficult question as to the permissible limits of coercion. He added at 356:

> Similarly, the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards, raises very difficult questions of policy.

[98] This case exemplifies those difficulties. Mr Hastwell continued his management of the joint venture for a considerable period after the 11 May meeting at which the increased remuneration was agreed to, presumably on the understanding that the variation agreement meant what it said and that the additional remuneration would be paid.

[99] The steps which were taken by the trustees – allocating the remuneration sections to Mr Hastwell, paying the hourly rate which was ultimately agreed for his work after September 2001 and not at any stage protesting that they had acted under duress until after Mr Hastwell had died – should be seen as affirmation.

[100] As this Court noted in *Pharmacy Care (CA)* at [112], a failure to take timely steps to avoid the variation agreement, said to have been agreed to under duress, amounts to affirmation. We are satisfied that, when the conduct of the trustees over the period after the 11 May 2001 meeting until the duress issue was first raised in July 2005 is considered, it is inevitable that any duress claim would have been found to fail on the basis that the impugned variation agreement had been affirmed.

ISSUE 2: THE BALANCING PAYMENT CALCULATION

[101] The second issue on appeal concerns the calculation of the balancing payment that was agreed to be paid under the joint venture agreement so that each party received from the subdivision an equal number of sections by value.

The relevant provisions

[102] Clause 7 of the transfer agreement provided for the basis on which each party would be rewarded for participating in the joint venture:

> Upon subdivision of the land McIntyre shall be entitled to one half of the allotments equal to one half of the value of the whole of the land as at the date of subdivision and included in McIntyre's half shall be the allotment upon which stands the present house and it is agreed between the parties that it is their intention that each of the parties shall receive a fair apportionment of the land both as to value and as to quality of allotment.

[103] The parties did not jointly market the sections created by the subdivision. Instead, cl 8 of the joint venture agreement provided for all sections (with one exception, which is not relevant for present purposes) to be allocated to the parties by random ballot. Each marketed and sold his or her sections separately. The section allocated to Mr Hastwell as remuneration was excluded from this regime.

[104] Of course, the sections varied in value, and in order to ensure that the objective set out in cl 7 of the transfer agreement was achieved, it was necessary to have an adjustment mechanism. Clause 9 of the joint venture agreement provided as follows:

> Once title to all lots has been issued then the value (as fixed for the purposes of reserve contribution) of lots allocated to each party shall be totalled (with the exception of one lot for Hastwell as set out in the preceding clause of this Agreement) and any disparity between the two sums shall be corrected by a cash adjustment between the parties to take place only upon receipt of funds from sale of the first of any lots held in joint title or disposal of the largest lot.

[105] The parties chose to use as the method of attributing value to each section the value which was fixed for the purposes of a reserve contribution. When reserve contributions came to be paid (the Council now refers to them as development impact levies, but we will use "reserve contribution" in conformity with the joint venture agreement), a local valuer, Mr Bowie, was engaged to value the sections for that purpose. As it transpired, the rules for calculating reserve contributions allowed for one of the lots of the subdivision to be excluded. The logic for this was that the reserve contribution would be payable only in respect of newly created lots.

Mr Bowie excluded lot 13, which was the lot on which Mrs McIntyre's house was located, as he thought this should be considered to be the original lot.

[106] Mr Bowie valued lots 11 to 19 inclusive at a total value of $653,000, which meant that the reserve contribution (set at 5.5 per cent of the assessed market value) amounted to $35,915 including GST. In his written valuation, each lot was given a value (these vary between $65,000 and $100,000) except lot 13, in respect of which the word "Excluded" was entered instead of a dollar value.

[107] The trustees assert that the effect of Mr Bowie's valuation is to attribute a value of zero to lot 13, which therefore becomes its value for the purposes of cl 9. The respondents argue that cl 9 cannot achieve its obvious purpose unless a value equal to the valuation which would have applied to lot 13 if it were not excluded from the reserve contribution is attributed to that lot. They say it is wrong to say lot 13 had a valuation of zero: it was not valued at all because Mr Bowie excluded it from his valuation. They engaged Mr Bowie to assess the value which would be given to lot 13 for reserve contribution purposes and he valued it at $105,000 including GST.

[108] The issue before us is whether the calculation required by cl 9 should be undertaken on the basis that the value of lot 13 is zero or on the basis that its value is $105,000. The Judge concluded that the latter was correct. She said that it could not be presumed that Mr Hastwell's lawyers or the parties knew at the time the joint venture agreement was entered into that the lot on which Mrs McIntyre's house stood would be excluded for the purposes of reserve contribution. This was because the Council's position was not clear at the time. We would add that it would also not have been known that Mr Bowie would choose lot 13 as the one to exclude from the reserve contribution valuations. The joint venture agreement did not provide this, and nor did the Council's requirements.

[109] The Judge noted that if the parties had intended to exclude the section on which Mrs McIntyre's house stood from her half share for the purposes of cl 9, the clause could have provided for this, but did not. She said that attributing a valuation to lot 13 of $100,000 (the calculation appears to have been done before the actual

valuation was obtained) was necessary to achieve the objective of cl 9, which was a fair apportionment in value between the parties.

[110] The Judge rejected the respondents' argument that subsequent communications between Mr Hastwell and Mr Smythe were consistent with the proposition that lot 13 should not be given a zero valuation for the purposes of cl 9. She said that the subsequent evidence, if relevant (on the basis outlined in the decision of the Supreme Court in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277), did not assist because it was not evidence of what the parties intended at the time the joint venture agreement was entered into, but rather of later interpretations.

[111] Ms Davidson criticised the Judge's decision because she said it amounted to putting words into cl 9 which were not there, requiring a "notional" valuation be given to lot 13. She said unless rectification of the contract was sought, the Judge was not entitled to do this.

[112] Our assessment of this issue coincides with that of the Judge. The purpose of cl 9 is clear and that purpose cannot be achieved if lot 13 is not given a value for reserve contribution purposes. The fact that the Council does not require that all lots be assessed for reserve contribution does not create a windfall for the owner of the property which is excluded (bearing in mind that the choice of lot 13 was relatively arbitrary). While it may have been preferable procedurally if the respondents had sought rectification in the High Court, we are satisfied that the Judge's interpretation is not an illegitimate addition to the clause, but rather a legitimate interpretation of the words "value for reserve contribution purposes".

[113] We therefore uphold the Judge's decision on this aspect of the case.

Result

[114] We dismiss the appeal.

Costs

[115] We award costs to the respondents for a standard appeal on a band A basis and usual disbursements.

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