16 JP NSP PWD

duress & undue influence exercised on the part wife to enter property deed.

legal advice not a defense on the facts.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-002993

BETWEEN	CHRISTINE MARGARET GEMMELL Plaintiff
AND	KENNETH WILLIAM HARLOW Defendant

Hearing: 7, 8, 9 March 2006

Appearances: A B Lendrum & J Taylor for Plaintiff
G L Harrison for Defendant

Judgment: 4 July 2006

JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 4 July 2006 at 12pm pursuant to Rule540(4) of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors

S M Palmer, Epsom for Plaintiff
Bennett Vollemaere, Auckland for Defendant

[1] On 30 July 2001 Kenneth Harlow and Christine Gemmell who had, except for eleven months apart between December 1998 and November 1999, lived together since January 1992, entered into a deed governing their property and displacing the Property (Relationships) Act 1976 which as from 1 August 2001, two days later, gathered in all de facto relationships including theirs.

[2] Mr Harlow secured his sole interest in their St Heliers home and his corporate interests. Ms Gemmell, who with her daughter was dependent on Mr Harlow, secured her interest in her parents' property in Gisborne; and was to obtain, if they separated before August 2004, $20,000 and $40,000 if they separated afterwards. She was also to benefit by a $75,000 bequest.

[3] On 12 April 2004, when Mr Harlow required Ms Gemmell and her daughter to leave the home by 1 June, before he returned from overseas, their relationship effectively ceased. Mr Harlow left Ms Gemmell a $20,000 cheque and required her to sign a deed of release. She remained in the home and when she and her daughter left on 30 September 2004 Mr Harlow contributed $6,000 towards her future rent. She did not execute the release or cash the cheque.

[4] Ms Gemmell now contends that the deed did not fairly accord to her what she was then in equity entitled to and deprived her of rights just about to accrue to her under the 1976 Act. She signed the deed, she contends, under duress or undue influence. Mr Harlow abused her psychologically, she contends; he intimidated and harassed her. He told her, she says, that unless she signed the deed their relationship would be at an end and he would evict her and her daughter.

[5] Ms Gemmell seeks a declaration that the deed is void and, assuming that it is, a determination of her rights under the 1976 Act. That second question must await the answer to the first, which is all that I am asked to resolve.

Context

[6] When Mr Harlow and Ms Gemmell met in 1988 she was living in Gisborne with her three children. He was living in Cleveland, Auckland, with his then wife

and their children. Until 1992 they continued their relationship at a distance. In January 1992 they began living together in Auckland; as from August in the home Mr Harlow then purchased in St Heliers. At first all three of Ms Gemmell's children lived with them. They were then aged 15, ten and six. Mr Harlow's children, then aged ten and seven, remained with their mother and visited each second weekend.

[7] In December 1998 Ms Gemmell and her youngest child, her younger daughter, then the only child still living with them, left the home and for the next 11 months lived elsewhere in St Heliers. In November 1999 she and Mr Harlow resumed living together. Ms Gemmell contends that Mr Harlow approached her. He says that Ms Gemmell's daughter left him a letter in his letterbox asking to be able to return. The fact remains that they did reconcile. They remained together for the next four years.

[8] Before that happened, as Ms Gemmell soon discovered, Mr Harlow had taken advice from his solicitor, Mr Bennett. Mr Harlow was only prepared to resume the relationship, if they entered into an agreement governing their property and excluding legislation then being promoted to govern property in de facto relationships. Had that been passed into law Ms Gemmell would have acquired rights that Mr Harlow, having experienced one division of property, did not wish to be exposed to.

[9] In October 1999 Mr Harlow's solicitor, Mr Bennett, prepared an initial draft confined, it appears, to confirming that they were each to retain their own property and that neither was to have any interest in, or any expectation as to, that of the other. Ms Gemmell was to confirm that during their relationship she had done nothing to assist Mr Harlow to acquire, preserve or enhance any asset of his, and had no such intent.

[10] Mr Harlow told Ms Gemmell that before signing the agreement she must first take legal advice. She saw two barristers before finally engaging Ms Wagner, the barrister still advising her when she signed eventually the agreement she now wishes to impugn.

[11] The draft deed, as it had become when Ms Gemmell first saw Ms Wagner, offered her $15,000, should she and Mr Harlow separate. Otherwise it held to the position that Mr Harlow was to retain his property and she was to retain hers.

[12] On 13 December 1999 Ms Wagner wrote to Mr Bennett. She said that Ms Gemmell was 'reasonably happy'. She herself had questions. Mr Harlow's property and corporate interests, she pointed out, were not listed. When set against the length of their relationship, and Ms Gemmell's non-financial contribution, she questioned also how adequate Mr Harlow's offer of $15,000 was.

[13] Quite how Mr Harlow reacted to this letter is in dispute. He contends that he remained even, Ms Gemmell that he became very angry. Ms Wagner has a file note that Ms Gemmell then said that he became 'completely ballistic'. Nothing then happened definitively until July 2001. In early 2001 Ms Wagner asked Mr Bennett what Mr Harlow intended and he said that he lacked instructions. What then occurred is best recounted in a letter, dated 22 June 2001, sent by Ms Wagner to Mr Bennett when she returned to him a further version of the agreement, this time signed by Ms Gemmell.

[14] In her letter Ms Wagner stated that Ms Gemmell had signed the agreement under duress:

> Early this year your client presented mine with a further de facto property agreement, which I assume you prepared, which he 'asked' her to sign. What in fact he advised was that if she had not signed it before he left for an overseas trip in May 2001, he would in effect evict her from the home on his return.
>
> After taking advice, and it would be fair to say against my advice, my client has signed the agreement, with some amendments. The agreement is enclosed in duplicate for execution by your client.
>
> My client has asked me to convey that she signed the agreement very reluctantly. She feels that she had very little option but to sign it, indeed was under duress to sign it, given the threat made by your client to mine. She had little doubt that your client would act on his ultimatum if she did not sign the agreement.
>
> Further, my client does not believe the agreement represents her legal entitlement to the property nor that it fairly reflects what she contributed to the relationship.

[15] On 12 June 2001 Ms Wagner had obtained an indemnity from Ms Gemmell recording that she had advised Ms Gemmell not to sign the agreement and that, to advise Ms Gemmell whether the agreement accorded to her what she was entitled to, she needed more information.

[16] In a letter dated 13 July 2004 Mr Bennett told Ms Wagner that 'under the circumstances' Mr Harlow had decided not to sign the agreement. Instead Mr Bennett set out in the letter, as Mr Harlow had instructed him to do, the features of the relationship that Mr Harlow regarded as justifying the agreement. He and Ms Gemmell had lived separate lives. He had met the outgoings. And, when they had first separated, she had taken a car and household items and appliances with her.

[17] As to duress, Mr Bennett stated in essence what his instructions then were. In a letter dated 28 June 2001, Mr Harlow had said this:

> My comments to Christine regarding the agreement was that because of the law change (i.e., the introduction of the Supplementary Order Paper No 21 by the incoming Labour administration, widening the Matrimonial Property Act to include de facto couples) I said that unless we could agree to the signing of agreement, she would need to find other accommodation. I didn't say that it had to be signed by May 2001 and didn't say she would be evicted.

[18] The result was a stalemate. But on 23 July 2001 that seemingly dissolved. Mr Harlow and Ms Gemmell signed a letter, addressed to Ms Wagner and Mr Bennett, in which they said:

> Please be advised that we the undersigned, Christine Margaret Gemmell and Kenneth William Harlow, do both agree that the De Facto Property Agreement accompanying this letter is deemed to be fair and reasonable.
>
> Christine and Ken have agreed, through mutual consensus, that the distribution and entitlements of this agreement are acceptable to both parties.

[19] Mr Bennett received this letter. Ms Wagner says that she did not. There was no agreement, so far as Mr Bennett can recall, accompanying the letter. Ms Gemmell says that she did not prepare the letter and that Mr Harlow presented it to her. He says that he did not prepare it either and that it must have been prepared by Ms Gemmell or her advisers. It is against that highly ambiguous background that on 26 July Ms Gemmell signed the agreement now in issue.

[20] This agreement, in contrast to the last, increased the cash sums to which Ms Gemmell became entitled on separation: $20,000 before August 2004 and $40,000 after. Mr Harlow also undertook to make a bequest to Ms Gemmell of $75,000; a bequest that may have been made during the relationship but no longer subsists.

[21] On this occasion Ms Gemmell took advice not from Ms Wagner, who was overseas, but from Ms Crawshaw, a solicitor acting for her. Ms Gemmell, Ms Crawshaw recalls, told her that to continue in her relationship with Mr Harlow, to continue to live in the home with him and her daughter, she had to sign the agreement. Mr Harlow had told her so. She was adamant that she had no choice.

[22] Like Ms Wagner, Ms Crawshaw had Ms Gemmell give her an indemnity. It said this:

> 1. I am under duress to sign the deed, as Ken has informed me that I will have to leave the home if I do not do so.
>
> 2. I have been informed that if Ken and I separated after February 2002 I could be entitled to a greater share of Ken's property than I am receiving under the deed.
>
> 3. Even if we separated prior to February 2002, under existing law I could possibly receive a greater share of Ken's property.

[23] When Ms Crawshaw passed the signed agreement to Ms Wagner's secretary, to be sent in turn to Mr Bennett for Mr Harlow's signature, she noted that Mr Bennett was not to be sent a copy of the indemnity. Ms Crawshaw cannot now remember why that was. The indemnity was to protect her and her then firm of solicitors. It was not a document to which Mr Harlow was privy or entitled. Ms Crawshaw does not recall Ms Gemmell instructing her to withhold it. But, she accepts, Ms Gemmell was anxious that Mr Harlow have his agreement uncomplicated by duress. That may well have been why she was reticent.

[24] In April 2004 Mr Harlow once again gave Ms Gemmell a letter asking her to leave the home, this time by 1 June 2004. On 8 May, when he went overseas, he asked her to be out by 30 May. He left her a cheque for $20,000 and a deed of release that he had signed confirming that their relationship was to cease by 30 May 2004. Ms Gemmell chose not to sign the release, or to cash the cheque. When she

left in September 2004 she received instead from Mr Harlow $6,000 towards her future rent. Soon after, she launched this action.

Proposed third cause of action – unconscionable bargain

[25] Two issues arose when the hearing began, the first of which was as to an amended statement of claim filed for Ms Gemmell that morning, seeking to rely, as a third cause of action, on the doctrine of unconscionable bargain. That called for leave under R 187(2) or in the last resort R 11, but there was no application on notice under either and the application made orally was opposed.

[26] The doctrine of unconscionable bargain, it was contended for Mr Harlow, in contrast to the doctrines of duress and undue influence underpinning the two existing causes of action, called for his and Ms Gemmell's entitlements under the deed, and their entitlements at law or in equity at the date of the deed, to be compared. Had it been pleaded from the outset, he would have called evidence to show that Ms Gemmell had got all that she was entitled to.

[27] I deferred deciding this application until after I had resolved whether Ms Gemmell succeeded on either or both of her two existing causes of action. It could only have become pertinent if she failed in both and there remained this complication. When Mr Harlow and Ms Gemmell entered into the deed, she had not taken any advice as to her entitlement, then or prospectively. He may not have done so either. Evidence now as to what those entitlements might then have been would be, in her case certainly but perhaps also in his, an exercise in retrospect anticipating the second phase of this case.

[28] The true threshold issue, I then thought and think still, is more accurately captured in the two existing causes of action. Ms Gemmell's complaint is not just that she was denied what she was entitled to. It is that she was denied even the chance to take fully considered advice as to what her entitlement was.

Hearsay and opinion objection

[29] The second preliminary issue was raised for Mr Harlow. The affidavits filed for Ms Gemmell failed, it was contended for him, to comply with R. 510(1)(d)(i). They were filled with hearsay, and unqualified opinion founded on hearsay.

[30] This application too was made orally and, I said, ought to have been on notice. Instead, because Mr Harlow's counsel had required it, all Ms Gemmell's witnesses had come from a distance. In deciding the case, I said I would review what each witness could say admissibly on their entire evidence.

[31] The hearsay and unqualified opinion in Ms Gemmell's affidavits, of which there was an appreciable amount, supplemented orally, went principally, I found, to Ms Gemmell's state at the time when she signed the agreement, and why that was. It was partly hearsay as to the latter, but not the former, and as to the former it has a definite place in the evidence as a whole.

Impugned deed

[32] The deed into which Ms Gemmell and Mr Harlow entered and which Ms Gemmell wishes now to impugn is, and was intended to be, akin to an agreement under s 21 of the Relationships (Property) Act 1976 and shares almost all of its essential features.

[33] In the deed Mr Harlow and Ms Gemmell confirmed, first of all, that they intended to live together, 'to cohabit', at the St Heliers address; that Mr Harlow was to pay the general housekeeping expenses and that Ms Gemmell was to be responsible only for her private telephone account. Any work she carried out in the house was not to be regarded as creating for her any beneficial interest (cls 3, 4, 5).

[34] Ms Gemmell acknowledged that Mr Harlow's property, set out in an attached schedule, most pertinently the St Heliers home, was absolutely his and he acknowledged that her scheduled property, most pertinently her interest in her parents' Gisborne home, was absolutely hers (cls 1 and 2). All property they had

acquired at the date of the agreement for their domestic use was to be held in common in unequal shares according to their contributions; so too any otherwise acquired jointly (cls 8, 10). Any acquired individually was to remain separate, as also any proceeds of sale (cls 6, 7 and 9).

[35] If they lived together beyond 1 August 2001 Mr Harlow was to pay to Ms Gemmell $20,000 and, if they continued to live together after August 2004, $40,000; also he was to make a bequest to her of $75,000 (cls, 16, 17).

[36] The intent of the deed was to bring to an end any claim that either might have against the other in equity at law, by statute or otherwise and was to bind their executors (cls 11, 12). Each was to execute any documents necessary to give it better effect (cl 15).

[37] Mr Harlow's signature was witnessed by Mr Bennett and Ms Gemmell's by Ms Crawshaw. Neither was called on to certify, as s 21F(5) requires of lawyers witnessing s 21 agreements, that he or she had explained the effect and implications of the agreement, but cl 13 provided:

> Each party acknowledges that prior to the execution of this deed he or she has had proper independent legal advice as to its effect and implications.

Gemmell case

[38] Ms Gemmell's case, as pleaded in duress and undue influence, rests on a single basis. Mr Harlow, it is her case, coerced her to sign the deed. He psychologically abused her by intimidating and harassing her. He threatened to bring their relationship to an end. He threatened to evict her and her daughter from their home.

[39] In duress, Ms Gemmell emphasises, Mr Harlow so coerced her that she was left with no practical choice but to enter the agreement. Just how acute her predicament then was, and the state to which she was then reduced, she contends, is apparent from the evidence of her friends and advisers. It is confirmed in the retrospective psychological opinion evidence of Dr Ratcliffe. The advice that Mr

Harlow insisted she take could only ever have been, she says, beside the point. The only function that served was to mask the reality.

[40] In undue influence, Ms Gemmell emphasises rather Mr Harlow's ability to turn her to his will as a natural incident of their relationship, then of 12 or more years, in which he had played, as she says invariably, the dominant part. As well as being financially dependent on him, she was dependent emotionally. Knowing that, he pressed her into an agreement serving his interests, but patently against hers.

[41] The deed she consequently entered into, it is her case, was not one to which she acceded in any true sense. It did not accord to her what she was entitled to in equity in July 2001 and deprived her of those rights about to accrue to her under the Property (Relationships) Act 1976. It would be unconscionable for Mr Harlow to be able to rely on it.

Harlow case

[42] From the moment they began living together in 1992, it is Mr Harlow's case, he provided Ms Gemmell with a home, and those of her children who lived with them, and he supported them. From the outset he made it clear, he says, that the home was to remain his and was to pass to his own children. When Ms Gemmell offered to contribute $10,000 he refused. His business interests remained quite separate.

[43] When they resumed living together in 1999, having been apart for eleven months, it is his case, there was the distinct prospect that the matrimonial property regime might soon extend to such relationships as theirs and, having experienced one such division of property already, that was not a risk to which he wished to be exposed. He was only prepared to resume living with Ms Gemmell if she accepted that to be so and entered with him into a definitive agreement.

[44] The process of negotiation, it is his case, was lengthy. Between November 1999 and July 2001 the agreement evolved through two drafts or more and, at his urging, Ms Gemmell took legal advice. She was advised firstly by Ms Wagner and

finally by Ms Crawshaw. Thus the deed they entered into was at arm's length and fully considered; and a term was that he was to meet her legal fees and he did.

[45] The reality that he was not prepared to remain in the relationship unless Ms Gemmell entered into the deed, and on terms acceptable to him, did not mean, he contends, that he coerced her illegitimately. Contracting out agreements before relationships begin, or resume, are commonplace. Nor was it unreasonable for him to say, he contends, that if they could not agree she should leave the home. He had title and she had no beneficial interest or any right in law to occupy it.

[46] Rather, it is his case, Ms Gemmell chose to enter the deed because it accorded to her all that she was entitled to after July 2001 as well as before and gave her certainty as to the future. But even if she came to it reluctantly, she did so willingly because she retained, whatever she may have said then, or may say now, other practical choices. She could, as she did in 2004, have accepted that their relationship was at an end. If she was anxious about where she and her daughter were to live initially, and believed that she had been coerced, she could have obtained, as she did in 2004, an occupation order under the Domestic Violence Act. She could have pursued, as she has now, a claim against him, then on the principles well settled in *Lankow v Rose* [1995] 1 NZLR 277, CA.

[47] Instead Ms Gemmell chose to enter the deed on the faith of which, Mr Harlow says, he continued in the relationship. But she ensured by her indemnity to Ms Crawshaw, which was never disclosed to him, that she had the ability to erode the agreement later. That is unconscionable.

Duress and undue influence

[48] The law as to duress and undue influence in New Zealand is in main outline mapped out definitively in *Attorney General for England and Wales v R* [2004] 2 NZLR 577 (PC): *Pharmacy Care Systems Ltd v Attorney General* 17 PRNZ 308, SC. The case in the Privy Council concerned English law but, as Tipping J had confirmed in the Court of Appeal, that law is nearly, if not completely, identical to the law in New Zealand: *Attorney General for England and Wales v R* [2002] 2

NZLR 91, 104 (CA).

[49] The two essential features of duress, Lord Hoffman confirmed in the Privy Council at para [15], speaking for the majority, are as Lord Scarman stated in the *Monrovia* case: first 'pressure amounting to compulsion of the will of the victim' and secondly, 'the illegitimacy of the pressure', both to be assessed against the fact that decisions are almost invariably taken under pressure and that, even when pressure appears overwhelming, an agreement can still be genuinely consensual.

[50] Whether pressure is legitimate or illegitimate, Lord Hoffman confirmed also, at para [16], is to be assessed having regard to its nature and 'the nature of the demand which the pressure is applied to support'. Pressure will be illegitimate if it is unlawful but can be illegitimate even if it is lawful: a blackmailer's threat to disclose may be lawful, for instance, but not the demand which it enforces.

[51] In that case also, in the Court of Appeal, Tipping J, at 111, para [62], said that pressure, lawfulness or unlawfulness apart, can also be illegitimate if the one pressed is left without any other practical choice:

> Illegitimate pressure may amount to duress even if there is a practical choice, but the absence of practical choice may suggest the pressure is illegitimate. Illegitimacy of pressure can sometimes arise from conduct which is lawful in itself, albeit it will of course be easier to demonstrate illegitimacy of pressure if it derives from conduct which is unlawful in itself.

Ultimately, Tipping J said, 'the nature of ... any alternatives reasonably open ... will be of major importance'.

[52] Undue influence, Lord Hoffmann said at para [21], is founded on the same principle as duress:

> Like duress at common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. Undue influence has concentrated in particular upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other.

[53] In *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773, the decision of the House of Lords on which Lord Hoffman founded his own analysis,

Lord Nicholls described at para [11] how widely the principle can apply:

> The principle is not confined to cases of abuse of trust and confidence. It also includes ... cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand ascendancy, domination or control on the other.

[54] So too, the burden of showing undue influence in fact, though it rests on the proponent, can be discharged, Lord Nicholls made clear at para [13], by recourse to the widest range of considerations:

> The personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

[55] Moreover, as Lord Nicholls then said, the proponent can have the benefit of a presumption that shifts the persuasive burden. As summarised by Lord Hoffman, at para [22], Lord Nicholls' reasoning was this:

> ... if the transaction is one which cannot reasonably be explained by the relationship, that will be prima facie evidence of undue influence. Even if the relationship does not fall into one of the established categories, the evidence may show that one party did in fact have influence over the other. In such a case, the nature of the transaction may likewise give rise to a prima facie inference that it was obtained by undue influence.

[56] The presence or absence of legal advice, Lord Hoffman continued to say at para [23], may or may not be to the point. A transaction in which legal advice is absent may involve no unfair exploitation. Conversely, as he said:

> The transaction may be such as to give rise to an inference of undue influence even if the induced party was advised by an independent lawyer and understood the legal implications of what he was doing.

[57] I need finally to refer to *Harrison v Harrison* [2005] 2 NZLR 349, CA, which concerned the setting aside of a contracting out agreement, entered into just before a married couple resumed living together after a time apart, not on account of duress or undue influence but under s 21J of the Property (Relationships) Act 1976.

[58] The issue s 21J poses, the Court of Appeal said at para [96], is not identical to

those posed at law or in equity when coercion and patent unfairness are contended to vitiate a contract beyond the 1976 Act. It is whether 'giving effect to the agreement would cause serious injustice.' And the Court, in deciding that there was no 'serious injustice', contrary to this Court on appeal from the Family Court, reached two conclusions germane to this case.

[59] The second of those conclusions, to begin there, was that, even if the wife obtained less than she might have been entitled to under the 1976 Act, that did not of itself make the agreement 'seriously unjust'. The agreement was not principally, like those entered by married couples after they separate, to compromise rights that had already accrued under the 1976 Act. It was rather, before reconciling, to contract out of entitlements about to accrue.

[60] Rights in such an agreement, the Court held, could only be compared with those in the 1976 Act insofar as such rights had already accrued and whether the contrast showed 'serious injustice' would depend on the extent to which such rights were relationship or pre-relationship rights. Future rights, by contrast, could not be tested against the 1976 Act because the whole point of the agreement was to contract out.

[61] In assessing whether the wife had entered the agreement under unfair pressure, the Court took as commonplace, at para [84], that a threat to the underlying relationship is often the very basis on which such agreements are entered into. The 1976 Act, the Court held, answers that reality by providing 'substantial protection' in the 'requirements for legal advice and certification.' As long as they have been adhered to they will answer generally any later complaint of undue pressure.

[62] As William Young J said, speaking for the Court, at para [90]:

> It will almost always be the more affluent party who wants a contracting-out agreement and it will be often the case that the other party only signs the agreement given the implications for the relationship if he or she declines to do so. No doubt Ms Marshall did not particularly wish to sign the agreement. On the other hand she did wish to reconcile with Mr Harrison and, because this was dependent on them both achieving, via the agreement, certainty as to property rights, she can be taken to have 'wished to achieve [that] certainty'.

[63] This analysis, William Young J acknowledged at para [91] 'might be thought to be a little bleak and emotionless.' But it was called for, the Court considered, by the statute. To set aside an agreement, on the faith of which the one who had pressed for it had resumed the relationship, would be destabilising, the Court held, and could be unjust. William Young J said at para [112]:

> The consequence is that, at least for contracting out agreements, 'serious injustice' is likely to be demonstrated more often by an unsatisfactory process resulting in inequality of outcome rather than mere inequality of outcome itself.

[64] In contending that she had entered the agreement under undue pressure the wife relied, principally, on the fact that her lawyer, lacking full disclosure, could not advise her and had advised her not to sign. Also, she relied on the fact that she and her husband had reconciled before the agreement was entered into and that, when she did eventually sign the agreement, she struck from the recitals, on her lawyer's advice, the word 'fair'.

[65] The Court of Appeal was not persuaded. It thought none of these to be symptoms of any pressure that was undue. Rather, William Young J said, at para [115], they were 'generally of a kind which is likely to be present in many, if not most, situations in which contracting-out agreements are entered into'.

[66] These conclusions of fact and law have their place in, but cannot be translated literally to this present case. However close Mr Harlow's and Ms Gemmell's agreement is to a s 21 agreement, it still lies beyond the 1976 Act; and the test, 'serious injustice', a test deliberately heightened recently, stands higher than those posed at law or in equity where a contract is said to be vitiated by coercion and unfairness. Even in such a case as this, the law as to duress and undue influence is not to be seen as assimilated and complementary.

[67] The facts of that case, moreover, differ materially from those of this. The marriage, to which the husband had brought the assets, had been shaky and was of short duration but was soon to become one requiring equal sharing; the husband's precondition, before reconciling, was understandable: para [86]. The wife's predicament lay in deciding whether to accept the precondition and that had not been

aggravated by the husband. Moreover, the agreement accorded to the wife rights broadly consistent with her then accrued rights: para [14].

[68] One issue here, by contrast, is what significance ought to attach to the length of Ms Gemmell's and Mr Harlow's relationship before they separated, and after they reconciled but before they entered the agreement. The latter alone was 18 months. But in issue principally, is not so much whether Mr Harlow could legitimately require Ms Gemmell to enter into an agreement. It is whether, relying as Ms Gemmell says on his dominant part in their relationship, he so coerced her that she entered the deed blindfold, subscribing to the fiction that she had been fully advised.

Conclusions

[69] In this the first phase of this case, I am not asked to decide what rights had accrued under *Lankow v Rose* to Ms Gemmell in July 2001, when she entered the deed, or what rights might have accrued to her within two days under the 1976 Act, or later. Those questions are reserved for the second phase of the case, should there be any.

[70] Despite that, and despite the fact that Ms Gemmell took no informed advice as to her rights before entering the deed, I am invited to conclude that the deed denied her significant existing and future entitlements. And that could, I accept, go to the threshold issue I am asked to decide, whether the deed she entered was vitiated by duress or undue influence. But the evidence does not equip me to go that far. As to this aspect, it is impressionistic at best.

[71] What I am able to say, however, and it will suffice, is that in July 2001, leaving aside their months apart in 1998 – 1999, Mr Harlow and Ms Gemmell had been together for almost 13 years and Ms Gemmell must then have had some enforceable expectation on the *Lankow v Rose* principle. She might also have acquired equal, perhaps better, rights under the 1976 Act two days later.

[72] Theirs may have been an unusually constricted relationship. They may have shared neither interests nor friends. To a pronounced degree their relationship may

have been sexual and little else. But they did in a conventional sense cohabit. Mr Harlow supported Ms Gemmell and those of her children who were with them. She kept the house and for a time assisted him in one of his business interests. They shared holidays together, including holidays overseas, as late as 2003. Also, after they entered the deed, they did remain together until mid 2004.

[73] Mr Harlow may have purchased the St Heliers home out of pre-relationship capital and it may have been his income on which they lived. But in the years 1992 – 2001 the St Heliers property appreciated significantly. In 1992 Mr Harlow purchased it for $430,000. In June 2001 it was worth $900,000. Leaving aside any claim that Ms Gemmell might have against any other asset of his, her expectation as to the house could arguably well have exceeded what the deed conditionally accorded to her.

[74] Yet, though Ms Gemmell had taken advice, because Mr Harlow had insisted, and Ms Wagner and Ms Crawshaw advised her conscientiously, she did not know, and could not be told when she entered the deed, what expectation she then possessed or what rights she was about to surrender. In December 1999, when Ms Wagner asked Mr Bennett what Mr Harlow's assets were and what their worth was, she never found out. In July 2001 Ms Crawshaw was no better placed. Both obtained an indemnity from Ms Gemmell for that very reason.

[75] Ms Gemmell can therefore say, as she does now, that taking advice from Ms Wagner and Ms Crawshaw proved no better than a formality. She might as well not have seen them. She can also say that the only purpose Ms Wagner and Ms Crawshaw served was to bring some semblance of credibility to her statement in the deed that she had taken 'proper independent legal advice as to ... (its) effect and implications', when she had not.

[76] To hold her relationship with Mr Harlow, moreover, Ms Gemmell, whatever her actual state of mind, signed with Mr Harlow the letter dated 23 July 2001. In that letter she confirmed that she and he had agreed a division of their property and that the deed attached set out fairly her entitlement. It was this letter that freed Mr Harlow to sign the deed seven days later relieved of any question of duress. And

yet there was no deed attached to the letter. Nor was one ever identified. And, as Ms Crawshaw found, when Ms Gemmell signed the deed, the letter did not then truly record her state of mind.

[77] Mr Harlow denies that this letter was his. To the contrary, I consider, it can only have come from his hand. It appears a lawyer's letter. 'Fair and reasonable', 'distribution and entitlements' are all lawyer's concepts. But it was not written by Mr Bennett or Ms Wagner. Ms Gemmell lacked the ability. Mr Harlow, an experienced businessman, who knew what he was about, did have the ability and it was his interest, and his interest only, that the letter served.

[78] In July 2001, one needs to recall, Ms Gemmell and Mr Harlow had been back together for at least 18 months. Mr Harlow had first pressed for an agreement and then stepped back, then pressed again. He had not, as he could easily have done, brought the relationship to an end in December 1999 when Ms Wagner asked for more information and questioned whether what was then proposed was fair. He had not done so in June 2001 when Ms Wagner confirmed that Ms Gemmell had signed the agreement under duress. His evidence was that he still loved Ms Gemmell and wished their relationship to continue, as it did until 2004. But he had wanted since they reconciled, and with mounting urgency as the change of law became imminent, also to hold his property as completely as he could. He wanted both the relationship and the property at once. To achieve that he needed Ms Gemmell to accede irrevocably, as she apparently did, first in the 23 July letter and then in the deed.

[79] Why then did Ms Gemmell sign the letter and execute the deed, the latter against advice? She had hoped, she said in evidence, that the issue would go away and for a time it did. But when Mr Harlow became adamant she saw no option but to accede to whatever he wanted. She had, she said, been greatly affected by their eleven months apart. Also she was still without means and she had her daughter to support. She loved Mr Harlow, her evidence is, and was willing to do whatever was needed to keep their relationship in place.

[80] None of Ms Gemmell's friends, on whose evidence she relies, can speak directly about her relations with Mr Harlow. They had little or no contact with him.

What they can speak of is how they found Ms Gemmell during the relationship, especially towards the end and in that their evidence converges. During the relationship, they say, Ms Gemmell ceased to be confident, outgoing and independent. She appeared constrained in her ability to invite them to the St Heliers home or even to meet them. She appeared emotionally dependent to an unusual degree on Mr Harlow's interest and goodwill.

[81] When Mr Harlow pressed Ms Gemmell to enter into an agreement after they reconciled, their evidence is, Ms Gemmell turned to more than one of them for advice and support. They found her highly reluctant to enter into any of the versions he proposed. But she appeared to think that she had no alternative. She could not cope with her relationship with Mr Harlow ending.

[82] The opinion evidence of Dr Ratcliffe, the psychologist on whom Ms Gemmell relies for this case, resulted from an analysis in retrospect, relying exclusively on Ms Gemmell's version of events. Mr Harlow was not given the opportunity to contribute. The rationale for Ms Gemmell's conduct that Dr Ratcliffe supplies, therefore, though plausible, and all of a piece with the evidence of Ms Gemmell's friends and that of Ms Wagner and Ms Crawshaw, cannot I think be given any independent weight.

[83] What does deserve weight, I consider, is the evidence of Ms Wagner and Ms Crawshaw, on each of whom Ms Gemmell made a marked impression, well recorded in their filenotes and in the indemnities each felt obliged to obtain. According to Ms Wagner, Ms Gemmell was 'emotionally fragile'. She was in a state of sustained stress. She appeared subject to pressure she could not withstand. Ms Crawshaw, likewise, recalls Ms Gemmell being, when she met her, in 'acute distress'. Ms Gemmell, Ms Crawshaw is clear, was intent on preserving her relationship with Mr Harlow, as much as on retaining her home for herself and her daughter. That was her priority.

[84] Both Ms Wagner and Ms Crawshaw found themselves confined to advising Ms Gemmell on the literal effect of the terms of the deed. Both accept that Ms Gemmell understood what she was being asked to sign. Their evidence is,

however, that this was an exercise in futility. Ms Gemmell saw no alternative but to sign the agreement in the form in which it happened to be. She retained no independent mind or, as she saw it, any other practical choice.

[85] Against that evidence as a whole, therefore, I am prepared to accept that Ms Gemmell was as dependent on Mr Harlow as she says she was not just because he had the assets and the means and she had neither but because, to an unusual degree, she was emotionally reliant on him and subject to his will. It may be that she then had the options that she took up in 2004, to obtain an occupation order and to pursue her present claim but then, while their relationship was still on foot, and there was room for hope, those options seemed to her unthinkable.

[86] Mr Harlow, I am satisfied, knowing just how completely dependent on him Ms Gemmell was, took advantage of her. He threatened and threatened again to end their relationship unless she acceded to an agreement in his terms, which settled for the past any claim to property she then had and any for the future. She acceded, as he must have known she would eventually, and even intended, without knowing what her entitlements were or could be.

[87] However the matter is viewed, in duress or undue influence, I consider, the deed is vitiated and Mr Harlow ought not to retain the benefit of it. Mr Harlow pressed her, illegitimately, to enter into the deed without proper advice; a prime feature of which was that she had enjoyed all the advice that she needed. And in this he relied unconscionably on his dominant part in their relationship to exploit her emotional and material vulnerability.

[88] I see no injustice to Mr Harlow in that conclusion. He may well, until 2004, have continued to live with Ms Gemmell, relying on the agreement to shield him from any claim. He can have been under no illusion as to how that agreement had been obtained. Nor can he say that Ms Gemmell ought to be denied relief because he was never told of Ms Crawshaw's indemnity. All that the indemnity did was to confirm what was independently true.

[89] Ms Gemmell will have the declaration she seeks, that the deed is void and

unenforceable. The case will now need to be timetabled to hearing as to what division of property is proper under the 1976 Act. In this distinct phase of the case Ms Gemmell is entitled to costs, as I should have thought at scale 2B, and disbursements as fixed by the Registrar.

[90] If a path ahead can be agreed as to timetabling and costs, a joint memorandum as to both is to be filed within ten working days of the date of this decision. If one or both cannot be agreed, a memorandum for Ms Gemmell is to be filed and served within that time and any reply within the succeeding seven working days.

P.J. Keane J