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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-117

BETWEEN	RABOBANK NEW ZEALAND LIMITED Plaintiff
AND	LOGAN DONALD BALDERSTON First Defendant
AND	LOGAN DONALD BALDERSTON, FRANCIS ROBERT TWISS AND JARROD LOGAN BALDERSTON AS TRUSTEES OF THE L.J.C. BALDERSTON TRUST Second Defendants
AND	KAY FRANCES HARLAND AS TRUSTEE AND EXECUTRIX OF THE ESTATE OF THE LATE PETER JAMES HARLAND (DECEASED) Third Defendant
AND	KAY FRANCES HARLAND Fourth Defendant
AND	KAY FRANCES HARLAND AND MARK FRANCIS HARLAND AS TRUSTEES OF THE HARLAND FAMILY TRUST Fifth Defendants

Hearing: 30 March 2006

Appearances: R.J. Gordon for Plaintiff
K. Johnston for Fourth and Fifth Defendants

Judgment: 4 May 2006

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 11.00am on the 4th day of May 2006.

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JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

Introduction

[1] This is an application by the plaintiff, Rabobank New Zealand Limited ("Rabobank"), for summary judgment. The first to third defendants have all admitted liability. The fourth and fifth defendants, on the other hand, oppose this application.

Background Facts

[2] In late 2001 two men who had been involved in the transport industry for some time, Mr Peter Harland (now deceased) (the "late Mr Harland") and Mr Logan Balderston ("Mr Balderston"), set up a freight-carrying company called Southern Cross Logistics (2001) Limited ("Southern Cross"). Mr Harland and Mr Balderston were the sole directors of Southern Cross. The shares in that company were held equally by their respective family interests, the Harland Family Trust and the L J C Balderston Trust.

[3] Later in 2001, Southern Cross decided to purchase two truck and trailer units for its transport operations. Rabobank agreed to finance the purchase of those units by way of a lease and hiring agreement ("the agreement"). As part of this agreement, Rabobank required each of the defendants to personally guarantee *inter alia* the due payment of all amounts owing under the agreement. Although initially there was a suggestion that the fourth defendant Mrs Kay Francis Harland ("Mrs Harland") did not sign the guarantee document in her personal capacity (as opposed to signing in her capacity as a trustee of the Harland Trust), and therefore did not in fact provide a personal guarantee, it appears no longer to be in dispute that all five defendants executed personal guarantees in favour of Rabobank.

[4] In 2004 Southern Cross defaulted on its obligations to Rabobank to make payment of rental instalments that were due under the agreement. On 7 September 2004, demand was made upon both Southern Cross and the guarantors for the

amount then outstanding $33,923.56, plus interest. When the breach was not remedied, Rabobank informed both Southern Cross and the guarantors of its decision to terminate the agreement. It also demanded payment of the "termination value" under the agreement which at that stage was $1,037,251.75, plus interest.

[5] In an attempt to recover its debt, Rabobank then exercised its rights under the agreement and repossessed and sold the Southern Cross truck and trailer units over which it held securities. The shortfall following realisation of these assets was $283,144.51.

[6] In the meantime, on 10 December 2004, the late Mr Harland died in a motor vehicle accident. Two months later, on 8 February 2005, Southern Cross was placed into liquidation.

[7] Rabobank subsequently served notices of demand on each of the five guarantor defendants in respect of the outstanding sum of $283,144.51. It is this amount, together with interest and costs, which is sought in the present summary judgment proceedings.

[8] As noted above, three of the guarantors, the first to third defendants, have admitted liability under their personal guarantees. Accordingly, the present summary judgment before the Court is against the fourth and fifth defendants only.

[9] Mrs Harland (the late Mr Harland's wife) is sued in two capacities. In her personal capacity she is the fourth defendant. Then as one of the fifth defendants she is a trustee to the Harland Family Trust. Mark Harland ("Mark Harland") (the late Mr Harland's son) is the other fifth defendant as the second trustee to the Harland Family Trust. As fifth defendants, Mrs Harland and Mark Harland are sued in their capacity as trustees of the Harland Family Trust.

[10] Mrs Harland and Mark Harland seek to defend these summary judgment proceedings on the basis of undue influence. Specifically, they claim that the late Mr Harland exerted undue influence over them in respect of executing the personal guarantees, that Rabobank had constructive knowledge of the undue influence but

that it failed to insulate itself against any potential claim. Thus, they contend that the guarantees are now unenforceable.

Summary Judgment Principles

[11] In seeking summary judgment here, the plaintiff relies upon Rule 136 High Court Rules, which states:

> The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of any such claim.

[12] Under Rule 136 the onus is clearly on the plaintiff to satisfy the Court that the defendant has no defence to the claim.

[13] In *Pemberton v Chappell* [1987] 1 NZLR, Somers J said at 3:

> At the end of the day Rule 136 requires that the plaintiff 'satisfies the Court that a defendant has no defence'. In this context the words 'no defence' have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See for example *Wallingford v Mutual Society* [1880] 5 App Cas 685, 693; and *Fancourt v Mercantile Credits Limited* [1983] 154 CLR 87, 99; *Orme v de Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

And:

> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless.

[14] Although the Court must be cautious in summary judgment applications, a Judge is not bound:

> [t]o accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Eng Mee Young v Letchumanan [1980] AC 331 at 341.

[15] Thus, whilst it is for the plaintiff to show that its case is unanswerable, and that the defendant has no arguable defence, the Court ought to assess any defence, or narrative, presented by the defendant in a "robust and realistic" manner: *Bilbie Dymock Corporation v Patel* (1987) 1 PRNZ 84 (CA) at 85.

Counsel's Arguments and My Decision

[16] The plaintiff's position is simply that both Mrs Harland personally, and she and Mark Harland in their capacity as trustees of the Harland Family Trust, should be compelled to honour the guarantees that they gave to Rabobank, guarantees upon which the bank relied in agreeing to provide finance to Southern Cross.

[17] It submits that there is no merit to the defendants' undue influence defences. Indeed, the plaintiff suggests that the claim to undue influence must be treated by the Court with some scepticism as they were raised only after it became apparent first that the repossession and sale of Southern Cross's truck and trailer units did not dispose of the company's full indebtedness, and secondly, after the argument put forward by Mrs Harland that she was not a personal guarantor had failed.

[18] Before me the parties accepted that in cases where undue influence is sought to be imputed against a creditor, the guarantor must establish three elements - first, that he or she was in fact subject to undue influence by the debtor; secondly, that the creditor had been put "on inquiry" as to the risk of undue influence; and thirdly, that the creditor failed to take "reasonable steps" to insulate itself from the consequences of such undue influence and thus against a potential claim by the guarantor.

[19] I turn now to consider separately each of the claims to undue influence by the fourth and fifth defendants.

Undue influence against Mrs Harland

[20] In her affidavit dated 23 February 2006, Mrs Harland describes her marriage and relationship with the late Mr Harland as a "relatively old fashioned marriage" in which the late Mr Harland made the financial and business decisions. She maintains that she had little involvement in, and no knowledge of, the late Mr Harland's business enterprises. Mrs Harland says that in all business matters she simply trusted his judgement.

[21] Mrs Harland explains in her affidavit that the guarantee documents were brought home by the late Mr Harland. She says it was not until this moment that he informed her that she needed to sign the documents, and his explanation for this was because half of Southern Cross was owned by the Harland Family Trust, and she was a trustee of that Trust. Mrs Harland maintains that the late Mr Harland indicated to her exactly where she was required to sign. On this basis Mrs Harland says she signed the documents, even though she did not understand the true effect of this. And, according to Mrs Harland, she had never at any stage had any contact with Rabobank or its representatives.

[22] Counsel for Mrs Harland submits that this evidence of undue influence contained in her affidavit "could scarcely be clearer".

[23] In response, Rabobank's view is that the late Mr Harland's apparent "expectation" that Mrs Harland would sign the guarantee documents did not constitute undue influence on his part. Rabobank maintains that the late Mr Harland did not use any "unacceptable means" to obtain Mrs Harland's signature on the documents. Quite the contrary, counsel for Rabobank submits that Mrs Harland's description of her relationship with the late Mr Harland is "entirely unremarkable" and this demonstrates that they "plainly worked together for their mutual financial benefit".

[24] Although in New Zealand there has never been a *presumption* of undue influence for a wife who acts as surety for her husband (as there is, for instance, where a client acts as a surety for her/his lawyer), the Court of Appeal in *Wilkinson v*

ASB Bank Ltd [1998] 1 NZLR 674, at 690-691, noted that undue influence is likely to be presumed where a guarantor first has limited commercial ability; secondly, has no more than a minimal financial stake in the enterprise guaranteed under the transaction, and thirdly, has a relationship involving an emotional tie or dependency with the debtor. If the guarantor was able to establish these three factual matters, *Wilkinson* concludes that a Court would be likely to accept that undue influence had been exerted upon the guarantor.

[25] However, more recently, the Court of Appeal in *Hogan v Commercial Factors Ltd* CA225/03 10 November 2004 at [37] and [38]- without purporting to alter the law in any way- suggested that a wife who has provided a guarantee for her husband can only avoid liability by establishing that her husband actually exercised undue influence over her in relation to the guarantee. Thus it appears that a wife can no longer simply point to a lack of commercial ability and a relationship of trust and dependency. She must now positively demonstrate that undue influence was exerted in respect of the impugned transaction.

[26] Before me, the parties advanced their arguments on the basis that the position taken by the Court of Appeal in *Hogan* represents the current law in New Zealand, so I too will proceed on that basis. Mrs Harland must show, therefore, that she was in fact subject to undue influence at the time she signed the guarantee documents.

[27] I should mention at the outset that I do not place much weight on counsel's observation that the late Mr Harland did not use "unacceptable means" to obtain his wife's signature on the guarantee. Despite the use of those words in *Hogan* at [37], I consider that undue influence does not necessarily have to be exerted by the debtor in an overt manner, or with malicious intent. A debtor can certainly exert undue influence by applying improper pressure on a guarantor, but equally, a debtor can do so simply by taking advantage of the guarantor's trust, dependence, and vulnerability: *Wilkinson* at 689.

[28] Similarly, the comment from counsel for Rabobank that Mrs Harland's relationship with her late husband was "entirely unremarkable" does not mean that there was no undue influence in respect of the transaction. As I see it, unremarkable,

traditional relationships are often the very ones that end up in Court, because (commonly) a wife has readily relied, without question, on her husband's financial and business decisions.

[29] Bearing in mind that the application before me is for summary judgment, and therefore that the evidentiary threshold on the defendants is lower, I consider that Mrs Harland has done sufficient in her affidavit to show that she was in fact subject to undue influence at the time she signed the guarantee documents. According to that affidavit, Mrs Harland had little understanding of commercial matters, she always allowed the late Mr Harland to make the business decisions, and she wholeheartedly trusted his judgement in that respect. It seems to me that the phrases "excessive dependence" and "extreme loss of autonomy" arising out of the Court of Appeal's discussion in *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655 at 658 and 659 encapsulate the nature of the relationship between Mrs Harland and her late husband, or at least as she has described it in the affidavit.

[30] Mrs Harland deposes that her late husband directed her to sign the documentation he had brought home. She says that she did not understand the nature of her obligations upon executing the guarantee. In my mind, for summary judgment purposes there is a reasonable argument that this may well be an instance of Mrs Harland placing too much reliance on her husband's judgement at the time, and not making her own informed decision, and of the late Mr Harland, intentionally or otherwise, taking advantage of the trust reposed in him by his wife.

[31] Having accepted that for the purposes of the summary judgment application before me there is a plausible narrative of undue influence here, the next consideration is whether Rabobank had actual or constructive knowledge of the late Mr Harland's undue influence, and thus his wife's equitable claim to set aside the guarantee.

Was Rabobank put "on inquiry" as to the risk of undue influence?

[32] Mrs Harland does not suggest that Rabobank had actual knowledge of her husband's undue influence. Instead, the Court must determine whether the bank had

constructive knowledge of that undue influence, or in other words, whether it was put "on inquiry" as to the risk that the guarantee was procured by undue influence.

[33] In this regard, counsel for Mrs Harland simply relies on *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449 (HL), in which Lord Nicholls emphasises that the bank is put "on inquiry" in every case in which a wife stands as surety for her husband's debts – see [44], [48], and [84]. Indeed, Lord Nicholls goes further at [87] by stating that:

> the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial.

[34] Although this represents the English approach, counsel submits that *Etridge* has been approved by our Court of Appeal in *Hogan* (above) at [50], and thus is authority in New Zealand too.

[35] In response, counsel for Rabobank submits that it has not yet been conclusively determined whether the *Etridge* approach is appropriate in the New Zealand context. Accordingly, Rabobank contends that to the extent that the principles in *Etridge* go further than, or depart from, the principles espoused by our Court of Appeal in *Wilkinson*, this Court is bound to accept the *Wilkinson* approach.

[36] Rabobank denies that it was put "on inquiry" here. First, it submits that Mrs Harland had a "direct financial advantage" in finance being provided to Southern Cross. This is because, as a trustee of the Harland Family Trust, she was a shareholder of the company. Secondly, this was not a transaction carrying a substantial risk. Rather, it was a relatively normal financing transaction. Rabobank therefore did not have constructive knowledge of the late Mr Harland's alleged undue influence.

[37] The Court of Appeal in *Wilkinson* noted, at 680, that a combination of two factors puts a creditor on inquiry when a wife offers to stand as a guarantor for her husband's debts:

(a) The transaction is on its face not to the financial advantage of the wife; and

(b) There is a substantial risk in transactions of that kind, that, in procuring the wife to act as a surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

[38] This can be contrasted with the English position in which the bank will be put on inquiry *in every case* in which the relationship between the guarantor and the debtor is "non-commercial" - *Etridge* at [87].

[39] Although the issue was not of significance in *Hogan*, the Court of Appeal indicated, at [44], that the *Etridge* approach as to when banks may be put on inquiry, namely, in "non-commercial" cases, is "highly likely" to be the approach adopted in New Zealand by that Court at least in banking cases in the future.

[40] For the purposes of this summary judgment application, I need obviously to apply the law as I see it presently standing in New Zealand. That is, I will continue to treat *Wilkinson* as the leading authority.

[41] The difficulty with Rabobank's argument here is that in almost every case in which a wife stands as a surety for her husband's debt it could be argued that she may derive some financial benefit from the transaction, albeit it in an indirect fashion. Thus, it could be argued in the present case that Mrs Harland, as wife of one of the directors of Southern Cross, might well benefit from the loan advanced to that company (if that loan contributes to the company's financial well-being, and that financial well-being is then reflected in her lifestyle). Or, as an alternative argument that, as a discretionary beneficiary of the Harland Family Trust, which holds half the shares in Southern Cross, Mrs Harland might thereby potentially benefit from the financial arrangement with Rabobank.

[42] However, for the purposes of the present application before me, as I see it, this financial benefit to Mrs Harland personally (if it ever was to materialise) could be said to be simply too remote. The Court of Appeal in *Wilkinson* uses the words "on its face" and they must, therefore, assume some importance in respect of the question whether the bank was put "on inquiry". I consider that *on its face*, that is, without dissecting all the different layers and relationships involved, the loan

provided to Southern Cross by Rabobank was not to Mrs Harland's personal financial advantage.

[43] In this regard, it is evident that the Courts in England have moved towards a legal framework in which the threshold for a bank to be put "on inquiry" is very low indeed. The Court of Appeal in *Hogan* suggested that in the future New Zealand is "very likely" to move in that same direction. In my view, it would be inconsistent with these developments to adopt here a formalistic or pedantic assessment of whether Mrs Harland personally had a financial advantage in this case.

[44] These English developments may, at first glance, appear to be overly-demanding on creditors. However, as I outline below, a Bank lender which has constructive knowledge of undue influence by a debtor can adopt processes to protect itself reasonably easily from a subsequent equitable claim by a guarantor. So as I see it, a Court need not be too exacting in determining whether circumstances may be such as to put a creditor on notice.

[45] I consider that for the purposes of this summary judgment application, there is a sufficient evidential foundation here to hold that Rabobank was "on inquiry" about the risk of undue influence when it became apparent that Mrs Harland was going to act personally as guarantor for Southern Cross's loan arrangements under the agreement.

Did Rabobank take "reasonable steps" to insulate itself against a potential claim by the guarantor?

[46] The final issue is whether, having constructive knowledge of the late Mr Harland's undue influence, Rabobank took reasonable steps to ensure that Mrs Harland understood the nature of the transaction, and thus it insulated itself against a future claim.

[47] The facts relevant to this issue are not in dispute.

[48] It seems that Mrs Harland had no contact with Rabobank or its representatives in the course of negotiations, before signing the guarantee, or afterwards. Her evidence is that the late Mr Harland brought home the documents, indicated exactly where she was required to sign, and that she did just that.

[49] However, contained within the document in the pages entitled "Signature Pages for Master Agreement", under the sub-heading "Acceptance by guarantor", was the following message:

> **Warning**
>
> - **If the guarantor signs these signature pages, thereby becoming bound by the master agreement the guarantor may be liable instead of or as well as the renter under each lease agreement or hiring agreement or goods schedule entered into by the renter, by virtue of the guarantee and indemnity in part L of the terms and conditions.**
> - **It may become necessary for the guarantor to sell its possessions so that the guarantor can pay us.**
> - **We strongly advise that the guarantor should have the full consequences of the guarantee and indemnity contained in the terms and conditions explained to the guarantor by an independent lawyer before the guarantor agrees to sign these signature pages. The guarantor's lawyer must complete the Guarantor's Solicitor's Certificate below.**
> - **If the guarantor elects not to obtain independent legal advice the Waiver of Independent Legal Advice below must be signed by the Guarantor.**
> - **By signing these signature pages, thereby becoming bound by the master agreement (including the guarantee and indemnity in part L of the terms and conditions), the guarantor takes on a personal liability to guarantee that we will receive payment and to indemnify us under any lease agreement or hiring agreement we may enter with the renter. This is additional to any liability the guarantor has under any security (such as a mortgage) that the guarantor gives us in connection with the master agreement (including the guarantee and indemnity in part L of the terms and conditions).**

[50] On the following page Mrs Harland signed her name directly underneath the following waiver message.

> **Waiver of Independent Legal Advice for Individual Guarantor**
>
> **I, PETER JAMES HARLAND & KAY FRANCES HARLAND confirm that-**

1. RABO has advised me to obtain independent legal advice before signing this agreement;
2. I do not require independent legal advice;
3. I fully understand my obligations and the extend [sic] of my liability under this agreement and any lease or hire agreement entered into by the renter.

[51] Counsel for Mrs Harland, relying on *Etridge*, submitted that these written warnings did not constitute "reasonable steps" that a bank should take to insulate itself against a wife's equitable right to set aside the guarantee.

[52] Counsel for Rabobank, on the other hand, considers that the written warnings were "red flags" which should have alerted Mrs Harland to the risks inherent in the transaction and to the real need for independent legal advice. From Rabobank's perspective, in signing the waiver clause, Mrs Harland was expressly indicating that she understood the risks involved in being a guarantor but that she chose to disregard them. Rabobank says it was satisfied that Mrs Harland had understood the transaction, and that she did not require advice from a solicitor. Accordingly, Rabobank argues it took all reasonable steps to protect itself against Mrs Harland's current claim.

[53] In *Wilkinson* the Court of Appeal observed, at 691, that the prudent course for a creditor who is "on inquiry" is to insist that the guarantor be given advice by an independent solicitor and to obtain a certificate from the solicitor indicating that the requisite advice had been given and was understood.

[54] It could be argued here that this is more or less what Rabobank intended with its written form of acknowledgements.

[55] Importantly, however, the Court in *Wilkinson* at 691 goes on to say that where a guarantor declines to get legal advice, a prudent financier would:

> endeavour to ensure that someone, preferably a solicitor, explains the documents and their consequences. The financier may be able by that means to obtain reasonable satisfaction that the guarantor has understood the transaction. Unless it can be shown that an explanation was given, it may be hard to argue plausibly that the guarantor did understand. In that circumstance, without proof that the guarantor knew what he or she was doing, the financier will be unable to remove the suspicion

> and so overcome the presumption. The existence of an acknowledgement by the guarantor of an understanding of the transaction may not suffice when unaccompanied by evidence of an explanation from someone competent to give it.

[56] The purpose of a bank/lender undertaking these precautionary steps is not simply to avoid liability, but also to attempt to bring home to a wife the risk she is running by acting as a guarantor - *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 196.

[57] In *Hogan* (as outlined at [25](b); [27] and [48]) the Court of Appeal held that "on any conceivable view of the law", the creditor sending a letter to the guarantor strongly recommending that he take independent legal advice, was insufficient to insulate itself from the consequences of undue influence.

[58] Although Rabobank here went further than that, by also providing to Mrs Harland as guarantor a written warning of the risks involved in executing the guarantee, it seems to me that its actions were still inadequate. Rabobank did not arrange for Mrs Harland to meet with any of its representatives, and so she was never instructed face to face to seek independent legal advice, nor were the possible consequences of the transaction explained to her in this way. To paraphrase the Court of Appeal in *Hogan*, without actually giving Mrs Harland an explanation of the relevant documents and their consequences, it is hard for Rabobank to now insist that Mrs Harland did understand fully. As I see it, the written waiver may not suffice as it is unaccompanied by evidence of an explanation from someone competent to give it.

[59] A further point is that the warning outlined in the documents was expressed on the page preceding the page containing Mrs Harland's signature. It is quite possible that the late Mr Harland took his wife straight to the relevant pages to sign, leaving out, intentionally or otherwise, the page containing the warning. Indeed, Mrs Harland deposes that "I recollect that he [the late Mr Harland] directed me to the pages of the documentation which needed to be signed and we both signed them."

[60] Although Mrs Harland should have read and understood the entire document before signing it, in which case she would have been aware of the warning, that is not the point. Rabobank had a duty to *bring home* to Mrs Harland the risk that she was running. On the material currently before the Court, there is a reasonable argument that Rabobank has failed to do so. At best it appears to have satisfied the requirements in form but not in substance, and therefore for the purposes of the present summary judgment application it cannot be said to have taken reasonable steps to insulate itself from the consequences of a finding of undue influence.

[61] It follows that Mrs Harland has at least an arguable defence to Rabobank's demand for payment under her personal guarantee.

[62] Rabobank's summary judgment application against Mrs Harland personally as fourth defendant must therefore fail.

[63] I turn now to consider the summary judgment application against the fifth defendant, the Harland Family Trust.

Undue influence against trustees of the Harland Family Trust

[64] The trustees of the Harland Family Trust (the late Mr Harland, Mrs Harland, and their son Mark Harland) also executed guarantees for Southern Cross's indebtedness. The surviving trustees claim that the late Mr Harland exerted undue influence on them with respect to their decision to sign the guarantee documents.

Undue Influence against the Trustees

[65] Having already found it arguable that the late Mr Harland unduly influenced his wife Mrs Harland to sign the documents in her personal capacity, and given that at the time she signed the documents she did so also in her capacity as a trustee of the Harland Family Trust, it follows that for the purposes of the current summary judgment application it must be arguable that the late Mr Harland also exerted undue influence on Mrs Harland when she signed as a trustee of the Trust.

[66] As to Mark Harland's position as the other trustee, counsel for the fifth defendant submits that he also executed the guarantee without first understanding its effect and he did so simply because his father had told him.

[67] Rabobank's response is that Mark Harland's affidavit, which indicates that he felt there was an "expectation" on him to sign the guarantee document, is not sufficient to constitute evidence of undue influence.

[68] Mark Harland's evidence is that in late 2000, his father asked him to become a trustee of the Harland Family Trust. From that time, the late Mr Harland apparently periodically asked Mark to sign certain documents, and Mark would do so. He deposes that he felt he had "no real choice" but to sign the documents presented to him by his father, because had he questioned his father's judgement, he expects that he may have been removed as trustee. Although in his affidavit, Mark Harland claims that he did not appreciate that the document he signed provided the Trust's guarantee to Rabobank to make payments in the event of default by Southern Cross, in the *Eng Mee Young* sense, in my view, this statement clearly lacks credibility. There can have been no other reason for the trustees to sign the Rabobank guarantee other than to bind the Trust to guarantee repayment of the rental payments, and to suggest otherwise is simply not tenable.

[69] I need also to state at the outset that I do not consider Mark Harland has put before the Court enough in his evidence to show undue influence. A number of expressions have been used in the authorities to capture the nature of a relationship in which undue influence is alleged to have occurred: "excessive dependence", "extreme loss of autonomy", "trust and confidence, reliance, dependence or vulnerability on [his side] and ascendancy, domination or control on [the side of Mr Harland]". Unlike my findings earlier as to Mrs Harland's relationship with her late husband, there is no suggestion in Mark Harland's affidavit that the factors noted above describe the kind of relationship he had with his father. On the contrary, the evidence suggests that he was quite independent of his father. Mark Harland was almost 32 years old at the time of signing the guarantee, he had his own family, was financially independent, and was not involved in his father's business. There was

absolutely no evidence before the Court to suggest that Mark Harland was in any way unable to cope with his day-to-day business and financial affairs.

[70] In his affidavit, Mark Harland simply says that he did not want to question his father for fear of being removed as a trustee. As I see it, he does not suggest that his father dominated or controlled him, or exerted any pressure at all. Alternatively, he does not claim to have been reliant, dependent, or vulnerable in any way. It seems to me that Mark Harland simply acquiesced to his father's request. Perhaps, it could be suggested that in signing the guarantee document, he may not in fact have made an informed decision, but the important point is that there is no evidence that he was not *capable* of exercising his independent judgement on that occasion.

[71] Even if I accept uncritically the facts as set out in Mark Harland's affidavit, I do not consider that they are sufficient to establish undue influence by his father here.

[72] Where does that leave the situation, however, given my earlier finding that his co-trustee, Mrs Harland, both in her personal capacity, and therefore in her capacity as a trustee, had been the subject of undue influence by her late husband? This is a reasonably vexed question, given the need for trustees to act unanimously in making decisions, but also the requirement that the trustees must exercise personal judgement in deciding upon matters which are in the best interests of a trust.

[73] But, as I see it, this issue does not require final resolution here for the reasons I note below.

[74] Even if I had found that there was an arguable claim of undue influence against the trustees sufficient to taint their guarantee, I would still be inclined to grant summary judgment here against the Harland Family Trust. This is because, as the law currently stands in New Zealand, I do not consider that Rabobank was put "on inquiry" in respect of the alleged undue influence against the trustees. I turn now to consider that aspect.

Was Rabobank put "on inquiry" as to the Risk of Undue Influence?

[75] Given that the Harland Family Trust was a 50% shareholder in Southern Cross, from Rabobank's perspective I am satisfied that there was nothing out of the ordinary in the Trust acting as surety for the loan agreement. Southern Cross needed assistance from Rabobank in order to purchase the truck and trailer units for its business, and particularly as a new company with little established record, it was a normal commercial requirement that Rabobank would require Southern Cross's shareholders and/or directors to guarantee repayment of the rental instalments.

[76] In my view, there was nothing in this commonplace situation to alert Rabobank to the risk that the transaction might have been brought about by undue influence. On the contrary, the transaction was on its face to the manifest advantage of the Trust, it having a half-share in the business. Without the guarantee, the loan agreement would not have been entered into by Rabobank, and without that agreement the business may not have had the opportunity to complete the purchase of the vehicles no doubt intended to improve the trading position and ultimate success of Southern Cross. Indeed it was precisely the shareholders who stood to gain from Southern Cross's success.

[77] To hold otherwise would, I think, tip the balance too far in favour of the surety. As *Wilkinson* notes at 689, the Court should always be mindful of the balancing exercise that must take place in these circumstances:

> The Court must balance the desirability of protecting vulnerable persons from loss of their assets, particularly their homes, against the undesirability of economically sterilising those assets. Sympathy for a victim of undue influence or misrepresentation should not lead a Court into the error of imposing upon lenders an unrealistic standard.

[78] Accordingly, even if the trustees of the Trust were able to demonstrate undue influence by the late Mr Harland, as I see it, the fifth defendant would fail at this second hurdle.

[79] I find, therefore, that for the purposes of this summary judgment application, Rabobank has established that, under the circumstances here, it was not put "on inquiry" about the risk of undue influence on the trustees of the Harland Family Trust.

[80] Given this finding, it is unnecessary for me to consider the third aspect as to whether Rabobank took reasonable steps to insulate itself against a potential claim by the Harland Family Trust as guarantor here. Suffice to say that given my earlier findings at paragraphs [58] and [60] of this judgment, it is likely that Rabobank would also be found here to have failed to do sufficient to insulate itself from liability to the trustees had I concluded otherwise than the position I reached at paragraph [79] above.

[81] It follows, therefore, that given the fifth defendant, the Harland Family Trust, has no arguable defence to Rabobank's demand for payment under the guarantee, summary judgment will be granted against the Trust.

Conclusion

[82] The plaintiff's application for summary judgment against the Harland Family Trust therefore succeeds. As I have noted above, it has failed with respect to the claim against Mrs Harland in her personal capacity.

[83] An order is now made granting summary judgment to the plaintiff Rabobank against the fifth defendants as trustees of the Harland Family Trust, Mrs Harland and Mark Harland in terms of and as pleaded in Rabobank's Statement of Claim.

[84] Leave is reserved for any party to approach the Court for further assistance in the event that any issues may arise as to clarification of the quantum of this order for summary judgment.

[85] As to costs, Rabobank has been partly successful and partly unsuccessful in its summary judgment application. Costs should therefore lie where they fall. There will be no order as to costs.

Associate Judge D.I. Gendall

Solicitors:
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Wadham Goodman, Palmerston North for Fourth and Fifth Defendants