

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**IN THE DISTRICT COURT
AT TAURANGA**

**CIV-2017-070-000621
[2018] NZDC 10331**

BETWEEN

[CM]
Plaintiff

AND

[PP]
Defendant

Hearing and judgment: 17 May 2018

Appearances: Mr Delaney for the Plaintiff

Reasons decision: 20 June 2018

**REASONS FOR JUDGMENT ON FORMAL PROOF
GRANTED 17 MAY 2018 OF JUDGE P G MABEY QC**

[1] This matter came before me by way of formal proof on 17 May 2018. Mr Delaney appeared.

[2] I considered the plaintiff's claim supported by her affidavit and heard submissions from Mr Delaney.

[3] Judgment was granted on formal proof with costs on a 2B basis. I informed the plaintiff and counsel that I would deliver a reasoned decision and thus do so.

Background

[4] The plaintiff commenced her proceedings against the defendant by statement of claim and notice of proceeding dated 29 June 2017. Service on the defendant could not be completed by an authorised process server.

[5] The process server's affidavit details attempts to locate the defendant over the period July – December 2017 and his contact with the defendant between December 2017 and February 2018 by telephone and text.

[6] The contact by telephone and text was to the defendant's known cell phone number and a further cell phone number from which the defendant had made contact with the process server.

[7] Included in the process server's affidavit is a reference by the defendant to him that he is "lying low to avoid service".

[8] The plaintiff applied for an order to serve the defendant by substituted service. That order was granted on 13 February 2018 and provided for service by way of text message to both cell phone numbers detailed in the process server's affidavit and also by publication in the [national newspaper].

[9] In accordance with that order substituted service was effected on 28 February 2018 by text messaging and publication, proof of which was established by affidavit.

[10] The defendant did not respond within the time limits specified and the plaintiff sought to have her proceedings set down for formal proof.

[11] That application was granted and the formal proof hearing was conducted before me on 17 May 2018.

The claim

[12] The plaintiff claims various sums from the defendant by way of equitable compensation based on separate causes of action which allege:

- (a) An unconscionable transaction – one transaction.
- (b) Breach of fiduciary duty – two transactions.
- (c) Unconscionable conduct in the alternative for all transactions.

[13] Each cause of action refers to separate advances of money made by the plaintiff to the defendant.

[14] In her statement of claim the plaintiff recites generally in relation to each cause of action that she is a [age deleted] woman who at all material times suffered from [mental health issues].

[15] She pleads that she was emotionally vulnerable due to a breakdown of her marriage, which ended in or about [date deleted], and was financially vulnerable due to a lengthy period of unemployment resulting directly from her [mental health issues].

[16] She and the defendant were friends from [date deleted] but entered into an intimate relationship [for under one year] when the defendant ended the relationship.

[17] The plaintiff pleads that at all material times the defendant knew of her [mental health issues] and emotional and financial vulnerability.

[18] She pleads further that in or around [date deleted] the defendant told her that:

- (a) He was able to procure profitable business opportunities.
- (b) It was in her best interest to invest the proceeds of her relationship property settlement with him to be used to pursue those business opportunities.
- (c) She would be in a joint venture with him in respect of those business opportunities.

The first cause of action – unconscionable transaction

[19] This claim asserts that:

- (a) That in or about [date deleted] the defendant told the plaintiff he had secured a business opportunity which required the purchase of a [small business details deleted].
- (b) The defendant invited the plaintiff to join with him in a business venture which required the purchase and use of the [business details deleted].
- (c) The defendant said he had paid a deposit of \$5000 towards the purchase of the [business details deleted].
- (d) That in or about [date deleted] the defendant informed her that he had lost his deposit and pressured her to reimburse him for it.
- (e) On or about [date deleted] she paid \$5000 to the defendant.

[20] She pleads that was an unconscionable transaction as at all material times, the plaintiff was unable to determine if the transaction was in her own best interests due to her circumstances of vulnerability known to the defendant and that the defendant exploited her for his own benefit.

[21] She seeks equitable compensation of \$5000.

The second cause of action – breach of fiduciary duty

[22] This claim is based upon pleadings which assert that in or about [date deleted]:

- (a) The defendant advised the plaintiff that he had procured a further business opportunity requiring the purchase of [equipment] and the subsequent on sale of the [equipment] for a profit.
- (b) The defendant invited her to participate in that venture to which she agreed.
- (c) The defendant informed the plaintiff that he required \$73,000 to purchase the [equipment].
- (d) On [date deleted] the plaintiff advanced \$73,000 to the defendant as her agent and strictly for the purpose of purchasing the [equipment].

[23] The plaintiff pleads further that upon receipt of \$73,000 the defendant was under a fiduciary duty to the plaintiff to ensure that the money was used to purchase the [equipment].

[24] The plaintiff asserts that the fiduciary duty was breached as:

- (a) The money was not used by the defendant to purchase the [equipment].
- (b) He has failed to recount for its use.

[25] She seeks equitable compensation for the sum of \$73,000.

The third cause of action – breach of fiduciary duty

[26] This claim is based upon pleadings which assert that in or about [date deleted]:

- (a) The defendant advised her again that he was able to procure profitable business opportunities, that it was in her best interest to invest the

proceeds of her relationship property in those opportunities and that she would be a joint venture partner with him.

- (b) She was persuaded to invest the proceeds of her relationship property settlement by advancing those proceeds to the defendant as her agent.
- (c) On [date deleted] the plaintiff paid \$111,000 to the defendant.
- (d) On or about [date deleted] the defendant purchased [investment purchase deleted] for \$5000 but advised the plaintiff that he had paid \$100,000.
- (e) Of the original advance of \$111,000 the plaintiff has received \$10,743 plus ownership of the [investment purchase] which has a current market value of \$200 only.

[27] The plaintiff asserts that the defendant's receipt of the payment of \$111,000 was subject to a fiduciary duty to ensure that the monies were used in pursuit of business opportunities and that the fiduciary duty is in breach as:

- (a) The defendant misrepresented the purchase price of the [investment purchase].
- (b) He has failed to account for the outstanding balance.

[28] She seeks equitable compensation for \$95,257.00.

Alternative cause of action – unconscionable conduct

[29] The plaintiff claims in relation to each of the above three transactions that they were all unconscionable transactions as:

- (a) At all material times, the plaintiff was unable to determine whether the transactions were in her own best interest due to her pleaded emotional and financial vulnerability.

- (b) That her vulnerability and inability to determine her own best interests were known to the defendant.
- (c) He exploited her for his own benefit.

[30] She seeks equitable compensation for \$173,257.00.

Plaintiff's affidavit

[31] In her affidavit of 11 May 2018 the plaintiff details her relationship with the defendant.

[32] She met him first in [date deleted] when she was married to her then husband. He became a friend of them both and spoke of his business ventures and success in [details deleted].

[33] The plaintiff details her medical history noting that she has a history of [mental health issues] and that her [family members] [had passed away] when she was younger.

[34] In [date deleted] her [marriage] broke down resulting in increased [mental health issues] which required referral by her GP to community adult mental health services in [location deleted].

[35] She was intermittent in taking medication and continued to suffer [mental health issues].

[36] The final separation from her husband occurred in [date deleted] when the plaintiff [sought treatment for her mental health issues]. She sought advice from the defendant who advised her to stop taking her [medication] as her husband was entirely responsible for her mental state. She told him in a text message she had accepted his advice and stopped taking her [medication].

[37] She was under the care of a consultant psychiatrist whose report is exhibited to her affidavit. It is dated [date deleted] and records that although she has chosen not to accept his advice she will nonetheless maintain her contact with him.

[38] [Timeframe deleted] she moved to [accommodation] in [location 1 deleted] and often saw the defendant who also lived in [location 1].

[39] After a visit with the defendant to [location 2 deleted] she attended an auction and bid upon [a property] there that she could not afford. The defendant advised her against that action which the plaintiff now accepts was irrational.

[40] She was however bound to the contract for sale and purchase and the defendant advised her to give him her money to defeat the vendors of the [location 2] property should they seek to enforce their contract against her.

[41] She reached a final settlement of matrimonial property issues in [date deleted]. Her share of the property was \$150,000 and she told the defendant that. She was yet to receive those funds as the settlement depended upon sale of relationship property in [location 3].

[42] Around that time she was advised by the defendant that he wished to buy a [business] and had borrowed \$5000 from a friend to put down a deposit. He offered her work in the business. He said that the balance of the purchase of the business can come from her matrimonial property settlement.

[43] In [date deleted] her psychiatrist in [location 3] diagnosed [mental health issues]. When the defendant was told this he disputed the psychiatrist's diagnosis, but she now resumed taking her medication as recommended.

[44] After [details deleted], the defendant told her that the [business] purchase had fallen through. She says she was pressured by the defendant to repay the \$5000 deposit that he had lost as a result.

[45] She did so saying that she felt that he made her feel that she was responsible for not actively assisting him in pursuing the purchase.

[46] The matrimonial property settlement had not yet been completed but she was able to pay the \$5000 from her savings.

[47] She says that the defendant continued to pressure her about the relationship property settlement wanting to know when the money would come into his account. She says that the defendant continued to advise her that she was at risk of action by the vendors of the [location 2] property if they had suffered loss from a subsequent sale.

[48] In the end the [location 3] relationship property did sell and her anticipated share of all relationship property in fact came out at approximately \$200,000.

[49] After the failure of the [business] purchase the defendant told the plaintiff that he had identified another business opportunity which involved the purchase of [equipment] for \$73,000. He wanted to use her money to purchase the [equipment] which he intended to sell to a buyer already arranged thus producing an instant profit.

[50] She understood from the defendant that upon sale the purchase funds of \$73,000 would be repaid to her immediately. She says he continued to pressure her for the money.

[51] She thus obtained funds from her lawyers which she gave to the defendant. She did so for the purchase of the [equipment] on the understanding that she would not only receive the purchase price back but would also share what the defendant said would be an instant profit.

[52] After advancing \$73,000 to the defendant she heard nothing further about the [equipment] and does not know what happened to her funds which have never been repaid.

[53] Upon receipt of the balance of her relationship property settlement, in [date deleted], and still under pressure from the defendant she transferred a further \$111,000 to the defendant's bank account. He said that he would invest it for her.

[54] Shortly after receiving those funds he told her he had bought [investment purchase deleted]. She was shown [purchase details deleted] with a price tag of \$100,000 and believed that the [investment purchase] had been purchased by the defendant for her at that price.

[55] She trusted him to make decisions on her behalf and in her best interests and relied upon what he had previously said was his expertise in dealing with [that business].

[56] Later in [date deleted] she received \$10,743 into her bank account from the defendant and in [date deleted] he ended his relationship with her.

[57] [Investment purchase details deleted].

[58] [Details deleted].

[59] [Details deleted]. In [date deleted] she was admitted as an inpatient to the [Hospital] suffering from [mental health issues]. She remained there for two weeks.

[60] Upon discharge she sold the [investment purchase] which was valued at \$200-\$300. She eventually obtained \$500.

[61] The plaintiff has paid \$189,000 to the defendant and in return has received \$500 from the sale of the [investment purchase] and \$10,743 into her bank account.

[62] She seeks equitable compensation of \$177,757 and the costs of her proceedings. Mr Delaney relies principally upon the causes of action which allege unconscionable conduct. He says that the defendant, having befriended the plaintiff and her husband became aware of difficulties in their marriage and upon their separation set out to take advantage of the plaintiff.

[63] He says that the plaintiff was vulnerable and that the defendant knew of this. His submission in essence is that the friendship developed into an intimate relationship which enabled the defendant to exploit the plaintiff until such time as he had obtained

the proceeds of her relationship property settlement. When that had been achieved he ended the relationship having achieved his purpose.

[64] Mr Delaney submits that the defendant's actions were cynical, exploitative and entirely unconscionable. The defendant should not be entitled to retain the proceeds of his unconscionable conduct.

[65] He relies separately and additionally upon what he submits was a fiduciary relationship between the plaintiff and the defendant in relation to the second and third transactions. The monies were advanced by the plaintiff to the defendant in the context of an agency relationship. He submitted that the defendant owed a fiduciary duty to the plaintiff as her agent and is in clear breach of that duty.

The law- unconscionability

[66] One need go no further than the judgment of his Honour Justice Somers in *Nicholls v Jessup* which says:¹

The equitable jurisdiction to set aside unconscionable bargains is not a paternal jurisdiction protecting or assisting those who repent of foolish undertakings. It is a jurisdiction protecting those under a disadvantage from those who take advantage of that fact; equity looks to the conduct of the stronger party.... a party may be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other suffered from a material disability or disadvantage and of its effect on that other, but also when he ought to have known of that circumstance; when a reasonable man would have adverted to the possibility of its existence.

[67] The essential elements of an unconscionable bargain were described by the Court of Appeal in *Contractors Bonding Limited v Snee*² confirmed the later judgment of *Bowkett v Action Finance Ltd.*³

[68] In *Snee* Richardson J said:

An unconscionability inquiry involves an assessment of all the circumstances of the particular case. Whether the complainants were under a special disadvantage or disability; whether they had independent advice; whether the terms of the contract were significantly more favourable to one party than the

¹ *Nicholls v Jessup* [1986] 1 NZLR 226 (CA).

² *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157.

³ *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449.

other; whether any special disadvantage or disability of one party was known or ought to have been known by the other and whether one applied unfair means or pressure to obtain the other's assent, are obvious matters for inquiry. But it is not sensible to speculate on other matters or what conjunction of factors may or may not be considered material in a particular case. At the end of the day equity will intervene to deprive parties of their contractual rights where they have unconscionably obtained benefits or have accepted benefits in unconscionable circumstances. That is where they would be acting unconscionably in receiving or obtaining their bargain.

[69] It has been held that a special disadvantage may include illness, mental impairment and the pressure of financial needs. The special disadvantage must be such that it adversely affects the ability of the person suffering the disadvantage to act in his or her best interests. These matters were addressed in the Australian jurisdiction in *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 (HCA).⁴

[70] In this case Mr Delaney submits that the doctrine of unconscionability is available to assist his client as:

- (a) She was under a special disability in the form of her diagnosed mental illness.
- (b) In the circumstances that illness impaired her ability to make rational decisions in her self-interest.
- (c) The defendant had knowledge of this special disadvantage.
- (d) The defendant exploited that disadvantage to his own benefit in an unconscionable way such that he should not be able to retain that benefit he obtained.

[71] I accept that submission. The defendant was a friend of the plaintiff and his wife and asserted that he had knowledge in business and in particular the [industry].

[72] He was present when the plaintiff visited [location 2] and knew that subsequently she had entered an unconditional contract to purchase a property that she could not afford.

⁴ *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 (HCA).

[73] That led him to advise her that she was at risk of action by the vendors of the property should she default and that she should entrust her money to him to protect it from any judgment.

[74] He knew that she was under medical care, actively disputed the diagnosis of [medical details deleted] and encouraged her not to take her medication.

[75] Taken alone, the above matters may possibly be seen as misguided advice but when considered in light of what then occurred I have concluded that, in the knowledge of her special disability, the defendant set about to exploit the plaintiff to unconscionably obtain her money which he has retained without accounting or explanation.

[76] The pressure to obtain \$5000 being the lost deposit on the failed [business deleted] adventure resulted in that payment being made in circumstances where, on the evidence I have, there was no obligation upon the plaintiff to make it. The money obtained to purchase the [equipment] has gone without explanation and I consider those funds, together with the subsequent payment for the purchase of [details deleted] were obtained unconscionably and by deliberate and cynical means designed to exploit the plaintiff's known frailties.

[77] On this cause of action I grant equitable compensation in the amount sought together with costs on a 2B basis.

[78] The plaintiff also pleads a breach of fiduciary duty in relation to the "[equipment] payment" of \$73,000 and the "[details deleted] payment" of \$110,000.

[79] As I have given judgment on the alternative cause of action alleging unconscionable conduct I do not consider it necessary to give judgment on the fiduciary duty claim. However I make the following observations.

- (a) The statement of claim asserts that both amounts were given to the defendant as the plaintiff's agent and were clothed with the fiduciary obligations that he owed her as principal.

- (b) I am not satisfied that the “[equipment] payment” comfortably fits within the agency context.
- (c) The pleadings and evidence would suggest that the arrangement between the parties was in fact one of partnership.
- (d) The defendant represented that he had a business opportunity involving the purchase and subsequent resale of [equipment] with a view to obtain profit for them both. The plaintiff acted on that representation by giving over funds in the expectation that she would receive repayment plus a share of the profits.
- (e) It was a partnership arrangement where the defendant owed an obligation to the plaintiff to provide full and accurate information in relation to matters relating to the partnership and to account for any benefit he derived from the transaction. His own interests were not to be preferred.
- (f) There was no accounting of any type and I am satisfied that the defendant has failed in his duty to the plaintiff.
- (g) I am however satisfied that the “[investment purchase details deleted] payment” of \$110,000 does fall within the agency context where the primary duty is to act openly and fairly. That duty is also in breach.

Result

[80] At the formal proof hearing on 17 May 2018 I informed Mr Delaney that his client shall have judgment for equitable compensation of \$173,257 together with costs on a 2B basis. I informed him that my reasons would be delivered subsequently.

[81] My reasons are as set out above and I confirm that the award to the plaintiff is on the alternative cause of action alleging unconscionable conduct. Judgment may be sealed for the sum claimed together with costs and disbursements calculated on a 2B basis.

P G Mabey QC
District Court Judge