HOW NOT TO TRANSACT WITH THE ELDERLY AND FRAIL

(2019) 93 ALJ 13

In 2004, Mr Raoul, a pensioner, was induced by a Mr Hiley into granting a mortgage over his home to secure a loan of $200,000 to Mr Hiley. Until March 2014, Mr Hiley paid the interest on the loan but did not reduce the principal debt, despite Mr Raoul's efforts to have him pay off the loan.[6] Importantly, Mr Raoul had an obsessive fear about losing his home to the mortgagee.[7] His nephew, George Hanna, knew this. On 16 September 2014, Mr Raoul and Mr Hanna executed a "Deed of Arrangement" and an undated memorandum of transfer. As summarised by the primary judge, Lindsay J:

[I]ts general tenor was to the effect that the defendant would obtain a discharge of the mortgage over the land by repayment of the mortgage debt; the plaintiff would transfer the land to the defendant; and the defendant would grant the plaintiff a life estate in the land, and agree to pay all rates, taxes and insurance premiums referable to the land and to maintain it in good repair and condition.[8]

Once the Deed was executed, Mr Hanna paid out the mortgage debt in the sum of $200,509.64 and took a transfer of the remainder interest in the property. The land was agreed by the parties to have been worth $675.000 as at September 2014.[9]

The issues both at trial and on appeal were: (1) whether Mr Raoul had legal capacity to enter into the Deed and the transfer on 16 September 2014; (2) whether the Deed and the transfer were unconscionable in accordance with equitable principles; and (3) whether the deed and the transfer were "unjust" at law or within the meaning of the *Contracts Review Act 1980* (NSW).

Divergent Approaches to the Issue of Capacity

The primary judge synthesised the evidence of the parties' experts and held that Mr Raoul:

[W]as suffering from dementia … was highly suggestible, … was vulnerable to undue influence … would not have been able to understand anything complex and … his capacity to understand the deed of arrangement, the memorandum of transfer and what was proposed to be done with them would have

depended upon what explanations were given to him, who was present at the time business was transacted, and other variables such as the level of stress he was under and fluctuations in his condition.[10]

The opinion of the expert geriatrician called for Mr Raoul that he "wouldn't have been able to understand anything complex" was accepted by the primary judge.[11] On that basis, the primary judge found that Mr Raoul did not relevantly have capacity.[12]

Macfarlan JA in the Court of Appeal considered that this did not amount to a finding that Mr Raoul would not have been able to understand the general purport of the deed and the transfer if a proper explanation of them had been given to him, and so the primary judge's finding that Mr Raoul lacked relevant capacity

was therefore not warranted.[13] Macfarlan JA also agreed with Beazley P and White JA who considered that Mr Raoul did have sufficient capacity because he had given instructions in accordance with the suggestions made by the first of the two solicitors to whom Mr Raoul was taken by Mr Hanna, Mr Panopoulos, and because Mr Raoul had provided a description of the proposed transaction to the second solicitor, Mr Taouk.[14] Their Honours formed the view that the primary judge had set the bar too high in requiring that capacity be tested by analysing whether Mr Raoul could understand the quite complex impact of the transaction on him.[15]

Both the Court of Appeal and the primary judge relied on Gibbons v Wright,[16] a case which concerned a challenge to the severance of a joint tenancy by two sisters, who were said to have lacked capacity to know what they were doing. However, the Court of Appeal and the primary judge concentrated on different aspects of the key passage in the High Court's reasons for judgment. While the High Court observed that to have capacity the sisters had to understand the nature of the transaction embodied in a particular instrument, it explained that they also had to understand "the effect of a wider transaction which the instrument is a means of carrying out", which included the alteration to their legal rights and the impact of the transaction for inheritance purposes of holding as tenants-in-common rather than joint tenants.[17]

The Court of Appeal considered that Mr Raoul's inability to understand the complexities and impact of the transaction went to whether the transaction was unconscionable or unjust rather than to his capacity.[18] It was sufficient if he understood the "broad operation" or "*general purport*" of the instrument in question, without understanding the implications both financial and legal, in contrast to the primary judge's focus on the need for Mr Raoul to be able to understand the effect of the wider transaction and how the character of his interest in the property would be altered.

An Unconscionable and Unjust Transaction

A number of factors pointed to the transaction being both unconscionable in equity and unjust in terms of the *Contract Review Act 1980*.

The transaction was improvident for Mr Raoul, who was a vulnerable, single, 75-year-old pensioner whose only asset was his home. It resulted in a number of consequences adverse to Mr Raoul's interests. For example, he would be deprived of access to capital should he require it in his declining years, for example, to put up a bond for nursing home care.[19] Not only did Mr Hanna receive his remainder

interest at a substantial undervalue,[20] Mr Hanna retained the right to sell his remainder interest in circumstances where Mr Raoul's consent was likely to be given by reason of Mr Raoul's suggestibility and vulnerability.[21]

In setting the deed of arrangement and transfer aside, the primary judge found that Mr Hanna had "actively encouraged the plaintiff" to transfer his home to Mr Hanna if he paid out the then existing mortgage, and that Mr Hanna "counselled no caution".[22] Mr Hanna "bravely asserted that there were no disadvantages at all" to the plaintiff in the 16 September 2014 transaction.[23]

Two Solicitors Fail Mr Raoul

Mr Panopoulos, who also acted for Mr Hanna, suggested to Mr Raoul that he should retain a life interest in the property, and that he would need an independent solicitor to advise him as to the transaction with Mr Hanna. Mr Raoul agreed to each of these suggestions.[24] Mr Hanna then took Mr Raoul to see a Mr Taouk to act as the independent solicitor, despite knowing that Mr Raoul had another firm already acting for him in relation to a motor accident compensation claim. Mr Taouk provided advice confined to a review of the deed of arrangement.

In relation to the advice, such as it was, given to Mr Raoul by the two solicitors selected by Mr Hanna, the primary judge's findings, which were not challenged on appeal, were as follows:

> Mr Panopoulos accepted that his advice was less than adequate and suffered from the following shortcomings: first, he saw his role, primarily, as protecting the interests of Mr Hanna as an established client; secondly, he failed to comply with Mr Raoul's instructions by omitting to include in the Deed express provision for what would occur if Mr Raoul needed to be admitted to a nursing home; and thirdly, he failed to arm Mr Raoul, or any prospective solicitor, with sufficient details of the instructions given to him by Mr Raoul to enable Mr Raoul to receive appropriately critical advice from an independent solicitor.[25]

And:

> Mr Taouk's performance of his obligations as an independent solicitor was "irretrievably compromised" by an erroneous belief that it was sufficient for him to confine his advice to the terms of the Deed without making general enquiries about Mr Raoul's circumstances, asking for associated documentation, exploring the underlying transactions or testing Mr Raoul's understanding of the legal and financial implications of the transaction.[26]

There are some important lessons for solicitors here. No solicitor should act for both parties in a transaction which involves a large element of intra-family gift. Nor should a solicitor give advice about such a transaction without making substantial inquiries into the context and attendant circumstances. And there is a duty to counsel a client who wishes to proceed with an obviously improvident transaction "in appropriate terms (perhaps strong terms) about the risks in proceeding without further information or advice" such as financial advice.[27]

No one gave Mr Raoul advice that he would not have access to his capital should he need it.[28] Nor did Mr Raoul receive advice as to the impact of the transaction on his pension entitlements; especially the risk that his pension could be reduced or lost altogether, a matter about which he ought to have received

independent advice.[29] No one gave him advice sufficient to enable him to appreciate the extent of his future dependence on Mr Hanna for security and support, nor to appreciate that Mr Hanna acquired a present entitlement to his land.[30]

The Court of Appeal agreed with the primary judge that Mr Hanna had an onus to discharge in demonstrating that the transaction was "fair, just and reasonable".[31] That onus could not be discharged in the circumstances set out above and, where the solicitors' advice was fundamentally inadequate.

The Court of Appeal had little difficulty in upholding the primary judge's findings that the transaction was unconscionable on equitable grounds for the reason that the appellant took unconscientious advantage of the respondent who was in a position of special disadvantage. Moreover, sufficient elements of s 9(2) of the *Contracts Review Act 1980* existed to warrant a finding that the contract was unjust.[32] The case therefore demonstrates the substantial overlap between equitable doctrine and statutory protection.

David D Knoll AM

Counsel for the successful party in these proceedings

FOOTNOTES

1 MFB Properties (NQ) Pty Ltd v MSD Securities Pty Ltd [2018] QCA 259; MSD Securities Pty Ltd v MFB Properties Pty Ltd (No 2)[2018] 2 Qd R 51; see WD Duncan and Sharon Christensen, "Instalment Contracts and the Unwary Seller – A Case for Reform" (2017) 7 Prop L Rev 62 which considers the first instance judgment.

2 See, eg, *Sale of Land Act 1970* (WA) s 10 (right of terms buyer to seek rescission of contract from Supreme Court where seller mortgages land without consent of buyer or Court); *Law of Property Act* (NT) s 75; *Sale of Land Act 1962* (Vic) ss 29P, 29S(1)(a)(terms contract voidable at instance of buyer if subject land mortgaged without consent of buyer). Contrast the position in New South Wales where, under the *Land Sales Act 1964* (NSW) ss 13, 14, the seller only needs to give 28 days' notice before mortgaging land subject to a terms contract. The buyer has no right of termination in the event of the failure by the seller to give the notice, and has no right to refuse consent.

3 MSD Securities Pty Ltd v MFB Properties Pty Ltd (No 2) [2018] 2 Qd R 51, [21].

4 MFB Properties (NQ) Pty Ltd v MSD Securities Pty Ltd [2018] QCA 259, [37].

5 MFB Properties (NQ) Pty Ltd v MSD Securities Pty Ltd [2018] QCA 259, [37].

6 Raoul v Hanna [2017] NSWSC 728, [47(g)]; Hanna v Raoul [2018] NSWCA 201, [11].

7 Raoul v Hanna [2017] NSWSC 728, [160]; Hanna v Raoul [2018] NSWCA 201, [31(1)].

8 Raoul v Hanna [2017] NSWSC 728, [7].

9 Raoul v Hanna [2017] NSWSC 728, [10]; Hanna v Raoul [2018] NSWCA 201, [156].

10 Raoul v Hanna [2017] NSWSC 728, [69].

11 Raoul v Hanna [2017] NSWSC 728, [69].

12 Raoul v Hanna [2017] NSWSC 728, [92(a)–(b)], [116].

13 Hanna v Raoul [2018] NSWCA 201, [162].

14 Although that description was inaccurate.

15 Hanna v Raoul [2018] NSWCA 201, [54].

16 *Gibbons v Wright* (1954) 91 CLR 423, 437–438.

17 *Gibbons v Wright* (1954) 91 CLR 423, 438.

18 Hanna v Raoul [2018] NSWCA 201, [53].

19 This was a matter about which Mr Panopoulos had included a reference in a draft of the Deed of Arrangement, but which Mr Panopoulos omitted from the final document.

20 Hanna v Raoul [2018] NSWCA 201, [100].

21 Hanna v Raoul [2018] NSWCA 201, [101]–[102].

22 Raoul v Hanna [2017] NSWSC 728, [77].

23 Raoul v Hanna [2017] NSWSC 728, [112].

24 Raoul v Hanna [2017] NSWSC 728, [19], [28]; Hanna v Raoul [2018] NSWCA, [57].

25 Raoul v Hanna [2017] NSWSC 728, [69].

26 Raoul v Hanna [2017] NSWSC 728, [70]. Also see: Ryan v Aboody [2012] NSWSC 136, [79]; Bester v Perpetual Trustee Co Ltd[1970] 3 NSWR 30, 36.

27 Also see: Provident Capital Ltd v Papa (2013) 84 NSWLR 231, 233, [2] (Allsop P).

28 Hanna v Raoul [2018] NSWCA 201, [18].

29 Raoul v Hanna [2017] NSWSC 728, [107]; Hanna v Raoul [2018] NSWCA 201, [18].

30 Hanna v Raoul [2018] NSWCA 201, [31(3)], [52]; Raoul v Hanna [2017] NSWSC 728, [101].

31 See further: *Aboody v Ryan* [2012] NSWCA 395, [68] (Allsop P).

32 The Court of Appeal did not make a finding as to whether taking Mr Raoul to Mr Taouk rather than to Mr Raoul's solicitors, Konstan Lawyers, was an unfair tactic because there were sufficient other factors to demonstrate that the contract was "unjust": *Aboody v Ryan* [2012] NSWCA 395, [137].