IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 24/2020
[2020] NZSC 54

BETWEEN		GAVIN JOHN HURLIMANN Applicant
AND		BEVERLEY ANNE NOLAND Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: S I Perese for Applicant
B M Stewart and K N Sabine for Respondent

Judgment: 9 June 2020

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is dismissed.

C The applicant must pay costs of $2,500 to the respondent.

REASONS

Introduction

[1] The applicant, Mr Hurlimann, received from the respondent, Ms Noland, cash equal to half the value of their former matrimonial home when their marriage ended. Ms Noland had brought the home to the marriage. In the context of an attempt at reconciliation, Mr Hurlimann subsequently returned about 80 per cent of the payment to Ms Noland.

[2] The attempted reconciliation failed. Mr Hurlimann wants his money back. He seeks leave to appeal against refusals in the Courts below.

Extension of time

[3] This application was filed one day out of time, due to counsel error. Counsel has filed submissions explaining the error and apologising for it. The respondent does not oppose. The extension is granted.

Background

[4] Mr Hurlimann and Ms Noland were married for nearly 12 years. They separated in 2012 but remained on amicable terms and attended relationship counselling. But any prospect of reconciliation was lost when Ms Noland discovered Mr Hurlimann was in another relationship. Their marriage was dissolved in August 2015.

[5] In the context of the dissolution, Mr Hurlimann claimed a half interest in the matrimonial home. The home was Ms Noland's from a previous marriage, and it was common ground that prior to their marriage, Mr Hurlimann had assured Ms Noland that he would not make a claim against it. Ms Noland was extremely upset that the applicant had broken his promise, but she accepted it was not legally binding.[1] She borrowed from her parents, who in turn had to sell a property, to fund the pay-out of $305,902. The money was transferred on 3 September 2015.

[6] At Mr Hurlimann's initiative, he and Ms Noland met four days later on 7 September 2015, and again on 14 September 2015. Mr Hurlimann wanted to reconcile. At the second meeting he offered to return the money. Ms Noland agreed that they could attempt another reconciliation and Mr Hurlimann transferred $250,000 to Ms Noland's bank account.

[7] Mr Hurlimann and Ms Noland then attempted reconciliation. Although Mr Hurlimann did not move back in to the house, the pair returned to being on familiar terms and resumed a sexual relationship.

[8] The attempt ultimately failed. Ms Noland said she felt that Mr Hurlimann had not changed and that she deserved better. Almost exactly a year after Mr Hurlimann

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1 Property (Relationships) Act 1976, ss 21 and 21F.

returned the money, Ms Noland informed Mr Hurlimann that she had met another man and no longer wished to reconcile.

[9] Mr Hurlimann demanded Ms Noland return the $250,000. Ms Noland refused.

Lower Court judgments

[10] In the High Court, Mr Hurlimann advanced three causes of action: resulting trust, unconscionable bargain and deceit.[2] Only the second was pursued in the Court of Appeal and in this application, so we will focus on that issue.

[11] Mr Hurlimann argued that, due to an earlier brain injury, he suffered from impaired judgement and poor planning at the time he paid the money back to Ms Noland. That led him to make impulsive decisions. He had also been suffering from somatisation, depression and anxiety, as Ms Noland knew. It was argued that by accepting the money, Ms Noland took unfair advantage of Mr Hurlimann's mental health issues and so equity required repayment.

[12] Brewer J rejected that argument. All three causes of action were dismissed.[3]

[13] Ms Noland had recorded her phone and in-person conversations with Mr Hurlimann leading up to and during the second meeting. Transcripts were available of the phone conversations, and an audio recording of the second meeting was played at trial. In reliance on that evidence, the Judge found that there was no bargain at all.[4] Rather, the payment was a gift;[5] and the real question was whether Mr Hurlimann's mental health made it unconscionable for Ms Noland to keep the money.[6] On the evidence available, the Judge considered that Mr Hurlimann had not discharged the onus of proving on the balance of probabilities that his mental health issues made it unconscionable for Ms Noland to keep the money. There was no real

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2 *Hurlimann v Noland* [2018] NZHC 2251 (Brewer J) at [38], [56] and [71].
3 At [55], [70] and [75].
4 At [57].
5 At [50].
6 At [58].

linkage between the effects of those issues and his behaviour at the second meeting where the transfer was made.[7]

[14] The Court of Appeal upheld Brewer J's finding that the payment was a gift and not a bargain.[8] While it considered the gift might have been conditional on an understanding that it might open the parties to reconciliation, such condition had been satisfied in any case. Ms Noland did try to re-establish a relationship with Mr Hurlimann. Mr Hurlimann's gift was not conditional on the couple *successfully* reconciling.[9]

[15] The Court considered that in the gift context, the equitable principle of undue influence, rather than unconscionable bargain, was the correct lens through which to view the facts.[10] On these facts, however, the conceptual distinction made no practical difference. The Court found that undue influence could not be established.[11] While Mr Hurlimann's decision might have been considered "foolish",[12] the most that could be said of Ms Noland's influence was she acknowledged that the payment "would go a way to restoring the balance between them, and to preparing the way for her to agree to engage positively with Mr Hurlimann with a view to a possible reconciliation".[13] Absent any question of mental illness, Ms Noland's actions did not constitute undue influence.[14]

[16] The Court then turned to the evidence of Mr Hurlimann's mental health issues. The two main sources of this evidence were medical notes dating back to 2002 and a psychiatrist's report from 2017. The Court considered the psychiatrist's report provided little support for the claim that a material mental impairment adversely affected his decision-making in September 2015.[15]

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7 At [68].
8 *Hurlimann v Noland* [2020] NZCA 42 (Clifford, Mallon and Moore JJ) at [23].
9 At [28].
10 At [36], citing *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 165
11 At [41].
12 At [47].
13 At [48].
14 At [48].
15 At [52].

[17] The medical notes revealed that Mr Hurlimann had been suffering from, and treated for, depression and anxiety in the years preceding the breakup of his relationship with Ms Noland. In the absence of expert assistance, the Court considered it could not draw any conclusions as to the significance of those conditions on Mr Hurlimann's decision to transfer the money to Ms Noland.[16]

Submissions

[18] Mr Perese advances three arguments for Mr Hurlimann.

[19] First, Mr Perese submits that Mr Hurlimann had paid $250,000 for an opportunity to reconcile that was itself unachievable. This was because, during the second meeting, Ms Noland had said:

> If you can be on the same footing as me – mentally emotionally and financially, when we are both on our feet then we'll start all over again … .

[20] Mr Perese submits that it was not possible for Mr Hurlimann to be on the same footing as Ms Noland, mentally, emotionally and financially. This, it is argued, means Ms Noland's attempt to reconcile was "of no value, a nullity".

[21] Second, Ms Noland did not honour the spirit of the basis on which the payment was made. Mr Perese points to Ms Noland's brief of evidence in which she said that, after going on several dates with other men, she realised that she "deserved more for [herself] than what [she] would ever get from [Mr Hurlimann]". Mr Perese submits that this shows Ms Noland did not view the attempt to reconcile as being anything more than an option open to her.

[22] Finally, Mr Perese submits that the Court of Appeal was wrong not to attribute more weight to the psychiatrist's report. He submits that Mr Hurlimann's personality change is the only plausible explanation for what would otherwise be the "foolish behaviour" of giving away such a large amount of money in the hope of having an opportunity to reconcile with a former spouse.

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16 At [53].

[23] Mr Perese also submits that the law of undue influence in relation to gifts is not settled.

Our assessment

[24] There is no question of law of general or public importance engaged by this application.[17] While Mr Perese submits that the law of undue influence is not settled, he does not explain why or how the law might evolve to accommodate this case. In truth, as the respondent submits, Mr Hurlimann's difficulty is not with the relevant principles of undue influence, but with their application to these facts. That is why the thrust of Mr Perese's submissions is in substance an argument for miscarriage of justice.[18] In civil appeals the miscarriage ground is not an avenue for error correction except where (rarely) there is an apparent error of such a substantial character that it would be repugnant to justice for it to go uncorrected.[19] This is not such a case.

[25] The nature of, and background to, Mr Hurlimann's admitted mental health issues were the only matters capable of founding a successful case in undue influence. That evidence has twice been assessed against the relevant principles. It was found wanting on both occasions because it was equivocal on the key issue of the relationship between those issues and the applicant's gift. We see no reason to depart from those findings and so see no risk of miscarriage in this case if leave is not granted.

Result

[26] The application for an extension of time is granted.

[27] The application for leave to appeal is dismissed.

[28] The applicant must pay costs of $2,500 to the respondent.

Solicitors:
Saseve Solicitors, Auckland for Applicant
Simpson Western, Auckland for Respondent

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17 Senior Courts Act 2016, s 74(2)(a).
18 Section 74(2)(b).
19 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].