RECEIVERS AND THE CREDIT CODE — ISSUES FOR SUCCESSFUL RECOVERY (A CASE STUDY)

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The question of whether, on the facts posed, Jim and Jane Jones can avert the mortgagee's sale of their home is necessarily determined under New Zealand law and involves consideration of:

(1) A New Zealand statute, the Credit Contracts Act 1981, which has no precise Australian counterpart;

(2) Another New Zealand statute the Fair Trading Act 1986, which is a close copy of Part V of the Trade Practices Act 1974; and

(3) General legal and equitable principles.

The Credit Contracts Act replaced the rigidities of the old money lending statutes. It affects all types of credit provision, not just loans *stricto sensu*, and all lenders including banks. One consumer protection device which it adopts is to empower the High Court to impose a broad range of remedies where:

(a) a term of a credit contract is oppressive; or

(b) a right or power contained in a credit contract not unfair in itself is being exercised oppressively; or

(c) entry into the credit contract has been induced by oppressive means.

"Oppressive" is defined as "oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice." Since the coming into force of the statute the courts have become used to *in extremis* applications by debtors to avert mortgagee sales or the appointment of receivers by debenture holders.

Despite some fears when the statute was first enacted, it is now apparent that the tendency of the courts is to exercise their powers cautiously. The New Zealand Court of Appeal has recently made it clear that the mere fact that (as in the present problem) delay would be to the economic benefit of the defaulting mortgagor does not render the persistence in its contractual power to sell by a mortgagee oppressive.[1] There is no authority under the general law justifying interference by the court on that particular ground.

So whether anything can be done for the mortgagors will depend on the circumstances of the execution of the mortgage. The question is whether anything turns on the facts taken either individually or in combination:

(a) that the bank did not disclose to the mortgagors that the effect of the wording of the mortgage was that their contingent liability under the guarantee was secured thereby;

(b) that the mortgagors were not advised independently of the bank and of each other; and

(c) that the female guarantor had no financial interest in the principal debtor company.

The general rule is that a mistake as to the effect of a contractual provision, unless induced by a representation by the other party, or known by the other party so as to be a basis for rectification, does not entitle the mistaken party to relief.[2] But for a banker to extract from a customer who is not separately advised security for a new advance which security in its fine print defines the amount secured to include an existing contingent liability and for the banker to do so without drawing attention to that fact can be argued to be misleading or deceptive conduct.

The steps in the argument are these. A statement as to the effect of a document is a statement of fact.[3] There are on the authorities circumstances in which non-disclosure of material fact may amount to misleading or deceptive conduct. (This conclusion is more easily arrived at in New Zealand because the relevant definition provision "In this Act a reference to engaging in conduct ... includes ... omitting to do an act" (s2(2)(a)) is more direct than the Australian version.) There is no reason why non-disclosure of the effect of a document should not amount to non-disclosure of a material fact. The circumstances which on the facts posed impose an obligation on the bank to speak out include the element of confidence in the banker-customer relationship and the absence of independent legal advice. Support for this view is to be found in the recent High Court decision in *Dungey v ANZ Banking Group NZ Limited*,[4] in which a defacto wife was encouraged by a bank to agree to her protector's individual bank account being made a joint account without being warned that this would make her liable for the protector's large overdraft and outstanding personal loan. The court ruled that the totality of the bank's acts and omissions constituted misleading and deceptive conduct.

If in the circumstances posed by the problem such an argument succeeded the court would have power to vary the mortgage terms to exclude the guarantee liability from the secured amount.

The original guarantee is not a credit contract, and in any event would be governed by the law of some Australian state, presumably Queensland. But the later mortgage is a credit contract and the provision including the liability under the guarantee among the obligations secured thereby is one of its terms. It is arguable that the bank's failure to warn in the circumstances makes its conduct oppressive within the meaning of the Credit Contracts Act definition in which event the court would have a comparable power to extinguish liability under the mortgage for the guarantee.

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1 *Taylor v Westpac Banking Corporation* (1996) 5 NZBLC 99-377.

2 *Hamilton v Watson* (1845) 12 Cl & Fin 109; 8 ER 1339; *Goodwin v The National Bank of Australasia Limited* (1968) 117 CLR 173; *Alexander v Westpac Banking Corporation* (1995) 3 NZBLC 99-231; *Bank of New Zealand v Maas-Geesteranus* (1991) 3 NZBLC 99-230.

3 Spencer Bower & Turner *The Law of Actionable Misrepresentation* (3rd ed, 1974) p 65.

4 HC, 18.2.97 Doogue J Blenheim CP 12/96.

It is perhaps useful to note the weight attached by the High Court in *Dungey's* case and in the slightly earlier case of *Clarke v Westpac Banking Corporation*[5] to the provisions of the Code of Banking Practice which provide in para 5.3.1:

> Banks will advise individuals proposing to give them a guarantee or other security for someone else's liabilities that they should seek independent legal advice before doing so because of the risk of ultimate liability.

Both judges in the two cases referred to declined to treat this provision as imposing some sort of burden of care on the bank in favour of the surety and given the propensity of New Zealand courts to pluck duties of care out of the empty air this must be regarded as showing merciful restraint. Perhaps rather surprisingly neither judge was prepared to treat the breach of the code as evidence of oppression within the meaning of the Credit Contracts Act definition despite it being an element of that definition that there is "contravention of reasonable standards of commercial practice". One would have thought that the bankers' own code would be treated as cogent evidence of such standards. No question under the Fair Trading Act arose in *Clarke's* case because the documentation predated the coming into force of that statute, but in *Dungey's* case the judge observed that a "breach of [the code] must always be likely to give rise to misleading conduct".

Finally it is necessary of course to give consideration to the effect in the fact situation posed of the line of cases commencing with the House of Lords decision in *Barclay Bank plc v O'Brien.*[6] The effect of these cases is that the mere fact that a wife or other cohabiter obtains no direct benefit from the advance being guaranteed puts a bank or other lender on inquiry as to whether the surety is being unduly influenced by the principal debtor. It seems from the authorities that a bank to satisfy its obligation must point out to the wife the risk she is running and take reasonable steps to persuade her to obtain independent advice. The cases go so far as to suggest that even this is not enough if the advice given though independent is advice that no competent solicitor would give[7] and that independent advice as to one advance does not necessarily protect the bank in respect of future advances although the surety's liability therefor is plain from the wording of the guarantee.[8]

In the present case that reasoning applies possibly to the original guarantee, but certainly to the mortgage, so that the wife is entitled to a declaration that so far as her interest is concerned liability as surety if enforceable at all is not secured against the land.

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5 (1996) 7 TCLR 436 (Patterson J).

6 [1994] 1 AC 180; 1993 4 All ER 47.

7 *Credit Lyonnais v Birch* [1997] 1 All ER 144.

8 *Baxter v ANZ Banking Group (NZ) Ltd* (1996) 5 NZBLC 104281, 108290, criticised by P G Watts [1996] New Zealand Law Review 471, 472 ff.