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Duress and Joint Ventures

A recent decision of the Court of Appeal sheds some light on the issue of when conduct will amount to duress by a party to a joint venture arrangement.

In ***McIntyre & Ors v Nemesis DBK Ltd* [2009] NZCA 329**, the Court of Appeal was asked to consider whether the Appellants were acting under duress when they agreed to important variations to agreements relating to a Joint Venture for the development of a property in Nelson.

There were two formal agreements in place between the parties, the first of which was an agreement for Mrs McIntyre to sell a half share in the property to be developed to a Mr Hastwell's adopted daughter. The second agreement was a Joint Venture Agreement ("Agreement") regulating the subdivision and sale of sections that were to result from the development of the property. The overriding objective of the joint venture was to subdivide the land in order to generate the maximum profits. Mr Hastwell was appointed as the Manager of the development and his remuneration was set out in the Agreement as follows:

> "***At the completion of the last stage of subdivision, Hastwell shall be entitled to take one (1) unallocated lot of his choice and this shall constitute his only claim to remuneration for managing and supervising the work of the subdivision… and this lot shall not be counted as one of those to which he is entitled by ballot nor in the computation of value distributed between the parties pursuant to clause 7.***" (paragraph 5)

The subdivision was subject to significant delays due to disputes over planning and consent issues.

From 1998 onwards, Mr Hastwell began to express concerns over the amount of time and effort he was expending on the joint venture project. He had decided that the remuneration agreed upon under the Agreement had become insufficient. As a result there was a series of meetings and exchanges of correspondence between Mr Hastwell and Mr Smyth (solicitor to Mrs McIntyre and independent trustee of the Gladwen Frances McIntyre Family Trust ("Trust")) which culminated in the agreement by the trustees (which had replaced Mrs McIntyre as a party to the JV Agreement) that Mr Hastwell would have the right to select two lots from the subdivision and to be remunerated at a rate of $60 per hour for his attendances.

It is this variation to the Agreement which the trustees of the Trust allege was entered into as a result of economic duress. Following a discussion of the relevant case law, the Court of Appeal concluded that duress alleged in this case was best analysed under the following headings:

(a) Was there a threat against, or the exertion of illegitimate pressure on, the trustees?

(b) If so, did that threat result in the trustees being coerced into entering into the variation agreement?

C. If the result of that analysis is a finding that there was duress, did the trustees affirm the variation agreement?

The Court observed that the fact that one party to a contract has exerted pressure on the other does not, on its own, amount to duress – "***Pressure (and even threats) is commonly exerted in commercial dealings. A claim of duress cannot succeed unless there has been the exertion of illegitimate pressure***" (paragraph 26).

In this case the allegation was that Mr Hastwell threatened to stop managing the subdivision unless his remuneration was increased, when he was contractually bound to do so.

Counsel for the trustees said that this was a threat to breach a contract, which was illegitimate pressure. In this case, the Court proceeded on the basis that a threat to breach a contract is indeed unlawful and generally illegitimate but that care must be taken to distinguish between (illegitimate) threats and (legitimate) warnings.

The Court observed that where one party warns the other that, as a matter of commercial reality, it will not be able to perform its contractual obligations unless changes are agreed to, this does not amount to a threat.

Having analysed the correspondence and meetings which occurred between 14 February 2001 and 17 January 2003, the Court summarised the case for the trustees as follows: although each of the individual items of correspondence or individual meetings may not have itself constituted illegitimate pressure, the cumulative effect of Mr Hastwell's bullying manner, his difficult dealings, his constant complaints re remuneration and his statements that he would not continue unless paid more, amounted to illegitimate pressure on the trustees.

The Court concluded that when viewed overall, Mr Hastwell's pursuit of a change in the basis of his remuneration, though forceful and repetitive, did not cross the line between forceful and illegitimate pressure.

The Court then turned to the issue of whether coercion occurred and in doing so proceeded on the assumption that (contrary to the above finding) the conduct of Mr Hastwell did constitute illegitimate pressure.

The Court observed that consideration of whether there was coercion in fact focuses on the availability of alternatives and that other factors that are relevant to the analysis are whether the person said to have been coerced:

(a) Did or did not protest;

(b) Was independently advised; and

(c) After entering the contract, took steps to avoid it.

The Court concluded that there were a number of alternative courses available to the trustees including buying out Mr Hastwell's interest in the subdivision or appointing another Manager.

The Court found that there was no evidence that the trustees were coerced into agreeing to the increased remuneration, that there was no protest expressed at Mr Hastwell's behaviour and that the explanation given for this, that it was necessary to keep Mr Hastwell on side, was unconvincing.

When considering whether the party on whom coercion was alleged to have been exerted had been independently advised the Court observed that Mr Smythe was an experienced Property Solicitor and provided legal advice to Mrs McIntyre and to the trustees after they took over Mrs McIntyre's interest in the joint venture and that the other trustee Ms Campbell, also brought her experience of resource management matters to bear.

The Court also observed that Mr Smythe was aware of the binding nature of Mr Hastwell's contractual obligations and able to advise Mrs McIntyre of that. He was not bullied by Mr Hastwell and his contemporaneous file notes or communications with his client do not support the proposition that he was coerced by Mr Hastwell's conduct into agreeing that the trustees would accept the variation agreement.

The Court then considered whether any effort had been made to avoid the contract. The Court concluded that the steps which were taken by the trustees:

(i) Allocating the rear sections to Mr Hastwell;

(ii) Paying the hourly rate which was ultimately agreed for his work after September 2001; and

(iii) Not at any stage protesting that they had acted under duress until after Mr Hastwell had died;

should be seen as affirmation.

The Court noted that a failure to take timely steps to avoid the variation agreement, said to have been agreed to under duress, amounts to affirmation and concluded that when the conduct of the trustees over the period after the 11th May 2001 until the duress issue was first raised in July 2005, is considered, it is inevitable that any duress claim would have been found to fail on the basis that the variation agreement had been affirmed.

In their overall assessment of the coercion issue, their Honours saw it as significant that it was the independent trustees who persuaded Mrs McIntyre to agree to the increased remuneration. This was not a situation where Mrs McIntyre was cowered into acceptance: on the contrary, she was resisting it.

The Court concluded that the assessment made by Ms Campbell and Mr Smythe was realistic in the circumstances:

> "***Mr Hastwell was difficult and sometimes unpleasant, but his intimate knowledge of the subdivision and the Council's requirements was important, and it was obvious that he was very unhappy at how the delays in the completion of the subdivision had impacted on the attractiveness of the remuneration to which the parties had originally agreed.***" (paragraph 90)

The Court concluded that the trustees had agreed to the change in remuneration because they thought it was the best option in the circumstances, not because they were coerced into doing so by Mr Hastwell's conduct.

The case emphasizes that to the extent possible, the basis of remuneration for a party who is to be actively involved in the management and conduct of a joint venture arrangement needs to be set out in clear and unambiguous terms at the outset, and that it may be prudent to provide for an independent and appropriately qualified third party to adjust such remuneration if circumstances change or significant delays are encountered.

Norris Ward McKinnon is experienced in advising clients on joint venture arrangements. This article is not a substitute for detailed legal advice and if you have a specific query in respect of a joint venture arrangement, please contact Norris Ward McKinnon (07) 834-6000 or by email to: lawyers@nwm.co.nz.

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