IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2013-409-001716
[2015] NZHC 2644

BETWEEN	KAREN JANE MCGRATH, JOHN GRAEME GARDNER, ANNA LOUISE COOK, SUZANNE JUDI DAVIES First Plaintiffs
AND	KAREN JANE MCGRATH AS EXECUTOR AND TRUSTEE OF THE ESTATE OF SALLY ELIZABETH SIMSON Second Plaintiff
AND	KAREN JANE MCGRATH AS TRUSTEE OF THE R & S SIMSON FAMILY TRUST Third Plaintiff
AND	RUSSELL JAMES SIMSON AS EXECUTOR AND TRUSTEE OF THE ESTATE OF SALLY ELIZABETH SIMSON First Defendant
AND	RUSSELL JAMES SIMSON AS TRUSTEE OF THE R & S SIMSON FAMILY TRUST Second Defendant
AND	RUSSELL JAMES SIMSON Third Defendant

Hearing: 12-13 October 2015

Appearances: M J Wallace for Plaintiffs
Defendant in person with McKenzie Friend Ms J A West

Judgment: 28 October 2015

JUDGMENT OF DUNNINGHAM J

Introduction

[1] Russell Simson and Sally Gardner became a couple in the mid 1990's, both having been married before. They married seven years later in 2001. Russell describes it as a happy marriage, where they shared common interests such as square dancing and spending time at Sally's family bach in the Lewis Pass.

[2] They recognised the need to structure their affairs to provide for each other should one die, but also to provide for their adult children from their respective earlier marriages. With the help of their lawyer they set in place legal structures, involving the execution of mirror wills and the establishment of a family trust, to achieve that end.

[3] The arrangements Sally and Russell put in place were put to the test sooner than expected as, sadly, Sally was diagnosed with Waldiston cancer. Despite treatment she developed a secondary brain tumour. She died in November 2009 after only eight years of marriage.

[4] Difficulties arose between Russell and Sally's adult children (the Gardner children) in the year following Sally's death. At the end of that year the Gardner children initiated Family Protection Act proceedings claiming their mother had breached her moral duty to them because her will left almost all her assets to the R & S Simson Family Trust, of which Russell was a trustee. Russell was deeply aggrieved by this action which he saw as an affront to his late wife's wishes.

[5] In late 2012, the parties agreed to go to formal mediation. They appointed Nicholas Davidson QC as the mediator. The Gardner children and Russell were each legally represented. The mediation took all day. Eventually, at around 7.00 to 7.30 that evening, they signed a settlement agreement. The next day, the lawyer for the Gardner children identified the agreement missed one important term and three more minor matters. He telephoned the lawyer for Russell. Russell's lawyer acknowledged that the written document did not reflect all matters that had been agreed. An addendum to the signed settlement agreement was prepared by the Gardner children's lawyer reflecting the matters he thought had been omitted.

[6] Russell initially refused to sign the addendum, asserting he would only be bound by the settlement agreement itself. However, in due course, he resiled from that position too, and said he should not be bound by any aspect of the settlement agreement. He now asserts that he suffered from mental incapacity at the time of the mediation, that the agreement was obtained through duress, and that the agreement represents an unconscionable bargain. For all these reasons, the agreement should be set aside in its entirety. In any event, even if the agreement is not set aside, there should not be rectification of the agreement as sought by the plaintiffs to include the matters covered in the addendum.

[7] In those circumstances the following issues need to be determined:

(a) Should the settlement agreement reached in mediation be set aside on any of the grounds raised by Russell?

(b) If it is not set aside, should the agreement be rectified to reflect some or all of the matters set out in the addendum prepared to the settlement agreement?

(c) If the settlement agreement is upheld, either as signed, or as rectified, should specific performance of the agreement be ordered?

What arrangements had Sally and Russell made for each other and their children in the event of their death?

[8] As Russell explains, his and Sally's marriage was a second marriage for both of them. They both had children from a previous marriage, so they took legal advice on estate planning. In line with that advice they set up the R & S Simson Family Trust (the Trust). The trustees were the two settlors, Russell and Sally Simson, and Neil Simson, Russell's brother, who was known to all as Charlie Simson. The discretionary beneficiaries of the Trust were Russell and Sally and their respective children from their previous marriages.

[9] The family home that Sally and Russell lived in, and the bach at the Lewis Pass, were transferred to the Trust, and the debt owed by the Trust at the time of Sally's death was $233,000 to each of them. The intention was that Russell and Sally, in their capacity as discretionary beneficiaries, would have the ability to use the Trust's assets and income to provide for themselves during their lives, particularly in their retirement. The Trust was also intended to protect their assets to allow their offspring to benefit from them after both Russell and Sally had died.

[10] Sally and Russell also owned two rental properties, in Charles Upham Avenue and in Suva Street in Christchurch. As part of their estate planning, they altered their ownership of these two properties so that they held them as tenants in common in equal shares as opposed to a joint tenancy. This was to allow Sally and Russell to bequeath their half share, via their wills, into the Trust and for the survivor to retain the other half share, to also be bequeathed upon his or her death to the Trust by way of the survivor's will.

[11] Both Sally and Russell then executed mirror wills whereby they:

(a) placed their half share of the relationship assets, including the rental properties, into the Trust;

(b) forgave the existing debt that the Trust owed them;

(c) appointed a replacement trustee from within their own family in order to ensure the interests of that family continued to be recognised by the trustees, after their death.

[12] At the same time as the Trust was established, a memorandum of wishes was prepared to guide the trustees in the operation of the Trust and in making dispositions from the Trust fund. Relevantly, that memorandum of wishes provided that:

(a) while Russell and Sally were alive, it was to be "operated for the benefit of ourselves in order that we can live in reasonable comfort and provision for any health needs we may have";

(b) Russell and Sally should be permitted to "reside in any house, or other residential unit owned by the Trust, without consideration, subject to paying all rates, mortgage payments, insurance premiums, cost of all repairs and other outgoings and keeping the properties in good condition";

(c) following the death of either one of them, any income from the Trust assets was to be for the sole benefit of the surviving spouse until their death;

(d) following the death of both Russell and Sally, Russell's children were to benefit equally from his half share and Sally's children were to benefit equally from her half share of the Trust's assets.

[13] In practical terms, therefore, their wish was that they enjoyed a life interest in the assets of the Trust and, when both of them died, half the Trust assets were to go to Russell's children and half of the Trust's assets to go to Sally's children, whether by distribution or by resettlement into a Trust for the benefit of those children.

What went wrong with those arrangements?

[14] When Sally was diagnosed with a secondary brain tumour, after receiving treatment for cancer, she needed 24 hour nursing care. Her four adult children took turns to be with their mother despite their family commitments. This was an emotional and intense time for the family while they cared for their mother at St John of God Hospital at Halswell in Christchurch. When the family was advised that Sally's death was near, her children went to her bedside, as did her sister Judy, and were there when she passed away. Her children still grapple with the fact that Russell was not there at that time, nor did he arrive on time to make arrangements with the funeral director. The date of the funeral had to be changed to accommodate Russell's pre-existing commitments. Russell also advised the funeral director he

would not pay for any part of the funeral, when he and the Gardner children differed on aspects of the funeral arrangements. Russell, in turn, felt the Gardner children "took over" the arrangements for the funeral, excluding him totally, and the funeral was not what he wanted for Sally.

[15] These, and other matters are not recounted to cast blame on Russell or the Gardner children. They are recounted because they help explain the disintegration in the relationship between the parties. I accept, as Russell said in cross-examination, "we coped quite differently, our reactions to Sally's illness was different and it doesn't make either of us right or wrong it was just different. They don't seem to be able to accept that everybody doesn't do it their way".

[16] Karen McGrath, the eldest child of Sally, was named the executor of her mother's estate in her mother's will. She was also appointed to be the trustee to replace Sally as a trustee of the Trust. As Karen explains though, she had little knowledge of the Trust and how it worked. Indeed, she said she wished that her mother and Russell had called a meeting with both families while Sally was still alive to explain to them how the Trust ran and was intended to be run if she or Russell died.

[17] Two weeks after their mother's death, the Gardner children asked for a meeting with Russell and his brother Charlie to discuss and understand how the Trust was being run. Russell told them that they "could trust him to run it and that he would be totally transparent". However, that promise was not carried out from the Gardner children's perspective. For example, the Trust did not operate a separate bank account and income and expenses were operated through Russell's personal accounts which Karen was not privy to.

[18] In April 2010, Russell came to see Karen seeking to mortgage his half share of the two rental properties in order to raise some funds for investments he wanted to make. Karen discussed this with the other Gardner children and they decided they did not want to put up the Trust's half share as security for Russell's investment activities.

[19] The next issue concerning the estate property arose out of a meeting to discuss the rental property at Charles Upham Avenue. The tenants had moved out and Russell wanted to do some refurbishment work before re-letting it. However, that would require a bank loan of $35,000 to $50,000 against the property which, again, needed to be agreed to by Karen. With the support of her siblings, Karen was prepared to agree to this if Russell would agree to "splitting" the Trust so that the Gardner family interests and the Simson family interests did not have to continue to work together. A meeting was held at the Cashmere Club where Karen says an arrangement to that effect was agreed to. However, Karen says the next day Russell pulled out, so she did not sign the bank loan. Russell nevertheless proceeded with the renovations with personal funds but, for both sides, these events escalated tensions.

[20] Another issue which escalated the distrust between the parties was when Karen found out that, shortly before her mother's death, Russell had used joint funds for the deposit to purchase a property at Marley View Road. Russell maintains this property should be treated as his personal property because he refunded a large part of the deposit from an account which he asserted was his "separate property" because it was in his sole name. However, he acknowledged that the funds in that account came from income earned during the marriage and he and Sally did not have a contracting out agreement under the Property (Relationships) Act.

[21] From the Gardner children's perspective, Russell expected to do whatever he wanted with the property without reference to Karen, as the executor of her mother's estate, and as newly appointed trustee of the Trust. From their perspective, Russell was "arrogant, self absorbed" and "money hungry". Equally, Russell found the Gardner children difficult to deal with. He describes them as "callous" and taking "no interest in my state of bereavement". He also did not trust Karen to exercise her powers as a trustee to give security to him as the surviving spouse, saying:

> [The Trust] works fine if everybody gets on but as soon as you get a hostile trustee the whole thing falls to bits. We have got a totally ineffective Trust because we have got three very divergent people.

[22] Again, I recite these facts, not to allocate blame to any one party, but to illustrate the practical reality that, following Sally's death, it became evident that the trustees would not be able to work together. Russell had been used to exercising control over the Trust and its assets. He was not happy to relinquish that level of control by having to deal with his stepdaughter, Karen, when he perceived her as unsympathetic to his plight and his needs. She, on the other hand, was concerned that if Russell would not be open with her about the operation of the Trust and the use of the Trust's assets, so they were protected in the long term for the final beneficiaries, then it would be better that there was some practical change to the arrangement so that Russell and the Gardner family could go their separate ways.

[23] The Gardner children took advice from their lawyer, Pearse Smyth of Cameron and Co, about the situation. On his advice they commenced a Family Protection Act claim against their mother's estate. That was the first step in the chain of events which have led to these proceedings.

What happened at the mediation?

[24] After the Family Protection Act claim was filed there was ongoing communication between the Gardner children's lawyer and Russell's lawyer, in order to sort out a solution. Little progress was made.

[25] Eventually the parties agreed to go to formal mediation. The mediation was scheduled for 4 December 2012 at the offices of Mr Davidson QC, the mediator, commencing first thing in the morning.

[26] Present at the mediation were the four Gardner children; Karen McGrath, John Gardner, Anna Cook and Suzanne Davies. They were represented by their lawyer, Mr Smyth. Russell was represented by a barrister, Mr Dale Lester, who had been instructed by his solicitor, Mr Alan Bruce. Russell was also accompanied by a support person, a long time friend, Sandra Sinclair.

[27] At some point, though the parties' recollections are hazy, they signed a standard mediation agreement which identified the dispute to be mediated, and set out various provisions about the conduct of the mediation and about confidentiality.

It included a specific confidentiality agreement to be signed by Sandra, as she was, of course, only attending in a support capacity, rather than as a party.

[28] As is common practice, the mediator opened the mediation by welcoming everyone, explaining the process of mediation and the intended outcome, which was that the parties would not have to take the matter further in the Courts. Mr Davidson asked each party to introduce themselves and to say a little about what they were feeling and what they hoped to achieve during the day. Anna's evidence was that she said how happy she was that the parties were finally getting together for mediation after everything they had been through over the past couple of years. She explained that the Trust had not been functioning properly for a long time and that the parties needed to sort out "a decent outcome for all involved so it wasn't to carry on the way it had done".

[29] The parties' accounts of the mediation process are not dissimilar. They agree that during the mediation, the assets and liabilities of Sally and Russell and the Trust were put up on the whiteboard and discussions ensued about how a separation of those assets and liabilities would work. The Gardner children were keen to secure control of the Lewis Pass bach, as it had been owned by their mother's family since well before Sally met Russell. Similarly, Russell was keen to retain the Marley View Street property that he had purchased just prior to his wife's death, as he considered that to be his separate property. The parties were all agreed that the debt of $233,000 owed by the Trust to Russell was recorded as a liability on the whiteboard.

[30] As is usual in a mediation, the parties spent some time together and at other times withdrew to a separate room where they could talk with their lawyer alone or with the lawyer and the mediator, and this process happened several times over the day. Options for a final agreement were written up on the whiteboard, and were added to and changed as the negotiation continued. Some minor items were wiped off the whiteboard when it was decided that they were not to be brought into the agreement.

[31] All were agreed that the mediation was prolonged. They commenced the mediation at the beginning of the day and it did not conclude until 7.00 or 7.30 pm. Most of the witnesses say that the terms of the agreement they negotiated were recorded on the whiteboard during the afternoon and, when all had been dealt with, Mr Davidson went through them to confirm the agreement reached.

[32] The lawyers then, with the assistance of Mr Davidson's personal assistant, converted the agreement into a formal written document. It needed some adjustments to ensure the parties were satisfied that the wording accurately reflected the terms of agreement, but in the end a written agreement was presented to the parties and they signed it. It also needed to be signed by Charlie Simson, the third trustee, and he did that at Cameron and Co's offices the following day.

[33] The key points recorded in the signed agreement were as follows:

(a) all disputes between the parties were settled by the agreement, including the Family Protection Act proceeding and any other claim the parties may have had against Sally's estate;

(b) the Lewis Pass bach was to be resettled in a Trust for the Gardner family;

(c) the terms of the Gardner Family Trust would include an obligation to provide, free of charge, use of the bach by Russell and his children during his lifetime for a specified number of days;

(d) Russell would transfer his half interest in the Charles Upham Avenue and Suva Street properties into the Trust, but would be compensated from the Trust if any tax losses that he could have claimed were no longer available as a consequence;

(e) the Marley View Street property was to be retained by Russell as his separate property, and he would be responsible for the remaining debts on it;

(f) the Trust would compensate Russell for the amounts he had spent on the rental properties on production of evidence to establish those claims;

(g) a sole trustee would be appointed to the Trust and a mechanism was agreed for making that appointment;

(h) the agreement was conditional upon the third trustee, Charlie Simson, consenting to the provisions of the agreement.

[34] Russell was a reluctant signatory to the agreement. He made it clear throughout the mediation that this did not reflect his wife's wishes and he was angry at having to be there. He then left hastily in what John described as "a foul mood". However, the Gardner children all expressed a sense of relief that an agreement had been reached and their respective families could move forward. As Anna put it, "we were overjoyed that this nightmare was going to be over". However, matters were not resolved.

What happened after the mediation?

[35] When Mr Smyth reviewed the signed copy of the agreement the next morning in order to prepare a reporting letter to his clients, he immediately realised that a significant term of the agreement, as he understood it, had been omitted from the written record. That term was the obligation for Russell to forgive the $233,000 debt owing to him by the Trust.

[36] He says he immediately contacted Mr Lester and advised him of the mistake. Mr Lester readily agreed that the term had been omitted in error and both Mr Lester and Mr Smyth contacted Allan Bruce, Mr Lester's instructing solicitor.

[37] On reviewing the agreement again, Mr Smyth also realised there were some other minor omissions. He then suggested to Mr Lester that in these circumstances it would be appropriate to prepare an addendum to the settlement agreement to deal with those errors and omissions. He sent that through to Mr Lester but did not

receive a reply and Mr Smyth presumed Mr Lester had ceased receiving instructions on the matter.

[38] The terms which Mr Smyth considered had been admitted and which he incorporated in the addendum, can be summarised as follows:

(a) Russell was to forgive the debt of $233,000 to the Trust;

(b) the agreement to allow Russell 30, 24 hour periods in the bach, rent free, should be qualified by the words "per calendar year" to make it clear this was an annual entitlement, not a lifetime entitlement;

(c) the deed of trust to create the Gardner Family Trust was to include express reference to Russell's entitlement to the free use of the bach and Russell's lawyer would be allowed to have sight of the draft deed of Trust, primarily to ensure that such an agreement was incorporated in it, before the bach was resettled into that Trust; and

(d) in consideration of the Marley View Street property being retained by Russell, as his separate property, the transfer of the Lewis Pass bach out of the Trust to the Gardner Family Trust would not be taken into account in any future division of the Trust's assets.

[39] Russell did not accept that the addendum drafted by Mr Smyth accurately reflected further agreed matters. On 20 March 2013, his lawyer emailed Mr Smyth saying "[o]ur client advises that he will comply with the signed agreement from the mediation but not with the unsigned proposed amendment".

[40] On 20 August 2013, the Gardner children's lawyers sent a copy of the draft Gardner Family Trust deed for the trust intended to hold the Lewis Pass bach and also a range of other documents for signature by Russell, including:

(a) the addendum;

(b) a deed of appointment and retirement of trustees; and

(c) authority and instruction forms regarding transfers of the four properties to either the Gardner Family Trust or to Mr Lindsay Lloyd, the solicitor proposed as the sole trustee of the Trust.

[41] On 10 September 2013, Russell's lawyers responded by advising that Russell would sign a deed of appointment and retirement of trustees and the authority and instruction forms, subject to certain conditions, but would not sign the proposed addendum to the mediation agreement "as he believes he did not agree to forgive the debt to the trust at the mediation".

[42] With the parties having reached stalemate, the plaintiffs filed these proceedings in late 2013, seeking rectification of the agreement to reflect the matters set out in the addendum prepared by Mr Smyth. They also sought an order of specific performance requiring Russell, in his various capacities as executor and trustee of the estate of Sally Simson, trustee of the Trust and beneficiary of Sally's will, to properly execute all documents including the addendum and any documents which were required to be signed for the terms of the settlement agreement to be given effect.

[43] Even these proceedings have had a chequered history. Russell chose not to be legally represented, but filed his own statement of defence. It did not meet the formal requirements of the High Court Rules.[1] More importantly, the plaintiffs argued that because it did not deny key allegations in the statement of claim, as required by r 5.48, those allegations should be treated as admitted and judgment entered accordingly. However, following the hearing of an interlocutory application on that matter, the Court accepted that Russell's failure to specifically deny each allegation could not properly be taken as an admission pursuant to r 5.48(3), particularly when the document was construed as a whole.[2]

[44] Leave was given to Russell to file an amended statement of defence. However that, too, had shortcomings. More importantly, by May 2014, it became apparent that Russell wished to advance positive defences to the plaintiffs' claim,

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1 High Court Rules, rr 5.2-5.14.
2 *McGrath v Simson* [2014] NZHC 721.

including that he signed the settlement agreement under duress and when suffering from mental incapacity, and the Court should therefore set aside the settlement agreement in its entirety. The Court held that the plaintiffs were entitled to a proper pleading to which they could then respond, although the Court directed it would be acceptable if Russell simply filed a document called "Particulars of Pleadings of Duress and Mental Incapacity".[3] A document described as this was filed in June 2014.

[45] It appears that matters were deferred while Russell sought legal representation. For a period he was legally represented and further attempts were made to settle the dispute to no avail. However, those instructions ceased and Russell continued to act in person.

[46] The matter came back before the Court and, in a minute issued by Nation J on 8 July 2015, it was accepted by the plaintiffs that the current statement of defence gave "adequate notice of the issues that are in dispute and of evidence Mr Simson is likely to give".[4] It recorded that the plaintiffs' lawyer would "not require strict compliance with all the rules that normally have to be followed in this situation", as long as Russell provided "the plaintiffs with detailed statements providing the evidence which he is going to put forward in support of these arguments". The minute also helpfully set out the matters that Russell would have to prove if he was to argue that the settlement agreement should be set aside because of duress, lack of mental capacity, or because it was an unconscionable bargain.

[47] It was on that accommodating basis that the matter proceeded to hearing. Even then, Russell did not expressly clarify whether he claimed the agreement was an unconscionable bargain but, for the sake of finality, the plaintiffs and Court have assumed that claim is pursued and have addressed it.

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3 *McGrath v Simson* HC Christchurch CIV-2013-409-001716, 21 May 2014 [Minute of Associate Judge Matthews].

4 *McGrath v Simson* HC Christchurch CIV-2013-409-001716, 8 July 2015 [Minute of Nation J].

Did Russell enter the settlement agreement under duress?

[48] Russell argues that he was subjected to duress to enter the agreement at mediation, and as a consequence it should not be recognised and should be set aside.

[49] As was explained in the minute issued by Nation J, if Russell wanted to claim that the settlement agreement reached in the mediation should be set aside because of duress, he would need to prove:[5]

(a) the plaintiffs threatened or pressured him to sign the agreement;

(b) this pressure or threat was improper;

(c) his will was overborne by this improper pressure so as to displace his free will and judgment;

(d) it was this threat or pressure which actually caused him to indicate he was agreeing to whatever was agreed to at the mediation;

(e) the threat or pressure was so serious that he had no reasonable alternative but to agree;

(f) he has not subsequently affirmed the agreement i.e. accepted that he is still bound by the agreement; and

(g) following the mediation he took timely steps to say he was not bound by any agreement reached at the mediation and that he was not entitled to any benefits from such agreement.

[50] As the Court of Appeal said in *McIntyre v Nemesis DBK Ltd*,[6] adopting the approach the Privy Council took in *Attorney-General for England and Wales v R,*[7] the enquiry can be reduced to the following issues:

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5 *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [98].
6 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463.
7 *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577.

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

(b) If so, did that threat or illegitimate pressure result in that party being coerced into entering the settlement agreement?

(c) If there was duress, did the party affirm the agreement?

[51] I use this framework to examine Russell's claim.

Was there a threat or the exertion of illegitimate pressure?

[52] The particulars Russell relied on to support the claim of duress were, in summary, as follows:

(a) there were differences between him and the Gardner children over how Sally should be cared for once her brain tumour was diagnosed;

(b) the Gardner children "took over" the funeral arrangements;

(c) the Gardner children exhibited an "inconsiderate attitude" when they came to Russell's house to collect the items specified in Sally's will;

(d) the Gardner children announced the challenge to Sally's will on the first anniversary of her death;

(e) the Gardner children constantly pressured Russell to settle the estate and divide the assets of the Trust;

(f) the Gardner children reneged on agreements reached, including the financial arrangements for maintenance of one of the rental properties, leaving Russell to carry the cost;

(g) there was "bullying" by the Gardner children and their legal adviser at the mediation meeting; and

(h) "numerous bullying letters" were sent from the Gardner childrens' legal adviser to Russell's lawyer, Mr Bruce.

[53] Russell also complains about the way the Gardener children came to his home after the signing of the agreement to look for items personal to their mother, saying they "spent many hours totally ransacking my home", but that subsequent event is not relevant to whether duress was exerted to force him to sign the agreement.

[54] Most of the pleaded particulars of duress do no more than explain the breakdown in the relationship between the parties which lead to litigation. They are not evidence of duress.

[55] However, there can be no doubt that Russell felt he had been placed under pressure from the Gardner children, particularly once the Family Protection Act proceedings were filed, because they were challenging the arrangements he and Sally had put in place. He was hurt and aggrieved that they had taken that step, and did not think it right he should have to go to Court to defend those arrangements. That sense of pressure was even more pronounced at the mediation where he had a stark choice between making some concessions to address their concerns, or else proceeding to Court.

[56] However, the real issue is whether such pressure was improper pressure and not simply pressure which was an inevitable result of the breakdown in relationship between the Gardner children and Russell, and the subsequent decision to issue proceedings.

[57] There was no evidence given of anything said or done by the plaintiffs, or their solicitor, prior to the mediation, which would amount to a threat or improper pressure. While the fact of issuing proceedings clearly placed pressure on Russell, the Gardner children were entitled to do that and it cannot be regarded as pressure of an improper or illegitimate kind.

[58] Despite a generalised allegation of "bullying by the plaintiffs and their legal adviser at the mediation meeting", no specific example of such behaviour was identified. That allegation was inconsistent with the more detailed evidence given about the conduct of the mediation.

[59] From the evidence, the mediation proceeded quite normally. Each party was welcomed and given an opportunity to say something about their position and their hopes for the mediation. The negotiation that followed was structured, using the whiteboard to identify issues. Both sides had opportunities to consult with their lawyers separately from the main group, and there was also a break at lunchtime where they could also speak privately with their lawyers.

[60] Importantly, Mr Lester's recollection of the mediation was that it was "in many ways unremarkable". He recorded "I do not consider Mr [Smyth] acted inappropriately or aggressively or dominated the day. Had he done so I would have made a point of dealing with that". I accept that is at odds with Sandra's evidence-in-chief where she said that the plaintiffs' lawyer "exhibited relentless aggression and bullying towards Russell" although she gave no specific example of this type of behaviour. However, in cross-examination she acknowledged that he did not behave like that all day, but "probably at certain times" and never to the point where the mediator needed to tell Mr Smyth to "pipe down and stop being aggressive".

[61] I am satisfied that, even if Mr Smyth advocated aggressively for his clients at stages during the day, it was never to a point where either Russell's own lawyer or the mediator saw fit to intervene, nor is there evidence that it reached a threshold of being improper or illegitimate pressure.

[62] Turning to the second leg of the enquiry is the fact there is nothing to suggest that, whatever pressure Russell was placed under at mediation, it displaced his free will and judgment and coerced him to enter the agreement. It is clear, for example, that Russell actively negotiated a number of the terms to his benefit, right through to late in the day when the agreement was being concluded. For example, despite Karen's reservations, it was agreed that Russell and his family could have ongoing

use of the bach at no cost, and Anna says that when the agreement was close to being concluded "the only sticking point Russell had was his concern about tax", because if Russell was not managing the properties he would have to pay "something like $30,000 tax". He then negotiated compensation for the loss of that tax benefit as a further term of the agreement.

[63] While Russell baldly asserts that, "[e]ventually, I felt the pressure was so serious that I had no reasonable alternative but to agree", that assertion is not linked to any illegitimate action by the plaintiffs. As his lawyers had already advised him, he had the option of defending the plaintiffs' claim in Court and, while that was unattractive to him, it remained an option throughout the mediation. He has not given evidence which demonstrates why the plaintiffs' actions had the effect of removing that alternative from him, leaving him unable to do anything but sign the agreement.

[64] My conclusions above make it technically unnecessary to go on to consider whether, if duress was applied, Russell subsequently affirmed the agreement. However, it is clear that for many months after the settlement agreement was signed, he was prepared to perform it, but not the terms of the addendum. It seems he only resiled from the agreement in its entirety some time after these proceedings were commenced. That would, in my view, count against setting aside the terms of the written settlement agreement, even if the settlement agreement had been procured under duress.

[65] In summary, there is no evidence of improper or illegitimate pressure being placed on Russell, but simply the pressure which is inevitable when there has been a breakdown of a relationship between parties and proceedings have issued. Accordingly, Russell's claim of duress fails.

Mental incapacity

[66] The next ground advanced by Russell to say the settlement agreement should be set aside is that, at the time of signing it, he suffered from mental incapacity. In his document setting out the particulars of his pleading of mental incapacity, he explained that since Sally died he has been "depressed, distraught with anxiety, and

had constant sleepless nights" and he still suffers from constant total exhaustion and lacks the ability to function normally, because "the plaintiffs cannot accept their mother's well thought out wishes".

[67] He explains that he has not gone to a doctor because "I believe that his solution would have been to prescribe drugs which would have treated the symptoms, not the problem". However, he does say that on 19 May 2014 he visited a new GP because he was "run down, and suffering from persistent coughing and eye infections". He attaches a medical certificate from that visit.

[68] Again, the minute of Nation J gave assistance to Russell saying that, to establish lack of mental capacity, Russell would have to show that he was mentally incapable at the time of the mediation agreement and that:[8]

(a) he was unable to understand the general nature of any agreement entered into; and

(b) the plaintiffs knew of his unsoundness of mind at the time any agreement was reached at the mediation conference.

He was also invited to provide medical evidence from a doctor as to his mental state at the time of mediation.

[69] Russell chose not to call expert evidence, but instead to rely on his own assertions as to his mental capacity, and on the evidence of his friends and work colleagues at the time. They, of course, are not qualified to give an expert opinion as to Russell's mental capacity on the day. However, I accept that such witnesses could, in theory, provide factual evidence as to their observations of his functioning of the time which would allow me to draw conclusions as to whether Russell was unable to understand the general nature of the agreement entered into and whether that would have been apparent to the plaintiffs at the time.

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8 *O'Connor v Hart* [1985] 1 NZLR 159 (DC).

[70] The lay witnesses Russell called were competent, professional people. Mr David Flewellen was a colleague of Russell's in the building industry and someone who has known Russell since the mid 1980's. His evidence was that he observed "a change in Russell" after Sally's children commenced their challenge to the will and that Russell became "withdrawn", "constantly tired" and "run down". He also described Russell as being "depressed" and "flat" in this period.

[71] Similarly, Jacqueline Borsje, who had worked with Russell since October 2010 in the same unit of the Christchurch City Council, was concerned about Russell's "morale and diminishing health". She and Russell spoke at a work related team dinner on the night before the mediation, where she said he was "quite distressed and anxious about the upcoming mediation".

[72] Sandra, the support person who accompanied Russell at the mediation, said he was "extremely stressed at this meeting" and "I believe that he was not in a fit state to sign anything as significant as this document which was dealing with his personal assets". However, she stated in re-examination that this was a view she reached after the mediation had concluded, and she acknowledged in cross-examination that she did not suggest to anyone that it was unreasonable for him to be asked to sign an agreement on the day.

[73] Equally, Ms Jillian West, who is now Russell's partner, gave evidence that in the days before the mediation meeting Russell was "not sleeping at all, [and] was trying to work at his Council employment" and appeared to her to be "quite unstable". She said he was "perpetually distracted, uncommunicative" and "not his cheery self".

[74] I accept the evidence of these witnesses about Russell's mental and physical state at the time, being that he appeared anxious, was not sleeping well and was withdrawn. However, none of those observations go so far as to demonstrate that Russell's mental functioning was affected to the point where he was unable to understand the mediation process or what he was agreeing to.

[75] There was also a significant body of evidence that supported the contrary view which was that, despite the stress he was experiencing (which stemmed from a combination of personal and work related stresses) he nevertheless functioned at a high level in daily life and had a good grasp of what was going on.

[76] Throughout the period leading up to the mediation, Russell held down a responsible job in the Christchurch City Council as a senior building inspector. He continued to carry on in this job and his colleagues speak highly of his abilities. He also prepared and presented evidence at the Royal Commission of Inquiry into the Canterbury Earthquake Building Failures held in late 2011 through to September 2012. While he says he left his Council employment in September 2013 because of stress, he then went on to set up his own consultancy business as a licensed certifying plumber and drain layer, and has been working in that role ever since.

[77] Furthermore, throughout this period, he was involved in the acquisition of five investment properties and was an active member of the Canterbury Property Investors Association, including being on their executive board for some time. This all lent support to my conclusion that Russell was a commercially astute man who, despite his misgivings about the reasons for having to attend mediation, did understand the agreement he entered into at mediation. Indeed, he acknowledged in cross-examination that he understood what was going on and what the terms of the agreement meant. This was reinforced by his evidence that, during the drafting of the agreement, he pointed out to his lawyer an error in the written terms of the agreement that was in his favour, albeit on a minor matter.

[78] I am therefore satisfied that, despite the combination of anger and stress he felt at being involved in the mediation, he had the mental capacity to understand the terms of the agreement and their consequences for him.

[79] Again, that finding means I do not need to consider whether the plaintiffs were aware of any mental incapacity. However, for completeness, there was no evidence to suggest that the other parties at the mediation had any reason to doubt Russell's mental capacity. As already mentioned, he participated actively in the negotiation of the terms of the agreement. While at times he exhibited anger or

frustration at the process, no-one, including his own lawyer, his support person, or the mediator, saw any reason to bring the mediation to a halt because they had concerns about his mental capacity.

[80] For all these reasons, Russell's claim to set aside the agreement on the grounds that he lacked mental capacity fails.

Was there an unconscionable bargain?

[81] Russell never formally advanced his case on this basis, although it was discussed in the pre-trial conference before Nation J and, again, Russell was given guidance on what he would need to prove to sustain such a claim. However, he did repeatedly submit that the terms of the settlement agreement were "not remotely fair", placing particular emphasis on his view that there was an imbalance between the Gardner family getting effective control of the Lewis Pass bach, in return for him getting sole ownership of the Marley View Street property. Assuming this submission pointed to an agreement that was so unconscionable that equity should intervene, I go on to consider whether such a claim could succeed.

[82] There are of course a number of factors which may be relevant to such a claim. As Richardson J held in *Contractors Bonding Ltd v Snee*:[9]

> 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 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. … 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 unconscientiously in receiving or retaining their bargain.

[83] I first consider whether Russell was at a special disadvantage in the mediation compared with the others. Such disadvantage may arise for a number of reasons, but the key factor is that the disadvantaged party must be, for whatever

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9 *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 174.

reason, unable to make proper judgments as to what is in his or own best interests.[10] Importantly, such disadvantages will normally be overcome where the weaker party has had adequate independent legal advice.[11]

[84] Here I accept that Russell was stressed and tired. However, as already discussed, I do not accept there is any evidence that meant he was at any particular disadvantage in understanding the agreement or in making proper judgments about its terms. He also had access to competent independent legal advice throughout the day, and it is clear that he was able to take advantage of that by participating actively in the negotiation to his benefit. There is, therefore, nothing in the evidence which supports the assertion that Russell was at a special disadvantage when concluding the settlement agreement.

[85] That conclusion means there is no need to enquire as to whether there has been unconscionable advantage taking. However, as Russell considered the agreement to be significantly unfair, I consider the evidence on that issue. It appears Russell placed weight on the fact that he initially purchased Marley View Street with a deposit of only $10,000 and the rest was financed by the bank and so the equity in that property should not be compared with the equity in the bach which had no debt.

[86] However, no valuation evidence was provided to support that proposition. In any event, I do not accept Russell's view that the value of Marley View only equated to the deposit paid. Russell gave evidence that he bought Marley View at a significant discount because it had a problem on the Land Information Memorandum for it. Using his knowledge of building consent processes, Russell was able to resolve that problem before settlement which he said immediately increased the value of the property by some $60,000 or $70,000. The property was then able to give him a springboard into purchasing three further properties, and a half share in a fourth property, and still meet the bank's loan to value ratios.

[87] While I was not in a position to place a value on the agreement that Russell could retain the Marley View Street property, it clearly had a value to him which was

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10 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (HCA).
11 *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC) at 460-461 per Tipping J.

far in excess of the $10,000 initially expended on it. In any event, it is impossible to judge the agreement on the basis of dollar value exchanges only. Like any settlement agreement there were no doubt both tangible and intangible benefits to settlement which are not necessarily obvious from the written terms of the agreement.

[88] Thus, there is nothing on the face of the agreement which suggests that the bargain concluded at mediation so significantly advantaged one party to the disadvantage of the other, that equity would intervene. For all these reasons, I am satisfied that the potential claim of unconscionability is simply unsupported on the evidence and could not succeed.

Should the plaintiffs' claim for rectification be allowed?

[89] As the claims by Russell that the agreement should be set aside have not succeeded, I turn now to the plaintiffs' contention that there should be rectification of the written version of the agreement dated 4 December 2012 to include the four terms listed at [38] above.

Principles on which rectification is ordered

[90] The leading New Zealand case on rectification is the Court of Appeal decision in *Dundee Farm Ltd v Bambury Holdings Ltd.*[12] In that case, Richmond P cited *Crane v Hegeman-Harris Co. Inc.*, as correctly setting out the legal principles which govern rectification, and which provide:[13]

> … in order that this court may exercise its jurisdiction to rectify a written instrument it is not necessary to find a concluded and binding contract between the parties and antecedent to the agreement which it is sought to rectify … it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If you find that in regard to a particular point the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties.

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12 *Dundee Farm Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647 (CA).
13 *Crane v Hegeman-Harris Co. Inc.* [1971] 1 WLR 1390 (Ch) at 1391.

[91] In *Westland Savings Bank v Hancock*, Tipping J elaborated on what was required before rectification would be ordered, saying:[14]

> … I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the court must be satisfied that the following points are established:
>
> (1) That, whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
>
> (4) That the documents sought be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

[92] The burden of proof falls on the party seeking rectification and, to establish that on the balance of probability, "convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself".[15]

[93] Rectification is a discretionary equitable remedy and thus, factors such as delay and disqualifying conduct, acquiescence and lack of clean hands will be relevant to the question of whether rectification should be granted.

What is the evidence of what was agreed?

[94] There are four issues in respect of which rectification of the settlement agreement is sought.

[95] Russell candidly accepted that the two matters which were in his favour, being the annual entitlement of 30 days use of the bach, and the ability of his lawyer to review the Gardner Family Trust agreement to ensure that entitlement was

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14 *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC) at 29-30.

15 *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA) at 521 per Brightman LJ adopted in *Westland Savings Bank v Hancock*, above n 14 at 27.

protected, were not being challenged by him. However, he did not want to be seen as being selective about what was put back in the agreement by acknowledging these points but not the other two. In any event, his primary argument was that the agreement should be set aside in its totality. I therefore accept Mr Smyth's unchallenged evidence that those two minor matters, in Russell's favour, were agreed, and were intended to be included in the formal agreement but inadvertently omitted.

[96] The primary dispute is over whether Russell agreed during mediation that he would forgive the debt of $233,000 owed by him to the trustees of the Trust. In relation to that issue, the evidence that it was agreed at mediation is compelling. Each of the Gardner children gives evidence that the debt was one of the assets and liabilities which was recorded on the whiteboard and that there was discussion about what should happen with each of the assets and liabilities to reach agreement. In respect of the debt of $233,000 owed by the Trust to Russell, their evidence is that it was agreed this would be forgiven by Russell and this was recorded on the whiteboard. Before the lawyers embarked on the task of writing up the formal agreement for signing, Mr Davidson went through all the points which were recorded on the whiteboard to confirm the terms of agreement.

[97] That recollection of events was confirmed by the evidence of Mr Smyth, the plaintiffs' lawyer. He said this was one of the proposals put forward on behalf of Russell by Mr Lester, and "[a]t no stage did Mr Simson demur in respect of the proposals put forward by Mr Lester on the whiteboard".

[98] Mr Lester was issued a witness summons to appear and give evidence. To assist the parties he then prepared a written brief of evidence. He confirmed he did so without having first seen the evidence of the plaintiffs or their solicitor. In his evidence he also recalled the discussion about the items written on the whiteboard which took place in the early afternoon of the mediation. He said Mr Smyth asked him if the debt was still to be forgiven. Mr Lester looked across to Russell, who indicated his consent, and he said to Mr Smyth that the debt was to be forgiven. He then said the issue was not raised again. He explained that "[t]o me the forgiveness of the debt was not an issue because it was accelerating what had been in Mr Simson

and Sally's Wills anyway", and "Mr Simson's approach was that he wanted to keep as close as possible to the terms of Sally's will".

[99] He also gave evidence that when Mr Smyth telephoned him about the omission of the forgiveness of the debt the next morning, he recalled telling him that it was his assumption that it was part of the settlement.

[100] Russell did not challenge any of this evidence and, although denying this was agreed, when it was put to him that events occurred as Mr Lester had recalled them, he simply said "I can't recall the details Sir". Similarly, when Sandra was cross-examined about the exchange which led to Mr Lester confirming the debt was to be forgiven, she said she simply could not recall whether that happened or not. No witness credibly denied that the parties reached a common intention on this issue at the mediation.

[101] Not only was there consistent and credible evidence that such an agreement was reached at mediation, there was evidence that Russell subsequently acknowledged this was the case. Karen gave evidence that when she telephoned Russell regarding why power had been allowed to be cut off to the Lewis Pass bach, he "admitted to the forgiveness of the debt being on the whiteboard". Furthermore, Russell's brother, Charlie, who was summonsed to give evidence, recalled his brother telling him that a mistake had been made in relation to the forgiveness of debt and that it was "close to a quarter of a million dollars". When cross-examined on that by Russell, Charlie confirmed his clear recollection that Russell said there was a "stuff up" in his favour, that "it was close to a quarter of a million dollars", and it was "in relation to the forgiveness of debt". Charlie impressed me as a forthright person, lacking in guile, with no reason to favour one side or the other, and I accept his evidence.

[102] Accordingly, I am satisfied that Russell consented to the forgiveness of debt and this was recorded on the whiteboard as an agreed item which was intended to form part of the overall settlement reached. Thus, there was a common intention on this issue which was held by all parties right up to the moment of execution of the settlement agreement.

[103] The last issue which was in dispute, was whether it was agreed that the transfer of the Lewis Pass bach from the Trust to the Gardner Family Trust, was not to be taken into consideration in the ultimate distribution of the assets from the Trust.

[104] The evidence that this was agreed at mediation came from several parties. Karen recalled that:

> It was quite clearly discussed and agreed that when the Trust property came to be divided between the Simson children and the Gardner children no account would be taken of the bach being put in the new Gardner Trust. Part of the reason for this was that Russell was to get Marley View Road, and part was that the bach was a Gardner property dating from my grandparents.

[105] Similarly, Suzanne said:

> The deal was struck that the bach would be put into the Gardner Family Trust and Russell would have Marley View Road in his own name and when the trust property was divided those two items would not be taken into account. This was all talked about and agreed at the mediation.

Similar evidence was given by John and Mr Smyth.

[106] Russell also appeared to acknowledge that an effect of the agreement was that the removal of the bach from the Trust would not affect the rights of the Gardner children to an equal share of the Trust's assets at final distribution, as he said:

> The signed document is also grossly unfair, in that how can one side expect to remove a significant asset for their own use (the bach) from trust assets, yet still expect to receive an equal share upon my death. That is hugely unfair to me and my offspring.

[107] Again, I am satisfied that there is consistent evidence that this was agreed to and was, at least in part, justified by Russell retaining Marley View Street as his separate property, and because the bach had been Gardner family property since before Russell and Sally got together. Furthermore, Russell would have practical use of the bach during his lifetime, at no cost to him, so would continue to have the practical benefit of the bach that he enjoyed when it was in the Trust.

Should rectification be ordered?

[108] Being satisfied that all four terms of the addendum formed part of the common intention of the parties on the day of mediation right up to the point of signing the settlement agreement, there is jurisdiction to order rectification. I must now consider whether it is appropriate to do so.

[109] There has been no suggestion that grounds exist for declining equitable relief. The plaintiffs sought rectification as soon as it was realised the written document did not accord with the common intention of the parties and no other basis for declining relief has been raised.

[110] The only potential impediment to granting relief was if the third trustee, Charlie, was not willing to confirm the agreement as amended. However, he confirmed in evidence that he would give his approval to the agreement, whether as recorded in the written agreement, or as rectified by the Court.

[111] Consequently, there are no impediments to granting the relief sought by the plaintiffs and the written version of the settlement agreement is to be rectified so that the terms of the agreement set out in the addendum to the agreement are included in the written version.

Should there be an order for specific performance?

[112] Finally, the orders seek that Russell, in his various capacities as executor and trustee of the estate of Sally Elizabeth Simson, as trustee of the Trust and in his personal capacity be required to:

(a) execute the addendum (thereby correcting the errors in the written version); and

(b) properly execute all other documents which need to be executed by the first defendant, the second defendant and the third defendant, and to carry out all other acts for the terms of the agreement to be given effect.

[113] Specific performance is, of course, a form of equitable relief requiring the defendant to perform a duty that the defendant has agreed, by contract, to do. Having declined to set aside the settlement agreement and having confirmed it should be rectified to reflect the four matters as set out in the addendum, the contract in this case comprises the full terms of the settlement agreement including the addendum. It is not necessary therefore to require execution of the addendum, as the order for rectification of the existing agreement achieves the same end.

[114] Turning to the claim for specific performance of the agreement as rectified, that remedy is discretionary and may be granted where there would be no adequate remedy by way of damages. I am satisfied that in this case there are significant components of the settlement agreement which, if breached, could not be remedied by way of damages. For example, the personal connection of the Gardner family to the Lewis Pass bach is not something which can be compensated for by damages. Equally, the agreement to appoint an independent trustee, to avoid the difficulties experienced between the existing trustees following Sally's death, is not something which can be readily compensated for by damages if it is not complied with.

[115] Again, no grounds have been raised which would tell against an order of specific performance, or make it inequitable to order it as sought.

Outcome

[116] As a consequence of my findings, I make the following orders:

(a) the defendants' claims to have the settlement agreement set aside are unsuccessful;

(b) the settlement agreement is rectified so that the further terms of the agreement set out in the addendum prepared by the plaintiffs' lawyers and forwarded to the defendants' counsel on 11 December 2012, are included in the settlement agreement; and

(c) there is an order of specific performance requiring the first defendant, the second defendant and the third defendant to properly execute all

other documents which need to be executed by the first defendant, the second defendant and the third defendant in order to carry out all other acts which need to be carried out by those parties for the terms of the settlement agreement, as rectified, to be given effect.

[117] At the request of the parties, costs are reserved. It is to be hoped that this is a matter which can be resolved by agreement, and I consider time should be given to the parties to do so. However, should that not be the case:

(a) the plaintiffs are to file any memorandum as to costs by 27 November 2015;

(b) the defendants are to file any memorandum by 11 December 2015; and

(c) the plaintiffs are to file any memorandum in reply by 18 December 2015.

[118] In all cases, memoranda are not to exceed seven pages.

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