

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2014-404-3277
[2016] NZHC 2270**

BETWEEN

VINDIYA SHILPA NANDANI
Plaintiff

AND

SOUTH PACIFIC LOANS LIMITED
Defendant

Hearing: 15-17 August 2016

Counsel: P M Webb for Plaintiff
P Craighead for Defendant

Judgment: 26 September 2016

JUDGMENT OF WHATA J

*This judgment was delivered by me on Monday 26 September 2016 at 3.00 pm
Pursuant to Rule 11.5 of the High court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Denham Bramwell, Manukau
Alistaire Hall, Manukau

[1] Ashok Maharaj owned a building company, the 3 Maharajs, now in liquidation. Vindiya Nandani, his wife, owns a residential property. Mr Maharaj needed \$50,000 to pay his company's debts. He could not obtain a loan from South Pacific Loans Limited (SPL), but SPL was happy to lend the money to Ms Nandani even though she had no income. Unlike Mr Maharaj, she could provide her property as mortgage security. When Mr Maharaj needed another \$40,000 for his business, SPL was again happy to lend it to Ms Nandani. Both loans were initially short-term with an interest rate of 29.5% and a penalty interest rate of 39.5%. When Ms Nandani could not repay the loans, they were combined and fresh loans were made. In that time the 3 Maharajs went into liquidation. With no income, Ms Nandani defaulted on the loans. SPL wants to sell the house. A sum in the order of \$650,000 is now due and owing.

[2] Ms Nandani wants to set the loans aside. She says that:

- (a) The loans were taken under undue influence;
- (b) The loans were unconscionable; and
- (c) The loans were oppressive in terms of Part Five of the Consumer Credit Contracts and Finance Act 2003.

[3] SPL denies these claims.

Facts

Pre-loan history

[4] Ms Nandani and Mr Maharaj have lived together since July 2003 and were married on 14 March 2008. When Ms Nandani met Mr Maharaj she was working as a salesperson and later became an assistant manager. She also owned a unit at Rangitoto Street. Mr Maharaj was working as a supervisor at a manufacturing company. In 2006 Mr Maharaj became involved in property investment and he formed a building company called the 3 Maharajs Limited. Over the course of the next few years Mr Maharaj would acquire and sell a number of properties.

[5] In May 2007 Ms Nandani sold the Rangitoto Street property and purchased a property at Sunnyside Crescent. A mortgage with Property Finance Limited was required to complete the purchase. It was her intention to develop the site and, after subdivision, construct a new house on the rear site. She hoped to accumulate enough capital to purchase a house with a more affordable mortgage so she could stop work and raise a family. She then obtained a loan from Sovereign for the purpose of the subdivision and building a house on the rear site. The previous mortgage was discharged.

The first SPL loan

[6] By late 2008 the subdivision was complete and the 3 Maharajs were contracted to build the house on the rear site. But Mr Maharaj's business was struggling financially, his properties were facing mortgagee sale and he needed bridging finance to, among other things, pay his workers and suppliers. Finance was hard to come by until he was introduced to Sangeeta Malhotra of SPL by a client, Mr Chand, in early January 2009. She was not prepared to approve a loan to Mr Maharaj or 3 Maharajs because he could not provide adequate security. Mr Maharaj told her that his wife, Ms Nandani, owned the Sunnyside property and that they were building on the rear site. Ms Malhotra said she would approve a loan to his wife to enable them to keep his business going and to complete the subdivision and development of the rear site at Sunnyside road.¹

[7] Following his meeting with Ms Malhotra, Mr Maharaj went home and told Ms Nandani what he proposed, namely that she borrow the money to enable him to pay his debts and keep his business going. There was an argument about this. Ms Nandani was very reluctant to borrow the money. She did not want to mortgage the Sunnyside property. The argument became heated and Mr Maharaj became loud and aggressive to the point that he hurled a plate across the floor accompanied by various expletives. Ms Nandani ultimately capitulated.

¹ This finding is supported by Ms Malhotra's file note record of the background, including the subdivision and building on Ms Nandani's property. The subdivision was in fact complete by this stage. I do not consider this error to be material as the purpose of the loan remained focused on the development of Ms Nandani's property.

[8] On Friday 9 January 2009 Mr Maharaj and Ms Nandani travelled together to SPL's offices. They were greeted by Ms Malhotra. She was presented with a number of documents, including:

- (a) A copy of the title of 40A Sunnyside Crescent, Papatoetoe;
- (b) A copy of the 3 Maharajs's building contract for 42 Sunnyside Crescent, Papatoetoe;
- (c) A copy of the building contract between the 3 Maharajs and Ms Nandani for 40A Sunnyside Crescent, Papatoetoe;
- (d) Details of a Toyota 1997 Rav 4 motor vehicle which was owned by Ms Nandani and being offered by Ms Nandani as part of the security for the loan with SPL;
- (e) Ms Nandani's bank statements for the previous three months; and
- (f) Details of a first mortgage over the property at 40 Sunnyside Crescent, Papatoetoe.

[9] The loan application completed by Ms Nandani contains no financial information. Her home address and home and mobile phone details are noted. Mr Maharaj's mobile phone numbers also appear at the top of the application. Ms Malhotra's file notes refer to the Sunnyside property, the existing mortgage to Sovereign and "224 from MCC. need \$44k".

[10] Having reviewed the documentation and viewed the motor car offered as security and the Sunnyside property, Ms Malhotra approved a loan of \$50,000 to Ms Nandani. She explained to Ms Nandani:

- (a) The amount lent (i.e. \$50,000.00 plus the \$750.00 application/document fee);
- (b) The payments Ms Nandani had to make;

- (c) That Ms Nandani was the only debtor;
- (d) The security agreed to be taken included a charge over the motor vehicle and a mortgage over the property at 40A Sunnyside Crescent, Papatoetoe (due to be subdivided); and
- (e) That an Agreement to Mortgage was being undertaken immediately, which would be converted into a registered mortgage once the formalities, such as the production of title by the first mortgagee could be arranged. A mortgage instrument would also be issued.

[11] The mortgage documents were not ready for execution. Ms Nandani and Mr Maharaj were asked to return the next day, Saturday 10 January 2010.

[12] As Ms Malhotra did not work on Saturdays, the signing process was handled by Danielle Rowlands. Two documents were signed by Ms Nandani: the Security Agreement and the Agreement to Mortgage. Ms Rowlands explained the loan terms, told Ms Nandani that a mortgage was being taken and that she was solely liable for the loan payments. Ms Nandani was asked to initial each page of the loan documentation and she was advised of her right to seek independence legal advice.

[13] Once the execution of the loan documentation was complete, a cheque was made out to Ms Nandani. The cheque was partially cashed at a bank situated in a Casino so that Mr Maharaj could pay his workers that day. The balance of the loan monies were also used to finance 3 Maharajs.

The Second SPL loan

[14] Before the first loan was due, Mr Maharaj needed further finance and approached SPL for another loan in the sum of \$40,000. Ms Malhotra also assessed this loan application. She was told that:²

² Ms Malhotra's file notes corroborate this.

- (a) The 3 Maharajs had completed the neighbouring building to the framing stage and the house on the vacant site at 40 Sunnyside Crescent, Papatoetoe was progressing;
- (b) Ms Nandani was selling the existing house at 40 Sunnyside Crescent Papatoetoe; and
- (c) The same security used for the first loan (i.e. the motor vehicle and the mortgage over 40A Sunnyside Crescent, Papatoetoe) could be used for the second loan.

[15] The loan was approved and the execution process repeated. Ms Malhotra carefully explained the terms to Ms Nandani, who initialled each page of the documentation. This process was also observed by Sitaleki Tupou.

The other loans

[16] The required payments on the loans were not made so they were effectively rolled over on two further occasions and then combined, culminating in a final loan agreement on 29 June 2011 with a settlement date of 29 January 2014 and a total amount of payments of \$345,359.18. The execution processes were repeated on each loan transaction. Ms Nandani was aware that these loans involved increasing the mortgage debt over her property.

Loan summary

[17] The following table provides a summary of the loans:

Loan	Loan No.	Date	Description	Amount	Final payment due date
1	785610	9 January 2009	Finance agreement	\$50,000+\$750	9 April 2009
2	803708	8 April 2009	Finance agreement	\$40,000+\$625	3 June 2009
3	816605	5 June 2009	Finance agreement	\$36,272.61+\$625	5 September 2009
4	829031	31 July 2009	Finance agreement	\$53,990.10+\$750	1 November 2009
5	845829	29 September 2009	Finance agreement	\$97,149.35+\$750	1 April 2010
6	911706	6 May 2010	Finance agreement	\$117,300.25+\$325	6 August 2010
7	942116	16 August 2010	Finance agreement	\$127,463.53+\$325	16 February 2011
8	1009125	25 February 2011	Finance agreement	\$148,953.62+\$325	16 June 2011
9	1048329	29 June 2011	Finance agreement	\$163,903.20+\$325	29 January 2014

As at the commencement of the hearing, the sum of \$648,787.82 was owing on the loans.

The evidence

Witnesses of fact

[18] Mr Maharaj and Ms Nandani gave evidence. Mr Maharaj says that he was unable to pay his debts in early January 2009 and approached SPL on the suggestion of a client, Mr Chand. He says he dealt with Ms Malhotra throughout, emphasising that the loan was needed for his construction business, and that he did not explain to Ms Nandani that she would have to mortgage her property. He said that when he returned to discuss the loan on Thursday 9 January, he became angry with Ms Nandani, acted violently and effectively forced her to agree to take the loan.

[19] Ms Nandani says that she felt under extreme pressure to take out the first loan and that she never appreciated that she was mortgaging her property. She says that no one explained to her that this would happen. She said that Mr Maharaj dealt with Ms Malhotra the whole time and that the details of the first two loans and the mortgage were never explained to her. She accepted that by the third loan she had realised that her property was at risk, but that it was too late to do anything.

[20] Ms Malhotra and Ms Rowlands are adamant that they explained to Ms Nandani that she was mortgaging her property with the first and subsequent loans and that she had the right to seek independent legal advice. This is corroborated by Ms Annette Ellis in respect of the first loan and Mr Tupou in respect of the second loan. Ms Malhotra says that she was told that the loan was needed to complete the development of Ms Nandani's property and for the benefit of both Ms Nandani and Mr Maharaj. She says that she never felt that Ms Nandani was under any pressure. Ms Rowlands expressed a similar view. A photo was produced showing Ms Nandani smiling. Ms Malhotra also said that as the loan was short term and that payment was linked to completion of the subdivision and sale of property or refinancing through their existing mortgagee, Sovereign, there was no reason for concern. Mr Parkinson, a director of SPL, however, accepted that lending to Ms Nandani in circumstances where she had no income breached company policy.

[21] It will be seen from my summary of the facts that I prefer the evidence of Ms Malhotra, Ms Rowlands, Mr Tupou and Ms Ellis as to the content of explanations given to Ms Nandani. All of the documentary record shows that the Sunnyside property was under discussion, both in terms of the purpose of the loan and the mortgage over it. Their accounts are consistent and cross-examination served only to confirm their accounts on this aspect. I detected no embellishment and proper concessions were made by them. It was also evident to me that both Ms Nandani and Mr Maharaj struggled to maintain that the prospect of a mortgage was never discussed prior to the first loan. Mr Maharaj's initial response to a question from Mr Craighead about why Ms Nandani did not want to sign the loan documentation in fact confirmed that she was well aware of the consequences. He said:

She don't want any loan taken out from her house.

[22] Broader context also supports the finding that Ms Nandani knew what was happening. She had an involvement with 3 Maharajs, having assisted Mr Maharaj with GST returns. She had already obtained mortgages in relation to the property for the purpose of the subdivision. She commenced studies in financial administration at Manakau Insitute of Technology in 2009, indicating a level of interest, if not competency, in financial matters. Mr Maharaj was the sole provider for the family by 2009, with Ms Nandani out of work and expecting her first child. She would have been well aware of Mr Maharaj's financial circumstances and the need for the loans to keep his business afloat for the benefit of the family.

Expert witness

[23] The parties also produced expert evidence, Mr Eichbaum for Ms Nandani and Mr Read for SPL. Mr Eichbaum is a retired bank officer with extensive experience in general banking, finance markets and risk management. He has served on several committees to advise on market issues and practise, and is currently working as an expert consultant for the Australian Securities and Investment Commission in its investigation into the manipulation of reference interest rates. He opines that obtaining security from Ms Nandani, knowing that the loan monies are to benefit a third party and not the borrower and knowing that Ms Nandani could not repay the loan, was highly irregular. He considers that SPL failed in its duty of care to protect their customer, namely, Ms Nandani in these circumstances. He also considered the loan rates were high, indicating an awareness of the risk associated of lending to Ms Nandani. He considered that, as a minimum, SPL should have required that Ms Nandani take independent advice and demanded that Mr Maharaj not be involved in the discussions around the recovery of the debt. He also considered it was highly irregular for the cheques to be handed directly to Mr Maharaj.

[24] Mr Read is a director of Independent Development Solutions Limited and a consultant to financial service businesses on compliance processes and systems. He was previously the General Manager of the Newpark Financial Service Group (a nationwide network of over 200 financial advisers). He has 22 years' experience working for various financial service companies. He was also chairman of the Auckland Branch of the Institute of Financial Advisers between 2006 and 2010. He

notes that SPL assumed that this was the purpose of the loan and that the loan would be repaid when Ms Nandani completed the subdivision building and drew down further on the Sovereign mortgage. He does not agree with Mr Eichbaum that the transactions amounted to oppressive behaviour. He said it is not unusual practise for married couples to select an individual or related entity to be the borrower for the loan and that, in this case, it was reasonable for the lender to assume that Ms Nandani would benefit from the purpose of the loan, namely, to assist with Mr Maharaj's business. He also said it is not standard practice for financial companies to insist on independent advice.

[25] During the hearing, the experts caucused and agreed the following matters:

- (a) The purpose of the loan determines whether it is a consumer loan or not;
- (b) The characteristics of the borrower do not determine whether the loan is a consumer loan or not;
- (c) In assessing loans, lenders would look for potential red flags to determine what procedure to follow on accepting a loan and it was agreed that Mr Maharaj's credit rating should have been a red flag;
- (d) A recommendation to seek independent advice should be made based on a lender's assessment of the client's understanding of the terms and that, in some circumstances, there may be an ethical obligation to insist on a client obtaining independent advice (but there was no agreement that this was such a case);
- (e) It was unfair to have allowed the rollovers to continue for as long as they did.

Undue Influence claim

[26] Mr Webb contends:

- (a) Ms Nandani's evidence that she was pressured into taking the loan was not disputed;
- (b) SPL should have been wary about Ms Nandani's vulnerability given that her property was put up for security to pay Mr Maharaj's debts and she had no means of repaying the loan except by sale of her property or remortgaging it;
- (c) While manifest disadvantage is not a criterion, the loan benefited only Mr Maharaj;
- (d) In this context, SPL carried the burden of showing the absence of undue influence; and
- (e) SPL should have insisted that Ms Nandani obtain independent legal advice.

[27] Mr Craighead responded:

- (a) There is no evidence of undue influence – a marital argument or “blazing row” about borrowing against the family home is not evidence of duress or disproportionate pressure;
- (b) Mr Maharaj did not hold a position of ascendancy: while his property business languished, Ms Nandani astutely invested on the Sunnyside property and borrowed (with legal advice) for the purpose of its subdivision and development;
- (c) Ms Nandani was actively involved in Mr Maharaj's affairs – she did his GST returns and assumed directorship of a company, Victory

Limited, to provide a vehicle for obtaining supplies when Mr Maharaj's company was in litigation with Bunnings;

- (d) The loan monies were being used for their mutual benefit – to keep their source of income going and to complete the development of the Sunnyside property.

Assessment

[28] The focal point remains whether the intention to transact was obtained by unacceptable means.³

[29] As stated by the Court of Appeal in *Hogan v Commercial Factors Ltd*,⁴ three key issues must be resolved for the purpose of the undue influence claim:

- (a) Was Ms Nandani subject to undue influence?
- (b) If so, were the circumstances as known to SPL such as to put it on inquiry as to the risk of undue influence?
- (c) If so, did the creditor act in such a way as to insulate itself from the consequence of such undue influence?

[30] If the answer to the first two issues is yes, then SPL plainly did not do enough by simply recommending that Ms Nandani seek legal advice.

Influence?

[31] Turning then to the first issue, there is no presumption of undue influence arising from a husband/wife relationship per se: the elements of trust and vulnerability must be shown and the transaction must not be readily explicable by

³ *Royal Bank of Scotland plc v Etridge (No2)* [2001] UKHL 44, [2002] 2 AC 773 at [7] (per Lord Nicholls).

⁴ *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA) at [13].

the relationship of the parties.⁵ Manifest disadvantage to the spouse may be a strong indicator of both.⁶

[32] I am not satisfied that the element of vulnerability has been established in this case. Rather I accept Mr Craighead's basic proposition that Ms Nandani and Mr Maharaj operated like a joint venture, with each contributing to it in their own way, including with time, money and property. Significantly, the incorporation of Ms Nandani's property into the joint enterprise occurred well before the SPL loans were obtained, with mortgage finance taken for the purpose of subdivision and development the Sunnyside property by the 3 Maharajs. There is also evidence that Ms Nandani was actively involved in the administration of Mr Maharaj's business, including providing assistance with GST returns and she assumed a directorship of Victory Limited in mid 2009 so that supplies could be obtained by Mr Maharaj. Ms Nandani was also familiar with financial administration, having occupied a managerial position. She was also aware of the implications of borrowing against her property – as noted at [21]–[22] – and was understandably reluctant to expose the property to risk, and rallied against. All of this shows that Ms Nandani was an active participant in the decision making affecting the family's fortunes, rather than simply an unwitting victim, vulnerable to her husband's pressure.

[33] For the same reasons I am satisfied that the transaction is explicable by reference to their relationship. In short, the evidence clearly suggests that Ms Nandani and Mr Maharaj were working together to secure their financial future. Her Sunnyside property was simply one, albeit important, part of the family enterprise. Mr Maharaj's property and construction business was another part. In January 2009 it became obvious that in order to maintain an income and realise the full value of the Sunnyside property, it was necessary to borrow more money against it.

[34] I also find that there is no manifest disadvantage to Ms Nandani in relation to the first two transactions. First, she received the money. Second, the money was being used to further the joint enterprise or family business. Third, the funds were in

⁵ *Royal Bank of Scotland plc v Etridge (No2)*, above n 3, at [13]–[14] and [21]–[22].

⁶ Above.

fact used directly or indirectly to enable the development of her Sunnyside property and to keep their sole source of family income afloat.

[35] Given the foregoing, the claim based on undue influence therefore falls at the first hurdle.

On inquiry

[36] As noted by Lord Nicholls in *Royal Bank of Scotland v Etridge (No 2)*:⁷

As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages Plc v Pitt* [2994] 1 AC 200.

[37] For the reasons expressed at [33] to [34] the loan monies were obtained for their joint benefit. In short, they furthered Ms Nandani's interests for the funds to be obtained so as to keep her husband's company afloat and to complete the development of her property. In this regard, I prefer the evidence given by Ms Malhotra that it was made plain to Ms Nandani that the loan was being used for the purposes of the ongoing development of Ms Nandani's property. It appears that Ms Malhotra may have wrongly assumed at the time that it was needed to complete the subdivision, but that does not materially affect the finding that, at least from SPL's perspective, the loan was obtained for a joint purpose and for Ms Nandani's benefit.

[38] This aspect of the undue influence claim also fails.

Outcome on undue influence claim

[39] I find that the claim based on undue influence has not been established. Ms Nandani was not vulnerable to Mr Maharaj's influence for the purposes of obtaining the loans and, further, SPL was not put on inquiry in terms of any vulnerability.

⁷ At [48].

Unconscionable bargain

[40] The claim by Ms Nandani based on unconscionable bargain rests on a finding that she suffered a serious disadvantage known to SPL and SPL has exploited that disadvantage in circumstances amounting to actual or equitable fraud. The basic premise of the claim is that SPL knew that:

- (a) Mr Maharaj was a clear credit risk and had no assets to secure the loan;
- (b) Ms Nandani had no income to repay the loan;
- (c) The only ability for Ms Nandani to repay the loan was either by sale of the Sunnyside property or remortgaging it; and
- (d) Ms Nandani stood to gain nothing from the lending.

[41] Taken together these facts are said to have made the lending to Ms Nandani unconscionable.

[42] Furthermore, the failure to provide copies of all relevant documentation, the purported taking of a power of attorney without the proper documentation, together with the wrongful taking and use of Ms Nandani's car, are all said to be indicative of improper conduct.

[43] Mr Craighead responds, in short, that as the monies were being borrowed for the mutual benefit of Ms Nandani and Mr Maharaj, and that as the whole transaction was presented to Ms Malhotra on that basis, there can be no suggestion of unconscionable conduct.

Assessment

[44] It is common ground that:⁸

An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. “Fraud” in its equitable context does not mean, or is not confined to, deceit; “it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties” ... It is victimisation, which can consist either of active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

[45] The Court of Appeal in *Gustav & Co Ltd v Macfield*⁹ more recently identified two elements to establish a defence that the transactions were unconscionable bargains:

- (a) One party was under a qualifying disability or disadvantage, for example ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety; and
- (b) The other party’s conduct was such that it would be unconscionable for them to take the benefit of the transactions. This requires knowledge of the disadvantage.¹⁰

[46] As stated in *Bowkett v Action Finance Ltd*,¹¹ a qualifying disadvantage may include circumstances where a guarantor has no hope of servicing a loan with their own resources and where there is a serious inadequacy of consideration that is known to the lender.

[47] Returning to the present case, Ms Nandani and Mr Maharaj were under significant financial pressure at the time that Ms Nandani took the first loan from SPL. Sangeeta Malhotra must have known this. She must have also known that Ms

⁸ *O’Connor v Hart* [1985] 1 NZLR 159 (PC) at 171.

⁹ *Gustav & Co Ltd v MacField Ltd* [2007] NZCA 205 upheld on appeal to the Supreme Court in *Gustav & Co Ltd v Macfield* [2008] NZSC 47, [2008] 2 NZLR 735.

¹⁰ At [30].

¹¹ *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC) at 461–462. This case was not directly cited to me by the parties but its correctness was expressly discussed and approved by the Court of Appeal in *Attorney-General for England & Wales v R* [2002] 2 NZLR 91 (CA) at [89], which both parties cited to me.

Nandani was unable to pay the loan out of her own income and that the first loan transaction exposed Ms Nandani to the significant risk of losing her property, especially given Mr Maharaj's difficult financial circumstances. Furthermore, the loans were not made in strict conformity with SPL's loan policy, which required information as to the ability of the borrower to repay the loan. The high rate of interest and penalty interest are also indicative of the risk associated with the transaction. In my view, these factors combined meant that Ms Nandani was at a qualifying disadvantage of the kind identified in *Bowkett*.

[48] Balanced against this, Sangeeta Malhotra understood that the purpose of the loan was for the mutual benefit of Ms Nandani and Mr Maharaj, namely to assist in keeping Mr Maharaj's company afloat and for the purposes of completing the subdivision and development of Ms Nandani's site. In addition the loan was initially meant to be a short term loan linked to a viable exit strategy, namely the sale of one of the subdivided lots or re-mortgaging on the successful completion of the next stage of the development of Ms Nandani's property.

[49] Overall, these facts do not amount to unconscionable conduct. While Ms Nandani was under significant financial stress and plainly unable to repay the debt out of her ordinary income, it was not unreasonable for Ms Malhotra to conclude that first two loans were for Mr Maharaj's and Nandani's mutual benefit and that there was a viable exit option, namely the completion of the subdivision and development which, in turn, would have enabled the repayment of a short term loan.

[50] But, the "rolling over" of the loans (that is, loans (3) to (9) of the table at [17]), brings into frame the comments of Tipping J in *Bowkett*, where the Judge held that unconscionable victimisation will occur where there are:¹²

...circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.

¹² At 457.

[51] The comments of Cooke P (as he then was) in *Nichols v Jessup*¹³ also become apposite.¹⁴

There appears to be nothing in *O'Connor v Hart* contrary to the view that a gross disparity of consideration, if it ought to have been evident to a purchaser may be one factor in deciding whether in all the circumstances of a particular case he has made an unconscionable bargain.

[52] The two experts unsurprisingly agreed that the “rolling over” of the loans was unfair to Ms Nandani. SPL ought to have known by May 2010 that Mr Maharaj could not service the loans¹⁵ and they knew Ms Nandani had no income. Mr Parkinson stated that SPL wanted to afford to Ms Nandani and Mr Maharaj the opportunity to pay off the loans. But there being no realistic prospect of repayment without the sale of Ms Nandani’s property, SPL must have known that the failure to pay the settlement sum on the settlement date was almost inevitable. As a minimum, from May 2010, SPL should have insisted that Ms Nandani obtain independent advice and the failure to do so meant that the roll over loans from May 2010 were unconscionable. Exemplifying this point, as at 31 July 2016 Ms Nandani owed \$648,787.82 on an initial borrowing of \$90,000.

Oppressive

[53] The final basis for Ms Nandani’s claim is that the loan contracts should be reopened under Part 5 of the Credit Contracts and Consumer Finance Act 2003 on the basis that the loan contracts were consumer credit contracts, in terms of s 11 of that Act.

[54] It is common ground that the purpose for which the loan is made is determinative of whether or not the loan is a consumer credit contract and a loan made for business or investment purposes is not a consumer credit contract.¹⁶

¹³ *Nichols v Jessup* [1986] 1 NZLR 226 (CA).

¹⁴ At 228–229.

¹⁵ The evidence showed that between 1 January 2009 to 29 September 2009 (being the date the loans were combined) Ms Nandani made only four payments totalling \$14,819.96 on a debt of \$97,149.35. By 6 May 2010 when the combined loans were extended again, only one further payment of \$1000 had been made and the 3 Maharajs was wound up on 4 June 2010.

¹⁶ See discussion above at [25]. See also *Burke v Advanced Securities Ltd* [2008] NZCA 93.

[55] Contrary to the central thrust of Mr Webb's case for Ms Nandani, this was a loan made for investment purposes, namely investment in Mr Maharaj's business and the subdivision and development of Ms Nandani's property. The business/investment purpose of the loans was discussed with both Ms Nandani and Mr Maharaj and this is corroborated by the extensive business documentation supplied by Ms Nandani and Mr Maharaj for the purposes of the loan. I therefore conclude that relief under the Credit Contracts and Consumer Finance Act 2003 is not available to Ms Nandani, and Mr Webb was right to concede that this was not the strongest part of her case.

[56] For completeness, Mr Webb contends that as the first loan was for the development of a family home at Sunnyside, it therefore qualified as a consumer credit contract. I accept that a mortgage enabling an extension to or construction of a family home might qualify as a consumer contract. But the development of the property, including the front and back sections, was clearly part of an investment strategy. While the ultimate object may have been a personal one, the method of getting there involved an investment strategy and the loan furthered that investment strategy.

Outcome

[57] The pleaded claims based on undue influence and the Credit Contracts and Consumer Finance Act are dismissed.

[58] Loan contracts (6) to (9) (see table at [17]) were unconscionable. But the plaintiff in her statement of claim has only sought orders that the first and second loan agreements are null and void. Those orders sought relate to contracts that are not the product of unconscionable behaviour.

[59] Without forming any final view, my current thinking nevertheless is that there should be relief in the form of rescission insofar as concerns the monies owing in relation to contracts (6) to (9). But SPL should be repaid the sums owing on contract (5) together with interest at a rate to be fixed from that date, less any interest payments already made in relation to that contract.

[60] As I have not heard from the parties as to jurisdiction or relief, I wish to afford them an opportunity to make submissions on these matters. The plaintiff is to file submissions within 10 working days and the defendant shall have 10 working days to respond.

[61] Costs are reserved, pending resolution of the remaining matters.