

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

**CIV-2011-404-8215
[2012] NZHC 990**

BETWEEN	TIAN MIN (MAGGIE) MA Plaintiff
AND	TONY MENG HIANG TAY First Defendant
AND	SELINA SIAW NYUNG TAY Second Defendant
AND	JIREH HOTEL INVESTMENT LIMITED Third Defendant
AND	TONY TAY TRUST LIMITED AS TRUSTEE FOR THE TONY TAY TRUST Fourth Defendant
AND	TONY MENG HIANG TAY, SELINA NYUNG TAY AND RONALD WILLIAM EDWARD CHERRY AS TRUSTEES OF THE ELSHADAI FAMILY TRUST Fifth Defendants
AND	ROSGO FINANCIAL SERVICES LIMITED Sixth Defendant
AND	ROSHNI GOLIAN Seventh Defendant

Hearing: 7 May 2012

Counsel: P Dale and J Xu for plaintiff
A M Swan for first, second, third, fourth and fifth defendants

Judgment: 16 May 2012

RESERVED JUDGMENT OF ASSOCIATE JUDGE D I GENDALL

*This judgment of Associate Judge Gendall was delivered by me on 16 May 2012 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Ross Holmes, PO Box 33009, Takapuna, Auckland 0740 (juliax@rossholmes.co.nz) for plaintiff
Jeffrey Ng, PO Box 36026, Northcote, North Shore City 0748 (jeffrey@jeffreynlaw.co.nz) for first to fifth
defendants

Introduction

[1] The plaintiff, Tian Min (Maggie) Ma (Ms Ma) applies for summary judgment against the first, second, third, fourth and fifth defendants (collectively called the affected defendants) in this proceeding. The application is opposed by the affected defendants.

[2] As a preliminary matter, before me counsel for Ms Ma acknowledged that the present application sought summary judgment only against the affected defendants. As I understand the position, confirmation of service of the proceeding on the sixth and seventh defendants has yet to be provided. The current application before me did not seek summary judgment against the sixth or seventh defendants.

[3] The present application effectively seeks summary judgment against the affected defendants for the sum of \$403,034.44, together with additional interest, an amount for general damages and costs. The amounts in question relate to a default which Ms Ma has made on a loan and mortgage to Westpac Bank Limited (Westpac) for which Westpac has obtained judgment against her in this Court for the sum of \$403,034.44 and continuing interest. Ms Ma contends that the affected defendants are liable to her for this debt for reasons I will outline later in this judgment.

Preliminary matter

[4] Before me a preliminary matter arose which I dealt with at the hearing of this matter. On 1 May 2012, Ms Ma endeavoured to file a second affidavit in reply for this proceeding.

[5] Counsel for the affected defendants objected to this and opposed the affidavit being read or taken into account on the present application. This was, according to counsel, on the basis that the affected defendants had had no opportunity to reply in the time available, that the affidavit was filed far too late and therefore it should not be read. In addition, the affected defendants' position was that the affidavit raised new matters on which they should have the opportunity to reply.

[6] Counsel for Ms Ma disputed all of this and contended that the affidavit should be read.

[7] Under all the circumstances prevailing here, however, I took the view that this affidavit should not be read given that it was filed extremely late in this proceeding and that there was really no effective opportunity for the affected defendants to reply. I ruled that the affidavit should not be read or taken into account in a consideration of the present summary judgment application, and now confirm that ruling.

Background facts

[8] I turn now to the background facts in this matter which, on their face, are complex. I will set them out at some length (for which I apologise in advance) but only so that a full picture of all the relationships and various dealings involved in this case can become apparent.

[9] The present claim by Ms Ma against the affected defendants is based principally, as I see it, on two agreements entered into between the parties, the first on 13 October 2011 and the second on 15 October 2011. The second, third, fourth and fifth defendants are included in this proceeding because they were referred to as parties only in the second agreement.

[10] As I have noted above, the background facts in this matter have a certain degree of complexity but, as will appear later in this judgment when the position is properly analysed, the real issues before the Court here, in my view, are reasonably narrow.

[11] Who are the principal parties in this dispute? The first is the plaintiff, Ms Ma. She is a 40 year old doctor who came to New Zealand from China in 2002 holding a work visa. She began work part-time at Middlemore Hospital as a research fellow in the Renal Department. She then applied for permanent residence and became a New Zealand citizen in May 2006.

[12] In February 2006, her father, Professor Jin Chun Ma (Professor Ma), also a doctor who had been working as a neurologist and spinal specialist in China for 43 years, came to visit his daughter from China. Subsequently, Professor Ma emigrated to New Zealand with his wife and now lives here.

[13] Through church connections, Ms Ma and her father, Professor Ma in 2006 met the first defendant, Tony Meng Hiang Tay (Mr Tony Tay) who is an elder of the Auckland Baptist Tabernacle Church.

[14] Mr Tony Tay at that time had established, operated and been a director in (and he and his interests had controlled the shareholding in) a large number of companies in Auckland and elsewhere which were together called the Tony Tay Group. These companies had engaged in many residential, apartment and commercial property developments and other businesses.

[15] Ms Ma and Professor Ma also met Mr Tony Tay's wife, the second defendant, Selina Siaw Nyung Tay (Ms Selina Tay) around this time, and at various times they also met other members of Mr Tony Tay's family.

[16] In 2006, according to Ms Ma, Mr Tony Tay then encouraged both herself and Professor Ma to be involved in wellness centres he was establishing in New Zealand.

[17] Subsequently in January 2007, Ms Ma confirms that Mr Tony Tay and she incorporated two companies, Jireh Health Limited (Jireh Health) and Karapiro Management Limited (KML) with Mr Tony Tay's interests having a 60 per cent and Ms Ma, through a Ma family trust, a 40 per cent shareholding in each of those companies. Jireh Health apparently was to trade as the Jireh Spinal Wellness Centre at Greenlane, Auckland. KML was formed to prepare for the operation of a health and wellness business to be run as part of the "Karapiro Wellness Resort", a health retreat to be established on a 4.4 hectare property overlooking Lake Karapiro in the Waikato (the Karapiro property).

[18] It seems that significant steps had been taken to establish the wellness clinic at the Karapiro property and a number of units or villas had been built for that

purpose. Some of those units or villas may well have been built some time before by a previous owner, but they were taken over by one of Mr Tony Tay's companies, Jireh Resorts Limited (Jireh Resorts) when it purchased the property.

[19] Initially, the relationship between Mr Tony Tay, Ms Ma and Professor Ma was a good one. Indeed, with their medical backgrounds, Professor Ma and Ms Ma, it was agreed, were to be involved in the wellness centres, and Ms Ma had actually been appointed as Managing Director of KML.

[20] As to this aspect, at para 13 of her 19 December 2011 affidavit sworn in support of the present application, Ms Ma confirms that at the time:

13. Both my father and I were very happy to contribute to the wellness centre because of our religious beliefs, and the trust we had in Tony Tay.

[21] By way of an aside, the Karapiro property, as I have noted above, was owned by Jireh Resorts and comprised 45 units completed, or to be completed, on the 4.4 hectare property overlooking Lake Karapiro. Separate titles under the Unit Titles Act 1972 were issued for each of those 45 units, and ultimately, as I understand it, the health and wellness centre was to be established there and operated by KML.

[22] Then on 14 June 2007, as I understand it, at the request of Mr Tony Tay or his interests, Ms Ma entered into an agreement to purchase one of the units at the Karapiro property (being Unit 7 on Deposited Plan 88926, Certificate of Title South Auckland 70C/205) (Unit 7) from Jireh Resorts. The agreement for sale and purchase signed by Ms Ma as purchaser and, it appears, by Mr Tony Tay on behalf of Jireh Resorts, provided for a purchase price of \$450,000 (inclusive of GST, if any). The purchase price was to be paid, first, as to a deposit of \$90,000 "immediately upon execution of this agreement by both parties and/or at such other time as is specified in this agreement", and secondly, as to the balance purchase price on settlement date which was to be some two weeks later on 29 June 2007.

[23] The agreement was subject to finance being arranged from a lender of the "purchaser's choice", being an amount "sufficient to complete this agreement". The

date for satisfying this finance condition was to be 10 working days after the contract was signed, which was to be only the day before settlement, 28 June 2007.

[24] Subsequently, it seems on 19 June 2007, Ms Ma made an application for finance to Westpac, seeking a loan of \$360,000. This loan application, which it appears was signed personally by Ms Ma, was submitted to Westpac by the sixth defendant, Rosgo Financial Services Limited. In a letter accompanying the loan application signed by the seventh defendant, Ms Roshni Golian, it was specified that Ms Ma had “an (annual) income of \$190,000 plus a rental income of \$400 per week”. This was confirmed in the application itself. As I have noted, that application was signed by Ms Ma, and she confirms this but with the qualifications I note in [25] below.

[25] Explaining this Westpac loan application, Ms Ma, in her affidavit dated 19 December 2011 deposes to a range of matters raising certain disturbing questions, which at some point require a proper response:

32. Around this time but after I had signed the agreement, I was introduced to Roshni Golian from Rosgo Financial Services Limited. I believe from the file and the date on the documents this was on the 12th June 2007. The introduction took place in Mr Tay’s office on the second floor at 540 Great South Road, Greenlane.
33. Mr Tay told me that Roshni was his friend and had helped him previously. Because I totally trusted Tony I also trusted Roshni.
34. After the introduction Mr Tay asked me to help him and said I only needed to sign some forms that Roshni had prepared and that he would take care of the rest of things. He said I did not need to do anything else besides signing the files but I had to do so in a hurry.
35. Tony then took Roshni and I to the board meeting room. I spent about five minutes with her. She asked me my name, date of birth, nationality, whether I was married or not, my occupation and my annual income.
36. I answered those questions and told her that I earned \$60,000 per year plus a small amount of \$160 per week from Middlemore Hospital for my part-time job there.
37. I told her my current home address and how long I had lived there, my previous address and what assets I owned.
38. Ms Golian then asked me to put my signature and date on the documents and then she would finish the forms for me later. I did as

she asked but I did not have the opportunity of reading any of the files or documents that she had asked me to sign. We then left the room.

...

40. Included in that bundle [of loan documents and the loan application] at page 19 is lo-doc declaration of income which is signed by me and has my handwriting on it for my name. However the numbers \$360,000 [for the loan sought] and \$190,000 [for annual income] are not in my handwriting, and that \$190,000 was not my annual income.

41. I believe the handwriting there is that of Ms Golian. I did not at any point in time ever say to her that my annual income was \$190,000.

[26] Subsequently, Westpac approved a loan of \$360,000 to Ms Ma, to be secured by first mortgage over Unit 7, repayable with an initial interest rate at 9.3 per cent per annum over a 25 year term.

[27] Then it seems that Ms Ma was directed to lawyers to act on her behalf in the purchase transaction, being Patel Nand Legal. Although there is some dispute over this here, Ms Ma deposes, at para 53 of her affidavit, that they:

...were the lawyers engaged [for her] by Tony Tay for this transaction.

[28] Patel Nand Legal were instructed by Westpac to prepare the mortgages for Unit 7, and in this regard Ms Ma states, at para 56 of her 19 December 2011 affidavit that:

56. Also in June 2007, and after I had signed the documents, Tony and Selina Tay took me to Patel Nand Legal where I signed more documents for settlement. I remember that we met a middle aged male there but I cannot remember his name and what he said to me. I did not pay any legal fees, a deposit, or any other money for the settlement. I do not know whether Patel Nand understood that I was not actually buying the property myself. They did not ask me for any explanation and I did not have any real discussion with the lawyer that I met.

[29] Subsequently, it seems Ms Ma also completed documents to open a bank account with Westpac. In addition, around 28 June 2007 Ms Ma, as landlord, signed a residential tenancy agreement for Unit 7 with KML as tenant under the Residential Tenancies Act 1986. This tenancy agreement provided for a tenancy of Unit 7 at a monthly rental of \$3,000 paid in advance. The commencement date for the tenancy

rather confusingly was left blank in the agreement. The agreement, however, appeared to be signed by Mr Tony Tay on behalf of KML as tenant and the address for the tenant was given as “care of Tony Tay Group Building, Level 1, 540 Great South Road, Greenlane”.

[30] The original agreement for sale and purchase for Unit 7, which had become unconditional when the Westpac loan offer had been accepted by Ms Ma as purchaser, specified a settlement and possession date of 29 June 2007.

[31] Settlement of this purchase did take place, but it seems, however, that this occurred a day earlier on 28 June 2007. On that date, Patel Nand Legal, as the solicitors acting for Ms Ma, confirmed by fax to Ms Audrey Chong-Schmidt (Ms Chong-Schmidt) (as I understand it, she is the in-house solicitor for the Tony Tay Group and clearly she was the solicitor named to act for the vendor, Jireh Resorts, on the backing sheet of the agreement for sale and purchase for Unit 7) that settlement of Unit 7 had occurred. Specifically, they stated in that fax:

... Patel Nand Legal have paid into your trust account with National Bank of New Zealand, Account No 06 0101 0784289 00 today the sum of \$358,952.66 as evidenced by the attached confirmation details. This payment represents the settlement amount less deduction of legal costs.

[32] As I understand the position, previously that day, 28 June 2007, Ms Chong-Schmidt had forwarded to Patel Nand Legal “a copy of our tax invoice for the above sale” including bank account details. That tax invoice showed the purchase price for Unit 7 at \$400,000, plus GST (at 12.5 per cent of \$50,000), with a total price of \$450,000. This tax invoice was addressed to Ms Ma care of Patel Nand Legal. The bank account details were shown as “Tony Tay Group, National Bank of New Zealand”.

[33] The next day, 29 June 2007, Ms Chong-Schmidt for the vendor, Jireh Resorts, forwarded the signed transfer and other settlement documents to Patel Nand Legal, and it seems these were received by that firm on 2 July 2007. Subsequently some three days later on 5 July 2007, the transfer of Unit 7 into the name of Ms Ma, together with the mortgage to Westpac, were registered against the title to this property.

[34] On reflection, aspects of this whole transaction must appear rather confusing. Certainly they raise a number of significant questions. What does seem clear is that the only amount received by the vendor, Jireh Resorts, or by its in-house solicitor, Ms Chong-Schmidt, was the sum of \$358,952.66 paid on 28 June 2007. As I have noted at [31] above, Patel Nand Legal in their faxed letter accompanying confirmation of the payment stated:

This payment represents the settlement amount less deduction of legal costs.

[35] It is clear that Patel Nand Legal were acting for Ms Ma on the purchase. It can only be assumed here that the sum of \$358,952.66, which was paid on settlement, represented the \$360,000 Westpac first mortgage advance (perhaps less the \$400 Westpac establishment charge which Westpac stated was to be “deducted from the loan amount”) less Patel Nand Legal’s legal costs for acting for Ms Ma on the purchase, which in the normal course of events would obviously have been charged directly to Ms Ma. That this amount had been deducted from the payment made to the vendor (rather than being paid by Ms Ma personally) would seem to be somewhat unusual.

[36] In addition, of course, the issue remains as to what had happened to the \$90,000 balance of the purchase price for Unit 7, stated in the agreement for sale and purchase to be paid by way of deposit. The GST tax invoice issued by the vendor, Jireh Resorts, forwarded to Patel Nand Legal on 28 June 2007 showed a total amount due for the sale of Unit 7 of \$450,000. What is clear, however, is that the only payment made to the vendor was the \$358,952.66 noted above.

[37] And indeed, Ms Ma confirms that at no time was the \$90,000 deposit, or any other monies, paid by her for this purchase. It is interesting at this point to note also the affidavit of Mr Damien Siow (Mr Siow) sworn on 14 March 2012 and filed in support of the opposition by Mr Tony Tay and the affected defendants to the present application.

[38] At the outset, Mr Siow states in this affidavit that he was employed by Jireh Management Limited as its in-house accountant at the time from approximately 2003

to 2009 and undertook accounting work for the various entities in the Tony Tay Group (approximately 30 companies).

[39] Mr Siow then goes on to confirm at para 5 of his affidavit that:

I can also confirm that Ms Ma did not pay her deposit which was \$90,000. The company to who Ms Ma owes the deposit, Jireh Resorts Limited, is now in liquidation.

[40] Rather confusingly therefore, it does seem that settlement of the sale by Jireh Resorts of its Unit 7 to Ms Ma and the subsequent transfer of title to this property into her name, proceeded, notwithstanding first, that the \$90,000 deposit under the agreement for sale and purchase had not been paid, and secondly, that from the balance of \$360,000 due under the contract, the further amount approaching \$1,050 had been deducted. As I have noted above, I presume this last amount mainly represents Ms Ma's legal costs on the purchase. Further, it is clear that the usual apportionments for rates and any other outgoings on settlement of the sale were not made at the time.

[41] It is useful also to note at this point other comments made in the affidavit of Mr Siow. In this regard, he deposes:

2. I can confirm that 11 units were sold in the Karapiro project. The funds received on sale went to the vendor Jireh Resorts Limited and then applied to the Tony Tay Group Limited (TTG) account. TTG funded various entities in the group as and when required.
3. The settlement funds flowed from TTG to Jireh Homes Limited (another entity in the group) which was undertaking the construction of the development and were used to complete construction. Some of the funds were also applied to Karapiro Management Limited to be utilised for set up costs.
4. Attached and marked "A" is a summary of the Karapiro project costs. In summary the total costs of the project were \$11.8 million, total borrowings were \$6.426 million, and the remaining \$5.3 million was funded by Tony Tay.
5. I can confirm that no settlement proceeds from the sale of the 11 units at Karapiro, including the unit sold to Ms Ma, were applied and/or deposited into any of Tony or Selina Tay's accounts...

[42] Attached to Mr Siow's affidavit as exhibit "A" is the brief breakdown of total construction and land costs for the project at the Karapiro property, which shows the following:

- (a) Total land and construction costs are noted at \$11,794,772.91.
- (b) This amount is said in this exhibit "A" to be funded by borrowings of \$2,000,026, 11 units sold totalling \$4,400,000 and a Tony Tay contribution of \$5,368,772.91.
- (c) At the bottom of this exhibit "A" is an area under the word "Remarks" which states that 11 units had been sold at \$450,000 each (including GST of \$50,000 each), giving a net total amount of \$4,400,000. Underneath that statement, however, are the words "only received - \$3,872,500".

[43] Returning to the body of Mr Siow's affidavit, I repeat that at para 4 he states in part:

In summary the total costs of the project were \$11.8 million, **total borrowings were \$6.426 million** and the remaining \$5.3 million was funded by Tony Tay. [emphasis added]

[44] In exhibit "A", this figure of \$6.426 million described in the affidavit as "total borrowings" is made up by the figure of \$2,000,026 described there as "borrowings" and \$4,400,000 described there as "11 units sold".

[45] These comments in my view may well prove to be of some significance here, as are the remarks at the foot of exhibit "A" that, of the \$4.4 million due from the sale of the 11 units, only \$3,872,500 had been received. More on these aspects later.

[46] Moving forward from this June 2007 period when settlement of the sale of Unit 7 to Ms Ma occurred, it does seem that for some time thereafter matters proceeded between these parties reasonably smoothly. Rental for Unit 7 under the residential tenancy agreement with KML was regularly paid, and this enabled the

Westpac mortgage payments to be met. In this regard, Ms Ma has confirmed at para 57 of her 19 December 2011 affidavit in part:

57. ... Westpac Bank directly debited [from the account set up for me at Westpac] the amount of the money to pay interest of the loan. I know this because Westpac sent bank statements recording these transactions to my home address. I never touched or used any money myself. I did not think I even owned the property of unit 7 of Karapiro. Because of my total trust in Elder Tony I did not doubt anything.

[47] Also around this time, brochures were prepared to market the Karapiro Wellness Centre, the Karapiro property and the sale of future units there. These brochures included profiles of Ms Ma and her father, Professor Ma, as medical specialists who would be involved in the “holistic health care” services to be offered at the Wellness Centre.

[48] In addition, on 5 September 2007 it seems that Professor Ma, who was now resident in New Zealand, himself signed an agreement to purchase another unit, being Unit 17 at the Karapiro property, also for a price of \$450,000. This agreement was on virtually identical terms to the earlier agreement for sale and purchase signed by Ms Ma for unit 7, although in the case of Professor Ma, the agreement was unconditional and called for settlement and possession to take place nine days after signature on 14 September 2007. Again, that agreement provided for an initial \$90,000 deposit with the balance payable on settlement.

[49] The agreement for sale and purchase with Professor Ma again appeared to be signed for Jireh Resorts by Mr Tony Tay, and although it was unconditional, before me counsel confirmed that the purchase did not proceed. It was explained that this was because Professor Ma was unable to obtain mortgage finance for the purchase because of his age. The fact that this agreement appeared to be unconditional when signed, and that it was in virtually identical terms to Ms Ma’s agreement, but was later effectively cancelled with the agreement of Jireh Resorts as vendor, does not seem to be questioned.

[50] Time moved on to early 2011. At that point, however, matters between Ms Ma, Westpac and Mr Tony Tay turned somewhat sour. Rental payments for Unit 7 stopped and defaults occurred under the Westpac mortgage.

[51] So, it was that in May 2011, Ms Ma received a demand from Westpac for repayment of the sum of \$380,240, being the amount said to be in default at the time under the Unit 7 mortgage. She was quite unable to meet this demand. Ms Ma claims in her affidavit that when she received this demand, she took it to Mr Tony Tay and his wife, Ms Selina Tay, and they told her “not to worry” and that “they would deal with the problem and solve it”.

[52] Irrespective of what Mr Tony Tay or his wife may say in reply about all of this, “dealing with and solving this problem” clearly did not occur. On 18 August 2011 Ms Ma was served with a summary judgment application by Westpac, which culminated on 15 September 2011 in judgment being given against her in favour of Westpac for the sum of \$403,034.44. In addition, under that summary judgment order, interest continued to accrue as set out at para [3](b)(i) and (ii) of that order.

[53] Subsequent to that judgment, according to Ms Ma, on 22 and 30 September 2011 two meetings took place between herself, Professor Ma, Mr Tony Tay and Ms Selina Tay. According to Ms Ma, Professor Ma recorded on his mobile phone parts of the conversation which occurred at these meetings and she has provided, in her affidavit, a translation and transcript of “some of what I believe are the important passages” of the conversations at these meetings. More on this aspect later.

[54] There followed two further meetings between Ma family interests, Mr Tony Tay, members of the Tay family and others which, as I see it, are significant here.

[55] The first of these meetings, which commenced at 7.30pm on 12 October 2011 and took place at the premises of Jireh Health at the Auckland City Hotel in Hobson Street, Auckland was attended by Ms Ma, Professor Ma, Mr Tony Tay, Ms Selina Tay, Pastor Kok Soon Lee (Mr Lee), the Chinese Pastor of the Auckland Baptist Tabernacle Church and Mr Ross Hern Yen Chin (Mr Ross Chin), the managing director of the Auckland City Hotel and an employee of Mr Tony Tay. The meeting,

which, as I have noted, commenced at 7.30pm, did not finish until about 2.30am the following day, 13 October 2011. At that time, a typed document entitled “Heads of Agreement between Maggie Ma and Tony Tay” (the Heads of Agreement) was signed by Ms Ma and Mr Tony Tay. Their signatures were witnessed by Mr Lee and Mr Ross Chin.

[56] Amongst other matters, that Heads of Agreement dealt with Ms Ma’s Westpac loan and stated:

A. Westpac loan

A loan of \$360,000 was borrowed by Tony Tay in Maggie Ma’s name from Westpac Bank in 2007, mortgaged using Unit 7 of Karapiro Resort, 1002 SH1, Waipa. This was used by Tony Tay, as his injection, to inject into Jireh Health Limited and Karapiro Management Limited to keep the companies afloat.

Maggie Ma and Tony Tay hereby agrees [sic] to settle the account as follows:

- (1) The mortgage for the above loan owed to Westpac Bank, all related expenses and responsibilities is to be taken by Tony Tay.
- (2) Tony Tay will meet up with a representative of Westpac by 14 October 2011 together with Maggie Ma or representative to transfer responsibility for the above loan from Maggie Ma to Tony Tay. This date is subject to an appointment made with Westpac.

[57] As I have noted, the Heads of Agreement was signed and witnessed on 13 October 2011, presumably towards the conclusion of the meeting in the early hours of that morning.

[58] Addressing that Heads of Agreement (and a later document I note at [63] below), Mr Tony Tay, at para 25 of his 15 March 2012 affidavit sworn in opposition to the present application, deposes:

25. Finally it is well documented by all parties present at the meetings of the 13th and 15th October 2011 (excluding Ms Ma) that Ms Ma extracted my signature (and my wife’s) to both agreements by force and undue pressure. I can confirm that neither I nor my wife signed those agreements of our own free will.

[59] I will turn to address these aspects later in this judgment.

[60] Next, a further meeting of the parties took place two days later on 15 October 2011. That meeting occurred at Ms Ma's home in Howick, Auckland, which she shares with her parents. It involved a visit by six members of Mr Tony Tay's family. These were Mr Tony Tay, his wife, Ms Selina Tay, two sisters of Mr Tony Tay, Mr Tony Tay's mother and one of his brothers-in-law. From affidavit material before the Court, it is claimed by members of the Tay family that the purpose of this visit was to see Ms Ma's mother who was unwell and that in particular Mr Tony Tay's mother wished to see her friend, Ms Ma's mother, before she returned to Malaysia.

[61] That 15 October 2011 visit and meeting, it is said, commenced at around 2.30pm, and it is said it lasted for about five hours. Ms Ma, her mother and Professor Ma were present.

[62] At the conclusion of the meeting, a handwritten document was signed by Mr Tony Tay and Ms Selina Tay, it was dated and their signatures were witnessed by Mr Tony Tay's mother.

[63] It is important to set out that document (the 15 October document) in full. It stated:

We, Tony Tay, Selina Tay, Jireh Hotel Investment Limited, and Tony Tay Trust, Elshadai Family Trust guarantee to take full responsibility of the bank loan of Westpac Bank and mortgage on unit 7 Karapiro from Tian Min Maggie Ma by 12am of 14/11/2011 (if before 14/11/2011, the Westpac Bank takes any actions against Maggie, we take full responsibilities).

Caveat over ten units at Auckland City Hotel (consist of one penthouse and nine delux suites) owned by Jireh Hotel Investment and 1501/76 Wakefield Street, Auckland City owned by Jireh Wakefield Limited.

Signed by "Tony Tay" "Selina Tay"

15 October 2011

Witnessed by:

Signature of Sim Ah See (Mr Tony Tay's mother)

15 October 2011

[64] Again, as noted at [58] above, Mr Tony Tay in his affidavit contends that neither he nor his wife, Ms Selina Tay, signed the 15 October document of their own

free will and their signatures he claims were extracted by “force and undue pressure”. Further affidavits from Mr Tony Tay’s mother, his brother-in-law and one of his sisters have been provided to address this aspect. Ms Ma, however, disputes that there was any force or illegitimate pressure applied to anyone to have the 15 October document or indeed the Heads of Agreement signed. More on this later.

[65] As a result of all the matters noted above, Ms Ma’s overall position is, first, that her purchase of Unit 7 and completion by her of the Westpac loan documentation was not bona fide and involved a “dishonest scheme” whereby Mr Tony Tay and his interests appropriated the Westpac loan monies and subsequently defaulted in making the loan interest and principal repayments they were to make, and secondly, that Mr Tony Tay and his interests have defaulted in respect of their obligations contained in both the Heads of Agreement and the 15 October document (which itself provides enforceable guarantees), as a consequence of which Ms Ma remains exposed to the threat of enforcement by Westpac of the judgment for \$403,034.44 plus interest it has entered against her. These claims are opposed by the affected defendants on grounds specified in their amended notice of opposition dated 14 March 2012 as follows:

3. ... that each defendant has a valid defence to the plaintiff’s claim:
 - 3.1 The purchase of the property [Unit 7] by the plaintiff was a bona fide transaction;
 - 3.2 If on the plaintiff’s evidence the agreement to purchase the property was entered into with the intention of defrauding and/or deceiving the Westpac Bank (which is denied) then the agreements dated 13th & 15th October 2011 (“the agreements”) are illegal and/or void;
 - 3.3 Alternatively there was no consideration for the agreements;
 - 3.4 Alternatively the agreements are voidable in that [they] were obtained under duress and/or undue influence.

Summary judgment principles

[66] Turning now to the summary judgment principles that apply to the application before me, this is an application brought pursuant to r 12.2(1) of the High Court Rules which provides:

12.2 Judgment when there is no defence or when no cause of action can succeed

- (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[67] The principles of summary judgment have been recently summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* at [26]:¹

The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[68] Therefore, the application before me can only succeed if I am satisfied that the affected defendants here have no arguable defence to the claims against them.

[69] The effective claim by Ms Ma against Mr Tony Tay and the affected defendants is outlined in submissions advanced to me by counsel for Ms Ma as follows:

- (a) Ms Ma alleges that she was misled into signing the agreement for sale and purchase of Unit 7 and the loan application to Westpac, and that the \$360,000 in question was in fact borrowed from Westpac by Mr Tony Tay or his interests and the monies applied for his or their own purposes.
- (b) Mr Tony Tay fraudulently procured Ms Ma's signature on the loan application in order to obtain the loan advance from Westpac and that

¹ *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

he or interests associated with him appropriated the proceeds of that loan.

- (c) As a consequence, first, Ms Ma was exposed to a claim by Westpac and has now had judgment against her in the sum noted above, being \$403,034.44 plus continuing interest, and secondly, when Ms Ma referred all this to him, Mr Tony Tay has expressly admitted liability for the Westpac loan in the written Heads of Agreement signed on 13 October 2011.
- (d) There is a further written admission of liability by Mr Tony Tay contained in the 15 October document, which also contains a personal guarantee of the debt from the remaining affected defendants which binds those defendants.

[70] Ms Ma's case proceeds then on the basis that she alleges Mr Tony Tay and the affected defendants have defaulted in respect of their obligations contained in both the Heads of Agreement and the 15 October document, as a consequence of which Ms Ma remains exposed to the threat of enforcement by Westpac of the judgment it has entered against her.

[71] I turn now to consider each of these claims in turn, bearing in mind that the application before me is one for summary judgment on which I must be satisfied that there is no real question to be tried here on the basis that Ms Ma must show there is no defence to her claims.

Ms Ma's entry into the agreement for sale and purchase of Unit 7 and the Westpac loan application.

[72] Effectively on this aspect of her case, Ms Ma contends that Mr Tony Tay and his interests used her name to purchase Unit 7 at the Karapiro property and that she did not know she was buying the property or indeed even owned it. Ms Ma's claim is that Mr Tony Tay and his interests did this dishonestly and that therefore they should pay her the money that she owes to Westpac.

[73] In my view, and particularly given the application before me is one for summary judgment on which I must be satisfied that the affected defendants have no defence to this claim, it is one that can be quickly disposed of.

[74] As I see the position, for the purposes of the present application, Ms Ma is unable to justify her contention that she did not know she was buying Unit 7 at the Karapiro property or that she owned Unit 7, even though she may have been misled to some extent when she signed the agreement for sale and purchase. I reach this conclusion for the following reasons:

- (a) Ms Ma is a mature highly educated, woman who, as I understand it, shares in the ownership of other property. She signed the agreement for sale and purchase for Unit 7 personally and there is no evidence before me that she was forced to do so.
- (b) As noted above, Ms Ma already owned a property with her father which itself had a mortgage on it to Westpac.
- (c) Ms Ma acknowledges that she personally signed the loan application to Westpac (although she does claim it contained blanks in crucial areas at the time) and in addition the mortgage documents with Westpac. .
- (d) Ms Ma personally opened a bank account with Westpac and all the bank statements for this account, as she acknowledges, were sent to her at her home address and read by her.
- (e) Ms Ma signed the residential tenancy agreement with KML.
- (f) Ms Ma effectively, through her bank account, collected rent on the property for almost three years and noted that the mortgage payments to Westpac were promptly made during this period.

- (g) The evidence before me at this point indicates that Ms Ma had an excellent grasp of the English language, had good business skills and a reasonable level of competence.
- (h) Ms Ma was appointed the managing director of KML and also from the evidence it is suggested she ran a wellness centre in Great South Road, Auckland with her father from 2007 until late 2011.
- (i) Ms Ma is a qualified doctor in China with a Bachelor of Medicine obtained in 1994. She also obtained a Master of Medicine degree in December 2001. She came to New Zealand in April 2002 and worked initially as a research fellow in the Renal Department at Middlemore Hospital.
- (j) Finally, Ms Ma's father, Professor Ma with whom she lived and had an obviously close relationship himself entered into an almost identical agreement to purchase a different unit at the Karapiro property being Unit 17, although as noted above this purchase did not proceed as Professor Ma was unable to arrange finance.

[75] Given all these matters, it is difficult to accept Ms Ma's claim that she did not know what she was signing or doing when she entered into the agreement for sale and purchase of Unit 7 and the Westpac mortgage.

[76] Essentially all this is tied up in a suggestion by Ms Ma and her counsel that the agreement for sale and purchase of Unit 7 was not bona fide. For all the reasons outlined above, at this early stage on the present summary judgment application, there is simply insufficient material before the Court to find that the agreement and purchase was not bona fide. On the contrary, on all the evidence before me including the actual transfer of title to Unit 7 into Ms Ma's name, and the subsequent residential tenancy arrangement with rent paid and accepted for some three years, it must be presumed at this point that the purchase of Unit 7 by Ms Ma was bona fide.

[77] At this point, however, I do need to comment on certain specific aspects of that purchase transaction noted earlier in this judgment which must raise significant questions. I now list these:

- (a) On settlement of the purchase, it is acknowledged that the only payment made by Ms Ma under the agreement for sale and purchase was the sum of \$358,952.66. As noted earlier, this appeared to represent the Westpac loan advance of \$360,000 less costs and charges which were levied to Ms Ma. It has been confirmed by both Ms Ma and Mr Siow, and not in any way contested, that she paid no additional monies for the purchase of Unit 7 other than this net mortgage advance from Westpac. The original \$90,000 deposit provided for in the agreement for sale and purchase was not paid as confirmed by Mr Tony Tay's accountant, Mr Siow, in his affidavit – see [39] above. Further, it is unusual, to say the least, that the vendor of Unit 7, Jireh Resorts, has effectively paid Ms Ma's costs in this matter and has transferred title to Unit 7 into her name notwithstanding that the purchase price was underpaid as to \$90,000. No acknowledgement of debt, second mortgage or other document related to this unpaid \$90,000 was entered into.
- (b) On all this, Mr Siow, in his affidavit at para 5, confirmed that the \$90,000 deposit was not paid but he then went on to say that Ms Ma owes this deposit to Jireh Resorts. It is nearly five years since settlement of the sale now, and it might be seen as more than a little surprising that no demand from Jireh Resorts has ever been made on Ms Ma for this unpaid \$90,000, which itself represented 20% of the sale price for Unit 7.
- (c) Mr Siow, as in-house accountant for Mr Tony Tay and his group of companies, in his affidavit went further and confirmed that 11 units at the Karapiro property had been sold, but that of the total net amount due to Jireh Resorts from these sales, being \$4.4 million, the only amount received was \$3,872,500. This must lead to the irresistible

conclusion that not only on the sale of Unit 7 to Ms Ma, but also on at least a number of the other unit sales, the respective purchase prices on settlement had been underpaid. It goes without saying that this “fact”, which is entirely unexplained here, must be viewed as extremely surprising.

- (d) Further in Mr Siow’s affidavit, as I have noted at [44] above, he describes the total funding of \$11.8 million for the Karapiro project as made up of total borrowings of \$6.426 million, with the remaining \$5.3 million funded by Mr Tony Tay. The \$6.426 million clearly includes the \$4.4 million earlier described as “11 units sold”. In my view, this must in some way throw a degree of doubt upon the contention that there have been 11 outright sales of units at the property, including the sale of Unit 7 to Ms Ma.

[78] I will return to address what I see as the further significance of these aspects shortly. Suffice to say at this point, however, as I have confirmed at [76] above that for summary judgment purposes, the claim by Ms Ma that the agreement to purchase, and her actual acquisition of Unit 7, was not in any way bona fide, has not been made out here.

[79] However, that is not an end of this matter. I turn now to consider the Heads of Agreement and the 15 October document .

Heads of Agreement

[80] As I have noted above at [55] and following, the Heads of Agreement, which addressed Ms Ma’s Westpac loan, was signed by her and Mr Tony Tay on 13 October 2011 at the conclusion of the lengthy meeting which commenced at 7.30pm the previous day. The operative part of the Heads of Agreement is set out at [56] above. There is no dispute that the Heads of Agreement was signed by Ms Ma and Mr Tony Tay and their signatures witnessed by Mr Lee, the Chinese Pastor of the Auckland Baptist Tabernacle Church and Mr Ross Chin, an employee of Mr Tony Tay.

[81] Significantly as I see it, that Heads of Agreement, which takes the form of a formally typed document, recites that Mr Tony Tay used the \$360,000 Westpac loan “as his injection, to inject into Jireh Health Limited and Karapiro Management Limited to keep the companies afloat”. (emphasis added)

[82] The Heads of Agreement then went on to state that the parties agreed that Ms Ma’s loan account with Westpac would be “settled” by Mr Tony Tay taking over liability for the loan, all related expenses and responsibilities, and further that he and Ms Ma would meet up with a Westpac representative to:

...transfer responsibility for the above loan from Maggie Ma to Tony Tay.

[83] In my view, there can be little doubt that this Heads of Agreement constituted both a contract and acknowledgement of liability on the part of Mr Tony Tay for the Westpac debt of Ms Ma.

[84] Insofar as it constituted an acknowledgement of liability, *Chitty on Contracts* states in part:²

Under the present law, all that is needed is an admission by the debtor that there is a debt or other liquidated pecuniary claim outstanding and of his legal liability to pay it. It is not necessary that the acknowledgement should specify the amount of the debt if it can be ascertained by other means.

[85] I am satisfied that in the Heads of Agreement, Mr Tony Tay has clearly admitted the debt owing to Westpac and his legal liability to pay the debt. And the document goes on to record an undertaking by Mr Tony Tay for the parties to meet with Westpac to confirm that Westpac would accept the transfer of responsibility for the debt to him. (It does appear however that this later matter did not occur).

[86] Further, in my view the Heads of Agreement itself constitutes a contract between Ms Ma and Mr Tony Tay confirming his liability for the loan arrangement with Westpac, which it seems clear to me from all the evidence of prior events I have outlined above, he had previously acknowledged. Consideration for this contract

² H G Beale (ed) *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 2008) vol 1 at [28-095].

and confirmation of the loan arrangement was provided simply by Ms Ma's forbearance to sue Mr Tony Tay for the acknowledged debt.

[87] On all of this, Ms Ma in her 19 December 2011 affidavit has referred to other evidence she has placed before the Court, representing what she deposes are the English translations and transcripts of some of the important passages of conversations between the various parties which took place at the two earlier meetings on 22 and 30 September 2011 noted at [53] above. The evidence before me shows that on 11 April 2012 a copy of the CD-ROM recording (in Mandarin) those meetings was forwarded to counsel for the affected defendants. No challenge of any kind has been made to any of this evidence translated by Ms Ma. Indeed Mr Tony Tay in his evidence before me being his 15 March 2012 affidavit has not disputed or even made any reference to this evidence nor has he made any comment about these two September 2011 meetings which he attended.

[88] That transcript evidence, which is displayed both in Mandarin and English, included the following questions and answers:

Ms Selina Tay – “At that time (June 2007) we used Maggie's name to get loan for the purchase of the property.”

Professor Ma – “Oh, used her name for the purchase.”

Ms Selina Tay – “At that time, we used the rent to pay the bank interests. When we had money, we used them to pay bank interests with the name of rental payments. The rent was for the payment of the bank interests.”

Professor Ma – “Where on earth was there any rent? What rent?”

Ms Selina Tay – “It was for the interest payment anyway. Our company was paying the bank interest at that time.”

Ms Selina Tay – “The company built 45 units, 11 of which were sold to others and one of which was ...”

Professor Ma – “The company built houses and sold to people, sold to them, actually it was only in the name of sales, isn't it?”

Ms Selina Tay – “Yes.”

Professor Ma – “Then the company use the money to pay the previous bank loan of the company ...”

Ms Selina Tay – “Then the company used the name as tenant.”

Mr Tony Tay – “Because the property was transferred to their (means: those seven people’s) names.”

Professor Ma – “Transferred to her name, but actually it’s not hers.”

Mr Tony Tay – “You are correct.”

Ms Selina Tay – “At that time, our company (of Tony Tay Group) paid bank interests for Maggie monthly.”

Ms Selina Tay – “Where did this \$3,000 come from? It’s our company, our Tony Tay Group, we put \$3,000 into Maggie’s account, and the bank debited \$3,000 directly from Maggie’s account.”

Professor Ma – “Then how about her deposit?”

Ms Selina Tay – “Our company paid that (means paid the deposit).”

Professor Ma – “The company paid that?”

Ms Selina Tay – “Yes.”

Professor Ma – “Why the company didn’t apply for the bank loan itself?”

Ms Selina Tay – “It couldn’t.”

Professor Ma – “Why not?”

Ms Selina Tay – “It’s because ... why we couldn’t get bank loan at that time (Asked Tony).”

Mr Tony Tay – “Actually this (means the sham bank loan) was the idea proposed by Roshni [the seventh defendant].”

Ms Selina Tay – “It’s that Indian person (means Roshni) who tutored us to do so.”

Professor Ma – “So why (the company) couldn’t get the loan?”

...

Mr Tony Tay – “Eh ... how to say? You could get 70% bank loan if you apply for your house. If you use the whole project to apply for bank loan, according to the financial regulations, banks won’t grant the loan to the company for such a big project, but they would grant the loan to personal applicants.”

Ms Selina Tay – “It’s easier for an individual to get the loan granted.”

Professor Ma – “So that means it (means the bank) didn’t grant the bank loan to Tony Tay Group?”

Mr Tony Tay – “Correct.”

Ms Selina Tay – “The amount of the loan will not be big (if Tony Tay Group applied for it).”

Professor Ma – “That’s why their (means: those seven people’s) names were used to apply for the loan.”

Ms Selina Tay – “Yes.”

Professor Ma – “That means getting loan for Tony Tay Group?”

Ms Selina Tay – “We could say that. And Tony Tay Group made rental payments to pay the bank interests.”

Professor Ma – “So Tony Tay Group was the one that received benefit?”

Ms Selina Tay – “It should be.”

Ms Ma – “My father’s question is: you just said that Tony Tay Group used my name to get the bank loan.”

Ms Selina Tay – “Correct.”

Ms Ma – “Actually the money of the bank loan was taken by Tony Tay Group.”

Professor Ma – “So the money was not used by herself, but by Tony Tay Group?”

Ms Selina Tay – “Correct.”

Professor Ma – “Why this happened? That means it’s because of Tony Tay Group could not get the bank loan granted, that’s why the Group used her name, individual name, to apply for the bank loan. Am I correct?”

Ms Selina Tay – “Yes.”

Professor Ma – “So that’s the fact.”

Ms Selina Tay – “Yes.”

...

Professor Ma – “It’s because of her signature. We are now talking about the truth, so actually Tony Tay Group used her (means Maggie’s) name, which means her name was used by Tony Tay Group to do the thing (means to get the bank loan). Is it correct?”

Ms Selina Tay – “Yes, correct.”

...

Mr Tony Tay – “It doesn’t matter if money is owed to the bank ... because they have to take risks if they want to loan the money to me! I don’t care about owing the money to the bank. The bank is the last one I will consider ... I therefore want to save her (Ms Ma) with money, this is the most important. I also know that you do care about it, so I will do it with all my best.”

[89] This other evidence before the Court, comprising the undisputed transcript of the two September 2011 meetings, adds some explanation and background colour to the 13 October 2011 Heads of Agreement and the 15 October document. Taking this into account, and all the other matters I have referred to above, I am satisfied that Mr Tony Tay, in the Heads of Agreement, was clearly admitting liability for the Westpac debt and agreeing to settle that debt, all related expenses and the responsibilities which Ms Ma had assumed under the Westpac mortgage. As I see the position and given the entire background to this transaction and the documents signed, Mr Tony Tay clearly accepted that the Westpac loan was for the benefit of his interests and that he would meet repayment. That said, the consideration for the Heads of Agreement was Ms Ma's forbearance to sue and the agreement provided by this document was binding – *Couch v Branch Investments (1969) Ltd* and *Moyes & Groves Ltd v Radiation New Zealand Ltd*.³

[90] The last remaining opposition ground advanced by the affected defendants with respect to the Heads of Agreement, is that this agreement is voidable in that it was obtained under duress and/or undue influence.

[91] On this, essentially as I have noted at [58] above, Mr Tony Tay says that he was pressured into signing the Heads of Agreement and that his execution of this agreement was obtained under “force and undue pressure”.

[92] Before me, Mr Swan, counsel for the affected defendants, submitted that there is a stark difference in the accounts of the parties as to what happened at this 12/13 October 2011 meeting. Mr Lee, the Chinese Pastor of the Auckland Baptist Tabernacle Church, has provided an affidavit in support of the affected defendants' opposition to the present application, this affidavit being sworn on 13 March 2012. As I have noted above, Mr Lee was present at this meeting and in fact witnessed the parties' signatures. In addition, Mr Ross Chin has provided an affidavit in support of the affected defendants' opposition to the present application, this affidavit also being sworn on 13 March 2012. Mr Ross Chin was also present at this meeting and witnessed the signing of the Heads of Agreement.

³ *Couch v Branch Investments (1969) Ltd* [1980] 2 NZLR 314 (CA); *Moyes & Groves Ltd v Radiation New Zealand Ltd* [1982] 1 NZLR 368.

[93] From both these affidavits, it is suggested that Ms Ma “dominated the meeting” which it is said largely turned out to be an interrogation and confrontation of Mr Tony Tay. Allegations it is claimed were made against him of all kinds of underhand dealings. Indeed the deponents suggest that Ms Ma accused Mr Tony Tay of “all sorts of wrongdoing”.

[94] As such, both Mr Lee and Mr Ross Chin state that Ms Ma “pressured Tony to sign a document acknowledging that he was solely responsible for the Westpac loan”.

[95] Mr Ross Chin also deposes that during the meeting, Professor Ma told Mr Tony Tay that he was “going to go to the church and tell the church about what Tony had done to them (the Mas)”. On this aspect, Mr Lee went further and stated that:

At one point Ms Ma’s father mentioned to Tony Tay that if he did not admit his wrongdoing, he would destroy his preaching ministry and reputation amongst the church.

[96] In an affidavit in other proceedings sworn on 8 November 2011 but provided in support of his position in this proceeding, Mr Tony Tay refers to this 12-13 October 2011 meeting. He describes this meeting as “an unexpected hostile confrontation at the instigation of Ma” and contends that she had slandered him in front of everybody at the meeting using disgraceful and hurtful language.

[97] In particular, Mr Tony Tay deposes in that affidavit that:

8. The meeting lasted until 2.30am in the morning during which time Ma continued to dominate. Ma pressured everyone to comply with her unreasonable demands. Chun (her father, Professor Ma) then said that if I did not sign a document, that Ma and he would use every means to destroy my preaching career by damaging my reputation amongst all the churchgoers.

For these reasons, Mr Tony Tay claims he was “forced” to sign the Heads of Agreement.

[98] In response, Ms Ma in her affidavit evidence disputes that she exerted any influence in getting the Heads of Agreement executed.

[99] As to the issue of duress, in *Magsons Hardware Ltd v Concepts 124 Ltd*, the Court, in carrying out a discussion of the principles involved stated:⁴

...the fact that one party to a contract has exerted pressure does not, on its own, amount to duress: pressure (and even threats) is commonly exerted in commercial dealings. There must be an exertion of illegitimate pressure.

[100] And at [25] of that decision, the Court said:

The Court in *McIntyre* observed that consideration of whether there was coercion in fact focuses on the availability of alternatives. Other factors relevant to the analysis are whether the person said to have been coerced did or did not protest, was independently advised, and whether after entering the contract, he took steps to avoid it.

[101] And, on the issue of undue influence this normally consists of gaining an unfair advantage by the use of a stronger power against a weaker entity – *Contractors Bonding Ltd v Snee*.⁵

[102] In the decision of the House of Lords in *National Westminster Bank v Morgan*, it was held that for undue influence it was not enough simply to show a relationship of dominance or influence, but also the parties needed to establish that the transaction constituted a manifest and unfair disadvantage to the person seeking to avoid it.⁶

[103] As to the issue of undue influence, in the present case, it is difficult to conclude that Mr Tony Tay and Ms Ma were in any relationship where Ms Ma could be described as the stronger party. If anything, given that Mr Tony Tay, on the evidence before the Court was a very experienced businessman with many business interests, the position would be to the contrary.

[104] In my view, there can be no suggestion here that undue influence was exerted on Mr Tony Tay to sign the Heads of Agreement.

[105] Turning now to consider the allegations of duress, it is interesting to note at the outset that no reference has been made here by Mr Tony Tay or any of the other

⁴ *Magsons Hardware Ltd v Concepts 124 Ltd*⁴ [2011] NZCA 559 at [21].

⁵ *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 165.

⁶ *National Westminster Bank v Morgan* [1985] AC 686.

affected defendants to the meetings of the parties which took place on 22 and 30 September 2011, and which were the subject of the transcribed evidence part of which was provided to this Court by Ms Ma as noted at [88] above.

[106] It is useful to record at this point that the Heads of Agreement notes specifically that the sum of \$360,000 was borrowed by Mr Tony Tay in Ms Ma's name from Westpac and injected into Jireh Health and the associated company, KML.

[107] On this question of duress, the specific allegations made on behalf of the affected defendants are that at this meeting Ms Ma's father said that:

If I (Tony Tay) did not sign a document, that Ma and he would use every means to destroy my preaching career by damaging my reputation amongst all the churchgoers.

[108] In response, Ms Ma in her reply affidavit sworn on 11 April 2011, refers to this allegation and explains:

38. ... my father asked Tony Tay to follow the words of God and to take action according to the Bible not just preaching and talking in front of our brothers and sisters. He said that as a spiritual leader it was more important what he did than what he said. My father said if you keep on doing wrong things and do not take your responsibility he would ask the brothers and sisters in our church to make judgement. He said that God knows everything.

[109] The evidence before me confirms that Ms Ma is a small woman, weighing less than 50 kilograms, and her father, Professor Ma, the only other member of the Ma family present at this 12/13 October 2011 meeting, is aged 72 and somewhat frail. Mr Tony Tay, Ms Selina Tay, Pastor Lee and Mr Ross Chin were the other parties who were present at this meeting (and all of whom now seem to support the affected defendants' position). There were no threats of violence, no reference to weapons and no reference to how threats said to be made might be carried out. The actual words used are disputed to some extent and no explanation was provided as to why someone did not leave the room to call the Police if there were genuine fears for safety. Accordingly, as I see it, the only possible conclusion that can be reached here is that what was said, at most, would have exerted some degree of pressure on

Mr Tony Tay to sign the Heads of Agreement but nothing more. In my view, this pressure however could not be seen in any way as illegitimate or to constitute duress.

[110] Ms Ma's position is that the reality must be that Mr Tony Tay knew that he had acted dishonestly and was again anxious to placate Ms Ma by promising to deal with and assume all responsibility for the Westpac loan. There is no suggestion from Mr Tony Tay or anyone else that he was threatened physically and in any undue emotional way at this 12/13 October 2011 meeting. There seems little doubt as I see it that reference was made at the meeting to Mr Tony Tay's role as an elder in the church in question and doubts were clearly raised by Professor Ma and Ms Ma that he should remain in that position. The clear message given in my view was that members of the church might be asked to make judgements on his position which would be outlined to them in detail. There can be little doubt that this constituted pressure placed upon Mr Tony Tay. This pressure no doubt played upon his fear that his senior position in the church would be at some way in jeopardy if details of this matter were broadcast amongst the congregation. Although I am satisfied that this constitutes what Mr Tony Tay might have seen as a significant degree of pressure placed upon him, as I see it, this cannot be regarded as illegitimate pressure. The thrust of the statements made by the Ma interests, which essentially does not appear to be contested in any real way, was simply that members of the church would be informed of what had happened in the present situation involving Ms Ma and Mr Tony Tay's role in all of this. I repeat that in my view that does not constitute illegitimate pressure. It is simply a statement that the factual position as the Mas saw it would be disclosed to a group of people in the church known to all parties. As I see it that falls well short of the requisite standard to make out a defence of duress. This is especially the case when there is a reasonable possibility that the admissions in question were true, and that in any event, Mr Tony Tay as a senior elder of the church would no doubt have been given the opportunity himself to speak to the congregation or members to counter any allegations which he said were untrue.

[111] For all these reasons, I dismiss the defence advanced by the affected defendants that the Heads of Agreement was entered into by Mr Tony Tay as a result of duress and undue influence. I find that that agreement is binding on the parties

and confirms Mr Tony Tay's liability to Ms Ma for the entire Westpac debt for which judgment has been entered against her.

[112] An order for summary judgment against the first defendant, Mr Tony Tay, is to follow.

The 15 October document

[113] I now turn to consider the possible liability as guarantors of the second, third, fourth and fifth defendants in this proceeding, which in terms of Ms Ma's present summary judgment application can only flow from this 15 October document. This raises the issue as to whether the 15 October document constitutes an enforceable contract of guarantee. It has not been executed by the parties as a deed.

[114] A guarantee is a secondary contract, ancillary to an agreement recording a principal debt. Section 27(4) of the Property Law Act 2007 defines the term "contract of guarantee" as a contract "under which a person agrees to answer to another person for the debt, default or liability of a third person". It is a distinct promise to perform the principal obligation if the principal debtor fails to do so.⁷

[115] A contract of guarantee must be in writing and signed by the guarantor: s 27 Property Law Act 2007. A guarantee must be supported by consideration which need not be evidenced in writing as long as it is valid.⁸ In the present case, although the guarantee was not in the form of a deed, in my view it generally satisfied the requirements of s 27 as a contract in writing, signed by the guarantors and was truly in all its stated terms a contract of guarantee. As to the issue of consideration for the giving of the guarantee, I will deal with this below.

[116] In addressing these aspects, it is also useful to consider the 1989 decision in *Paulger v Butland Industries Ltd*.⁹ In this case, an officer of a company experiencing financial difficulties wrote to the company's creditors confirming that

⁷ Burrows Finn and Todd (eds) *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [9.3.1].

⁸ *Scott v Broadlands Finance Ltd* [1972] NZLR 268 at 270.

⁹ *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549 (CA).

the company's business was being sold and that payment could not be made to the creditors until that sale was finalised. This letter continued:¹⁰

We ask your tolerance whilst we execute this matter and advise we will make good all outstanding matters within 90 days. The writer personally guarantees that all due payments will be made.

[117] In *Paulger*, it was held that this constituted an offer of a personal guarantee by the writer of the letter, which was accepted by the creditors by forbearing to enforce payment until after the 90 day period. It was this forbearance in fact which constituted the consideration for the promise of the guarantee.

[118] The 15 October document, which I have set out at [63] above) was signed towards the conclusion of a five hour meeting which took place that afternoon. Present at this meeting, which occurred at Ms Ma's home, as I have noted at [60] above, were Ms Ma, her parents and six members of Mr Tony Tay's family - Mr Tony Tay, Ms Selina Tay, his mother, two of his sisters and one of his brothers-in-law.

[119] It is Ms Ma's contention here that the 15 October document comprises a valid guarantee whereby each of the second, third, fourth and fifth defendants effectively guaranteed the indebtedness of Mr Tony Tay to Ms Ma and Westpac by agreeing to take full responsibility for the Westpac loan and mortgage over Unit 7 at the Karapiro property. Mr Tony Tay she notes also signed the 15 October document, once again acknowledging his responsibility for the loan.

[120] Interestingly, the 15 October document seems to go on to effectively provide that the guarantees contained in the document are additionally to be supported by caveats over 11 properties owned by the third defendant and another Tay Group company, Jireh Wakefield Limited.

[121] In their notice of opposition to the present application, the affected defendants suggest as a first defence, that the 15 October document does not provide a valid guarantee in that there was no consideration for the agreement.

¹⁰ At 551.

[122] In my view, this defence is quickly disposed of. As I see it, the consideration provided for this guarantee again is forbearance on the part of Ms Ma to sue the principal debtor, Mr Tony Tay on the earlier Heads of Agreement. The offer of the personal guarantee by the second, third, fourth and fifth defendants here was accepted by Ms Ma as the effective creditor by her forbearing to enforce his obligations and payment of the debt due from Mr Tony Tay.

[123] I dismiss this defence based on lack of consideration. In my view, there was clear consideration given for the guarantees here and this was provided by Mr Ma's forbearance to sue.

[124] Another issue that does arise, however, is whether the guarantees contained in the 15 October document bind the third, fourth and fifth defendants, notwithstanding that the document has been signed only by Mr Tony Tay and Ms Selina Tay. I interpolate at this stage that there can be no doubt in my mind that this guarantee does bind Ms Selina Tay, the second defendant, in her personal capacity. She has signed the document personally and her signature has been properly witnessed.

[125] On this issue as to whether the third, fourth and fifth defendants might also be liable under the guarantee, I am satisfied under all the circumstances prevailing in the present summary judgment application that the third and the fourth defendants (but not the fifth defendant) are indeed liable under the guarantee.

[126] Insofar as the third defendant, Jireh Hotel Investment Limited, is concerned, Mr Tony Tay is a director of this company and has, as I see it, signed the document on behalf of the company in that capacity. That fact is not disputed in any way by the affected defendants here. Nor is there any evidence of any kind to the contrary provided here. Further, as a director Mr Tony Tay has purported, on behalf of the company, to acknowledge that a supporting caveat can be registered over a number of properties owned by that company. It is not questioned here that the 15 October document was signed by Mr Tony Tay on behalf of the company as a director acting under its express or implied authority – s 4 Property Law Act 2007. I find therefore that the third defendant, Jireh Hotel Investment Limited, is liable to Ms Ma under this guarantee.

[127] As to the fourth defendant, Tony Tay Trust Limited as trustee for the Tony Tay Trust, Mr Tony Tay is also a director of Tony Tay Trust Limited. Again for the reasons I have outlined above, I find that Mr Tony Tay has signed the guarantee in his capacity as a director of the fourth defendant and to bind that company. This is not disputed nor is there any evidence of any kind to the contrary here. Again, it is not questioned here that the 15 October document was signed by Mr Tony Tay on behalf of the company as a director acting under its express or implied authority – s 4 Property Law Act 2007. The fourth defendant is liable to Ms Ma under the guarantee.

[128] Turning finally to the fifth defendant, this is noted as Mr Tony Tay, Ms Selina Tay and Ronald Edward Cherry as trustees of the Elshadai Family Trust. Here, Ms Ma is endeavouring to establish guarantee liability on the part of the Elshadai Family Trust, even though the guarantee document has been signed by what appears to be only two of the three named trustees of this trust.

[129] On this aspect, there is nothing before the Court here first, to indicate to me the basis upon which the trustees of this family trust may bind the trust to a contract, such as the present guarantee, or secondly to outline the requirements for execution of documents on behalf of this trust.

[130] That said, and given that the application before me is one for summary judgment, there is, in my view, a possible defence open to the fifth defendant here that it is not bound by this guarantee, given first, that it has not been signed by all three trustees of the Elshadai Family Trust, and secondly, that it may well be the position that the trustees must act unanimously and all sign major documents (such as the guarantee here) to bind the Trust.

[131] For these reasons, the application for summary judgment against the fifth defendant as a guarantor of the debt in question must fail.

[132] One last matter must be addressed regarding the guarantees contained in the 15 October document. This is the second substantial defence advanced for the affected defendants in their notice of opposition to the present application to the

effect that, like the Heads of Agreement, the 15 October document is voidable in that it was obtained under duress and/or undue influence.

[133] In my view, this defence is also quickly disposed of.

[134] The evidence with respect to the lead-up meeting prior to signature of the 15 October document is perhaps surprisingly similar to the evidence provided to the Court relating to the signing of the Heads of Agreement. That evidence, advanced in affidavits filed on behalf of Mr Tony Tay, is essentially from various members of his family and can hardly be seen as truly independent. In any event, it is to the effect that the 15 October 2011 meeting again was dominated by Ms Ma and her father Professor Ma, that Mr Tony Tay was besmirched, threats were made to reveal Mr Tony Tay's actions to the church congregation and that all parties claimed to have felt intimidated and unable to leave the meeting should they have wished to.

[135] Again, these contentions advanced on behalf of Mr Tony Tay and his interests were denied in the evidence of Ms Ma.

[136] On all of this, it does seem at the first instance inconceivable that Mr Tony Tay and five other members of his family were as they claimed unable at the time to leave this meeting at the house occupied by Ms Ma, her father Professor Ma and her aging and ill mother should they have wished to. Also, in my view, the real position which is effectively uncontradicted was that significant pressure was again placed upon Mr Tony Tay and his family supporters to have the 15 October document signed. This pressure again emanated from statements by Professor Ma and Ms Ma that Mr Tony Tay's senior position in the Baptist Tabernacle Church could be at some way in jeopardy as, if Ms Ma's liability for the Westpac debt was not in some way protected, the Mas would reveal to members of the congregation what they saw as his wrong doing in this whole matter. No consideration was given, however, to the fact that had this occurred again, Mr Tony Tay as a senior elder of the church would no doubt have been given the opportunity himself to speak to the congregation to counter any allegations which he said were untrue.

[137] As I see it, this was undoubtedly pressure on Mr Tony Tay but for similar reasons to those I have outlined at para [110] above, I do not see that this could constitute illegitimate pressure. As noted there, it was simply a statement that, failing Ms Ma being protected here, the factual position regarding the whole Karapiro property venture would be disclosed to a group of people in the church known to all parties.

[138] I am satisfied that all this falls well short of the requisite standard to make out a defence of duress.

[139] Similarly I do not see that there was any suggestion of undue influence being exerted here, given again that Mr Tony Tay was a highly experienced businessman and familiar with all of these matters.

[140] Finally, no real evidence has been placed before me concerning any physical threats or actual and justified concerns over the possibility of violence or harm being threatened at the 15 October 2011 meeting which might have constituted duress.

[141] For all these reasons I dismiss this second defence advanced by the affected defendants that the 15 October 2011 document was entered into by all of them as a result of duress and undue influence. I find that this guarantee document is binding upon the third and fourth defendants but, for the reasons outlined at paras [130] and [131] above, for present summary judgment purposes it is not to be regarded as binding on the fifth defendants.

Conclusion

[142] For all the reasons outlined above it will be apparent that this summary judgment application succeeds against the first, second, third and fourth defendants. It fails with respect to the fifth defendants and is hereby dismissed.

[143] Summary judgment is to be granted against the first, second, third and fourth defendants in terms of the plaintiff's basic claim for \$403,034.44 representing the

Westpac judgment against her together with interest as particularised in that judgment.

[144] The plaintiff's claim in her statement of claim however goes on to seek general damages in the sum of \$50,000.00 against each defendant, (although this amount seems to be reduced to a \$20,000.00 general damages claim in the summary judgment application). On this, before me Mr Dale for the plaintiff contended that Ms Ma has provided evidence in her affidavit of the distress and worry that has been occasioned to her as a consequence of the conduct of all the affected defendants here. He goes on to say that the obvious consequences of the early High Court judgment against her in favour of Westpac Bank, and the threats from the bank to enforce that judgment and perhaps also to pursue bankruptcy proceedings against her are serious. All this, he contends, justifies the general damages claim.

[145] On these issues, however, there was little substantive evidence before me of actual harm and distress. Certainly the defendants also did not in any real way, have an opportunity to counter this material or indeed for their counsel to make detailed submissions to me on the issues.

[146] And, given particularly that the present application before me is one for summary judgment on which I must be satisfied that no real grounds of defence exist, I am not at this point prepared on the present application to award general damages in favour of the plaintiff as sought. To do so, and thus to conclude that no arguable defence existed to the general damages claim, in my view would be inappropriate in all the circumstances here.

[147] Accordingly the plaintiff's claim for general damages (of either \$20,000.00 or \$50,000.00) by way of summary judgment is dismissed.

Orders

[148] An order is now made granting summary judgment to the plaintiff against the first, second, third and fourth defendants as follows:

- (a) In the sum of \$403,034.44 representing the judgment obtained by Westpac against the plaintiff.
- (b) For interest as particularised in the judgment of Associate Judge Bell entered against the plaintiff on 15 September 2011 in favour of Westpac New Zealand Limited under CIV-2011-404-4572.

Costs

[149] As to costs, the plaintiff as I understand it seeks indemnity costs here. No submissions were made to me with respect to the issue of costs however.

[150] Costs are reserved therefore. I direct that in the event that the parties are unable to agree on the issue of costs between them, then they may file memoranda sequentially which are to be referred to me, and in the absence of either party indicating they wish to be heard on the matter, I will decide the question of costs based on the material then before the Court.

Next Steps

[151] As the plaintiff's summary judgment application against the fifth defendants has been dismissed and the proceeding against the sixth and seventh defendants remains, the Registrar is directed to arrange a directions telephone conference of all parties at the first available opportunity to address these matters. That telephone conference can also consider the plaintiff's position with respect to her claim for general damages against the first, second, third, fourth and fifth defendants, which claim remains in the substantive proceeding given my refusal to grant summary judgment for those general damages amounts sought here.

'Associate Judge D I Gendall'