Reported	[2001] ANZ ConvR 240
Decision :	[2001] NSW ConvR 55-965

New South Wales
Court of Appeal

CITATION :	**Pasternacki and Solka-Pasternacki (as Executors of the Estate of the Late Mary Nagy) v Correy [2000] NSWCA 333**
FILE NUMBER(S) :	**CA** 40210/99
HEARING DATE(S) :	1 November 2000
JUDGMENT DATE :	23 November 2000
PARTIES :	Andrew Pasternacki and Krystyna Solka-Pasternacki (as Executors of the Estate of the Late Mary Nagy) (Appellants) Dafne Correy (Respondent)
JUDGMENT OF :	Sheller JA at 1; Stein JA at 2; Fitzgerald JA at 69

LOWER COURT JURISDICTION :	Supreme Court
LOWER COURT FILE NUMBER(S) :	CD 12342/94
LOWER COURT JUDICIAL OFFICER :	Hidden J

COUNSEL :	P R Graham QC (Appellants) G J McVay/D M Loewenstein (Respondent)
SOLICITORS :	Taylor Kelso (Appellants) Russell McLelland Brown (Respondent)
CATCHWORDS :	CONVEYANCING - mortgages - Contracts Review Act - whether mortgage unjust - improvident contract - elderly mother gave mortgage over home as security for loan to son - short term loan of estate money - knowledge of lender of improvidence of transaction - failure to make inquiries having been put on notice - beneficiaries may have legal recourse - relief under Contracts Review Act - mortgage set aside - D

LEGISLATION CITED :	Contracts Review Act 1980
CASES CITED:	House v The King (1936) 55 CLR 499 Melverton v Commonwealth Development Bank of Australia (1989) NSW Conv R 55 - 484 National Australia Bank Ltd v Hall (1993) NSW Conv R 55 - 684 Reisch v Commonwealth Bank of Australia and Ors (Supreme Court, Simos J, 13 March 1998, unreported) Teachers Health Investments Pty Ltd v Wynne (1996) NSW Conv R 55 - 785 Younan v Beneficial Finance Corporation Ltd (Court of Appeal, 21 November 1994, unreported)
DECISION :	Appeal dismissed with costs

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40210/99

CD 12342/94

SHELLER JA
STEIN JA
FITZGERALD JA

Thursday, 23 November 2000

Andrew PASTERNACKI and Krystyna SOLKA-PASTERNACKI (as Executors of the Estate of the Late Mary Nagy) v Dafne CORREY

Andrew Pasternacki and Krystyna Solka-Pasternacki, executors of the estate of the late Mary Nagy, appeal from a decision of Hidden J setting aside a mortgage under the *Contracts Review Act* 1980.

In 1994 the appellants lent the respondent, Dafne Correy, $125,000 from the Nagy estate for a term of two months. The loan was secured by a mortgage over her home and was guaranteed by her son Henry Correy. The principal was not repaid within the time required and remains unpaid.

Mrs Correy, an aged pensioner, had been approached by her son Henry to be a guarantor for a loan he said he desperately needed for urgent business reasons. However, when Mrs Correy subsequently signed the loan documents it was as borrower. This was because Smith & Pasternacki, solicitors for the appellants, required first mortgage security which Henry did not have. It was clear that the transaction was extremely urgent as far as Henry was concerned, that the respondent did not have the ability to repay the loan unless she sold her house, that the respondent was under emotional pressure from Henry, and that Henry’s capacity to repay the loan was at the least dubious.

Hidden J found that the contract was improvident to Mrs Correy and

unjust within the *Contracts Review Act* . He found that the beneficiaries of the estate may have legal recourse against the trustees (the appellants), and the appellants may have an action against their solicitors for negligence. He granted relief setting aside the mortgage.

Held (Stein JA, Sheller & Fitzgerald JJA agreeing)

The mortgage was improvident to Mrs Correy and Mr Smith (the appellants' solicitor) knew or ought to have known that. The evidence provided ample reason for Hidden J to conclude that the contract was unjust under the *Contracts Review Act* 1980.

Hidden J did not err in his exercise of discretion in granting the relief.

Orders
Appeal dismissed with costs.

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40210/99

CD 12342/94

SHELLER JA
STEIN JA
FITZGERALD JA

Thursday, 23 November 2000

Andrew PASTERNACKI and Krystyna SOLKA-PASTERNACKI (as Executors of the Estate of the Late Mary Nagy) v Dafne CORREY

JUDGMENT

1 **SHELLER JA:** I have had the benefit of reading the judgment of Stein JA in draft. I entirely agree with it.

2 **STEIN JA:**

Introduction

3 This is an appeal from a decision of Hidden J setting aside a mortgage under the *Contracts Review Act* 1980 (the Act). The appellants, Andrew Pasternacki and Krystyna Solka-Pasternacki, are the executors of the estate of the late Mary Nagy. On 18 May 1994 the appellants lent $125,000 to the respondent, Dafne Correy, for a term of 2 months. The loan was secured by a mortgage over her home at Corrimal, near Wollongong. It was guaranteed by Mrs Correy's son, Henry Correy.

4 The principal was not repaid within the time required and remains unpaid. Accordingly, the appellants sought an order for possession of Mrs Correy's home and an order that she repay the principal with interest. They also claimed repayment from Henry Correy, as guarantor. Prior to the hearing before Hidden J, Henry Correy disappeared and did not appear at the trial. His whereabouts are unknown. Substituted service was ordered. Judgment against Henry was entered by his Honour. It has not been sought to be set aside.

5 Substantial areas of the facts were disputed at the trial and his Honour made findings which, in certain respects, rejected some of the evidence of the respondent, some of the evidence of Mr Pasternacki and some of the

evidence of Mr Gregory Smith. Mr Smith acted as solicitor for the appellants on the transaction and was also in partnership with Mr Pasternacki under the firm name of Smith & Pasternacki.

Facts

6 Mrs Correy was born in Italy in 1928. There she completed her schooling and trained as a nurse. She met her husband in Naples and married in 1947. He was a medical practitioner. They immigrated to Australia in the late 1940s and settled near Wollongong, where she worked as a nurse in various hospitals until 1991. She is an aged pensioner and her husband died in April 1993, only one year before the events the subject of the appeal.

7 The Correys had two sons. The eldest, Henry, was born in 1948. The other son, Carlo, was born in 1955. Mrs Correy and her husband lived in the same family home at Corrimal from 1960. Apart from an old car, the house is her only asset. In 1994, the respondent was living alone in the home, although she maintained regular contact with both sons, to whom she was devoted.

8 Henry claimed to have some business interests in a popular music group. He told his mother that he was anticipating profits amounting to millions of US dollars from record sales.

9 On Sunday 15 May 1994 Henry paid his mother an unexpected visit. He asked for her help since he needed to send money to a European record company ‘for taxation’ so that he could receive his return on the record sales. He told his mother that he had found a lender but needed her to provide a guarantee. When she hesitated Henry said that Dad would have helped him. He told his mother that if she did not help him, he would go to ‘a close friend of the family to ask to be a guarantor, or even the Mafia’. The respondent said that her son was desperate. Because of his desperation and because she did not want her personal affairs to go outside the home, she agreed with Henry’s request to be a guarantor.

10 Henry had apparently been to visit Mr Pasternacki about a week beforehand and asked him for a loan. Mr Pasternacki refused the request because Henry had no first mortgage security to offer. Henry also approached a mortgage broker, a Mr Tomazin. The broker had an office at Campsie in the same building as Smith & Pasternacki, solicitors. Mr Tomazin did not give evidence at the trial. Either on Friday 13 May 1994 or on Monday morning of 16 May, Mr Tomazin saw Mr Smith at his office. He told Mr Smith that he had a client who wanted to borrow $120,000 or $125,000. This was Henry Correy. Mr Tomazin told Mr Smith that as security his client had a property in Wollongong worth $200,000. When Mr Tomazin made the inquiry of him, Mr Smith knew that there was money available for short term lending sitting in a controlled money account. This was some $158,000 from the Nagy estate of which his partner, Mr Pasternacki, was a trustee along with his wife.

11 Later that same day, Mr Smith told Mr Tomazin that he may be able to assist. Mr Smith said that a valuation of the property would be necessary and $450 would need to be provided ‘up front’ to cover the cost. On 17 May 1994 Henry Correy called at the office of Smith & Pasternacki and paid $450 in cash for the valuation.

12 According to the respondent, Henry telephoned her on Monday 16 May 1994 and said that he needed the title deeds, his father’s death certificate and the house insurance papers. He told his mother that they were needed ‘to prove you own the house’. Henry arranged to pick them up from his mother the following day.

13 On the Tuesday (17 May) Henry picked up the documents and told the

respondent that she would have to attend at the offices of the appellants on 18 May 'to sign the paperwork'. At this time Mrs Correy still believed that she was to be a guarantor for her son for moneys that he was to borrow.

14 Either on 16 May, or early on 17 May, Mr Smith spoke to Mr Pasternacki. Mr Smith told Mr Pasternacki that they had a loan proposal for $125,000. The security was a property at Wollongong valued at over $200,000. The owner was an old lady who wished to assist her son's business. Mr Smith said that Mr Pasternacki required that the loan be secured by a first mortgage with the respondent as the borrower, a valuation was needed and she should have independent advice. Mr Pasternacki did not tell Mr Smith of Henry's previous approach to him for a loan, which he had refused.

15 Thus it appears that at this point of time the transaction had moved from Mrs Correy being a guarantor for a loan by her son to her becoming the borrower, the loan being secured over her home. None of this was communicated to Mrs Correy who knew nothing about these events.

16 It appears that Mr Tomazin took Henry in to see Mr Smith on Tuesday 17 May. According to Mr Smith, Henry handed over a number of papers (I assume those obtained from his mother) and told him that he needed to borrow $120,000. Henry said that he needed US$75,000 to buy some recording equipment in the United States. He then mentioned that he had managed Helen Reddy and Renee Geyer (well known Australian singers) for years. Henry said that he would roll over the money very quickly because of contracts he had in America. Mr Smith asked no further questions about Henry's financial affairs nor did Henry produce any documentation. Mr Smith did however request that Henry and his wife give guarantees for repayment of the loan.

17 On 17 May or early on 18 May Mr Smith prepared the mortgage and a number of other documents. One of the documents, which he typed himself, was a letter from Mrs Correy to Smith & Pasternacki in the following terms:

> Dear Sirs
>
> RE MY LOAN FOR $125,000.00.
>
> I refer to my above loan application. I note that the interest rate is 18% pa and I note that you have advised me that I can look around for a better loan with a cheaper interest rate.
>
> However I need the loan moneys very urgently for my son's business reasons and so I am happy to get this loan and pay the interest rate of 18% pa.
>
> Because of my son's urgent business needs for the money this loan for $125,000.00 is of great benefit to me as I wish to help my son even though I understand that if the money is not repaid within 2 months I will lose my house and I will have to move out of my house and it will be sold.

18 In cross-examination Mr Smith ultimately agreed, after prevarication, that the letter was written and Mrs Correy's signature obtained on it, for the benefit of the lenders. It must be remembered that Mr Smith wrote the letter *before* he had met Mrs Correy or had any contact with her.

19 Early on 18 May a valuer called at Mrs Correy's home and proceeded to carry out an inspection for the purpose of providing a valuation report. The report was later sent to Mr Smith. The valuation was $210,000.

20 Later on Wednesday 18 May Henry picked up his mother from her home and they proceeded to Campsie to see Mr Smith. Henry introduced her to Mr Smith. Mrs Correy said that Mr Smith said 'we have made you the borrower, not guarantor'. His Honour so found. In giving evidence Mr Smith

did not accept that he said this. Notwithstanding, it must have been clear from the mortgage and other documents produced to her by Mr Smith, as well as his explanations, that Mrs Correy was to be the borrower and not simply a guarantor.

21 Mrs Correy said that Mr Smith told her of their fees, the interest on the loan, 18% p.a. for 2 months, then 20% and that the first 2 months interest was to be paid in advance. He showed her a piece of paper with all of the figures written down but she did not have time to look at it. Furthermore, she said that at the time she did not understand the difference between a guarantor and borrower.

22 The respondent said that while she was signing the documents she said to Henry, in Mr Smith's presence, 'I hope you know what I'm signing because I don't'. His Honour did not appear to make any finding as to whether this was said or not. However, since it seems clear that Mrs Correy was wrong in her evidence that she signed the mortgage at the initial visit to Mr Smith, and Hidden J so found, if it was said it was probably said in Mr Antonopoulos's presence when she signed the documents later in the day.

23 One thing is clear and that is that his Honour found that Mr Smith told Mrs Correy, before she signed any documents, that she could lose her home if the loan was not repaid. Mr Smith said that when he told the respondent this she said 'Oh, I hope not'. Then Henry entered the room and Mr Smith repeated the statement but Henry cut in before his mother could reply saying, 'Don't worry Mum'.

24 One of the documents signed by Mrs Correy was a memorandum of fees of Smith & Pasternacki. This included their professional fees for acting 'all with urgency' of $1,100; an establishment fee of $1,200 for the loan; around $1,500 disbursements and stamp duty and $4,500 to the broker, Mr Tomazin, for his procurement fee. The 'direction' in the letter also covered the pre-payment of the 2 months interest ($3,750). The balance of the $125,000 loan was $113,465.95 and was to be paid 'To Henry Steven Correy as directed'.

25 Mr Smith said that all of the documents were given to the respondent or to Henry to take to their solicitor. Henry did not want the delay of going to Wollongong to see the family solicitor.

26 Mr Pasternacki, who never at any stage met Mrs Correy, said in evidence that on 18 May he overheard a raised women's voice, whom he believed to be Mrs Correy, saying (or shouting) that she did not want to see another solicitor and, 'why can't we sign now'. His Honour rejected this evidence and rightly so in my view. It was not only contrary to the respondent's evidence but was not supported by the evidence of Mr Smith. It did not enhance Mr Pasternacki's credit. Indeed, to the contrary.

27 Mr Smith suggested that Mrs Correy and Henry consult Mr Tomazin who might refer them to a nearby solicitor. Mr Smith said that some short time later he found the respondent and her son outside Mr Tomazin's office and they told him that they were going to see Mr Antonopoulos at Bankstown. In giving evidence Mr Smith denied that he had arranged the appointment by telephone with Mr Antonopoulos. Mr Antonopoulos however gave evidence that Mr Smith telephoned him and asked him to see Mrs Correy. He said that Mr Smith told him that Mrs Correy's son needed an advance that day and that he would be guaranteeing the loan. Mr Antonopoulos made notes of the conversation. His Honour was satisfied that the conversation occurred as Mr Antonopoulos deposed. By implication, he did not accept Mr Smith's evidence on this issue.

28 Although there was conflicting evidence as to what occurred at Mr Antonopoulos's office, it is clear that Mr Antonopoulos told Mrs Correy that if

the loan was not repaid, she may lose her house. After the mortgage and other documents were signed by Mrs Correy, and witnessed by Mr Antonopoulos, Henry and his mother returned to the offices of Smith & Pasternacki.

29 There is a conflict on the evidence as to what happened at the office when they returned, but his Honour did not see it necessary to determine. What is obvious is that Henry was very anxious to get the settlement cheques that afternoon. Henry told Mr Smith that he had to transfer the moneys to America by that night or the next morning. It was also clear to Mr Smith that Henry wanted some of the moneys in cash. According to Henry's mother this was because he might need to fly overseas urgently. Mr Smith provided some assistance to enable the cheque of $9,000 odd to Mrs Correy to be cashed at the bank and Henry put the moneys in his briefcase.

30 One curious aspect of the meeting at Mr Smith's office at or about the time of settlement was the question of the guarantee by Henry. Mr Smith said that he got Henry to sign the guarantee, which he witnessed, in the following circumstances. He said to Henry, 'Since your wife won't sign the guarantee will you at least sign it for me?'.

31 This strikes me as strange. The settlement was all but over. Mr Smith knew that in reality the real borrower was not the respondent but Henry. He had asked Henry virtually no questions about his business and financial affairs. Indeed, he said in evidence that he was not concerned to know how a person would repay a loan. Then, after all the documents were signed and the cheques written out, and almost as a throwaway, he asks Henry, 'Will you at least sign it [the guarantee] for me?'. The situation assists in the conclusion that the only concern which Mr Smith had (and it was also Mr Pasternacki's primary concern) was adequate first mortgage security over the respondent's home.

32 This would tend to explain why Mr Smith made only the most perfunctory inquiry of Henry as to the purpose for which he so urgently needed the money and as to how he was going to repay the loan in the stipulated time of 2 months. Mr Smith's attitude is exemplified by the evidence that he assumed that if the money was not paid back, Mrs Correy would have to sell her home.

Consideration

33 There are other aspects of the evidence which are relevant. Mrs Correy gave evidence of the pressure that she was under from Henry. The pressure, she said, was compounded by the great haste with which everything happened. Mrs Correy said that, in addition to Henry's threat (that is the way she understood it) to go outside the family for a guarantor, Henry begged her, he cried for help and he pressed her. To Mrs Correy, the threat to go to 'a stranger' was obviously culturally significant. She saw it as affecting her reputation and that of the family.

34 His Honour accepted Mrs Correy's evidence of the pressure applied to her by her son. Hidden J said:

> The melancholy truth is that Mrs Correy mortgaged her home for a substantial sum to help a son, to whom she was devoted, but who may well have deceived her. I accept her evidence that Henry "said that in seventy-two hours everything would have been over and fixed and I believe him". She was very confident in her son's ability to repay the amount borrowed. Despite all that had happened since, she described him in evidence as "an honest man" and "a good son". Such is a mother's love.

and

> Henry Correy applied considerable pressure to Mrs Correy to

assist him at a time when she remained emotionally vulnerable as a widow. The loan was negotiated without reference to her and she had no say in the terms of it. The transaction was completed in haste.

35 Henry's desperation and the urgency with which he required the transaction to be completed and the proceeds sent overseas, must have alerted Mr Smith to the need to at least have sought more information about Henry's ability to repay the short term loan. Mr Smith knew that Mrs Correy was an aged pensioner. He told Mr Pasternacki as much. It was obvious to Mr Smith that she had no ability to repay the loan, unless she sold her only asset, her home. Knowing this and that the moneys were solely for Henry's purposes, and which he needed with extreme haste, Mr Smith was prepared to allow the matter to proceed without doing more than he did. That is, to tell Mrs Correy that if the loan was not repaid, she could lose her house and to refer her to Mr Antonopoulos to explain the legal effect of the mortgage.

36 Mr Smith knew that the *only* reason that Henry's mother was involved in the transaction was because she owned land which could be given as first mortgage security. That was the only way Henry could obtain the loan. Mrs Correy herself made no loan application nor approach at any time. Nor was she contacted by anyone, save Henry.

37 All of the documents were prepared prior to Mrs Correy attending Mr Smith's office. Indeed, as I have said, before Mr Smith had met her or had any contract. Mrs Correy believed, until the meeting, that she was to be a guarantor only. Mrs Correy said, and there is no reason why her evidence should not be accepted, that almost all of the conversation at the solicitors' office at Campsie was between Mr Smith and Henry. In effect, she was there to make up the numbers, Mr Pasternacki, Mr Smith and Henry having agreed, without involving Mrs Correy, that the loan would proceed only if she was the borrower giving first mortgage security over her home. She was in truth, a passive but necessary participant.

38 Knowing that Henry did not have the capacity to borrow himself, Mr Smith was content to assume that if the money was not repaid, Mrs Correy would lose her home. It is apparent that Mr Smith did not really care whether the loan was repaid. His only concern was with there being adequate security in real estate for the loan moneys. Likewise, Mr Pasternacki's primary concern was also with the security, as he said in evidence.

39 True it is that Mrs Correy trusted her son and believed his stories of repayment within 72 hours. Her devotion and loyalty to her son explain this. To the contrary, there was no reason why Mr Smith should have accepted Henry's explanation of why he needed the money so urgently and how it would be repaid. To any experienced solicitor, and one acting for an estate, the story was, at the least, far fetched. Certainly, its nature should have put Mr Smith on notice to make further inquiries. What ought to have been clear to Mr Smith was that the loan to Mrs Correy was an improvident one. A moments thought would have driven this home. Hidden J said that the circumstances of the transaction, including its haste, should have aroused his suspicion as to its providence. However, he made no proper inquiry, nor did he suggest that Mrs Correy seek advice as to the financial soundness of the arrangement.

40 Mrs Correy gave evidence that if she had obtained appropriate advice, she would not have gone along with her son's idea. His Honour accepted her evidence saying that he was not persuaded that even with appropriate advice as to the risk, Mrs Correy would have proceeded with the mortgage in any event.

41 The trial judge found that when she signed the relevant documents on 18 May 1994 Mrs Correy knew that she was borrowing the money 'on behalf of her son' and providing her land as security. He noted however that it should have been clear to Mr Smith (and to Mr Pasternacki) that the transaction may well have been improvident from Mrs Correy's point of view. The appellants draw attention to his Honour's reference to 'the transaction' and claim that this reveals an error in not having regard to the contract sought to be held to be unjust under the Act. I do not accept this criticism of his Honour's judgment. It is clear from the context that Hidden J was referring to the mortgage which the respondent signed when he made the reference to the transaction, and not to the transaction between the respondent and her son, as submitted by the appellants.

42 It is evident that the mortgage was in fact improvident from the respondent's perspective. She received not one penny of the loan moneys advanced. It all went to Henry. Nonetheless, Mrs Correy had the obligation to repay the principal after 2 months and she had put her house on the line as security.

43 There was ample evidence to justify a conclusion that Mr Smith (and Mr Pasternacki) knew or ought to have known that the mortgage was improvident to Mrs Correy. They knew that she was an aged pensioner. They were aware of the extreme urgency of the matter so far as Henry was concerned. They knew that the respondent did not have the ability to repay the loan, unless she sold her home. They knew that she was under emotional pressure from her son. They knew nothing about Henry's capacity to repay the loan, because, as his Honour observed, nobody asked him. They were ignorant of his situation in circumstances which put them on inquiry. His Honour suspected that it was Mr Smith's misgivings about this aspect which led him to draft the letter set out earlier in para 16.

44 Indeed, one likely scenario is that Mr Smith deliberately chose not to ask Henry any questions about his business affairs and his financial ability to repay the loan because of the answers which he might receive. The appellants were concerned only to have adequate real estate as security. Over and above that, the evidence of Mr Smith (and Mr Pasternacki) made it plain that they were unconcerned.

45 In *Younan v Beneficial Finance Corporation Ltd* (Court of Appeal, 21 November 1994, unreported) the lender was unaware of Mrs Younan's disadvantageous position and was unaware of the risks to which she was exposed.

46 In my view, this is not the position here. The appellants must had been aware of Mrs Correy's disadvantageous position. Mr Smith was certainly aware of her particular risks in that he assumed that if the moneys were not repaid, Mrs Correy would lose her home. Mr Smith was aware, as found by his Honour, that Mrs Correy could not repay the loan from her own resources. Mr Smith must have suspected, to say the least, that Henry would not be able to repay the loan.

47 Mahoney JA in *Younan* referred to the failure of the lender to initiate inquiries as to Mrs Younan's position. While his Honour said that the failure to make such inquiries did not of itself determine that the contract was unjust, it was a fact to be taken into account in the statutory exercise under the Act. Here Hidden J found that the circumstances known to the appellants were such as to put them on inquiry, but they made none.

48 In *Teachers Health Investments Pty Ltd v Wynne* (1996) NSW Conv R 55 - 785, when considering the case under the Act, Beazley JA said at 56,033:

> In this case, the mortgage document itself was unexceptional. However, the respondent was cajoled and bullied into entering

> into the mortgage by the principal debtor. Whilst she understood the nature and effect of the mortgage she did not know, at the time she entered into it, that it was an improvident transaction. She had no knowledge of or advice as to the principal debtor's ability to service the loan … save for the false information he gave her that he could do so. … As I have stated earlier, his Honour found, and there was no dispute as to the finding, that the circumstances in which the mortgage was entered into gave rise to an equity between the principal debtor and the respondent. Although the appellant was not aware of the history of the relationship between the parties or of the principal debtor's conduct in obtaining the mortgage, it knew, or had the information in its possession to enable it to know, that this mortgage was sheer folly when looked at from the ability of the principal debtor to make the interest payments. The only part of the transaction which was not folly was the extent of the security. The appellant was well protected in this regard. In the circumstances, I am of the opinion that the contract was unjust within the meaning of the *Contracts Review Act* 1980.

49 Although *Wynne* presents a different factual matrix, almost all of what Beazley JA said in the above extract could be said of this matter. Hidden J found that the circumstances in which Mrs Correy agreed to assist her son financially were such as to give rise to 'an equity between them'.

50 The case of *NAB v Hall* (1993) NSW Conv R 55 - 684 also bears some similarities to the present case. It concerned an elderly woman who mortgaged her house to secure her liability under a guarantee she gave to a business overdraft of her son-in-law (and daughter). Dunford J found that Mrs Hall obtained no benefit from the transaction but ran the risk of losing her house. His Honour found that there was an inequality of bargaining power. Standard form documents were used which were non-negotiable and in no real sense did the bank deal with Mrs Hall, she merely turning up to sign the documents presented to her, the arrangements having been made by her son-in-law. His Honour also referred to Mrs Hall standing to receive no benefit whatsoever from the transaction but running the risk of losing her only asset, namely the house in which she was born and had lived all her life. His Honour concluded that Mrs Hall did not have the capacity to make an informed and real choice.

51 In giving reasons for judgment his Honour referred to *Melverton v Commonwealth Development Bank of Australia* (1989) NSW Conv R 55 - 484. This was another case of an elderly pensioner helping her son in financial difficulties. She gave a mortgage over her home to secure the business overdraft of her son.

52 In *Melverton* Hodgson J said at 58,515:

> … the plaintiff did not have the opportunity to make an informed and real choice in the matter. Furthermore, in my view this was an improvident transaction because the plaintiff had no interest in Cenco and had no assets or income from which she could possibly pay the bank, and the home which was being given as security was the only significant asset which she and her husband had. …
>
> In the case the bank knew that the plaintiff and her husband were Terrence's parents. It knew that they had no apparent interest in Cenco and that the position of Cenco involved some risk. The bank knew that the plaintiff and her husband were entering into a transaction which, considered objectively, involved a certain amount of risk, in circumstances where their son must have been anxious for them to so.

53 A more recent case is *Reisch v Commonwealth Bank of Australia and Ors* (Supreme Court, 13 March 1998, unreported). It also bears some parallels with the present case. Again, this was a case of a mother mortgaging her home to guarantee the loan to a company associated with her son. From what Simos J said the plaintiff was clearly pressured by her son to provide her house as security. She felt that she had no choice but to lend her son the money. His Honour saw unfairness (under the Act) on the part of the bank officer in failing to tell the plaintiff that the bank had no real information on the capacity of the son's company to repay the overdraft, and that neither the company nor its directors had assets of any worth and that the prior dealings with the bank had been of an unsatisfactory nature.

54 Simos J inferred that the bank proceeded largely on the basis that its position would be protected by the security offered by Mrs Reisch rather than any likely capacity in the son's company to repay the overdraft.

55 His Honour summarised the situation thus:

> Thus, to the knowledge of Mr Bennetts, the plaintiff was an elderly widow who was proposing to mortgage her home for the benefit of a company of which her son, and a friend of the son, known to Mr Bennetts, namely, Mr Kierkegaard, were directors and shareholders, the friend of the son being known by Mr Bennetts to have had unsatisfactory dealings with the bank over a considerable period of time. Mr Bennetts knew that the company was relevantly without assets so that no security was sought from the company, as were both the son and his friend from whom, accordingly, guarantees were not sought. Mr Bennetts also knew that he had no real information as to the likely capacity of the company to repay the facility within the three to four months agreed, and that in all the circumstances he was proposing to grant the further overdraft facility largely on the basis that the bank's position would be protected by the plaintiff's mortgage. [at 47]

and

> … Mr Bennetts should, in my opinion, have realised that there was a real possibility that he had superior knowledge as compared with the plaintiff's knowledge and he should have realised this, having regard to what he actually knew of the plaintiff, namely, that she was an elderly widow who was proposing to mortgage her home for the benefit of her son's company, and who was unlikely to have had any detailed knowledge of the company's likely capacity to repay. Even accepting, as I have already held, that the plaintiff was aware of the nature and effect of the mortgage that she was agreeing to give, and, further, that she was not under the influence of the second and/or third defendant, I am of the opinion that a fair minded person in the position of Mr Bennetts would have wished to satisfy himself or herself that the plaintiff was informed that he or she had no real information as to the likely capacity of the company to repay the proposed further overdraft facility. [at 48]

56 Cases under the Act must, of course, be determined on their own facts. However, there is a common thread which runs through authorities such as *Wynne*, *Hall*, *Melverton* and *Reisch*. This is the improvidence of the transaction to the plaintiff and the knowledge of the lender of this fact, or their failure to make inquiries having been put on notice.

57 In my opinion, the evidence provided ample reason for Hidden J to conclude that the contract was unjust under the Act. I agree with it and can see no error. I turn therefore to the question of relief.

Relief

58 Having determined that the contract was unjust, Hidden J considered the question of relief. In a separate judgment of 26 February 1999 he found that Mrs Correy was entitled to relief which freed her home of the encumbrance on it and relieved her of personal liability under the mortgage. He ordered the setting aside of the mortgage as unjust under s 7 of the Act.

59 On appeal, the appellants submit that an unjust contract having been found, his Honour erred in granting the relief that he did. The appellants invite the court to re-exercise the discretion and grant no relief. Alternatively, they seek an order having the effect of deferring the enforcement of the mortgage during Mrs Correy's lifetime. Indeed, these were the options for relief for which they argued at trial.

60 The appellants submit that his Honour granted relief without reference to the test in s 7(1) of the Act. That is, that despite finding the contract unjust, he did not acknowledge and consider the case for awarding no relief. However, his Honour's judgment on relief plainly states that a finding that a contract is unjust does not necessarily mean that relief under the Act should be granted.

61 As to the appellants' submission that Hidden J should have granted no relief at all, it is easy to see why his Honour did not take this course. Granting no relief would not have avoided an unjust consequence to Mrs Correy because it would have deprived her of her only asset and left her with no redress. Granting no relief would not have done justice under s 7 of the Act.

62 The granting of relief under the Act is of course a discretionary decision, see *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256. As such, any appellate review must satisfy the well established principles in *House v The King* (1936) 55 CLR 499 at 504 - 5.

63 The error which the appellants seek to identify is that Hidden J allowed an irrelevant consideration to guide or affect him in the exercise of the discretion. It is submitted that he erred by taking into account that the beneficiaries of the estate may have recourse against the trustees (the appellants), and by taking into account that the appellants may have recourse against their solicitors for negligence.

64 His Honour said:

> On the other hand, the beneficiaries under the will might have some recourse against the trustees and they, in turn, against the solicitors.

and

> For the reasons I have given, the behaviour of Mr Smith in this transaction could fairly be described as reckless, but the power to grant relief under the Act must be not be used in a penal or disciplinary manner.

and

> Unlike the lenders in cases such as *Melverton* , the plaintiffs may have recourse against their solicitors for the loss they have incurred. (In so saying, I do not overlook the fact that one of the plaintiffs is a also a partner in that firm).

65 The appellants' argument seems to be that in addressing the question of 'avoiding as far as practicable an unjust consequence or result' (s 7(1)), Hidden J should not have assumed that the right of the estate to be repaid could be met by legal recourse by the beneficiaries or appellants. The

appellants submit that Hidden J placed either too much emphasis or improper emphasis on these considerations. However, it was a matter for his Honour as to the weight which he gave to these considerations in the balancing exercise. They were matters which, in my opinion, his Honour was entitled to take into account in the exercise of the discretion under the Act. They were not improper or irrelevant considerations.

66 Put another way, it may be argued that the discretion miscarried because the result his Honour came to was manifestly unreasonable or plainly unjust within *House v The King.* The appellants submit that in *Melverton, Hall*, and *Reisch*, the form of relief granted was limited to deferring the repayment obligation under the contract until death. But this does not indicate that such relief is appropriate in all cases of improvident loans. Each case must be considered on its own facts.

67 It cannot be said that the relief granted by Hidden J was plainly unjust. It is apparent that the beneficiaries may well have a good cause of action for breach of trust against the appellants. The appellants in turn may have a cause of action in negligence against the solicitors. Moreover, Hidden J set out factors that tended against a grant of relief in the form of a 'life estate' for Mrs Correy because of the effect it could have on the balance of her life. For example, as she grew older she would not be able to realise her asset to be able to acquire suitable alternative accommodation for herself. Such an order would also effectively disinherit her son, Carlo.

68 In my opinion, the appeal should be dismissed with costs.

69 **FITZGERALD JA:** The circumstances giving rise to this appeal are set out in the reasons for judgment of Stein JA.

70 As the appellants knew, the respondent was a conduit between them, as lenders, and her son. He was the person who was to receive the money which they lent. The appellants also knew that the respondent had no capacity to repay the loan, and stood to lose her house if her son did not repay the money. Although Mrs Correy was legally the borrower and her son the guarantor, in practical terms their roles were reversed.

71 Under sections 7 and 9 of the *Contracts Review Act* 1980, the trial judge was required to determine whether the mortgage which Mrs Correy gave over her house (including the promise to repay the money to the appellants) or some provision in the mortgage was "unjust in the circumstances relating to the [mortgage] at the time it was made….". By subsection 4(1) of the *Act*, "'unjust' includes unconscionable, harsh or oppressive ….". Subsection 9(1) of the *Act* required the trial judge to "… have regard to the public interest and to all the circumstances of the case …". The form of the transaction, i.e., that Mrs Correy was legally the borrower not a guarantor, was not conclusive. It was open to the trial judge to conclude that the mortgage was "…unjust in the circumstances relating to the [mortgage] at the time it was made… [having] regard to the public interest and to all the circumstances of the case…". Further, I agree with his Honour's conclusion. While each case must depend upon its own circumstances, his Honour's conclusion is consistent with previous decisions of this Court.

72 Subject to s 19 of the *Act*, the trial judge's conclusion that the mortgage was unjust in the circumstances relating to it at the time it was made provided a basis for his Honour to make one or more of the orders specified in paragraphs (a) - (d) of s 7(1) provided that it was "… just to do so … for the purpose of avoiding as far as practicable an unjust consequence or result…". Broadly stated, his Honour ordered the appellants to execute a discharge of the mortgage which the respondent had given and to deliver the discharge of the mortgage, the relevant certificate of title and

the amount of the fees payable in order to effect registration of the discharge of mortgage to the respondent.

73 The appellants argued that the trial judge should not have made any order under subs. 7(1) of the *Act* or, alternatively, should not have ordered them to execute a discharge of the mortgage but should have deferred the operation of the mortgage until Mrs Correy's death. Sometimes an order deferring the operation of a contract is appropriate, as previous decisions illustrate.

74 However, the trial judge was satisfied that, as between the appellants and the respondent, the appellants should bear the loss which has resulted from the respondent's son's failure to pay back the money. I agree. The appellants were trustees of the money which they lend. There is nothing to suggest that they were not authorised to make the loan or that the respondent was aware of any circumstance which might be material for this purpose. If it was relevant for the trial judge to consider the position of the beneficiaries of the trust in this context, it was open to his Honour to take into account that they "… might have some recourse against the trustees and they, in turn, against the solicitors".

75 Although the trial judge exonerated the respondent (who was legally the principal debtor) from any obligation to repay the appellants, his Honour awarded the appellants judgment against the respondent's son (who legally was a guarantor). The respondent's son had disappeared, and substituted service had been ordered. He did not appear at the trial, and presumably has not been served with the judgment. Since he did not appeal, the judgment against him does not arise for this Court's consideration.

76 I agree with the orders prepared by Stein JA.

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