Privy Council Appeal No. 84 *of* 1933.

Jean MacKenzie - - - - - - *Appellant*

v.

The Royal Bank of Canada - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11th JUNE, 1934.

Present at the Hearing:

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
LORD MACMILLAN.
LORD ALNESS.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, reversing a judgment of Mr. Justice McEvoy, who at the trial had given judgment for Mrs. MacKenzie the plaintiff, the present appellant. The action was brought to recover certain shares in Borden Company, Inc., which by an amalgamation represented 187 shares in Ottawa Dairy Co., Ltd. These shares the plantiff by a letter of hypothecation in November, 1921, had deposited with the defendant bank as security for advances made and to be made to the MacKenzie Manufacturing Co., Ltd., in which her husband was the principal shareholder. The transaction was attacked on the ground of undue influence of the husband and of misrepresentation.

The facts appear to be that Mrs. MacKenzie, then a girl of 20, was married in 1901 to Mr. John Angus MacKenzie, who was then in business as a salesman. He appears to have been energetic and successful, and in 1913 he formed a company, MacKenzie, Ltd., to carry on the business of manufacturers of

lumbermen's and railway contractor's supplies. In 1907 Mrs. MacKenzie's father had died, leaving her the dairy shares in question, worth at the material times about $10,000, together with a house in Ottawa and some $2,000. Mrs. MacKenzie in 1913 had hypothecated the shares at the Bank to secure an advance either to the Company or to her husband, for the benefit of the Company. With the advent of the war the Company prospered. Husband and wife lived in affluence in Ottawa and in a country house. In 1918 her shares were released to her. She had no money invested in the Company which represented her husband alone. In 1920 the fortunes of the Company changed. The Government ceased to require its goods, and the Company tied by forward contracts was unable to sell its goods to advantage. At the end of the year the Bank advances amounted to about $200,000, and the Bank was pressing for reduction and for further cover. On December 31, 1920, the plaintiff, at the request of her husband, and after interviews with Mr. Gray, the Bank Manager, signed the bank form of general hypothecation making her 187 Ottawa Dairy Co. shares " general and continuing collateral security for payment of the present and future indebtedness and liability of MacKenzie, Ltd." By the document she agreed " that the Bank may grant extensions, take and give up securities, accept compositions, grant releases and discharges and otherwise deal with the customer and with other parties and securities as the Bank may see fit without prejudice to the liability of the undersigned."

There was some question at the trial as to the circumstances in which this document was signed, Mrs. MacKenzie stating that her husband gave her to understand that the security was required to enable him to obtain a further advance from the Bank of $20,000 to $25,000. Mr. Gray apparently expressed to her a favourable view of the prospects of the Company. Unfortunately business continued to diminish and in May, 1921, an order in bankruptcy was made against the Company. In Canada companies are subject to the ordinary bankruptcy law. The Bank in pursuance of section 88 of the general Banking Act, held security over the stock-in-trade and book debts of the Company. The first proof of the Bank showed a substantial surplus in the value of their securities over the debt. Proposals were discussed for something in the nature of a reconstruction whereby the business should be carried on by a new company. On September 13, 1921, the Bank filed another affidavit of proof valuing their securities at $3,000 or $4,000 in excess of the debt and about the same time served notice on the Trustee in Bankruptcy to redeem the securities at that figure. The effect of the notice, according to the Bankruptcy Act, is that if the Trustee elects not to redeem the security, the equity of redemption vests in the creditor and " the amount of his debt shall be reduced by the amount at which the security has been valued." The Trustee did so elect, and on November 14, 1921, on the

application of the Bank an order of Court was made reciting the facts and ordering and declaring that an indenture of release releasing to the Bank the realty and personalty of the Company held by the Bank which had been executed by the trustee be confirmed and ratified. It appears clear that the effect of the Bankruptcy Act on the transactions as carried out is that the debt was not simply released by operation of law but was discharged and paid by the acceptance by the Bank of the Company's property in exchange for the debt. Thereafter there was no indebtedness or liability of the Company to which the hypothecation by the plaintiff of December 31, 1920, could attach. It is true that on September 13 the plaintiff and her husband had signed a letter addressed to the Bank in the following terms :—

> " We understand that you are filing with the Authorized Assignee of MacKenzie Limited, an affidavit valuing certain securities held by you at the sum of $125,000.00 and that the Authorized Assignee will be at liberty to accept your valuation in which case as between the Authorized Assignee and the bank the bank's claim would be considered paid in full.
>
> It is our desire that you should file the affidavit in question and we hereby agree that your so doing shall not in any way release us from our obligation under guarantees to the Bank nor shall our personal securities be in any way affected until the amount due to the bank by MacKenzie Limited has been actually paid.
>
> Yours truly,
> (Sgd) John A. MacKenzie,
> (Sgd) Jean MacKenzie."

It may very well be that in procuring the plaintiff's signature to this document the Bank had in mind to extend their obligations so as to cover a contemplated reconstruction. If so they failed in their purpose for it appears to their Lordships that the terms of this letter cannot be construed to give any right to the Bank over securities once the debt had been discharged in the manner above mentioned. What had been the property of the Company had become the absolute property of the Bank, who might use it, exchange it or dispose of it in any way they thought fit. It seems unreasonable to suppose that the Bank were to hold the property of the guarantors until the former property of the Company was actually sold for cash ; or that there was any implied obligation on the Bank to sell its own property for cash. The obligation, therefore, of husband and wife on this letter in the events that happened, ceased with the obligation of the Company. By November, the arrangements for reconstruction were completed and were carried out in the following manner. A new company, MacKenzie Manufacturing Co., Ltd., was formed. The Bank sold to Mr. MacKenzie the assets of the old Company for $125,000, MacKenzie sold them to the new Company for the same price, the Bank advanced the price to the Company and took the assets as security for the loan. In the result, the Bank were in much the same position in relation to the new Company as they had been before the

bankruptcy to the old. But the Bank and Mr. MacKenzie required the plaintiff to enter into a guarantee of the indebtedness of the new Company and a new hypothecation, and on November 21, 1921, at the Bank's office, she signed the ordinary form of bank guarantee with a limit of $200,000 and an hypothecation form securing the indebtedness of the new Company. Before doing so, she was assured by her husband and the Bank manager that her shares were still bound to the Bank, that they were gone anyway, and that she had a chance of getting them back if she signed. Mr. Gray, the Bank manager, admitted that he told her that her securities were still bound to and were the property of the Bank. After she had signed, she was given a form to be taken to a lawyer and signed by him, intimating that he had given her independent advice, and that she fully understood the transaction, and a form to be signed by herself to the same effect. She went over to the office of Mr. Burritt, told him that she had already signed the guarantee, and that this document had been sent over as a matter of form. According to the plaintiff, Mr. Burritt accepted that position and signed, saying he signed as a matter of form, seeing that she had already signed the guarantee, but that he had given her no advice, for he knew nothing about the new Company. Mr. Burritt was not called. She returned both documents to the Bank duly signed.

If it had been incumbent upon the Bank to prove that the lady had had independent advice, their Lordships would have had the greatest difficulty in coming to the conclusion that the Bank had discharged the onus. Independent advice to be of any value must be given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances, with a different position presented to the minds both of the adviser and his client. It is unnecessary, however, to emphasize this point, for their Lordships are not able to take the view that the transaction was one in respect of which there was an onus upon the Bank to prove that the plaintiff had independent advice. The view taken by the Court of Appeal that a wife does not fall within the class of " protected " persons in respect of whom in certain relationships there is a presumption of undue influence, is clearly right, and is supported by the authorities cited in their judgment. It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on everyone else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband. Such a case ought to be pleaded with full particulars. The pleadings in this case are in this respect defective, though the issue was apparently admitted without demur by the opposing party. But in their Lordships' view, the evidence falls far short of proof of undue influence by the husband. The plaintiff obviously possessed and exercised a will of her own.

She was able generally to appreciate business conditions : and it is impossible to draw the inference that in the transactions in question her will was overborne by the stronger will of her husband.

But their Lordships have come to the conclusion that the contract cannot be allowed to stand for another reason. A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently. In this case it is unnecessary to decide whether contracts of guarantee belong to the special class, where even at common law, such an innocent misrepresentation would afford a defence to an action on the contract. The evidence conclusively establishes a misrepresentation by the Bank that the plaintiff's shares were still bound to the Bank with the necessary inference, whether expressed or not, and their Lordships accept the plaintiff's evidence that it was expressed, that the shares were already lost, and that the guarantee of the new Company offered the only means of salving them. It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed was a representation of fact. That it was material is beyond discussion. It consequently follows that the plaintiff was at all times, on ascertaining the true position, entitled to avoid the contract and recover her securities. There were subsequent renewals of the guarantee before the plaintiff was advised of the true facts, but counsel for the Bank very properly conceded that they would be in the same position as the original guarantee. There is no difficulty as to *restitutio in integrum*. The mere fact that the party making the representation has treated the contract as binding and has acted on it, does not preclude relief. Nor can it be said that the plaintiff received anything under the contract which she is unable to restore. In the result, therefore, the plaintiff is entitled to succeed. Since the hypothecation, the original shares deposited with the Bank have been converted into 294 shares in the Borden Company Incorporated, to which it is agreed the plaintiff's rights have attached. Up to a particular date the Bank credited the plaintiff with the dividend on the shares. After that date, they applied the dividends in reduction of the Company's debt. From that date the plaintiff is entitled to the amount of those dividends. The sum will no doubt be agreed but in case of dispute there should be an inquiry as to the amount. The appeal should be allowed ; the judgment of the Appellate Division, dated June 23, 1932, should be set aside, and the order of Mr. Justice McEvoy, dated September 21, 1931, should be restored, with the addition of an order to pay to the plaintiff the dividends on the shares from the ascertained date. Their Lordships will humbly advise His Majesty accordingly. The defendants must pay the costs of the appeal to the Appellate Division, and such costs of the appeal to His Majesty in Council as are appropriate in an appeal *in forma pauperis*.

In the Privy Council.

JEAN MACKENZIE

v.

THE ROYAL BANK OF CANADA.

DELIVERED BY LORD ATKIN.

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1934.