

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Leslie James Mackie (Applicant)  
**AND** Raymond Realty Limited (Respondent)  
**REPRESENTATIVES** Stuart Henderson, Counsel for Applicant  
George Swanepoel, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 27 March 2006  
**SUBMISSIONS RECEIVED** 7, 10 and 18 April 2006  
**DATE OF DETERMINATION** 19 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Leslie Mackie says he was unjustifiably dismissed by his former employer, Raymond Realty Limited ("RRL"). The parties disagree over whether there was an employment relationship, and whether there was a dismissal. A written agreement, which they entered into in April 2004, expressly provided that Mr Mackie was engaged as an independent contractor, not an employee.

**The Real Estate Agents Act 1976**

[2] An investigation meeting was arranged to address whether the parties were in an employment relationship. Prior to its commencement I drew the parties' attention to the provisions of the Real Estate Agents Act 1976, particularly s 51A, and sought submissions on its effect.

[3] Section 51A provides in part as follows:

- "(1) This section applies .... to a salesperson and a real estate agent at any time if –
- (a) ...; or
  - (b) Before that time and after the commencement of the Real Estate Agents Amendment Act 1992, they agree expressly that the relationship between them at that time should be that of employer and independent contractor.
- (2) ...
- (5) At a time after the 31<sup>st</sup> day of March 1992 when this section applies to a salesperson and a real estate agent, the salesperson shall for all purposes be deemed to be engaged by the agent under a contract for services."

[4] Section 6(4) of the Employment Relations Act 2000 provides that the Real Estate Agents Act 1976 is not limited or affected by other provisions in s 6 relating to the tests for the existence of an employment relationship. Since there was no dispute that Mr Mackie was a real estate salesperson

under the definition in the Real Estate Agents Act, no dispute that he had the requisite certificate of approval, and (at the time) no dispute about the existence or content of the written agreement, I hoped the parties would focus on the deeming provision in s 51A(5).

[5] Counsel for the applicant did not do so until I raised the matter again at the commencement of the investigation meeting. Mr Henderson, who had not himself been the representative on record until then, took instructions and for the first time raised arguments that the written agreement should be set aside because:

- (a) it was procured through the exertion of undue influence on Mr Mackie; or
- (b) it was entered into under duress.

[6] Accordingly this determination addresses whether there was duress or undue influence in the entry into the April 2004 agreement, so that it should be set aside.

### **Entry into the April 2004 agreement**

[7] It was common ground that Mr Mackie had been working for RRL as an employee for several months before the parties entered into the agreement of April 2004. It was also common ground that the parties' relationship at the time was good, and RRL considered Mr Mackie was doing well at work.

[8] However Jan McPherson, the Whangarei branch manager for RRL, was under the impression Mr Mackie had serious financial problems, and said Mr Mackie would complain that he could not manage. Mr Mackie was not prepared to concede in evidence that he had 'serious financial problems' but he did acknowledge he was in debt and that there was a summary instalment order against his wages. I accept Ms McPherson's evidence that the reason for the proposal for change from an employment relationship to one of principal and contractor was RRL's wish to assist Mr Mackie to maximise his income by giving him access to tax benefits associated with having self-employed status.

[9] Accordingly RRL prepared the April 2004 agreement and presented it to Mr Mackie at a meeting on 1 April 2004. In addition to changing the nature of the parties' relationship, it offered a new remuneration structure. As an employee Mr Mackie had been receiving an hourly rate of pay of \$10. The new agreement offered a flat hourly rate of \$12.23 plus commissions. Ms McPherson and RRL's owner took pains to go through the terms of the new agreement and explain them to Mr Mackie – particularly the nature and effect of the new remuneration structure. They also informed Mr Mackie that his tax status would change. Mr Mackie did not indicate any reservations.

[10] At the same time Mr Mackie was given a copy of the agreement to take away and consider, and was told to seek advice if he wished. He mentioned that he knew a lawyer, and later tried to contact the lawyer but was unable to do so. The next day RRL asked him whether he had read the agreement, and whether he could return it as soon as possible. He replied that he would contact his lawyer about it again. He was again unable to make contact, but signed the agreement anyway and returned it to RRL on or about 5 April 2004. He did not advise RRL he had been unable to contact his lawyer.

[11] When asked at the investigation meeting why he did not ask for more time before he signed the agreement, Mr Mackie said he thought it would not be granted. When asked what he thought would happen if the agreement was not returned, he said he thought his employment would be in jeopardy. There were no reasonable grounds for such views, and I found the responses unconvincing and self-serving. I consider it likely Mr Mackie was happy to sign the agreement

because he was happy with the possibility of access to an increased income. I do not accept the suggestion that Mr Mackie was pressured or bamboozled into signing the April agreement.

## Duress and undue influence

### 1. Duress

[12] Mr Swanepoel cited the following as a statement of the current law on duress:

“In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim’s will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim’s manifestation of assent. Fifthly the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.” **Pharmacy Care Systems Limited v Attorney General** (16 August 2004, McGrath, Hammond and O’Regan JJ, CA 198/03)

[13] The Supreme Court declined an application for leave to appeal against this decision, saying the law in New Zealand was settled and referring further to the judgment of the Privy Council in **R v Her Majesty’s Attorney-General for England and Wales** [2004] 2 NZLR 577. In the latter, the Privy Council said this about duress:

“15. ... there were two elements in the wrong of duress. One was pressure amounting to compulsion of the will of the victim and the second was the illegitimacy of the pressure. ...

16. ... The legitimacy of the pressure must be examined from two aspects: first the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support: ...

[14] My recitation of the facts should indicate why I do not accept RRL subjected Mr Mackie to threats or pressure, let alone improper threats or pressure, or that Mr Mackie entered into the April 2004 agreement other than by the exercise of his free will. I do not accept there was any duress.

### 2. Undue influence

[15] The Privy Council in **R v Attorney-General** addressed the law of undue influence as follows:

“21. ... Like duress at common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. Undue influence has concentrated in particular upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other.

...

23. The absence of independent legal advice may or may not be a relevant matter according to the circumstances ...”

[16] For present purposes I will regard the ‘relationship’ here as at least analogous to the employer-employee relationship. As far as New Zealand employment law is concerned, the Court of Appeal has said there is no presumption of undue influence in the employer-employee relationship.<sup>1</sup> Where undue influence has been alleged, all of the circumstances must be considered.

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<sup>1</sup> **Eketone v Alliance Textiles (NZ) Limited** [1993] 2 ERNZ 783

[17] Mr Henderson submitted, correctly, that Mr Mackie was a young person<sup>2</sup> under some financial strain, and RRL offered him a means to alleviate that situation. Mr Mackie chose to accept the offer. I do not accept submissions that the full implications either were not explained, or were inadequately explained to Mr Mackie. I accept Ms McPherson's evidence that a careful explanation was given and that she and RRL's owner persisted in explaining matters until they believed Mr Mackie understood the offer. For his part, when giving evidence Mr Mackie accepted the discussion lasted at least half an hour (Ms McPherson said it was longer) but could barely remember any of the content. Otherwise he could do no more than make assertions, which again I found unconvincing. Accordingly I preferred Ms McPherson's account of the discussion.

[18] I do not accept the submission that RRL sought to enter into the April agreement because it had something to gain. It did so in an attempt to help Mr Mackie – a young man it believed showed promise.

[19] Regarding access to legal advice, I do not accept the submission that pressure was put on Mr Mackie to sign the April agreement before his solicitor was able to arrange an appointment. As I have said, Mr Mackie indicated he would be seeking legal advice, was given time to consider his position and obtain advice, and signed the agreement without informing RRL he had not been able to obtain advice. I do not regard the mere request that he return the agreement as soon as possible as amounting to 'pressure' to do so in any but the mildest or most innocent sense, and have not accepted that Mr Mackie had any reasonable grounds to fear the outcome if he did not do so.

[20] What remains is the fact that the agreement was signed without legal advice. However in the circumstances as I have described them I do not accept that the absence of legal advice made the entry into the agreement one in which RRL unfairly exploited any influence it had over Mr Mackie.

[21] I therefore decline to set the April 2004 agreement aside. The parties' relationship is deemed to be that of 'employer' and independent contractor under s 51A of the Real Estate Agents Act. As the jurisdiction of the Employment Relations Authority is limited to problems in employment relationships, the Authority cannot take Mr Mackie's claim that he was unjustifiably dismissed any further.

### **Costs**

[22] Costs are reserved.

[23] Mr Mackie is in receipt of a grant of legal aid. However, if the parties seek a determination on costs they may file and serve memoranda on the matter within 28 days of the date of this determination.

**R A Monaghan**  
**Member, Employment Relations Authority**

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<sup>2</sup> He had just turned 20.