

### NEWSLETTER

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### >> Unfairness Does Not Necessarily Mean that the Court Will Assist in Giving Compensation or Other Relief...

The decision in *Turner v Windever* is important for everyone to think about when it comes to organising affairs within families and in considering whether or not to ask the Court to help resolve a family dispute.

Mrs Lett was a seventy year old lady who was purchasing a home but needed an additional \$48,000.00 to make up the purchase price. She borrowed this money from a son-in-law, Mr Blackburn, and he became the mortgagee to secure the loan.

It was agreed between Mrs Lett and Mr Blackburn that the mortgage would only attract simple interest and would be repaid on the death of Mrs Lett or on a sale.

Mrs Lett discovered that the mortgage provided for compound interest. She became very distressed when she realised that the amount of the debt might outstrip the value of her property. The total purchase price was \$145,000.00.

Mrs Lett sought legal advice and because the issues did not appear to be resolving, she agreed with her other children, Mr and Mrs

Windever, that she would transfer the home to them for \$1 if they paid out the mortgage to Mr Blackburn, and give her the right to stay in the property for her lifetime. Mrs Lett and Mr and Mrs Windever had the same legal advisor.

It appears that Mrs Lett was not given legal advice that she could have had the mortgage given to Mr Blackburn corrected to reflect the agreement that had been reached with him.

Sadly, the relationship between Mrs Lett and Mr and Mrs Windever deteriorated and Mrs Lett asked the Court to set aside the Transfer between herself and Mr and Mrs Windever on the basis that it was unconscionable.

To set aside a transaction on the basis that it is against conscience, it is necessary to prove the following:

1. That the weaker party was suffering from a special disadvantage viz a viz the stronger party.
2. The special disadvantage seriously affected the weaker party's capacity to judge or protect his or her own interest.

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3. The stronger party must know of the special disadvantage (or know of facts which would raise that possibility in the mind of any reasonable person).
4. That person must take advantage of the opportunity presented by the disadvantage; and
5. The taking of the advantage must have been unconscientious or unfair.

Two of the Judges held that Mrs Lett was not under any special disadvantage. The most common set of circumstances of a special disadvantage are an inability to speak or understand English, drunkenness or sickness. In an earlier decision a Judge had said that a special disadvantage may be lack of assistance or explanation where assistance or explanation is necessary. It was this special disadvantage that Mrs Lett relied on.

Two of the Judges held that Mrs Lett was a strong minded lady who understood ideas like compound interest and therefore was not under any special disadvantage. The third Judge who heard the matter held that she was under a special disadvantage because she was not being given legal advice that the mortgage could have been corrected. That third Judge however held that Mr and Mrs Windever had no knowledge of this special disadvantage. Because they had no knowledge, Mrs Lett could not ask the Court for help in setting aside the transaction.

It is important when entering into transactions to make sure that everything is clear and that all documents reflect what the agreement is before anything is signed. The parties should have separate legal advisors so that the individual rights of the separate parties can be protected. The hope then might be that a family tragedy, such as is reported in this case, can be prevented.

>> Professional advice should be sought before applying the information in this newsletter to particular circumstances.

>> We hope that our newsletters are of interest to you. If you wish a particular topic examined, please let us know.

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