

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV 2022/0342

BETWEEN:

RITA BERNADINE

Claimant

and

[1] **LEROY BERNADINE**

[2] **ACB (GRENADA) BANK LTD.**

Defendants

Before:

The Hon. Mde. Justice Agnes Actie
Respectable

High Court Judge

Appearances:

Mr. Francis Williams for the Claimant

Mrs. Anyika Johnson-Cassone for the First Defendant

Ms. Shireen Wilkinson, Carah St. Paul and Chenelle Hyacinth for the Second Defendant

2024: June 18th t;
2026: January 15th , 28th

JUDGMENT

- [1] **ACTIE, J.:** The issue for determination is whether the Deed of Mortgage should be set aside on the grounds of undue influence and lack of independent legal advice. It is necessary to give a brief background to place the issues in context.

Background

- [2] The claimant and the first defendant were husband and wife from 2007, until their divorce on 20th May 2021. The first defendant and the second defendant entered into a mortgage loan with the claimant acting as surety for the sum of \$400,000.00, using three lots of land as security. Two of the lots were jointly

owned by the claimant and first defendant. The matrimonial home is erected on one of the two lots, and the third lot was in the sole name of the first defendant.

- [3] The claimant states that the mortgage was for the sole benefit of the first defendant to purchase equipment and tools for his joiner shop.
- [4] The claimant alleges that the mortgage was procured by the undue influence of the first defendant over her. The claimant alleges that unknown to her and prior to the securing of the loan, the first defendant commenced an affair with a family friend and worker in the joinery shop and fathered two children at the time.
- [5] With respect to the second defendant, the claimant avers that she did not understand the nature of the transaction and did not have the benefit of independent legal advice prior the execution of the deed.
- [6] The claimant states that the first defendant left the matrimonial home in 2017 and defaulted on the mortgage payments, however the second defendant failed to inform her that the mortgage was in arrears.
- [7] The claimant in a claim filed on 5th September 2022, claims among other things, (i) a declaration that the mortgage was obtained by undue influence of the first defendant: (ii) the second defendant had constructive notice of the undue influence (iii) the defendants have committed a breach of trusts (iv) the mortgage be set aside (iv) an injunction preventing the second defendant from selling the former matrimonial home; damages; interest and costs.

First Defendant's case

- [8] The first defendant avers that the mortgage was taken by the claimant and himself as a joint venture. The first defendant states that the mortgage was for the refinancing of a loan previously held by the parties with the Communal Co-Operative Credit Union, repairing the family home and to construct a workshop downstairs of the matrimonial home to conduct his trade as a joiner. He asserts that the loan also financed the medical bills of the daughter of the parties.

- [9] The first defendant denies that he had an extra marital affair at the time he took the loan and contends that it was the claimant that was unfaithful during the marriage.
- [10] The first defendant contends that the claimant is fully aware of the nature and effect of the transactions, as they both have previously jointly mortgaged one of their properties.

Second Defendant's Case

- [11] The second defendant states that by letter dated 31st July 2009, it wrote to the claimant informing her that by agreeing to provide security for the loan, it would be liable to realise its security should the first defendant fail to service the loan. The second defendant states that the said letter recommended that the claimant obtain independent legal advice.
- [12] The second defendant states that it was the claimant's decision not to obtain independent legal advice, and that it did what it was legally obligated to do in requesting the claimant to obtain independent legal advice.
- [13] The second defendant states that there has been no allegation of actual undue influence made by the claimant in her statement of claim, nor any particulars to ground an allegation of presumed undue influence.

Legal Analysis

Whether the mortgage executed by the claimant and the first defendant in favour of the second defendant was obtained by the undue influence of the first defendant over the claimant

- [14] In **Royal Bank of Scotland PLC v Etridge (No. 2)**¹, Lord Hobhouse of Woodborough defined actual undue influence as follows:

"It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal

¹ (2001) UK HL 44

rights against the other. It is typically some express conduct overbearing the other party's will."

- [15] The burden of proof and presumptions of undue influence rest on the claimant. Lord Nicholls in **Royal Bank of Scotland PLC v Etridge (No. 2)** stated: In paragraphs 13 and 14 of his judgment

"Whether a transaction was brought about by the exercise of undue influence is a question of fact. The general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule.

The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives or ordinary persons in that relationship, and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence."

- [16] On the facts of the case of **Royal Bank of Scotland PLC v Etridge No (2)**², it was found that where a wife sought to impugn a transaction into which she had entered on the ground of her husband's undue influence, their relationship did not fall within a special category of case where an irrebuttable presumption of trust and confidence arose. If she was able on the facts of the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not explicable in the ordinary way she could rely on a presumption which shifted the burden of proof to her opponent and could be rebutted on appropriate evidence by that party. Since the fortunes of husband and wife were ordinarily bound up

² (2001) UK HL 44

together, a guarantee given by the wife with a charge on her interest in the matrimonial home to secure her husband's debts was not plainly to her disadvantage so as to be explicable only on the basis that the transaction had been procured by his undue influence".

[17] Counsel for the claimant relies on the decision of the UK Court of Appeal in **Hewett v First Plus Financial Group PLC**³ as the authority that the non-disclosure of ex-marital affairs at the time of the execution of a mortgage amounted to undue influence and a breach of trust and confidence. Mr Hewett faced significant credit card debts, making it difficult to manage mortgage payments and other family expenses. Initially Mrs Hewett refused to participate in the mortgage due to concerns about risking their home, but reluctantly agreed after Mr Hewett insisted it was the only way to save their home. The court held that the concealment of an affair by the husband at the time of proposing that the wife enter into a risky financial transaction was considered to amount to undue influence because the wife was entitled to be apprised of all relevant circumstances. The finding of undue influence therein did not depend on the conclusion that the wife had made no decision of her own or that her will and intention was completely overborne.

[18] It is the law that a wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction.⁴

[19] The court is of the view that the facts of **Hewett** are distinguishable from this case at bar. Firstly, the claimant, other than making bald assertions of an extra marital affair with a family friend, has failed to particularize the undue influence of her husband or breach of trust at the time of the loan transaction. The claimant states that she discovered this affair in 2010, and that she signed the mortgage prior to this discovery. It is the claimant's evidence that the first defendant has fathered two children with the woman of the extramarital affair.

³ (2010) EWCA Civ 312

⁴ Barclays Bank plc v O'Brien [1994] 1 AC 180

- [20] The first defendant disputes the allegations of the extra marital affair. Instead, the first defendant contends that it was the claimant that had the extramarital affair. In addition, the first defendant contends that the purpose of the loan was for the benefit of both the claimant and the first defendant.
- [21] The facts and the purpose for which the funds were used do not suggest that the funds were used specifically for the first defendant's benefit. The claimant has not provided any evidence to support that the funds obtained by the mortgage were solely to the credit of the first defendant. The evidence confirms the loan was taken to refinance an existing loan with the Communal Credit Union by the joint parties in 2008 and to upgrade the matrimonial home.
- [22] The claimant's witness and close friend, Kevon Licorish, and one of her witnesses, confirmed that he did an invoice and constructed a toilet, kitchen and veranda for the claimant. The court accepts his evidence that the renovations were done within the timeframe of the loan, which supports the first defendant's evidence.
- [23] It is the evidence that the first defendant built the joiner shop on the first floor of the matrimonial home, with the intention to pay the mortgage from earnings from the joiner shop. There is no evidence that the first defendant took unfair advantage of her trust and confidence in him or negatively influenced her in any way in taking the mortgage in 2009.
- [24] As indicated before, the burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. The claimant has failed to establish any undue influence by the first defendant over her decision to act as surety for the mortgage with the second defendant.
- [25] Lord Nicholls of Birkenhead in **Allcard v Skinner**⁵ said :

“Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a

⁵ (1887) 36 Ch D 145

reasonable husband in the circumstances should not, without more, be castigated as undue influence”

- [26] The claimant seeks a declaration for the deed of mortgage to be set aside. The claimant, having failed to establish the presence of undue influence between the claimant and the first defendant, cannot by extension impose the same duty on the second defendant. The equitable right to set aside the mortgage will only be enforceable against the creditor (bank) if the bank had actual or constructive notice of the facts giving rise to the equity. The claimant has failed to satisfy that the loan was not to her financial advantage or that the first defendant in procuring her to act as surety, has committed a wrong that entitles her to set aside the mortgage.

Whether the second defendant had a duty of care to ensure that the claimant obtained independent legal advice prior to executing the mortgage

- [27] Counsel for the claimant argues that the claimant did not have the benefit of independent legal advice prior to executing the mortgage, neither did the second defendant explain the nature of the transaction to her.
- [28] The claimant argues that the second defendant knew that the first defendant and the claimant were husband and wife at the time of the mortgage, and that the second defendant was under a duty to insist on the claimant receiving instruction from an attorney-at-law.
- [29] It is the law that a bank is put on inquiry whenever a wife offers to stand surety for her husband’s debts. In **CIBC Mortgages plc v Pitt**⁶ it was stated at paragraph 48 ;
- “ As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is

⁶ [1994] 1 AC 200

aware the loan is being made for the husband's purposes, as distinct from their joint purposes.”

- [30] Lord Nicholls in **Etridge**⁷ quoted the decision in **Barclays Bank PLC v O'Brien and another**⁸ in which Lord Browne-Wilkinson stated:

“Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband’s debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitled the wife to set aside the transaction.”

- [31] The evidence of a letter of 31st July 2009 from the second defendant to claimant states the following:

“We are informed that you have agreed to provide security for the liabilities of the above named customer.

You would no doubt appreciate that if the customer fails to repay us, the Bank is entitled to realise on the security held.

The Bank therefore strongly recommends that you seek independent legal advice before signing the charge forms.

...

Alternatively, if you decline to accept the Bank’s recommendation as stated above, please confirm by signing and returning the attached duplicate of this letter as your acknowledgement that you fully understand the nature of the obligations being undertaken and that you are acting voluntarily.”

- [32] The reasonable steps required to be taken by a bank to ensure that it was not fixed with constructive notice of the wife’s rights were not steps that involved making any actual inquiry, but rather steps such as advising her to take independent advice.

- [33] The claimant at trial states that the said letter was given at the date when she went to sign the mortgage deed. She said that she read and signed at the same

⁷ (2001) UK HL 44

⁸ [1993] 4 All ER 417

time. The letter expressly stated that it was highly recommended that she obtain independent advice but she signed, nonetheless. Whereas the court is of the view that it would have been more prudent for the bank to have issued the letter to the claimant in advance of the date of signing the mortgage, however the claimant has failed to demonstrate that she was not given an opportunity to leave and return to sign the letter.

[34] The evidence suggests that the second defendant took a meaningful step to satisfy itself that the claimant understood the practical implications of the proposed transaction. The court notes that this is not the first mortgage transaction of the claimant. The court accepts that the claimant was of sufficient intelligence to understand the nature and effect of her obligations in the event of a default of payment of the loan. The signing of the letter suggests a waiver of the advice to seek independent legal advice.

[35] The dicta of Lord Nicholls in **Etridge**⁹ stated at paragraph 54 of his judgment that:

“The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.”

[36] On an application of **Etridge**¹⁰, the second defendant’s letter specifically addressed to the claimant which included an indication of the implications of the transaction. The court finds that the second defendant discharged its duty of sensitizing the claimant to the implications of the transaction. Accordingly, the claim fails on this ground.

Conclusion

[37] Given the above circumstances, the court is of the view that the claimant has failed to establish her claim against the defendant. However, one of the reliefs

⁹ (2001) UK HL 44

¹⁰ (2001) UK HL 44

sought by the claimant is an injunction against the second defendant to sell the matrimonial home. The court accepts that the second defendant has the statutory right to exercise its power of sale upon a default on a mortgage, upon giving the required notice to the defaulting parties. The first defendant indicates that the claimant evicted him from the matrimonial home in 2017, and he then informed her that he would not continue making payments on the loan.

[38] It is the evidence that it is upon enquiry by the claimant in a letter dated 9th December 2020, that the bank in a letter in reply dated 14th December 2020 informed the claimant that two parcels of land, including one parcel jointly owned by the claimant and the first defendant, were sold and the proceeds put towards the mortgage payments.

[39] The second defendant at trial presented a statement of status of sale of the properties and proceeds toward the mortgage loan but did not provide any information to satisfy compliance with the Act to inform the surety of the first defendant's default and intention to exercise its power of sale.

[40] In the circumstances the court is of the view that the status quo should remain until the second defendant can provide proof of compliance with the statutory requirements. Accordingly, an injunction is granted against the second defendant from exercising its power of sale against the one remaining property on which the matrimonial home is built, until it can satisfy the claimant that the process for exercising was in accordance with the law. The second defendant shall also provide the parties with full disclosure of the process in selling the properties and the valuation in selling the two other properties which formed the security of the loan.

ORDER

[41] Given the above circumstances, it is ordered and directed as follows

1. The claimant's claim against the defendants on the ground of undue influence fails.

2. The second defendant shall within 14 days of today's date provide the claimant with the valuations, proof of the procedure and particulars of sale of the properties;
3. An interim injunction is granted against the second defendant from exercising its power of sale of the matrimonial home until paragraph 2 is complied with and upon further application to the court;
4. Costs to the first defendant in the sum of \$7, 500.00.
5. In relation to the claimant and second defendant, costs shall be in the cause upon further application.

Agnes Actie
High Court Judge

By The Court

Registrar