

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2020/0061

BETWEEN:

REPUBLIC BANK (EC) LIMITED
(Qua Successor to The Bank of Nova Scotia)

Claimant

And

**(1) EMTI LTD.
(2) EMAD WARD
(3) NADIA WARD**

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mrs Sardia Cenac-Prosperre for the Claimant
Mr Eghan Modeste for the Defendants

2022: November 7, 8
December 19
2023 October 4

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Republic Bank (EC) Limited (the Bank) seeks to recover the sum of \$1,342,800.57 from the first defendant Emti Limited (Emti) and the second defendant Emad Ward (Emad) as co-borrowers, and the third defendant Nadia Ward (Nadia) as guarantor.

- [2] It is alleged that a loan was granted to the defendants, and secured by a hypothecary obligation over immovable property belonging to Emti. The property was purchased with the loan and a personal guarantee given by Nadia. The Bank says the defendants have failed to repay the debt despite repeated demands and are jointly and severally liable for the principal balance due on the loan, bank charges, interest and costs.
- [3] The defendants filed their defence, to which the claimant filed a reply. The parties filed witness statements, and the matter progressed to a 2-day trial. At trial the Bank deployed its full case and its main witness was cross examined and re-examined.
- [4] At the close of the Bank's case Counsel for the defendant proceeded to make a no case submission on behalf of all the defendants. The Court heard initial arguments and adjourned to the second day of trial, when the defendants were put to their election. Counsel for the defendants stated unequivocally that they have elected to call no evidence at trial (albeit that a defence and witness statements were duly filed), and they wished to stand by their no case submission. The parties were directed to file and further written submissions and authorities, and the matter adjourned for final oral submissions.
- [5] On 4th October 2023 I ruled that the no case submissions had no merit, that the Bank had proven its claim on the preponderance of the evidence, and gave judgment in favor of the Bank, against all three defendants. My full reasons are contained in this judgment

The Issue

- [6] The only issue which the Court was required to determine was whether the claim was defeated on the grounds advanced in relation to the no case submission, and if not, whether the Bank had satisfied the requisite threshold for establishing its case.

The Law on No Case Submission in Civil Claims

- [7] It is well settled that only in the most exceptional circumstances should a judge entertain a submission to dismiss an action at the close of the claimant's evidence, without putting the defendant to election.

- [8] The correct approach was explained in **Benham Ltd v Kythira Investments Ltd and another**¹ in this way:-

“Where a defendant is put to election, and has decided not to adduce evidence and to stand by a no case submissions, that is the end of the matter as regards evidence. The judge will not hear any further evidence, which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal.”

In **Miller (t/a Waterloo Plant) v Margaret Cawley**² Mance LJ explained the test to be applied by a judge where a defendant is put to election and elects to call no evidence. He stated :

“18. The issue after an election is, in other words, not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. It is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his or her case by the evidence called on the balance of probabilities.

19.....

20... once a defendant has elected to call no evidence, ... the only issue then becomes whether in the light of the evidence already adduced the claimant has made out his case on the balance of probabilities.....”

- [9] The point was further elucidated in **Benham**³ where it was said that:

“..... in those cases where the defendant elects to call no evidence, the only issue then is whether the claimant has established his claim on the balance of probabilities But it must be recognised that he may have done so by establishing no more than a weak prima facie case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour.”

- [10] The position is different where a defendant has not been put to election and in the **Miller** case Mance LJ went on to distinguished the test to be applied in such instances, which would require the lesser threshold of “a realistic prospect of success”. He stated:

“14. Where a judge does, however, embark at the close of the claimant's case on a determination whether the claimant's case has no real prospect of success without requiring any election, the judge will, if he determines that the claimant's case has

¹ [2003] EWCA Civ 1794 at para 43

² [2002] EWCA Civ 1100 at paragraphs 17 to 20

³ Supra note 1 at paragraph 30 of the judgment

no such prospect, dismiss the claim, and this will, subject to any appeal, be the end of the matter. If, on the other hand, the judge determines that the claimant's case has a real prospect of success, he must go on to hear the defendant's evidence and thereafter to find the factual position on the whole of the evidence and on the balance of probabilities."

- [11] This, of course, would not be applicable to the present case as the defendants were unequivocal in their election to forego adducing evidence, and to stand by their no case submission. Closer to home, the Court of Appeal in **Calvin Todman v Marguerite Hodge**⁴ adopted the position as stated in **Bentham** and **Miller** on the test to be applied where a defendant has elected to call no evidence, and stated:

"[7]in a civil trial when a defendant has elected not to adduce any evidence, and makes a no case submission, the test by which the no case submission falls to be considered is whether or not the claimant has established his claim on the balance of probabilities. It must be recognised that he may do so by establishing no more than a weak prima facie case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can tip the probability in the claimant's favour.

*[8] The correct approach to drawing adverse inferences from a party's election not to call evidence was discussed by our Court of Appeal in the case of **Elena Collongues v Andrew Lynch et al.**⁶ There, the Court explained that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness."*

- [12] More recently the Privy Council considered and restated the forgoing principles in **Matadai Roopnarine v A-G of Trinidad & Tobago**⁵

The Bank's Pleadings and Evidence

- [13] The Bank is incorporated as Company No. C142/2019 and is the holder of a licence to carry on banking business in Saint Lucia⁶.

⁴ BVIHCVAP 2012/002 – delivered on 4th October 2012

⁵ [2023] UKPC 30

⁶ See Exhibit YJ1

[14] Emti is incorporated as Company No. C287/2016⁷. Emad and Nadia are its only directors and shareholders. Emad is a Doctor and Nadia is a Manager.

[15] It is alleged that Emti and Emad were customers of the Bank of Nova Scotia ("BNS"), and co-borrowers of Residential Mortgage Loan No. 91700 ("the loan"). Nadia agreed to guarantee the loan and rendered herself jointly and severally liable with Emti and Emad, for amounts due and owing on the loan. By way of a Banking Business Vesting Order dated 4th October 2019 all the rights and interests in BNS banking business in Saint Lucia were transferred to the Bank, including the rights and interests in the said loan.

[16] The claim against the defendants jointly and severally is for the sum of \$1,342,800.57 comprising the following:

Principal	- \$1,135,156.96
Add-on-Charges	- \$11,030.91
Interest on principal	- \$196,106.51
Interest on Add-on-Charges	- \$441.91
Late Fees	- \$65.00

[17] The Bank further claims interest on the principal balance of \$1,135,156.96 at the rate of 7.5% per annum from 8th July 2020, until payment of the debt in full.

[18] It is said that the loan is premised, inter alia, on:

1. Applications for Credit dated and signed 17th February 2017
2. A Personal Credit Agreement dated and signed 28th February 2017
3. A Hypothecary Obligation registered in the Land Registry on 25th August 2017 as Instrument No. 3337/2017.

[19] Beverly Gideon gave evidence in relation to the authentication of bankers books and records belonging to Bank, to be used as evidence, for the purposes for section 125 of the Evidence Act. As the Bank had failed to properly authenticate its bankers books and records by way of a duly executed affidavit, this was done by calling the respective witness, who was not required to be cross-examined.

⁷ See TAB 2 of Trial Bundle 3

- [20] Yasmin Joseph ("Yasmin") was the main witness for the Bank. She is employed as the Adjuster for Collections and Recoveries, and was employed in the same position with BNS for 4 years. She has 20 years of banking experience. She testified that Emti and Emad are customers of the Bank by virtue of the loan, which was advanced to them as co-borrowers, and Nadia is a customer by virtue of savings account no.1031199⁸ (the "savings account") and as guarantor for the loan.
- [21] On 5th January 2017, Emad and Nadia made an application for the savings account which was they personally signed⁹. Printouts of the customer account information for Nadia and Emad as confirmation their ownership of the savings account was exhibited¹⁰. By way of separate applications for credit dated and signed on 17th January 2017, Emti, Emad and Nadia applied to BNS for a loan in the sum of \$1,134,000.00 to purchase a house. The loan applications were signed on behalf of Emti and Emad as co-borrower, and Nadia as guarantor, by Zayad Ward ("Zayad"), as their lawfully appointed attorney. It is said that in relation for Emad and Nadia his authority is derived from a Power of Attorney registered at the Land Registry on the 8th February 2017 as Instrument Number PA75/2017 ("PA75") and for Emti from a Power of Attorney registered at the Land Registry on the 10th February 2017 as Instrument Number PA89/2017("PA89"). Collectively these two documents will be referred to as the POA's in this judgment. Copies of the loan applications and the POA's are exhibited¹¹.
- [22] Thereafter a Personal Credit Agreement¹² dated and signed 28th February 2017 ("the PCA") shows that the loan in the sum of \$1,146,474.00 (inclusive of commitment fee) was granted by BNS to Emti and Emad as co-borrowers, and the full amount of the loan was guaranteed by Nadia. The PCA was signed on behalf of Emti, Emad and Nadia by Zayad acting under PA75 and PA89. The PCA also confirmed that the purpose of the loan was to purchase a house. It was agreed in the PCA that interest would accumulate on the loan at the rate of 7.25% per annum and it was repayable by monthly installments of \$8,286.79, with an initial

⁸ See Exhibit YJ3

⁹ See Exhibit YJ3

¹⁰ See Exhibit YJ4

¹¹ See Exhibits YJ5 and YJ6

¹² See Exhibit YJ7

payment of \$8,969.96 to be made on 31st March 2017. The PCA also stated that payments to the loan would be debited from the savings account. The PCA is accompanied by a document entitled 'Personal Credit Agreement Companion Booklet' ("the Booklet")¹³ which includes, among other things, the additional terms of the loan as well as the terms of the guarantee. As it relates to the terms of the guarantee, the Booklet provides that the loan can be recovered from Nadia prior to an attempt at recovering same from the co-borrowers as, "*all benefits of discussion and division*" have been given up.

[23] Yasmin further testified that the security for the loan is an Hypothecary Obligation registered at the Land Registry on 25th August 2017 as Instrument Number 3337/2017 against Parcel No. 0649D 16 ("the hypothec")¹⁴. It was granted by Emti in favour of BNS, and the property securing the loan is registered in Emti's name. The Hypothec was signed by Zayad on behalf of Emti by virtue of PA89. Pursuant to the PCA, the Loan was disbursed to McNamara & Co. the law firm acting for the Defendants, receipt of which was acknowledged and evidenced by receipt dated 3rd March 2017¹⁵ from the firm.

[24] She stated that the loan was being serviced through the savings account, albeit inconsistently, until 9th March 2018 when payments ceased. The payments made towards the loan are reflected on the statements for the loan history and savings account¹⁶. The codes used on these statements were explained. The loan history showed that late fees in the sum of \$65.00 for each late payment were added to the loan as it was not being serviced on time. Monthly payments fell due on the 1st day of each month. Additionally, add-on charges for fees associated with the loan recovery process accumulated. The balances stated on the loan history is the current balance only, being the principal balance and add-on charges, and does not include the interest on principal balance and add-on charges, or the late fees. The complete balance outstanding on a loan is shown on a payout inquiry. Due to the manner in which the loan was being serviced, the status changed from current to non-performing/non-accrual on 1st June 2018 and this is represented on the loan history.

¹³ See Exhibit YJ8

¹⁴ See Exhibit YJ9

¹⁵ See Exhibit YJ10

¹⁶ See Exhibits YJ11

[25] BNS demanded the balance outstanding on the loan at that time by letters dated 4th March 2019 and 3rd April 2019 ("the demand letters")¹⁷. The outstanding balance on the demand letters was obtained from a payout inquiry. Similarly, the balance claimed in the claim was obtained from a payout inquiry. The loan history and payout inquiry are related in that, the principal balance outstanding and the add-on charges reflected on a payout are the total of the current balance on the loan's history, as at the corresponding dates on both records. On the payout inquiry¹⁸ exhibited the principal balance is stated to be \$1,135,156.96 and the add-on charges balance is \$66,158.81. The total of these figures is \$1,201,315.77 which is the last balance reflected on the loan's history. The amount of late fees shown on the payout inquiry to have accumulated on the loan can also be extracted from the loan's history. The payout inquiry shows that, as at 5th August 2021 the total amount owing on the loan was \$1,489,651.46 with interest continuing on the principal balance of \$1,135,156.96 at the rate of 7.25% per annum from 6th August 2021 until date of payment in full. The Bank has also incurred costs in seeking to recover the loan.

[26] In cross examination Yasmin agreed that it was an essential requirement for the Bank to establish the ability to repay the loan, before granting it. There is an interview process prior to granting the loan to determine if customers qualify for what they are requesting. The statements requested from potential borrowers would depend on the customer and the business requested. She knew what a due diligence process entailed, but was unable to say whether Emti had any source of revenue. It was the task of the loan's officer conducting the interview to determine the customer's ability to qualify for the loan. She disagreed that if a loans officer did not conduct due diligence, that the bank also would have failed to do the requisite due diligence. She was unable to make a determination on whether the Bank failed to conduct due diligence in this case and ought to be responsible for any losses sustained. She confirmed that Nadia was a customer and a co-borrower but could not say whether she was advised that she should get independent legal advice and could not say if such discussion took place. All three defendants applied for the loan through their attorney Zayad and the loan was granted.

¹⁷ See Exhibit YJ12

¹⁸ See Exhibit YJ13

[27] She further stated that she was familiar with the POA's and that clauses 1 and 2 would have permitted Zayad to obtain advances from any bank on behalf of the defendants, or to approach a financial institution for a loan on their behalf. Although is not detailed in saying he should obtain a loan, in terms of transacting business at clause 1 that is what it says. She considered obtaining a loan to be transacting business and disagreed that the POA's did not permit him to guarantee any loan on behalf of Emad and Emti. She disagree that there is no clause in the PA89 which permitted Zayad to pledge, hypothecate or mortgage any property belonging to Emti, and stated that a power of attorney may vary based on what it is that it gives authority do. She agreed that if it does not permit a particular power the attorney would be unable to do it. She confirmed that the PCA stated that the full amount of the loan was guaranteed by Nadia and that the PCA is a loan agreement, It was signed on behalf of each the defendants. Apart from the PCA there was no other document specifically called a guarantee and no certificate of independent legal advice. She agreed that the claim is indeed hinged on the applications for credit, the PCA, and the hypothec.

No Case to Answer

The Defendants Submissions

[28] In oral submissions made on 7th November 2022 Counsel for the defendants stated that the Bank relies on 3 documents to substantiate its case, all of which are all void either because they were signed prior to execution and registration of the POA's, or that the attorney Zayad had no authority by way of a specific instructions or clauses contained in the POA's to seek loans and advance from any financial institution on behalf of the defendants, or to pledge or hypothecate the immovable property of Emti, or to bind Emad and Nadia as guarantors. Counsel says clause 1 of the POA's, which the claimant relies on, only confers general terms and according to articles 1603 and 1604 of the Code such powers particularly in respect of hypothecation ought to be expressly stated. No such power was conferred in PA89 to pledge the immovable property belonging to Emti. Thus, the Bank faces the impossible task of establishing its claim on the balance of probabilities, as all the documents relied on are void.

- [29] Concerning Nadia, Counsel submits that she did not personally sign any application for credit, and PA75 did not permit Zayad to obtain loans from any bank on her behalf, thus the application for credit is void. The guarantee within the PCA is also void and the PCA itself is void in relation to her. Further the Bank has not shown that she was afforded independent legal advice given that the nature of the transaction was a loan in excess of \$1.1 million. She would have been entitled to such advice, in the absence of which the transaction is rendered void in relation to her, and there is no case for her to answer.
- [30] Concerning Emad it is said that PA75 did not permit Zayad to obtain advances from any bank on his behalf, thus the application for credit and the PCA are void as Zayad had no legal authority to undertake these transactions. The Bank has not established a case against him and there is no case for him to answer.
- [31] Concerning Emti PA89 did not permit Zayad to obtain any loan on its behalf or to hypothecate its property and the PCA and hypothec are both void.
- [32] Counsel contends that paragraph 4 of the statement of claim states that the claim is founded upon 3 documents namely, the applications for credit, the PCA and the hypothec. However these documents have found themselves in ICU and may not be validated or given life at this time. The claimant's claim does not, and cannot establish any liability on the part of the defendants, on a balance of probabilities, and ought to be dismissed.
- [33] Counsel cited the case of **Sabina Alcide v Margaret Desir**¹⁹ to make the point that the Privy Council set aside a deed of sale because of undue influence, even if satisfied that an improbation action could not be successful. He says the authenticity of the POA's are not in question, and it is simply that they did not authorize Zayad to take loans and hypothecate property. Clause 1 in both of the POA's are general clauses and if they are sufficiently wide to empower such transactions, the POA's should have ended there. The Civil Code²⁰ ("the Code") speaks of the need for specificity in relation to hypothecation and clause 1 which is a general term usually included in every power of attorney does not convey the power to

¹⁹ Privy Council Appeal Nos 0042 and 0044 of 2013

²⁰ Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

pledge, hypothecate or obtain loans, as this must be specifically expressed. There is no dispute that the POA's are authentic, but the interpretation of clause 1 and whether it authorized Zayad to do as he did on behalf of the defendants, is what is being questioned.

- [34] In written submissions²¹ and further oral submissions made on 19th December 2022 Counsel cited the following articles of the Code to support the defendants position that for acts of hypothecation, the agency must be express, and that Zayad acted beyond the scope of the authority given to him:

"1603. The agency may be either special, for a particular business, or general, for all the affairs of the principal.

When general it includes only acts of administration.

For the purpose of alienation and hypothecation, and for all acts of ownership other than acts of administration, the agency must be express.

*1604. The agent can do nothing beyond the authority **given or implied by the agency.** He may do all acts which are incidental to such authority and necessary for the execution of the agency.*

- [35] Counsel submitted that the Bank relies on the following clause in the POA's which did not permit Zayad to obtain loans or pledge property:

"To take charge of, manage, transact and administer all and singular THE CONSTITUENT'S affairs, business and property in Saint Lucia in such manner as THE ATTORNEY shall think fit."

- [36] In order to meet the requirements of article 1603 to hypothecate property and for obtaining loans Counsel opined that the following clause should have been contained in the POA's:

"To obtain advances or loans from any person or bank either alone or jointly with others and as security therefore to pledge, hypothecate or mortgage all or any part of THE CONSTITUENTS real or personal, movable or immovable property, upon such terms and conditions as THE ATTORNEY shall deem fit."

- [37] Reliance was placed on the case of **Arthur Alban Richards v Jennifer Richards**²² where a Deed of Gift was set aside and cancelled in circumstances where the court found that the power of attorney in question did not give any power to the attorney to convey the

²¹ Filed on 18th November 2022

²² SVGHC2018/0053 at paragraphs 26, 27, 28, 31, 32, 34, 35, 36, 37 and paragraph 36

constituent's property to herself. It was said that documents which purport to act as power of attorney should be strictly construed, and as the document in question did not confer any powers on the defendant for the creation of a deed.

[38] The case concerned circumstances between a father and daughter, in which the daughter as attorney was authorized to sell property belonging to her father but indeed was not empowered to divest his property by way of an outright conveyance of a Deed of Gift to herself. The defendant was of the belief that when her father signed the power of attorney he had said that he wanted to convey his property to her. Following a trial where the court had the opportunity to hear the evidence and assess the credibility and veracity of the witnesses, the court found that upon a strict construction of the power of attorney, the defendant was not empowered to gift the property to herself in circumstances where she was only empowered to sell such property. On that basis the deed which she had executed in her favour was cancelled.

[39] Regarding Nadia Counsel amplified his submissions that as she was not afforded the opportunity to obtain independent legal advice with respect to the transaction and because of this she is absolved of any liability to the Bank. The well-known pronouncements of Lord Browne-Wilkinson in the case of **Barclays Bank PLC v O'Brien**²³ when dealing with circumstances of undue influence was cited as authority for this proposition.

[40] Counsel contends that the no case submission is about whether the Bank has advanced a case to be answered by any of the defendants. The defence and witness statements which they filed are now irrelevant. Even if they have admitted that Zayad is their duly appointed attorney, which is true because clause 2 of the POA's empowered him to acquire or purchase property, and he was empowered to sell, lease or end leases among other things. He in fact had authority to do several things, however the POA's simply did not permit obtaining loans on behalf of the defendants. The issue is not what was pleaded by way of defence, but whether the Bank has made out a case against the defendants.

²³ [1993] UKHL 6

- [41] Counsel says there is no ambush as suggested by the Bank, and the burden of establishing the claim is that of the Bank. In closing Counsel opined that based on the construction of the claim there is simply no case to be answered by any of the defendants.

The Banks Submissions

- [42] In oral submissions on 7th November 2023 Counsel for the Bank stated that although the POA's were not in existence at the time that the applications for credit were signed, these applications are not agreements, but simply expressions of an interest or intention. The PCA was signed on 28th February 2017 and the hypothec was executed on 25th August 2017 and these are the two documents which constitute the agreement between the parties, in relation to the loan. The PCA is accompanied by the booklet which contains all the terms of the lending, and it states that Emti and Emad are co-borrowers and Nadia is a guarantor, for the loan.
- [43] Counsel relied on the following extract from **Bowstead & Reynolds on Agency**²⁴ to support the Banks contention that Zayad was empowered to undertake these transactions. It states:
- " a power of attorney is 'a formal instrument by which one person empowers another to represent him, or **act in his stead** for certain purposes. It may contain general or particular powers"*
- [44] Counsel says clause 1 of the POA's are general clauses which granted Zayad the power to, inter alia, *"take charge of manage transact and administer all and singular the constituents affairs business and property in Saint Lucia in such manner as the attorney shall think fit.* They were sufficiently wide to include the business affairs of the defendants and empowered him to undertake all the acts that he did on behalf of the defendants. Of the 3 documents challenged by the defendants only one was signed prior to execution and registration of the POA's, which is the application for credit by each of the defendants. As it is simply a document of intent, it is not as weighty as the PCA and the hypothec which were duly signed after registration of both POA's. These are the documents which form the legal and contractual basis for the loans granted to the defendants. Further, the POA's are notarial

²⁴ 21st Edition at para 2-039 on page 69

documents, the authenticity of which have not been called into question and they provide complete proof of the matters stated therein.

[45] Counsel argued that the loan funds were disbursed and the defendants ratified the loan, which was being serviced through the savings account of Emad and Nadia until payments ceased in 2018. The existence and ownership of the savings account has not been disputed and payments were made for about one year. There is no defect with the PCA or the hypothec as they were signed after the registration of the POA's.

[46] Concerning the defendants contention that the claimant did not inform Nadia of the need to obtain independent legal advice, Counsel argued that there was no basis on which the Bank was obligated to do so. All that is said is that the loan concerned a large sum of money, and that Nadia is the wife of Emad. A wife serving as surety is usually advised of this in instances of undue influence, which has not been raised as a defence, and would concern questions of fact which must be proven by Nadia.

[47] In written submissions²⁵ and further oral submissions made on 19th December 2022, Counsel for the Bank argued that it was important to be cognizant of the process and procedure for pleadings, which is vital for doing justice between the parties, and to avoid trial by ambush. Matters concerning the authority of Zayad to act for the defendants in these transactions was never raised at a preliminary stage of the proceedings, and the defendants now seek to engage in ambush by not advancing any of the facts concerning the matters which they seek to advance, after the close of the claimant's case. At no time was lack of authority by Zayad to represent the defendants in respect of the loan pleaded. The loan was disbursed and repaid from the savings account of Emad and Nadia who now seek to hide behind the fact that their witness statements are not in evidence. In these circumstances, their pointed statement was that Zayad was their duly appointed attorney and they have failed to plead any of the matters being relied on, for this no case submission.

²⁵ Filed on 2nd December 2022

[48] Counsel posited that these are calculated steps to avoid a just disposition of the claim, and invited the Court to draw a strong adverse inference from the fact that if the defendants were undone by the conduct of Zayad and he did not have authority to act as he did, they had nothing to say in these proceedings to support their own allegations, to enable a just disposition of these matters.

[49] Counsel submitted that the more appropriate question to be asked is whether the Bank has been afforded an opportunity to put its case properly before the Court, in all material respects. If a fact is not in issue there is no requirement for proof. Had these matters been placed as facts in issue in the defence, the Bank would have been obliged to summons a multiplicity of persons to address these issues. The Bank was only required to prove facts in issue and the matters being raised on the no case submission are not facts in issue as they were never pleaded. If Zayad's authority to obtain the loan had been raised as a fact in issue evidence would have been led in relation to proof of ratification and the Bank would have taken steps to prove this. The defendants were duly represented by their own lawyers in these transactions and summonses would have been issued for relevant witnesses. These are hard questions which the defendants would have had to answer, and the adverse inference to be drawn is that they did not wish to have the truth of the facts come to light, and perhaps did not wish to perjure themselves, or answer these very hard questions. Hence the reason for making a no case submission.

[50] The Bank relied on was the recent judgment of the Court of Appeal in **Issa Nicholas (Grenada) Limited v The Attorney General of Grenada and another**²⁶ to make the point that a party may not raise matters not pleaded, in submissions at trial. In that case at the commencement of trial a defendant sought to raise a defence which was not previously pleaded. The court stated the following:

"[21]it is settled law that a party is bound by its pleadings and cannot raise any matter not pleaded in submissions.

[22] ...

[23] ...

²⁶ [2022] ECSCJ No. 259, Claim No. GDAHCV2016/0292

[24] Baptiste JA further held that CPR 10.7 provides the consequences of not setting out a proper defence. The defendant may not rely on any allegation or factual argument which is not set out in the defence but could have been set out there.

[25] Counsel for the first defendant cannot now, in legal submissions and at the commencement of the trial of a matter filed since 2016, raise a fundamental defence and legal issue not previously pleaded in its defence or canvassed in witness statements or pre-trial memoranda. These submissions by the first defendant evidently take the claimant and the second defendant by surprise, as submissions filed on behalf of the parties do not address the court on said issues."

[51] The Bank contends that it was not part of the defendants' case that their attorney lacked the authority to obtain loans on behalf of Emti and Emad, or to guarantee debts on Nadia's behalf. Nor was it part of the defendants' case that the loan documents were void, in particular the hypothec. There was a procedural application by the defendants and multiple case management hearings, and at no time was lack of authority or invalidity of loan documents raised. These were not issues which were foreshadowed in the pleadings, thus, the defendants cannot now seek to rely on these matters at this stage of the proceedings, to seek an order or declaration that the loan documents and hypothec are void.

[52] Concerning the issue that because Nadia is the wife of Emad, the Bank was required to ensure that she obtained independent legal advice before enabling, causing or permitting her to guarantee the indebtedness of EMTI and Emad, Counsel submits that she is merely seeking to evade liability to repay the loan, on that basis. She seeks to rely on the case of **Barclays Bank Plc v O'Brien** (an undue influence case) but has failed to plead factual arguments in support of this defence, to show that she was unduly influenced, by whom, and that the Bank had constructive notice of this. Counsel argued that the burden of proof lies on the person alleging constructive notice on the part of a creditor or bank to plead and prove that the creditor or bank had constructive notice of the undue influence. The burden then shifts to the bank to show that it took reasonable steps to ensure that consent was properly obtained.²⁷ As the defence of undue influence ought to be pleaded Nadia's defence is defective, because it contains nothing which purports to be a defence of undue influence. Counsel says in **Royal Bank of Scotland v Etridge**²⁸ the court found that the relationship

²⁷ Bullen & Leake & Jacob's Precedents of Pleadings - Vol 1, 17th Edition, Sweet & Maxwell

²⁸ [2001] 2 FLR 1364

of husband and wife, was not one to give rise to an irrebuttable presumption of undue influence. Therefore, the fact that Nadia is Emad's wife, cannot without more, ineluctably lead to the conclusion that there was undue influence. Not only did Nadia fail to plead any facts and particulars in support of this purported defence, but no evidence was elicited in cross examination of Yasmin, to substantiate this. She stated that she was aware that Nadia was Emad's wife and that she was not aware whether Nadia was told to get independent legal advice and that here is no independent legal advice document on file. Counsel submits that this is insufficient to discharge the burden of proving undue influence and constructive notice.

[53] Counsel submitted that the claim is that money was loaned to Emti and Emad as co-borrowers, and guaranteed by Nadia. By virtue of demands, the Bank required repayment of the outstanding balance of the loan, however, the defendants failed to repay the amount due. The facts which have been established are that: (i) the loan was granted to the defendants to facilitate purchase of the mortgaged property, (ii) the loan was disbursed to the defendants lawyers, (iii) the property was purchased by Emti and the saving account of Emad and Nadia was used to make repayments to the loan. All documents supporting ratification of the loan by these defendants have been adduced. Exhibit YJ11 containing copies of the history for the loan and savings account from which the loan payments were made shows the primary borrower as Emad. Exhibit YJ4 containing copies of printouts of the customer account information is the identifier key for Nadia, which shows the two accounts associated with her as the savings accounts and the residential mortgage account.

[54] Counsel says that the Bank has proven its case on a balance of probabilities through the evidence of its two witnesses and the adverse inferences which the Court is entitled to draw from the defendants failure to give any evidence in the case.

Analysis

[55] Although the defendants filed a defence and witness statements, once they elected to call no evidence and to stand by their no case submission, the consideration of these documents have been stymied. The Court must proceed to examine the claimants evidence and

determine whether the no case submission succeeds, or whether the Bank case has been made, on a balance of probabilities.

- [56] PA75 and PA89 were both executed on 23rd January 2017 and registered on 8th and 10th February 2017, respectively.

The Applications for Credit

- [57] The application on behalf of each defendant was signed on 17th January 2017, prior to execution and registration of the POA's. They are therefore invalid, and may not be relied upon by the Bank, as Zayad would have lacked the necessary capacity for signing on behalf of the defendants, at that time.
- [58] I accept however, that these applications do not constitute the contractual obligations between the parties, and even if they were invalidated by the premature execution, that would not be a basis for invalidating the transactions and the other contractual documents which the defendants seek to impugn.

The PCA and Hypothec

- [59] The PCA containing the terms and conditions which governed the loan was signed on behalf of all three defendants on 28th February 2017. This was subsequent to the registration of both POA's. The hypothec was executed on 11th August 2017 and registered on 25th August 2017 long after registration of PA89 with respect to Emti. There is no dispute about the authenticity of the hypothec. The only question is whether Zayad was empowered to obtain the loan and execute these documents, by virtue of the POA's.
- [60] I have examined the articles of the Code referenced by Counsel for the defendants and the relevant clauses of the POA's. The legality of the acts of Zayad in obtaining the loan and hypothecating Emti's property cannot be examined solely in the context of article 1603, to void these transactions, and their supporting documents.

[61] While I agree that the wording of the clause advanced by the defendants would have expressly stated that Zayad was authorized to obtain loans and hypothecate property, to conform to the dictates of article 1603, the matter does not end there. The absence of such clause does not mean that Zayad was not authorized to do as he did.

[62] Clauses 1, 2, and 3 of the POA's must be read together to gain a clear understanding of what he was required to do in relation to acts of ownership. They are reproduced below:

1. *To take charge of, manage, transact and administer all and singular, THE CONSTITUENTS affairs, business and property in Saint Lucia in such manner as THE ATTORNEY shall think fit.*
2. *To acquire by purchase or otherwise in THE CONSTITUENTS name and on the Constituents behalf any real estate or immovable property in Saint Lucia from any person, persons, corporation or body and for such price or prices and subject to any covenant or covenants servitude or servitudes and such other conditions as the Attorney shall think fit.*
3. *To sell, convey or otherwise dispose of to all or any person or persons all or any part of THE CONSTITUENTS movable or immovable property in Saint Lucia for such price and upon such terms and conditions as THE ATTORNEY shall deem fit.*

[63] There principle of incidental acts, would of necessity, have to examined to arrive at a determination on the scope of authority which Zayad had in relation to clause 2 which empowered him to purchase property on behalf of the defendants. There are also principles of law which may defeat such allegations, such as ratification, acquiescence and estoppel, based on the actions of the defendants, or lack thereof, in relation to these transactions.

[64] **Halsbury's Laws of England**²⁹ explains some of these precepts. Concerning implied authority it states:

- "(3) IMPLIED AUTHORITY*
37. Necessary and incidental acts.

²⁹ Halsbury's Laws of England Agency (Volume 1 (2022)) at paragraphs 37, 58 and 69

The implied authority of an agent extends to all subordinate acts which are necessary or ordinarily incidental to the exercise of their express authority¹. It does not, however, extend to acts which are outside the ordinary course of their business, or which are neither necessary nor incidental to their express authority².

*The manager of a business has authority to do all acts necessary to the regular conduct of the business³, but has no implied authority to borrow money⁴. A servant has not, merely from the fact of service, authority to pledge their master's credit⁵, **but an agent has been held, in particular instances, to have implied authority to pledge their principal's credit⁶.**"*

[65] Concerning ratification it states the following:

4. Ratification

(1) GENERAL PRINCIPLE OF RATIFICATION

58. Principal's retrospective ratification of agent's acts.

Under certain conditions an act which, at the time it was entered into or done by an agent, lacked the authority, express or implied, of a principal, may by the subsequent conduct of the principal become ratified by them and made as effectively their own as if they had previously authorized it.

Where the act has been done by a person not assuming to act on their own behalf¹, but for another, though without their precedent authority² or knowledge³, and is subsequently ratified by that other person, the relation of principal and agent is constituted retrospectively, and the principal is bound by the act whether it is to their advantage or detriment, and whether liability is founded in contract or in tort, to the same extent and with all the same consequences as if it had been done by their previous authority⁴.

A ratification may be of one act or a series of acts; and as a general rule every act, other than one which is void at its inception⁵, may be ratified, whether legal or illegal, provided that it was capable of being done by the principal himself⁶.

.....

69. Ratification by acquiescence.

Although a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to their knowledge and knowing that they are being regarded as having accepted the position of principal, takes no steps to disown that character within a reasonable time, or adopts no means of asserting their rights at the earliest time possible¹.

Like acts of adoption, acquiescence cannot avail when the contract or act is made or done before the alleged principal came into existence², even where such principal has derived advantage from the services rendered³.

The acquiescence must be acquiescence in the particular facts and be incapable of referring to another set of facts⁴. Acts which the principal has no choice but to perform will not of themselves amount to ratification⁵.

Acquiescence is stronger evidence of ratification where the relationship of principal and agent previously existed between the parties, and the act to be ratified was rather one in excess of the agent's authority than one which was totally unauthorised⁶. Thus, where a shipmaster who was entrusted with the sale of goods, the proceeds to be devoted to particular purchases, devoted the proceeds to other purchases and advised his employer of this, it was held that the fact that there was no repudiation by the employer within a reasonable time was evidence that he assented to and ratified the shipmaster's conduct⁷."

- [66] I agree with Counsel for the Bank that the defendants ought to have placed the Bank on notice of these matters first by way of defence, to provide opportunity to respond in their pleadings, evidence and submissions. In that sense, I agree that the no case submission does have the appearance of trial by ambush, which has been outlawed in this jurisdiction for well over two decades.
- [67] It is trite that obtaining loans and hypothecating property are matters incidental to the purchase of property and when read together clauses 1 and 2 could have empowered Zayad to undertake all such incidental transactions that he did on behalf of the defendants. The hypothec was a charge registered over the property for monies borrowed for the purchase of the very same property which is now registered to Emti as proprietor. The POA's permitted Zayad to make outright disposals by way of sale of the any property belonging to the defendants, and he could easily have disposed of it, to repay the debts, if the defendants found themselves in financial difficulty.
- [68] The defendants have chosen to call no evidence to show what steps were taken to intercept these transactions which they say are outside of the scope of Zayad's authority. They have not said whether they renounced the property which was purchased with the loan, but instead they seek to void the loan documents, with nothing said of Zayad purchasing the property with the loan, and Emti still having ownership of same.

- [69] Since they have elected to call no evidence to allow these matters to be fully ventilated article 1603 on its own does not provide relief. Taken together clauses 1, 2, and 3 may very well have satisfy the requirements of articles 1603 and 1604 of the Code, if that is what the defendants intended.
- [70] None of the cases cited by Counsel assists the defendants no case submission, as these were fully ventilated claims where the courts had the opportunity to test the veracity of the claims being made by the opposing sides, before arriving at a conclusion. It is also trite that every case will turn on its own peculiar facts and circumstances.
- [71] Based on the foregoing, it can be reasonably inferred that in all of the circumstance, the defendants by their very conduct intended that Zayad exercise all authority which would have been necessary and incidental to the purchase of property on their behalf, and appear to have ratified these transactions, in the absence of an express clause which Counsel for the defendants now say ought to have been included in the POA's.

Independent Legal Advice

- [72] The defendants have said that there can be no case for Nadia to answer, as she was not informed by the Bank that she needed to obtain independent legal advice. This point can be disposed of succinctly. It is not a foregone conclusion that whenever an wife acts in consort with her spouse to obtain a loan, there is an automatic presumption of undue influence or coercion, to put a bank on notice or inquiry. The party seeking to rely on this defence must mount the requisite facts and evidence from which the Court can deduce these matters. I agree with Counsel for the Bank that such allegations may only be made by way of a defence of undue influence. As Nadia has not pleaded any such defence, it is trite law that submissions whether by way of no case or otherwise ought not to be countenanced. Thus, the no case submission on this issue must fail.

The Claim

[73] Counsel for the claimant in written submissions identified the followings facts which the Bank says have not been refuted:

- (i) Zayad is the duly appointed attorney for the defendants;
- (ii) Zayad applied for the loan on behalf of the defendants;
- (iii) Zayad signed the PCA on behalf of Emti and Emad as co-borrowers;
- (iv) Zayad signed the PCA on behalf of Nadia as guarantor of the loan;
- (v) The PCA incorporated a Companion Booklet which sets out fully the terms of the guarantee and provided that the obligation of the guarantor to pay arises immediately upon a demand and is joint and several;
- (vi) The PCA was signed after each Powers of Attorney had been executed and registered;
- (vii) Emti signed a Hypothecary Obligation mortgaging the property to the Bank of which it was an express term that the loan was repayable on demand;
- (viii) The Bank advanced the loan to the Defendants which was disbursed to their solicitors, McNamara & Co, as was evidenced by the Receipt dated 3rd March 2017;
- (ix) The loan was used to purchase the property from Zayad and Marisse Ward³⁰;
- (x) The agreed interest rate was 7.25%;
- (xi) The loan was being serviced through Emad and Nadia's savings account until 9th March 2018 when payments to the loan ceased;
- (xii) The debt remained outstanding in the sum of \$1,201,315.77 as at 8th June 2021,55 with the principal balance being \$1,135,156.96;
- (xiii) The Bank made a demand against all the defendants for the balance on the loan by letters dated 4th March 2019.

[74] The balance of probabilities test to be applied in this case is simply whether it is highly probable (more likely than not) that the loan was granted to Emti and Emad as co-borrowers, with Nadia as guarantor, and that they have failed to repay the balance due on the loan and as such are jointly and severally liable to pay the sums claimed.

[75] The chronology of events provide cogent evidence of the defendants actions during the early part of 2017. The application for the savings account and execution of the POA's occurred

³⁰ See Exhibit YJ13 on page 116 Trial Bundle 3

in the month of January and February. The PCA was executed in February after the POA's were registered. The loan was disbursed to the defendants lawyers in March and loan repayments commenced from Emad and Nadia's savings account in March. The hypothec was registered in August, and from 2017 to 2018 Emad and Nadia repaid the loan.

[76] Emad and Nadia, from all indications, are the directing minds of Emti. If Zayad acted outside his scope of authority, these are very serious allegations for which he must answer, yet the defendants never saw fit to join him as an ancillary defendant to answer to these allegations, or to indemnify them for any losses incurred by his supposed wrongful behavior. On the contrary he has continued to act on their behalf throughout these proceedings, appearing at all court hearings on their behalf, and signing several documents filed in these proceedings. Such conduct is sufficient to lead to the inference that if indeed he acted outside of the scope of the authority give to him, the defendants are not least perturbed by this, and are only concerned to make these allegations in submissions only, in an attempt to evade liability for repayment of the loan.

[77] The Bank has provided ample evidence to prove its case, when considered against the silence of the defendants who are expected to have knowledge of all material evidence concerning matter of their business dealings and the authority given to Zayad. This has only served to strengthen the evidence adduced by the Bank. Alas, the defendants allegations of lack of authority on the part of Zayad remain unsubstantiated, on account of their own election to call no evidence. They have avoided the rigors of cross examination, and provide no explanations about the chronology of events leading up to these transactions, and what they in fact intended by virtue of clauses 1, 2 and 3 as well as other clauses in the POA's concerning ratification acts undertaken by Zayad. A no case submission ought not to be used as a shield to preclude a full investigation into matters which ought properly to be raised as defences and afforded the full inquisitorial process of trial.

[78] The end result is that the presumption that the defendants authorized Zayad to obtain the loans and hypothecate the property purchased with the loan by virtue of clauses 1 and 2 of the POA's has not been rebutted. All that is before the Court is the claimants evidence which clearly shows that the loan was disbursed, the property was purchased and registered in the

name of Emti (of which Emad and Nadia are sole directors and shareholders) and loan repayments commenced from their savings account and continued over a period of about 12 month. There are many questions to be answered by these defendants. Did they approach the Bank when the loan was disbursed, and the property purchased and registered to Emti, or when the loan repayments commenced from their savings account, to indicate that something was amiss. When demand letters were issued by the Bank, did they respond or even sound an alarm, that they were unaware of these transactions and did not authorize them. The is sufficient to demonstrate that without answers from these defendants, it is highly unlikely that they could succeed at defeating the claim.

[79] As it stands the defendants are not permitted to hide behind article 1603 of the Code, without more. Consideration must be given to the combined effect of articles of 1603 and 1604 and the law in relation to the interpretation of clauses 1, 2 and 3, which taken together were extremely wide and could have authorized Zayad to do all things incidental to the purchase of property on behalf of the defendants, as he thought fit. This would include obtaining loans and providing security for such loans which are purely incidental to the acquisition of property. With no evidence to the contrary, I accept that the PCA and hypothec were duly signed by Zayad in keeping with the powers given to him by the defendants under the POA's. These documents are valid documents which form the basis for the loan granted to the defendants.

[80] All matters concerning the terms and conditions for the loan are contained in the PCA, its Companion Booklet and the hypothec. As the validity of these documents have not been assailed, the defendants are jointly and severally liable to repay the Bank the sums claimed at the agreed interest rate.

[81] Based on the foregoing, I am satisfied that the Bank has surmounted the evidential threshold required to prove its case. The no case submission fails, and judgment will be entered against the defendants, for the sums claimed.

Conclusion

[82] I therefore make the following orders:-

1. Judgment is entered for the claimant against the defendants in the sum of \$1,342,800.57 together with interest at the rate of 7.5% on the principal sum of \$1,135,156.96, from 8th July 2020 until payment of the debt in full.
2. Cost is awarded to the claimant to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

[SEAL]

By the Court


Registrar