

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

GRENADA

CLAIM NO. GDAHCV2021/0068

BETWEEN:

THERESA BARTHOLOMEW
(by her Attorney-in-fact Joseph Ewart Layne)

Claimant

and

ARIZA CREDIT UNION LTD

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Jerry Edwin for the Claimant

Mrs. Celia Edwards, QC with her Ms. Celene Edwards for the Defendant

2021: October 7;
2022: February 8.

JUDGMENT

[1] **ACTIE, J.:** This claim is brought by Theresa Bartholomew, (Ms. Bartholomew) against Ariza Credit Union Ltd (the credit union) for breach of duty of care and breach of the provisions of the Co-operative Societies Act¹. Ms. Bartholomew contends that the credit union breached its duty of care by failing to ensure that she received independent legal advice before she entered into the mortgage with the

¹ Cap. 66 A of the 2010 Continuous Revised Edition of the Laws of Grenada.

credit union. Additionally, Ms. Bartholomew contends that the credit union's action in continuing to charge interest on her mortgage account after it has been "called in" or formally demanded is unlawful and contrary to the provisions of the Co-operative Societies Act.

Claimant's case

- [2] Ms. Bartholomew pleads that in 2007, she entered into a mortgage agreement with the credit union for a mortgage in the sum of \$340,511.00. At the time of the mortgage, Ms. Bartholomew was 70 years old. As such, Ms. Bartholomew pleads that she was advised by the credit union that her son, Cuthbert Bartholomew, would have to be added as a borrower on the mortgage. Therefore, Ms. Bartholomew's son, who was 37 years old at the time, was added as the principal borrower of the mortgage.
- [3] Additionally, Ms. Bartholomew pleads that the terms of the mortgage agreement required her to pay a monthly instalment of \$4,135.00 for a period of 120 months. In order to secure the mortgage Ms. Bartholomew avers that she used her property situate at Mt. Nesbit in the parish of Saint John. The proceeds of the mortgage were used to construct a dwelling house on the property which would be used as her retirement home. Ms. Bartholomew avers that the credit union was aware that it was highly likely that she would require the assistance of her son in order to consistently service the mortgage. Ms. Bartholomew avers that without her son being a party to mortgage she would not have received the mortgage.
- [4] Further, Ms. Bartholomew pleads that she was not represented by a lawyer or other professional at the time of entering in the mortgage. She avers that the credit union did not advise her to obtain independent legal or other professional advice before she entered into the mortgage. Moreover, Ms. Bartholomew pleads that she was not advised by the credit union that if she fell behind with her payments that she could end up paying far in excess of what was expected under the mortgage. Ms.

Bartholomew avers that she had total confidence in the credit union since as a member she considered that they were working on her behalf.

- [5] In 2009, Ms. Bartholomew avers that she lost her job during the world financial crisis and experienced difficulties in properly servicing the mortgage. However, Ms. Bartholomew avers that she made payments whenever she could. Further, she pleads that her son has never assisted her in servicing the mortgage which she says was disclosed to the credit union when she was unable to meet the instalments.
- [6] In or about 2018, Ms. Bartholomew avers that she was informed by the credit union that the mortgage was being restructured. Ms. Bartholomew states that she paid the sum of US \$600.00 monthly towards the payment of the mortgage. It was Ms. Bartholomew's understanding that by paying US \$600.00 monthly she would be able to pay off her mortgage in 15 years. Further, Ms. Bartholomew pleads that she did not receive any legal or professional advice regarding the restructuring of the mortgage neither was she advised by the credit union to obtain independent legal or professional advice with respect to the restructuring of the mortgage. Additionally, Ms. Bartholomew pleads that she did not sign any document in relation to the restructuring of the mortgage agreement.
- [7] Ms. Bartholomew avers that she was informed by one Joseph Ewart Layne that her payments were only servicing the interest and the mortgage amount was not reducing. She says that despite paying the credit union in excess of \$360,000.00 since 2007 in servicing the mortgage of \$340,000.00, the credit union is contending that she currently owes in excess of \$350,000.00.
- [8] Moreover, Ms. Bartholomew avers that she has entered into an agreement for sale of the said property. Ms. Bartholomew states that she understands her obligation to pay the credit union but is of the view that in all the circumstances it is unfair for the credit union to receive \$350,000.00 from the proceeds of sale of the property, given that she originally borrowed \$340,511.00 from the credit union.

Defendant's case

- [9] On 31st March 2021, the credit union filed a defence and counterclaim in response to the fixed dated claim. The credit union pleads that the terms of the mortgage were explained to Ms. Bartholomew in 2007 including the borrowing age. The credit union avers that Ms. Bartholomew did not qualify for the mortgage based on her age at the time. Therefore, Ms. Bartholomew informed the credit union that her son, Cuthbert Bartholomew, who at time resided and worked in the United States of America would join in the mortgage as the primary applicant. As such, the mortgage requirements were met and the mortgage was granted to Ms. Bartholomew and her son, Cuthbert.
- [10] The credit union pleads that the mortgage offer contains the terms and conditions which were clearly stated. It provided for a monthly instalment of \$4,135.00. All of the documents in respect of the mortgage, including the promissory note were signed by Ms. Bartholomew and her son in the presence of a Notary Public and returned to the credit union.
- [11] As it relates to Ms. Bartholomew's allegations that she was not advised before executing the documents in respect of the mortgage, the credit union pleads that:-
- (1) It was not under a duty to advise Ms. Bartholomew to seek independent legal advice.
 - (2) Further, there was no duty to advise Ms. Bartholomew of the danger of falling into what she terms as a "debt trap".
 - (3) The serious consequence of defaulting on the mortgage was explained to Ms. Bartholomew before she contracted for the mortgage. She signed the mortgage indicating that she understood and accepted the same.
 - (4) Had Ms. Bartholomew made efforts to meet the agreed monthly repayments, she would not have fallen into the "debt trap".
 - (5) Ms. Bartholomew chose to ignore the letters sent to her when she fell into arrears advising her to contact the credit union to make arrangements to service the mortgage as expected.

(6) Moreover, Ms. Bartholomew was fully aware of the monthly repayments of \$4,135.00 and was in a position to pay the repayment, having regard to two pension incomes one of which was in the sum of US \$1,782.80.00. The credit union further avers that one of Ms. Bartholomew's pension income was clearly capable of making the monthly mortgage instalment. However, Ms. Bartholomew insisted on paying US \$600.00 which is equivalent to EC \$1,601.32.

[12] In or about 2015, the mortgage was restructured at the instance of Ms. Bartholomew and her son to provide for a lower repayment and interest rate. The interest rate was reduced from 8% per annum to 6.99% per annum and the repayment was reduced from \$4,135.00 to \$2,800.00 per month. However, the credit union pleads that Ms. Bartholomew continued to pay US \$600.00.

[13] With respect to Ms. Bartholomew's request to sell the property and pay the principal only, the credit union considered the request and rejected it. The credit union pleads that it has no objection to Ms. Bartholomew paying off the mortgage and is prepared to execute a reconveyance.

[14] The credit union denies that it has managed the mortgage contrary to the provisions of the Credit Union Act as alleged or at all. Further, it denies that it has breached regulations 28, 29, and 33 of the Co-operative Societies Regulations as alleged. Equally, the credit union denies that when a loan or mortgage is called in the interest ceases to accrue.

[15] The credit union denies that section 33 of the Limitation of Actions Act² is applicable to waive the accrued interest on the mortgage.

[16] In the premises, the credit union counterclaims for the sum of \$321,202.80 together with interest continuing at the rate set out in the mortgage and costs.

² Cap, 173 of the 2010 Continuous Revised Edition of the Laws of Grenada

Issues

- [17] The court is to determine the following issues:
- (1) Whether the credit union had a duty of care to ensure that Ms. Bartholomew obtained independent legal advice.
 - (2) Whether there was undue influence in the mortgage transaction.
 - (3) Whether the credit union is entitled to the accrued interest on the balance of the mortgage.

Discussion

Duty of care to ensure Ms. Bartholomew received independent legal advice

Claimant's submissions

- [18] Counsel for Ms. Bartholomew, Mr. Jerry Edwin, submits that the defendant in the case at bar is not merely a bank, but is a membership organisation. Mr. Edwin submits that at the time when Ms. Bartholomew applied for the mortgage from the credit union she was member at the age of 70 years. Further, M. Edwin submits that by the time the mortgage was processed, Ms. Bartholomew and the credit union had extensive interactions and as such knew of her financial situation. Therefore, having regard to her age and income, it was reasonably foreseeable that Ms. Bartholomew would default on the mortgage.
- [19] Mr. Edwin states that the credit union advised Ms. Bartholomew that she did not qualify for the mortgage. However, the credit union went further and advised Ms. Bartholomew that she should get someone to join as a party to the mortgage agreement. Therefore, Mr. Edwin avers that Ms. Bartholomew obtained her son and as such the credit union approved the mortgage and placed him as the principal borrower.
- [20] With respect to whether it is reasonable to impose a duty of care in the circumstances, Mr. Edwin refers the court to the decision of **Clement Lawrence et**

al v First St. Vincent Bank Limited³. Counsel submits that in the case at bar there was great inequality of bargaining power between Ms. Bartholomew and the credit union. Mr. Edwin submits that Ms. Bartholomew is of limited education with a great ambition to build her retirement home in Grenada. Additionally, Mr. Edwin submits that, having regard to the interest accruing on the mortgage in the event of default, it was reasonably foreseeable that if Ms. Bartholomew, who was 70 years at the time, did not find a reliable person to assist her with the mortgage she was at risk of falling into a “debt trap”.

Defendant’s submissions

[21] Conversely, counsel for the credit union, Mrs. Celia Edwards Q.C, with respect to the issue whether the credit union should have insisted on Ms. Bartholomew obtaining independent legal advice before taking the mortgage submits that there was a contractual relationship between the credit union and Ms. Bartholomew. In essence, Mrs. Edwards avers that at all material times the mortgage was for the benefit of Ms. Bartholomew and she knew the terms of the mortgage and the risks involved before she entered into it. Mrs. Edwards referred to the pronouncements made in the decision of **Clement Lawrence et al v First St. Vincent Bank Limited**⁴, where his Lordship Webster JA held:

“In determining whether it is fair, just and reasonable for the court to impose a duty of care, the question is largely a matter of public policy. The taking of a mortgage over Mr. Lawrence’s property was entirely in the interest of the Bank with no benefit to Mr. Lawrence. Having regard to the reasonable foreseeability of damage to Mr. Lawrence, as well as his proximity to the Bank, it is fair and reasonable to impose a duty of care on the Bank in relation to Mr. Lawrence. The Bank acted negligently by failing to discharge its duty in that it allowed Mr. Lawrence to mortgage his property without obtaining written authorisation from him, failed to inform him that Mr. McBarnett was not in a financial position to service the loan, failed to ensure that Mr. Lawrence obtained independent legal advice, and failed to promptly inform Mr. Lawrence that the loan was in default.”⁵

³ SVGHCVAP2014/0016

⁴ Ibid

⁵ SVGHCVAP2014/0016 at para. 3 of page 3

[22] Mrs. Edwards Q.C submits that none of the elements necessary to impose a duty of care on the credit union as stated in the **Clement Lawrence** decision apply in the case at bar. Mrs. Edwards avers that the claimant in the **Clement Lawrence** decision was not informed of his obligation or of the consequences. Further, Mrs. Edwards Q.C avers that the above decision is distinguishable from the case at bar, since at all material times Ms. Bartholomew knew how what her monthly repayments were and the consequences of falling into arrears.

[23] Equally, Mrs. Edwards Q.C states that Ms. Bartholomew was warned when she fell into arrears and the mortgage was restructured to facilitate a lower payment. Therefore, Mrs. Edwards submits that there is no duty of care on the credit union to ensure that Ms. Bartholomew obtained independent legal advice. Mrs. Edwards Q.C further submits that Ms. Bartholomew at all times acted of her own free and voluntary act and was fully aware of the consequence for non-payments of the monthly repayments.

Analysis

[24] Under the common law, a bank or similar financial institution is not generally under a duty of care to explain or advise a customer on the nature and effect of a proposed transaction. This principle was elucidated by the Privy Council in **National Commercial Bank (Jamaica) Limited v Hew and Others**⁶ and adopted by our Court of Appeal in **Clement Lawrence et al v First St. Vincent Bank Limited**⁷.

[25] However, Webster JA [Ag.] in **Clement Lawrence** further explained that a bank has duty to its customers to exercise reasonable care and skill⁸. Webster JA also elucidated at paragraph 18 that: -

⁶ [2003] UKPC 51

⁷ SVGHCVP2014/0016

⁸ Ibid at para. 17

“Following the decision in *Donoghue v Stevenson*, the test has evolved into a three-way test that is best summarised by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman and Others* as:

“What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

The three elements of the test are therefore: (1) reasonable foreseeability of damage; (2) a relationship characterised by proximity or neighbourhood between the wrongdoer and the person damaged; and (3) that the law would consider it fair, just and reasonable to impose a duty of care.” (My emphasis)

Reasonable foreseeability

- [26] In relation to the element of reasonable foreseeability, it is the evidence that at the material time when the mortgage was being processed Ms. Bartholomew was an elderly member of the credit union. Further, it is not disputed that Ms. Bartholomew did not initially qualify for the mortgage. The evidence suggests and the court accepts that the credit union advised Ms. Bartholomew to get someone to become a party to the mortgage. Therefore, Ms. Bartholomew sought the assistance of her son, Cuthbert Bartholomew who joined her as a party to the mortgage. The credit union accepted the arrangement and approved the mortgage. Ms. Bartholomew was not a surety but was a co-borrower of the mortgage with her son being the principal borrower.
- [27] The court accepts the evidence that Ms. Bartholomew presented the credit union with a document revealing that she was in receipt of a monthly pension income in the sum of US \$1,782.80 equivalent to approximately EC \$4,760.07 which would have covered the monthly repayment of the mortgage. The court further accepts that the credit union relied on Ms. Bartholomew’s evidence of her pension income

of US \$1,782.00⁹ as proof that she was capable of meeting the monthly mortgage repayments. However, the evidence from the transaction history reveals the majority of the payments towards the mortgage were well below the total agreed monthly repayment sum. Therefore, as a consequence, the interest continued to accrue on the principal sum. In the premises, having regard to the evidence, the court is not satisfied that the defaults in the mortgage repayments by Ms. Bartholomew were reasonably foreseeable, since she provided proof that her pension income would have covered the repayments.

Proximity

- [28] In the case at bar, the financial institution in question is a credit union which is somewhat different from a traditional commercial bank. A credit union is a financial institution that operates as a co-operative and its customers are members of the institution. It can be argued that there is a relationship between the credit union and Ms. Bartholomew as a member which may be proved to satisfy the proximity element of a duty of care. The Privy Council in **National Commercial Bank (Jamaica) Limited v Hew and Others**¹⁰ stated:

“Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker-customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case¹¹.” (My emphasis)

- [29] Therefore, given the explanation by the Privy Council in **National Commercial Bank** the relationship of trust and confidence between the credit union and Ms. Bartholomew must be proved by facts. The court is of the view that Ms. Bartholomew has failed to lead such facts tending to show that relationship of trust.

⁹ Certificate of exhibits filed on 23 February 2021 marked “JEL 4” as mentioned and referred to in the Affidavit of Joseph Ewart Layne

¹⁰ [2003] UKPC 51

¹¹ Ibid at para. 31

Fair, just and reasonable to impose a duty of care

- [30] The question then arises whether the credit union as a financial institution similar to that of a commercial bank has a duty to its members to exercise reasonable care and skill? In determining this question, the Court of Appeal in **Clement Lawrence** held that it is “largely a matter public policy¹²”. Therefore, the court will examine the circumstances of the case at bar to determine whether it is fair, just and reasonable to impose a duty of care.

Analysis

- [31] Mr. Edwin, counsel for Ms. Bartholomew, relied on the pronouncements made by the court in **Clement Lawrence**¹³ in support of his submissions. However, the court agrees with Ms. Edwards Q.C that the facts in that decision are distinguishable from the facts in the case at bar. In that decision Webster JA stated that:

“The facts of this case are peculiar. The Bank allowed Mr. Lawrence, an elderly man of 90 years, who was partially blind and physically incapacitated and who had no income, to mortgage his only property (his home) as security for a loan to Mr. McBarnett, in circumstances where the Bank was aware that Mr. McBarnett’s income could not service the loan. There is no evidence to suggest that Mr. Lawrence received any proceeds of the loan or any other benefit from the mortgage. There is also no documentary evidence to suggest that Mr. Lawrence authorised the Bank to issue a loan to Mr. McBarnett, nor that he held himself out as guarantor of the loan. Having regard to the circumstances of the mortgage transaction, there is no doubt that the transaction did not benefit Mr. Lawrence and was manifestly disadvantageous to him.¹⁴”

- [32] Again, it is not disputed that Ms. Bartholomew initially approached the credit union for a mortgage to construct her retirement home on land which she owned at Mt. Nesbit, Saint John. However, given Ms. Bartholomew’s age, she but did not qualify for the mortgage. The court notes that Ms. Bartholomew was not a mere surety or guarantor to the mortgage. She was a co-borrower of the mortgage and had a direct pecuniary interest in its proceeds since they were used to construct her home. It is Ms. Bartholomew who stood to benefit most from the transaction. The court is of the

¹² Ibid at para. 22

¹³ SVGHCVP2014/0016

¹⁴ Ibid at para. 41

view that there was nothing peculiar on the face of the mortgage that requires the court's intervention to set aside. The terms of the mortgage were clear and not excessive or unconscionable.

[33] Moreover, there is no evidence before this court of the discussion between Ms. Bartholomew and her son which led to him to become a party to the mortgage agreement with the credit union. Mr. Bartholomew was not made a party to the proceedings nor did he give evidence in the matter. Further, there is no evidence that Mr. Bartholomew received any financial benefit from the proceeds of the mortgage. Ms. Bartholomew had provided evidence of her means and ability to make the monthly payments. Therefore, it is reasonable to form the view that the mortgage transaction was not "manifestly disadvantageous" to Ms. Bartholomew as formulated by His Lordship Webster JA in **Clement Lawrence**. Accordingly, the court is of the view that it would not be fair, just and reasonable to impose a duty of care on the credit union to ensure that Ms. Bartholomew received independent legal advice.

Did Ms. Bartholomew understand the nature and effect of the mortgage?

[34] The evidence tendered on behalf of Ms. Bartholomew by Mr. Joseph Ewart Layne¹⁵ reveals Ms. Bartholomew's transaction history on the mortgage account. The evidence reveals that between 31st July 2008 and 23rd May 2018 the full monthly mortgage repayment of \$4,135.00 was only paid a few times. Additionally, this evidence suggests that Ms. Bartholomew was fully aware of the agreed monthly repayment sum of \$4,135.00 and made some attempts to meet the repayments in full. Ms. Bartholomew's conduct in making those repayments of \$4,135.00 suggests that she acquiesced to the agreed monthly repayment sum contained in the promissory note. Accordingly, it was not open to Ms. Bartholomew to unilaterally pay the sum of US \$600.00 towards the mortgage repayments.

¹⁵ Certificate of exhibits filed on 23 February 2021 marked "JEL 4" as mentioned and referred to in the Affidavit of Joseph Ewart Layne filed on even date.

- [35] Equally, there is no evidence that the credit union knew that Ms. Bartholomew did not understand the nature and effect of the mortgage agreement. The evidence reveals that the mortgage was executed by Ms. Bartholomew and Mr. Bartholomew before a Notary Public in the United States of America. The mortgage contains two notarial certificates for Ms. Bartholomew and Mr. Bartholomew. The notarial certificate for Ms. Bartholomew reveals that she appeared before one Marcia Mitchell, a Notary Public for the State of New York, on 5th April 2008 and acknowledged that she executed the mortgage of her own volition. The Notary further certifies that “I having previously satisfied myself that the said Theresa Bartholomew fully understood the nature and effect thereof”. Likewise, the notarial certificate for Mr. Bartholomew was executed in a similar manner.
- [36] Moreover, Ms. Bartholomew has not led any evidence that she was incapable of understanding the nature and terms of the mortgage transaction. There is no evidence that she was incapable of reading the documents in connection with mortgage or lacked the capacity to understand the basic terms of the mortgage.
- [37] In the premises, the court is of the view that mortgage was not manifestly disadvantageous to Ms. Bartholomew as she benefited financially from the mortgage. Equally, the court is not satisfied that the terms of the mortgage were unfair, oppressive or unconscionable in the circumstances. There is no evidence that the mortgage was a “debt trap” as counsel for Ms. Bartholomew suggests. The agreed mortgage repayment sum included the accrued interest. The evidence reveals that Ms. Bartholomew was inconsistent in meeting the agreed monthly repayment sum. She unilaterally altered the payment sum to US \$600.00 monthly. As such, the principal on the mortgage continued to accrue to her and her son’s detriment.
- [38] In summary, the evidence suggests and the court accepts that Ms. Bartholomew fully understood the nature and effect of the terms of the mortgage agreement and sufficiently obtained independent advice from the Notary Public in New York as to the nature and effect of the transaction. The credit union was therefore obliged to

rely on the notarial certificates as proof that Ms. Bartholomew and her son both fully understood the nature and effect of the transaction. Accordingly, the court is of the view that, having regard to the totality of the evidence, the credit union was not under a duty to ensure that Ms. Bartholomew received further independent legal or professional advice.

Undue influence

[39] On this issue, Mr. Edwin submits that the credit union was under a duty to ensure that Ms. Bartholomew received independent legal advice, given the relationship of confidence between her and the credit union. Further, he submits that in view of that relationship and the arrangement between Ms. Bartholomew and her son, the terms of the arrangement were materially disadvantageous to Ms. Bartholomew. Mr. Edwin relies on the decisions of **Barclays Bank Plc v O'Brien**¹⁶ & **Another** and **National Westminster Bank Plc v Morgan**¹⁷.

[40] Additionally, Mr. Edwin pleads that:-

- (1) Ms. Bartholomew as a member of the credit union reposed confidence in the institution and during the negotiation for the mortgage, the credit union gave her advice about the transaction.
- (2) The credit union informed Ms. Bartholomew that she did not qualify for the mortgage and as such suggested that she should get someone to become party to the mortgage with her.
- (3) The credit union accepted Ms. Bartholomew's son and placed him as the principal borrower.
- (4) The credit union was aware of the risk that Ms. Bartholomew would default on the mortgage if she did not receive assistance from her son in servicing the mortgage.

¹⁶ [1993] 4 All ER 417 at page 423

¹⁷ [1985] 1 All ER 821 quote extracted from the Headnote

- (5) The credit union's stance on the continued accrual of interest on the mortgage after a default in repayments created a "debt trap" which was manifestly disadvantageous to Ms. Bartholomew.
- (6) Given the relationship of confidence between Ms. Bartholomew and credit union undue influence on Ms. Bartholomew can be presumed as referred to by the House of Lords as "Class 2B" in **Barclay's Bank Plc v O'Brien & Another**.
- (7) Ms. Bartholomew faced a manifest disadvantage given the credit union's position that interest would accrue even if she defaulted on the mortgage.

[41] The Privy Council in **National Commercial Bank (Jamaica) Ltd v Hew et al**¹⁸ at paragraphs 29-30 of the judgment explained the principle of undue influence as follows:

"Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. As Lord Nicholls of Birkenhead observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at p 794-5:

"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. ...

... [It] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage."

Thus the doctrine involves two elements. **First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.**" (My emphasis)

¹⁸ [2003] UKPC 51

Discussion and Analysis

[42] In explaining the requirements of a disadvantageous transaction, Albertini J in **Bank of Saint Lucia Limited v Anne Felicien et al**¹⁹ stated:

“to satisfy the requirement of an oppressive or disadvantageous transaction, it has been said that “**‘the resulting transaction must not simply be hard or improvident but overreaching and oppressive’ so that its terms, together with the conduct of the stronger party, ‘shock the conscience of the court’.**” (My emphasis)

[43] On the facts, there is no dispute that Ms. Bartholomew financially benefitted from the mortgage used to construct her home. Further, the evidence before the court reveals that Ms. Bartholomew has entered into a sale agreement with third parties to sell the said property for the purchase price \$480,000.00 without the credit union’s approval. In fact, the court notes that Ms. Bartholomew is in receipt of the proceeds of sale of the property and filed an application²⁰ seeking to pay some of the proceeds of the sale into the court.

[44] There is no evidence that the credit union exploited Ms. Bartholomew nor does the evidence suggest that the mortgage itself was manifestly unconscionable, oppressive or was financially disadvantageous to Ms. Bartholomew. The evidence reveals that it is Ms. Bartholomew and her son who contributed to the accumulation of the accrued interest on the principal sum by failing to pay the agreed monthly repayment sum. The court is of the view that the original interest rate of (8%) per annum was not excessive. The evidence reveals and the court accepts that the credit union restructured the mortgage at the instance of Ms. Bartholomew to lower the repayments and the interest rate to 6.99% per annum.

[45] The court notes Ms. Bartholomew’s evidence that she lost her employment in 2009. However, while the court accepts that this may have contributed to her default in the mortgage repayments, Ms. Bartholomew and her son were still under an obligation

¹⁹ SLUHCM2018/0028 at para 57.

²⁰ Application without notice filed on 8th March 2021

to meet the repayments. Therefore, Ms. Bartholomew and her son were in clear breach of the terms of the mortgage.

- [46] On this point, Lord Millett in the Privy Council decision of **National Commercial Bank (Jamaica) Limited v Hew & et al**²¹ stated at paragraph 33 of the judgment that:

“However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. **Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people**: see *Allcard v Skinner* (1887) 36 Ch D 145, 182.” (My emphasis)

- [47] Equally, the facts of this case are different from the **Barclays Bank plc v O'Brien & Another**²² decision which is relied on Ms. Bartholomew. In **O'Brien**, the court found it necessary to set aside a credit transaction since it was financially disadvantageous to the surety of the transaction. In that decision, a wife (Mrs. O'Brien) acted as surety for her husband's overdraft facility, but was not advised of the nature and effect of the transaction nor to seek independent legal advice before signing. The court found that Mrs. O'Brien ought to have received independent legal advice, since (1) she had no direct pecuniary interest in the transaction; (2) the matrimonial home was used to secure the debt; and (3) she personally guaranteed the debt as a surety, among other things.

- [48] Additionally, in **O'Brien**, the court held that:

“Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees: (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances, a creditor will have

²¹ [2003] UKPC 51 at para. 33

²² [1993] 4 All ER 417

taken such reasonable steps to avoid being fixed with constructive notice **if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.**²³
(My emphasis)

- [49] Accordingly, the court is of the view that the principles applied by the House of Lords in **O'Brien** do not avail Ms. Bartholomew. Ms. Bartholomew did not act as surety but was a joint borrower with her son and benefited personally from the proceeds of the mortgage. Again, having regard to the totality of the evidence, the court is of the view that the credit union did not exert any undue influence on Ms. Bartholomew.

Accrued Interest

Claimant's submissions

- [50] In relation to the issue of the accrued interest on the mortgage, Mr. Edwin in his filed submissions states that the credit union is not legally entitled to charge further interest on the mortgage after it has been "called in" or formally demanded. Further, counsel submits that in the absence of an agreement a court has no power at common law to award interest for the late payment of a debt. Mr. Edwin submits that to determine whether the credit union is entitled to interest on mortgage, the court must determine whether the agreement the parties provided for the payment of such interest.
- [51] Mr. Edwin referred the court to the provisions of the offer letter from the credit union and the promissory note. Mr. Edwin submits that there is no provision in the mortgage which addresses circumstances where the credit union "calls in" a mortgage. Mr. Edwin further submits that when the contractual documents are read objectively, taking into all the relevant circumstances, including Ms. Bartholomew's age, the credit union could "call in" the mortgage and sell the Ms. Bartholomew's property to recover the principal and accrued interest together with other associated expenses in connection to the sale or recovery of monies due at that time.

²³ [1993] 4 All ER 417 at page 431-432

[52] In essence, Mr. Edwin submits that there is nothing in the mortgage agreement between the parties which stipulates that after the mortgage is formally demanded or “called in” the credit union is entitled to continue to charge interest on the balance of the mortgage until it is fully paid off or satisfied. As such, Mr. Edwin submits that instead the credit union should have considered selling the mortgaged property to recover its principal and accrued interest at that material time.

Defendant’s submissions

[53] On the other hand, Mrs. Edwards Q.C submits that the mortgage provided that the borrowers, Ms. Bartholomew and her son, covenant to pay the principal, including liabilities “*together with the rate specified in Clause 2 hereof as well as after as before any judgment as obtained hereunder*”. Further, Mrs. Edwards submits that the agreement between the parties provided that interest would accrue on the reducing balance of the mortgage until the entire mortgage is fully satisfied. Counsel submits that the “calling in” of the mortgage does not affect Ms. Bartholomew’s obligation to pay the amount due to the credit union. Mrs. Edwards Q.C relies on the unreported decision of **RBT Bank Grenada Ltd v Devit Simon Jack**²⁴ in support of her submissions.

Discussion and Analysis

[54] The mortgage dated 5th April 2008 provided for interest to accrue on the reducing balance of the mortgage. The second recital of the mortgage states: “*the Borrowers have requested the Lender to lend to the Borrowers a sum not exceeding Three Hundred and Forty Thousand Five Hundred and Eleven Dollars (EC\$340,511.00) Eastern Caribbean Currency which the Lender has agreed to do upon having the repayment thereof with interest thereon secured in manner hereinafter appearing*”.

[55] The mortgage further states that: “*the Borrowers will pay interest on the moneys so due at a fixed rate of Zero Point Six Seven Percent (0.67%) per month for a period*

²⁴ GDAHCV2017/0364 (unreported)

of Thirty-six Months in the first instance on the reducing balance of the mortgage and thereafter at such rate as the Credit Union may from time to time charge.” It is the evidence that the credit union charged interest at a rate of 8% per annum on the mortgage which was restructured and lowered to 6.99% per annum in 2015. In any event, Ms. Bartholomew is not challenging the rate of interest, but challenges the basis on which the credit union can continue to impute interest on the balance of mortgage after it has been “called in”.

[56] Additionally, the promissory note dated 25th August 2007 provides that for value received “Cuthbert Bartholomew & Theresa Bartholomew” promise to pay to the credit union the sum of \$340,511.00 in the amount of \$4,135.00 comprising principal and interest at a rate of 8% per annum for a period of 36 months commencing August 2008 and thereafter a fixed monthly amount over the remaining period of 84 months. In the event of default, the note stated that: *“in case of any default in payment as herein agreed, unless excused by the Board of Directors, the entire balance of this note shall become immediately due and payable on demand.”*

[57] The court notes that there is nothing in the mortgage or promissory note which suggests that the accrual of interest on the outstanding balance is suspended when the mortgage is “called in” or formally demanded after a default in the mortgage repayments by the borrowers. Equally, there is no provision in the mortgage or promissory note which expressly prohibits the credit union from charging or imputing interest on the balance of the mortgage after it has been “called in”.

[58] In fact, the mortgage *expressly* states that interest accrues on the reducing balance of the mortgage. Indeed, interest continued to accrue on the balance of the mortgage regardless of any default in repayment by Ms. Bartholomew and her son as borrowers. The “calling in” of the mortgage by the defendant was a formal demand for the payment of entire sum due and owing by the borrowers at the time. The interest and charges are included in the mortgage agreement. The “calling in” of the mortgage did not automatically stop the interest and charges contemplated in the mortgage agreement signed by the parties.

Breach of the Co-operative Societies Act

[59] In relation to Ms. Bartholomew's arguments that the credit union breached regulations 28, 29 and 33 of the **Co-operative Societies Act**²⁵, the court notes those provisions speak to the reporting of the income of the credit union in relation to the calculation of accrued interest on bad debts or non-performing loans as income for reporting purposes.

[60] **Regulation 28 of the Co-operatives Societies Act** states:-

28. Bad and doubtful allowance

- (1) When a credit union identifies a loan as a doubtful or uncollectible loan, the credit union shall immediately allow for the doubtful loan by—
 - (a) **establishing on its books and accounts an allowance for the doubtful loan in an amount equal to the difference between—**
 - (i) **the book value of the loan, including any interest due and unpaid and interest accrued, and**
 - (ii) **the realisable book value of the loan as estimated by the credit union;**
 - (b) **reporting on any income statement it prepares ...**
 - (c) **reporting on any balance sheet it prepares, including its annual balance sheet...**
- (2) Notwithstanding sub regulation (1), a former-Act society...
- (3) **A credit union shall report, at the end of each financial year, to the Registrar—**
 - (a) the number and amount of doubtful loans ...
 - (b) ...
 - (c) ...
- (4) ...
- (5) **Where a credit union determines that the allowance for doubtful loans required by subregulation (1) will result in a net loss on its income statement for the financial year, it shall immediately notify the Registrar in writing of that fact.**(My emphasis)

[61] Further, regulation 33 of the said Act states:

²⁵ Cap. 66A of the 2010 Continuous Revised Edition of the Laws of Grenada

33. Interest on loan

(1) For the purposes of section 199(2) of the Act, **no interest payments are to be included in the credit union's income where the interest payment is with respect to a doubtful loan** for which an allowance has been made pursuant to regulation 28.

(2) A credit union may include in its income a maximum of six months accrued interest with respect to a loan. (My emphasis)

[62] A fair construction of the regulations, especially regulation 28(1), reveal that the statutory requirement which directs credit unions not to include interest on bad debts or “doubtful loans” as income *is for reporting purposes* in its financial statements to the relevant statutory body. Regulation 33 expressly prohibits the inclusion of accrued interest payments on doubtful or non-performing loans in the credit union's income. Indeed, a fair construction of the regulation 33 suggests that the accrued interest on a doubtful loan ought not to be included as income for accounting purposes, since it has not been collected.

[63] In any event, there is no provision in the regulations which the court have been referred to that expressly prohibits the credit union from charging interest on loans that have been “called in” or formally demanded after a default in repayment. Therefore, the court is of the view that the provisions of the regulations do not assist Ms. Bartholomew and are wholly irrelevant to the issues in the case at bar. Accordingly, the credit union is entitled to its accrued interest on the reducing balance of the mortgage as provided by the terms of the mortgage.

Conclusion

[64] In summary, the court is of the view that the credit union in the circumstances of this case did not owe the claimant a duty of care to advise her of the nature and effect of the mortgage agreement or to ensure that she received independent legal or professional advice before executing the mortgage agreement.

Additionally, the circumstances of the case at bar, do not justify an imposition of a duty of care to the claimant and even so the notarial certificate by independent notary in New York indicates that the nature of the agreement was fully discussed and understood by the borrowers.

[65] The court is satisfied that the general terms of the mortgage were clear and simple to the claimant, including the interest rate, monthly repayments and the term of years of the repayments. Moreover, there is no evidence that the claimant did not fully understand the general terms of the mortgage.

[66] In respect of the issue of accrued interest, there is no evidence of any covenant or legal obligation on the credit union to suspend accrued interest after default in repayments or where it has been “called in”. Therefore, the credit union is entitled to the principal sum together with the accrued interest of the mortgage.

[67] For all the above reasons, it is ordered and directed as follows:

- (1) The claimant’s fixed date claim filed on 17th February 2021 is dismissed.
- (2) The defendant’s counterclaim filed on 31st March 2021 is granted.
- (3) The claimant shall pay to the defendant:
 - (a) The sum of \$321,202.80 together with interest at the rate of 3% per annum from the filing of the counter-claim on the 31st March 2021 to the date of judgment and at the rate of 6% per annum from the date of judgment until payment in full.
 - (b) Prescribed Costs in the sum of \$40,870.28 pursuant to CPR 65.5

Agnes Actie

High Court Judge

By the Court

Registrar