

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CASE NO. DOMHCV2014/0194

BETWEEN: -

**THE BANK OF NOVA SCOTIA
ASSENDANCY CARIBBEAN 1 LTD**

Complainants

And

**AVANDALE ROBINSON GRIFFITH
MARVALEE GRIFFITH**

Defendants

Appearances:

Mrs. Noelize Knight Didier of Harris, Harris & Didier for the Claimants

Mr. Anthony Commodore of Elijah Law Chambers for the Defendants

2017: May 2
September 4,5
2020: August 31
September 1
December30
Issued: 12th February 2021

JUDGMENT

- [1] **Stephenson J.** This is a contested debt collection case. The claimant formerly called and carrying on business as the Bank of Nova Scotia now trading at the Republic Bank “the bank” is a bank that carries on business as such and provides general banking services to the people of The Commonwealth of Dominica including but not restricted to making loans to its customers.
- [2] The bank has made a claim¹ for the sum of \$118, 337.40 being monies due and owing on a loan number 63436“(the Loan”) made to Mr. Avandale Griffith and Mrs. Marvelene Griffith (“the defendants”). The bank seeks to recover this sum which is inclusive of interest and other charges as at the 19th March 2014, plus costs and interest which continues to accrue on the principal owing to the bank and judgment interest from the date of judgment to the date of payment. The bank also seeks an order that the mortgaged property be sold pursuant to the terms of the Title By Registration Act².
- [3] A fixed date claim was filed by the bank on the 4th June 2014 with an affidavit in support of claim with exhibits sworn to by Mervin Burton, the cross border adjuster on the 27th May 2014 and filed on the 4th June 2014.
- [4] The defendants together on the 5th September 2014 filed an affidavit in reply to the affidavit in support of the claimant’s claim. Witness statements were filed on behalf of the defendants and a witness summary on behalf of the claimant. The Court heard sworn evidence from Mr. Mervin Burton on behalf of the bank and from the first named defendant. The second named defendant was not present at the time of trial and therefore her witness statement was not taken into consideration in this decision.³

¹ Claim Form dated the 29th May 2014 and filed on the 4th June 2014

² Chapter 56:50 of the Laws of the Commonwealth of Dominica

³ Pursuant to Part IV of CPR 2000

Background

[5] It is the bank's claim that on the 25th April 2000 it entered into a loan arrangement with the defendants who signed a commitment letter and promissory note on the said date. The bank claims that it lent to the defendants the sum of \$153,000.00 with interest at the rate of 11% per annum from the 25th day of April 2000, which principal and interest was to be repaid by the defendants by a first installment of \$2,430.35 on the 1st June 2000 and continuing thereafter with monthly installments of \$2,107.58 to be paid on the 1st day of each month thereafter. The bank exhibited a copy of the Promissory Note.

[6] The bank contends that the interest on the loan was later reduced to 7.50% per annum and that there was a further agreement between them and the defendant that the loan would be secured by a mortgage on a portion of land held by Certificate of Title in the name of Robinson Griffith which parcel was registered in Land Titles Register Book A4 Folio 53, known as Lot S787 Pottersville housing scheme in the Parish of St George in the State of Dominica containing 1853 square feet and bounded as follows on the North West by Bowers Lane; on the North East by Lot S788A; on the South East by Lot 790A and on the South West by Lot 786. A copy of the Certificate of title of the said property was duly exhibited by the bank.

[7] A caveat was entered by the bank dated the 2nd May 2000 and presented on the 10th May 2000. A memorandum of deposit of the certificate of title dated the 25th April 2020 was also exhibited by the bank. Also exhibited to the bank's claim was the commitment letter dated the 25th April 2000 addressed to the defendants and signed by the defendants and one C.A. Smith the bank's manager. This document sets out the details of the loan including but not limited to, the loan amount, the purpose of the loan, the term of the loan, the rate of interest of the loan with provisions for the variation of interest, repayment, prepayment security and default. It is noted that as per this agreement the monthly payments were to be

deducted from the defendants' account number 7132 on the 1st day of each month.

[8] It is the bank's claim that the defendants failed to meet their payment obligation in accordance with the promissory note and as at the 19th March 2014 they made a total payment of \$160,767.94 which included payment in the sum of \$95,941.85 towards the principal and \$64,735.09 on the Interest.

[9] The bank claims that as at the 27th May 2014 the amount due and owing on the loan was as follows:

a. Principal outstanding	\$57,058.15
b. Interest due but not paid	\$50,010.83
c. Other charges	<u>\$11,268.42</u>
Total	<u>\$118,337.40</u>

[10] The bank also contends that interest continues to accrue at the reduced contracted rate of 7.50% per annum on the outstanding principal which amounts to \$11.72 until the date of judgment and thereafter at the rate of 5% per annum on the judgment sum as provided by law.

[11] The defendants deny that they owe the money as claimed and they also deny signing any mortgage documents or entering into any mortgage agreement with the bank.

[12] On the 8th March 2019, an application was made by the bank for the date listed for trial to be vacated and the trial adjourned so that the purchaser Ascendancy Caribbean 1 Ltd could be substituted as the claimant in the matter. An affidavit in support of the application was sworn to by Mervin Burton in support of the application.

[13] Mr. Burton in his affidavit in support of the application averred that the defendants' loan was among the portfolio of loans which were sold by the bank late in 2017 and that he was only able to ascertain and confirm that the loan subject of this matter was included in the portfolio on the 18th October 2018. That at the time affidavit Ascendancy Caribbean 1 Ltd had not yet completed the process of being registered as a company in Dominica.

[14] The trial was then adjourned to the 1st August 2019 and costs were awarded to the defendants for the day.

[15] On the 17th July 2019 the bank made an application for substitution of the claimant. In their application the bank stated that Ascendancy Caribbean 1 Ltd which was a company registered in the Cayman Islands had been registered to do business in the Commonwealth of Dominica. That the sale took place via a master purchase and sale agreement on the 14th December 2017, between the Bank of Nova Scotia and Ascendancy Cayman Holding, which is the parent company of Ascendancy Caribbean 1 Ltd and those parties also entered into an Assignment and Assumption agreement dated the 18th September 2018. That the defendant loan account number 63436 was part of the loan portfolio which was sold.

[16] In his affidavit in support of the application, Mr. Mervin Burton (supra) exhibited the certificate of Registration of Ascendancy Caribbean 1 Ltd, a redacted copy of the Master Purchase and Sale Agreement, a redacted copy of the Amendment to the Master Purchase and Sale agreement and a redacted copy of the Assignment and Assumption Agreement. It is noted that the documents were redacted so as to preserve the confidentiality of other customers of the bank not associated with the case at bar.

[17] By virtue of the Assignment and Assumption agreement dated the 28th September 2018, Ascendancy Caribbean 1 Ltd assumed the liabilities of the bank and the bank sold, transferred, assigned and conveyed to Ascendancy Caribbean 1 Ltd all

of its rights, title and interest in and to the purchased assets as listed in schedule A of the Assignment. The loan subject of the matter at bar among others was listed on page 7 of the said schedule A.

[18] On the 22nd July 2019, this court made the following order *inter alia* that:

1. Ascendancy Caribbean I Ltd⁴ is added as a claimant to this matter;
2. Counsel shall make submissions on the sale of the debt in the case at bar as to whether or not the contractual relations between the defendants and the claimants extend to the Ascendancy Caribbean I Ltd as a matter of law in the absence of a contractual term binding assigns and successors in title on or before the **15th August 2019**;

[33] It is an established principal of banking that lending is central to a bank's business. Loans are considered as the bank's assets.

[34] When a customer seeks to borrow money from the bank there are usually preliminary discussions. The document regarding the negotiations between the bank and its customer who seeks to obtain a loan usually contains information as to the nature of the contemplated loan and some or all of the terms to which the prospective loan will be subject.

[35] There are various terms which have been used to describe this document in the case at bar, the initial document utilised by the bank is called the "one step application for personal banking services", I pause to note that the document presented to the court by the bank is heavily amended, in that there are numbers written over and crossed out all of which are not initialed, which to this court's mind is not good banking practice. This puts the contents of this document into question as to what the court can accept regarding the information contained therein.

⁴ Ascendancy Caribbean 1 Ltd is hereafter in the judgment referred to as the bank

[36] The bank contends in this case that this form was prepared by a former bank manager and its purpose was to record the defendants' (the customers) information. The document was, according to the evidence adduced by the bank signed by the banking officer who processed the loan and by the defendants. The evidence of the first name defendant is that he never signed the document as claimed by the bank and further that he was not even in the Commonwealth of Dominica at the time and date stated on the said document.

[37] What is the legal nature of this document? Was this document intended to bind the parties? The description of the document gives a clear indication as to what is the relevance of the document as it regards the loan? It is an application for a loan. There are loan agreements which are subsequently drawn up and signed.

[38] The bank relies on the agreement made on the 25th April 2000 and the Promissory note and Letter of Commitment. It is the bank's case that the defendants signed both of these documents. Counsel on behalf of the bank quoted the applicable terms of the promissory note and commitment letter and relied on the contents thereof to ground the relationship between the parties herein. The relevant term of the Promissory note states "*For value received the undersigned, jointly and severally promise to pay to the Bank of Nova Scotia at its branch set out above the sum of one hundred and fifty three thousand dollars, together with interest...*" and the relevant provision of the Committal letter which states "*We (the Bank of Nova Scotia) are pleased to inform you that your application for Mortgage Finance has been approved under the following conditions: AMOUNT OF LOAN: \$153,000; PURPOSE OF LOAN: To enable the borrower to payout existing mortgage at another institution (\$90,401.00) and consolidate with existing SPL for home improvements (\$56,545.00)...RATE OF INTEREST....*". And ends, "*We trust that you will find the foregoing acceptable and will so indicate by signing and returning the attached copy*".

[39] The claimant bank also relies on the terms of the Memorandum of Deposit which stated inter alia. *"The undersigned Avandale Griffith of 3 Bowers Lane hereby declares that the title of deeds and other documents specified in the schedule hereto have been deposited with the Bank of Nova Scotia, with the intent to create an equitable mortgage upon all the property (real or personal), mortgage debts and sums of money comprised therein or to which the same or any of them relate for securing the payment and discharge on demand all monies and liabilities now or hereafter due from or incurred by the undersigned to the bank...."* The schedule referred to described the land pledged by the defendants as *"A portion of land @ Bower's Lane, Goodwill measuring 1853 sq. ft. registered in the name of Avandale Griffith"*. The bank contended that this document was signed by the first named defendant.

[40] Counsel Mrs. Knight Didier on behalf of the bank noted that the defendants' contention that they did not agree to borrow the sum of \$153,000.00, but that they agreed to borrow \$25,000.00. Counsel also noted that in their defence the defendants did not deny that the signatures on the loan documents were theirs, however this was categorically denied by the first named defendant in his viva voce evidence. It was also noted by Counsel that the defendants contended in their statement of case that they did not take a mortgage loan and that the bank granted a different loan to the second named defendant without her knowledge and that the bank withdrew monies from their account without authorization. The defendants in their case and in the evidence produced to the court sought to accuse the bank of improprieties.

[41] Mrs. Knight Didier pointed out to the court that the transactions to which the defendants refer pre dated the loan subject of the case at bar and Counsel further pointed out to the court that the defendant made no counterclaim against the bank concerning the bank's actions and their claims and in the circumstances urged the court not to take any note or take the said statements into consideration. I agree with learned Counsel in this regard.

[42] It is the claimant's case that the defendants are indebted to the bank in the principal sum of \$57,058.15 plus interest on the said amount at the agreed and contracted rate of

7.50% per annum from the 19th March 2014 to the date of judgment and thereafter interest on the said \$57,058.15 from the date of judgment at the Statutory rate of 5% per annum to the date of payment.

[43] The bank alleged that the defendants defaulted on their loan agreement and is seeking judgment in that regard.

[44] The burden of proof is on the party who asserts the debt is owed. As a general principle, a case will be made out when if on the evidence available it is open to the court as a tribunal of fact to conclude on the balance of probabilities if the claimant has made out a case.

[45] A bald denial of the debt or the indebtedness is not sufficient so far as the defendants are concerned.

The Claimant's case

[46] Mr. Mervin Burton the Bank's Cross Border Adjuster swore to an affidavit in support of the bank's claim. He also gave viva voce evidence and was examined extensively by Counsel Mr. Anthony Commodore acting on behalf of the defendants.

[47] Mr. Burton also gave a witness summary in support of the claimant's case. His evidence is that an agreement was made on or about the 25th day of April 2000, between the claimant and the defendants herein. The claim is that the Bank lent the defendants the sum of EC\$153,000.00 plus interest initially at the rate of 11% per annum from the 25th April 2000 to the date of payment. The first installment of \$2,430.00.35 was due on the 1st day of June 2000 and thereafter by consecutive monthly installments of \$2,107.58 on the first day of the month and on the 1st day of every month thereafter.

[48] It was Mr. Burton's evidence that the purpose of the loan was to pay off a mortgage loan held by the defendants and that St Paul's Credit Union and to consolidate that amount

with an existing Scotia Plan Loan held by the first named defendant and related charges and fees.

[49] The bank's evidence is that the amount paid to the St Paul's Credit Union was \$90,401.00. Mr. Burton made reference to a cheque stub which was put into evidence showing the payment of this amount to the Credit Union on behalf of the defendants.

[50] The bank tendered into evidence the loan agreement dated the 25th April 2000, the promissory note of even date wherein the defendants promised to repay the bank the sum of \$153,000.00 (one hundred and fifty-three thousand dollars) together with interest calculated on a daily basis at the rate of 11% per annum.

[51] It is the bank's case that the defendant signed both the promissory note and the loan agreement. The bank also adduced and relied on the commitment letter also dated the 25th April 2000, which was addressed to the defendants from the bank informing them of the approval of their loan and setting out the terms of the loan.

[52] This letter of commitment was signed by one C. M. Smith who the court was told by Mr. Burton was the then manager. The defendants, according to the bank both signed the commitment letter thereby agreeing to the terms of the loan offer made by the bank.

[53] It is the bank's case that the defendants made a total of 80 payments toward this loan as at the 7th May 2013. The bank claims that the total repayments made by the defendants towards the principal is \$95,941.85 and the total payments made on the interest as at the 7th May 2013 was \$64, 735.09.

[54] It is the claimant's case that the defendants agreed that the loan would be secured by an equitable mortgage on a portion of land contain 1,853 square feet registered in book of titles A4 Folio 53 registered in the name of "Robinson Griffith". A copy of the certificate of title along with the memorandum of deposit was exhibited by the claimant.

[55] The claimant registered a caveat dated 2nd May 2000 against the Title on the 10th May 2000 and registered in Book of Mortgages III Folio 83 signed off by the Registrar of titles.

[56] The Bank provided the court with print outs of the payments made by the claimants in the form of Record of payments by installments and a copy of the loan history transaction.

The Defendants' Case

[57] The defendants' case as stated in their statements of case (their defence) and based on the *viva voce* evidence of the first named defendant Mr. Griffith is that:

- a. They did not borrow the money from the bank as is claimed;
- b. They also deny signing the documents presented by the bank;
- c. That the first named defendant did have a loan with the bank for the sum of \$25,000.00 previously.

[58] In his evidence before this court Mr. Griffith vehemently denied that the signature on the Bank's documents was his. His contention was that he was out of the country on the dates stated on the documents as he worked at sea.

[59] A review of the defendants' affidavit sworn in reply to the claimant's affidavit in support of its claim filed on the 5th September 2014, the defendants jointly and the *viva voce* evidence of Mr Robinson which was elicited under cross examination shows a number of significant discrepancies.

[60] In his affidavit the first named defendant averred that he did not know Mr. Mervin Burton who swore to the affidavit in support of the claim herein and that he has never done any business with him⁵. Mr. Burton in his affidavit in reply refuted this and averred that Mr. Griffith knows him and he has come into the bank's Roseau Branch on many occasions and has held discussions with him. Under cross examination the first named defendant spoke about going into the bank to speak to Mr. Burton on more than one occasion. It

⁵ See paragraph 5 of the Defendants' affidavit filed on the 5th September 2014

was only in cross-examination that the first named defendant revealed that he in fact knew Mr. Burton after stating in his first affidavit that he did not know him. This is the same Mr. Burton he said in his affidavit that he did not know.

[61] In this affidavit the first named defendant averred that in 2000 he applied to the claimant bank for a loan of EC\$25,000.00 to pay off the Credit Union and that the arrangements between the claimant bank and him was that whatever repayments would be made through deductions from his saving account numbered 7132. Under cross examination the first named defendant said that he never took a loan from the claimant bank in 2000. Subsequently after some probing under cross examination by counsel on behalf of the claimant, he admitted to approaching the bank to pay off the Credit Union. The witness vacillated between borrowing money and not borrowing money.

[62] The first named defendant said that he was never given a loan passbook with loan numbered 63436 so that he could keep track of the loan repayments but in his witness statement filed on the 22nd December 2014, he said that his wife was given such a Loan Account Book in which the deduction and loan transactions were recorded and that it was his wife who conducted business on his behalf whilst he was away at work. It is clear therefore that the first named defendant had access to the bank records contrary to what he was saying that he did not have access to same.

[63] The first named defendant in his affidavit said that the claimants requested that he give security for the loan to pay off the credit union and he agreed that his Certificate of Title for the property at 3 Bowers Lane would be used as security and it is for that reason that his certificate of title is in the claimant's possession⁶ and that it's not for purpose of security for any mortgage loan agreement entered between them and the claimant. Under cross examination the first named defendant stated that he did not tell the bank that he owned property at 3 Bowers Lane Goodwill, he even sought to state that he and his father have a house at 3 Bowers Lane Goodwill. A review of the Certificate of Title to the said property is registered in the sole name of "Robinson Griffith". The claimant's name as

⁶ Paragraph 19 of the Defendants' affidavit

recorded on his passport which was placed into evidence is "Avandale Robinson Griffith". Though first named defendant did not deny owning the said property it appeared to the court that he was seeking to say that the property was not his solely but he and his father's. It is clear to the court that the witness again was not being forthright with the court and his evidence cannot be accepted.

[64] In his viva voce evidence the first named defendant at one point denied authorizing that the claimant bank to take possession of his Certificate of Title again he vacillated on this. In his witness statement he said that the reason that his Certificate of Title was deposited with the claimant was as a security for the repayment of the EC\$25,000.00 to the claimant and that on April 20th 2000, he signed the document and left it with the claimant. Under cross examination Mr. Griffith told this court that he had no need to deliver his certificate of title to the bank as security for that loan as he had sufficient money to cover the loan requested many times over.

[65] The first named defendant in his affidavit averred that he signed a promissory note for the sum of EC\$25,000.00 to repay the Credit Union and he asked his wife the second named defendant to go into the bank and inform them that he had to leave Dominica hurriedly due to an emergency on the vessel he worked with at sea and he signed the documents with the bank before the 25th April 2000 as he was not in Dominica on the 25th April 2000.

[66] The first named defendant averred that he returned to Dominica in July 2000 and that he visited the Claimant bank and informed them that the wrong amount had been paid to the Credit Union. I pause to note that here the first named defendant is saying (admitting) that an amount was paid to the Credit Union on his behalf. Under cross examination the first named defendant agreed that there was a deposit made to the Credit Union account in the sum of \$90,401.10 which paid off the amount owing to the Credit Union. He was however adamant that he did not ask the claimant bank to pay off the amount owed to the credit union.

[67] The first named defendant further averred that he has requested from the bank on numerous occasions documents to show that he owed the amount claimed but he has not received any documents to prove the correctness of the many payments and deduction that have been taken from his savings accounts over the years.

[68] Under cross examination the first named defendant stated that he signed a loan application for \$25,000.00, but he produced no document in support of his statement, he also said that he did not know that the loan was granted. He said he did not sign the commitment letter when the loan was granted neither did he sign the promissory note. Mr. Griffith admitted to signing the witness statement in the matter and the affidavit and he readily accepted that those were his signatures. However, when asked about his signature⁷ on the commitment letter he said it is “supposed to be my signature I am saying I do not know how that came there”.

[69] This witness also did not accept that it was his signature on the promissory note or any of the documents presented by the claimant. The witness told the court that he was born on the 11th July 1954, that information was stated on the bank application form and he agreed under cross examination that he would have given the claimant bank that information.

[70] In spite of denying requesting a loan from the claimant bank the first named defendant under cross examination told this court that he received a letter approving a loan for \$153,000.00 and that he requested a print out of his account and that he saw loan payments were coming out of his account, he however never received any loan money and he never challenged the bank or did he take any action to stop the bank taking out the money out of his account.

[71] Mr. Griffith also under cross examination spoke about going to see Mr. Green and Mr. Burton up and down between them, when he received the letter approving the loan for

⁷ Signature on page 53 of trial bundle number 3

\$153,000. However, in his first affidavit sworn to, he said he did not know who Mr. Burton was neither having any business with Mr. Burton.

[72] Generally, the court was of the view that the first named defendant was not a witness of truth. I have had the opportunity to observe the witness' demeanor and body language as he gave his evidence, I reviewed the affidavit in response to the affidavit in support of the claim herein and I am of the view that some of the defendant's evidence was contrived. The Court was left with the distinct impression that the witness was fabricating his evidence as the case evolved and as his evidence went along.

Court's considerations

[73] The claimant is a licenced financial institution which is authorised to provide lending facilities to the general public in the Commonwealth of Dominica. As the claimant the bank must establish its case on a balance of probabilities which is the standard that will be applied in assessing the evidence in this case.

[74] It is the court that determines what weight to attach to the documents entered into evidence and to take into consideration all the relevant circumstances of the matter. The court must also consider whether the witnesses or the maker of the documents had any incentive to conceal or misrepresent the facts.

[75] There was no direct evidence offered by the bank regarding the creation of the loan documents presented to the court. This court could only infer from the evidence adduced that the documents were created and signed by Mr. Smith during the course of his employment with the bank in the known normal course of banking.

[76] Mr. Griffith told his court that he did not sign the bank documents as stated before due to the inconsistencies and vacillations in this witness's testimony, I do not accept Mr. Robinson's testimony in this regard. I am satisfied on the balance of probabilities that the documents produced by the bank are genuine and they do provide this court with an

accurate history of the dealings between the parties herein in relation to the mortgage loan and the defendants' delinquency.

[77] The issues to be decided can succinctly be stated as:

- a. Whether or not a loan was made to the defendants and in what amount?
- b. Whether the defendants signed the loan documents presented by the claimants on the 25th April 2000, or on any other date? Has the loan documents be vitiated based on the testimony of the first named defendant?)
- c. If the defendants are indebted to the bank, in what amount?

Issue 1: Are the defendants liable to the bank in respect of the mortgage debt as claimed?

[78] Pursuant to Part 66 of the CPR 2000 a claimant in matters such as these must provide the court with the following information:

- a. The amount advanced;
- b. The interest payable under the mortgage;
- c. The amount of any periodic payments and indicate whether or not it contains an interest component;
- d. The number of repayments made
- e. The amount of repayments due but unpaid at the date of the claim with affidavit;
- f. The sum remaining due under the mortgage; and
- g. Where interest is claimant up to the date of judgment the daily rate of accrual.

[79] The loan documents adduced by the claimant reveals that the initial loan attracted an interest rate of 11% per annum which rate was reduced to 7.50% per annum on the principal sum with a daily interest rate of \$11.72 up until the date of judgment.

[80] From the documentation produced and as stated in the affidavit in support of the mortgage claim, the amount lent to the defendants was \$153,000.00. The first installment to be paid was \$2,430.35 which was to be paid on the 1st June 2000 and thereafter consecutive monthly installments of \$2,107.58 commencing the first day of every following month.

[81] The bank in compliance with Part 66 aforesaid, adduced the particulars as to the amounts repaid, the amount of repayments due and unpaid at the date of the filing of the claim. The bank also provided this court with evidence regarding the outstanding mortgage sum.

[82] The bank in the case at bar placed before the court as exhibits the “Scotia Bank Application for Credit” dated the 25th April 2000 and the bank says it was signed by the defendants. What does this document do? It confirms the identity of the borrower; it seeks to find out the customers’ needs and to determine the suitability of the bank’s services and the customer’s eligibility for the bank’s services. The information taken on this form essentially seeks to set up and manage the bank’s services to meet their customer’s needs and provide them with a suitable and ongoing service.

[83] What documents comprise the loan agreement?

- a. The commitment letter;
- b. The promissory note; and
- c. The memorandum of deposit.

[84] The personal loans extended to customers usually have a fixed time frame for payment. The personal credit agreements usually specify the security to be utilised in the loan facility. The Loan agreement outlines the amount of the loan payments, the interest rate and what is the applicable security that is pledged for the loan. **Re: Walford –v- Miles**

⁸The legal character of the commitment letters depends on the nature of the individual letter/document.

[85] Can the contract between the parties in the case at bar be vitiated? In **Re: Governor and Company of the Bank of Scotland –v- 31 PLC**⁹ it was held that a contract can be vitiated because the terms can be found to be unfair because of the nature of the terms of conduct of one of the proprietors. “Undue “influence” actual and presumed undue influence. In “**Re: Royal Bank of Scotland –v- Etridge**¹⁰. The person seeking to have the contract set aside has to establish affirmatively the exertion of excessive pressure **Re: Bank of Montreal –v- Stuart [1911] AC 120 (PC)**

[86] There is the concept of lender liability which in reality covers a range of liabilities based on a variety of legal doctrines. It includes a bank being found negligently processing a loan application. The narrow definition of lender liability focuses on the liability of banks in administering the loan. The question to be asked is does the situation apply to the case at bar? There has been no evidence adduced on the part of the defendants to establish this even on a balance of probabilities.

[87] Generally, when a customer borrows money from a bank they incur a debt. A customer is obligated or required to repay the debt as outlined in the personal credit agreement on application and agreement with the bank. The Customer agreement is usually an agreement to make each payment on time and in full. The customer’s primary obligation is to repay the debt according to the terms and conditions outlined in the agreement.

[88] This court has accepted the evidence presented by the claimants who relied on the Promissory note, the Commitment Letter and the Memorandum of Deposit which this court accepts was signed by the defendants. This court is of the considered view that based on the evidence presented by the claimant that they are entitled to judgment in the sum outstanding on the loan plus judgment interest and costs.

⁸ [1992] 2 AC 128

⁹ [1993] BCLC 968

¹⁰ (No.2) [2001] 3 WLR 1021

[89] To the court's mind having not accepted the evidence of the first named defendant on behalf of the defendants, this court sees no reason to explore any possible defence that was sought to be raised by the defendant as he would have failed to meet any evidentiary burden in that regard. It is to be noted as pointed out by Counsel on behalf of the claimant that the defendants have also failed to properly plead fraud, forgery or make specific allegations of dishonesty against the claimant or any of its officers and or employees. It is trite law the fraud must be specifically pleaded and proved by the person making such an allegation. The Defendants have failed in this regard.

[90] It is the determination of this court that the claimant is entitled to judgment and therefore judgment is there entered for the claimant as follows:

- 1) Judgment in the sum of outstanding principal in the sum of \$50,010.83 plus interest due and unpaid on the outstanding principal at the rate of 7.50% per annum from the 27th May 2014 to the 29th day of December 2020;
- 2) Total Charges accrued in the sum of \$11,268.42;
- 3) Statutory Judgment Interest at the rate of 5% per annum on the sum of \$64,326.42 being the outstanding principal and charges from today's date until the date of payment;
- 4) Further that the mortgaged property be sold in accordance with the terms of the Title by Registration Act Chapter 56:50;
- 5) Prescribed Costs is awarded to the Claimant;

[91] This court wishes to record its gratitude to Counsel for their written submissions rendered in this matter which was of assistance in preparing this judgment.

M E Birnie Stephenson
High Court Judge

[SEAL]

By The Court

Registrar