

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2018 /0028

BETWEEN:

BANK OF SAINT LUCIA LIMITED

Claimant

And

- 1. ANNE FELICIEN**
- 2. BERNADETTE JACOB**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms Diana Thomas with Ms Cleopatra McDonald for the Claimant
Mrs Carol Gideon-Clovis for the Defendants

2019: March 18
October 14

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** On 13th March 2018, the claimant, Bank of Saint Lucia Limited (“the Bank”) filed a claim against (1) Anne Felicien (“Anne”) as principal debtor and

(2) Bernadette Jacob (“Bernadette”) as surety, for recovery of debts allegedly owed to the Bank, together with interest and costs.

[2] The defendants admit that they are indebted to the Bank but deny the quantum claimed as principal and interest. They say the provisions of the **Moneylending Act**¹ (the “MLA”) present a case for reopening the transaction because the interest rate applied to the debt is excessive and the transaction harsh and unconscionable. Additionally, the Bank wrongfully continued to accrue interest, after they defaulted on the loan payments, contrary to the stipulations in the Eastern Caribbean Central Bank (the “ECCB”) Prudential Credit Guidelines (the “Guidelines”).

[3] The issues to be determined are: -

1. Whether the Bank is entitled to the sums claimed?
2. Have the defendants presented a case for re-opening the transaction on the grounds that the interest rate was excessive?
3. Was the loan transaction harsh and unconscionable?
4. Was the Bank under an obligation to direct the second defendant to obtain independent legal advice?

Background

[4] The Bank’s claim against the defendants is for the sum of \$322,496.48 inclusive of interest in the sum of \$41,282.36 for periods up to and including 20th February, 2018, together interest on the principal sum of \$281,214.12 at the rate of 8% per annum from 21st February 2018 to the date of payment and costs. The claim is premised on a loan agreement between the parties dated 2nd July, 2010 and the principal sum comprised three loans which were consolidated as follows: -

¹ Cap 12.10 of the Revised Edition of the Laws of Saint Lucia

1. The sum of \$37,497.00 secured by Hypothecary Obligation registered as Instrument No. 259 /2003 over Parcel No.1256C 8²
2. The sum of \$295,136.00 secured by Hypothecary Obligation registered as Instrument No. 3630 /2010 over Parcel No.1256B 727³
3. The sum of \$50,733.00 secured by Second Hypothecary Obligation registered as Instrument No. 5761 /2010 over Parcel No.1256C 8⁴

[5] The Bank pleaded that a term of the loan agreement was that the defendants would repay the loan by monthly installments over a period of 216 months. It was also agreed that the interest rate would be subject to variation at the Bank's discretion. At Anne's request the loan was restructured and the interest rate reduced from 10.5% to 9% per annum by a loan agreement dated 3rd July, 2012. Upon further request, the loan was again restructured, and interest reduced further to 8% by a loan agreement dated 3rd March, 2013. The Bank avers that the defendants breached the terms of that loan agreement by failing or refusing to pay the monthly installments as and when they became due. Demand letters were issued to the defendants requesting full payment of the balance of the loan, which the defendants have failed to pay, and remain indebted to the Bank for the sums claimed.

[6] The Defendants defence,⁵ in summary, admits that they are indebted to the Bank but denies the sums claimed as principal and interest and puts the Bank to strict proof thereof. They aver that the Bank (i) failed to issue a demand for the debt before filing the claim, (ii) charged an interest rate which was excessive, harsh and unconscionable contrary to the MLA, (iii) continued accrual of interest after the loan was 90 days in arrears contrary to the requirement of the Guidelines which govern the Bank's conduct in such transactions (iv) failed to explain the manner in which the loan would be repaid at the time that it was granted, and (v) failed to further refinance the loan taking into account a fall in the income of the first defendant.

² See Document No. 6

³ See Document No. 7

⁴ See Document No. 8

⁵ Filed on 3rd October 2018

- [7] The Bank, in its reply⁶, avers that a formal demand of the debt was served at the address which the defendants provided to the Bank. The loan was restructured twice at Anne's request and in any event the Bank was under no obligation to reduce the interest or monthly installments which were agreed by the parties to the loan agreement. Accrual of interest against the debt is permissible under the Guidelines and in any event, the Guidelines do not create a justiciable right or cause of action capable of being invoked by the defendants as a defence. The amortization of the loan is in line with the provisions of the **Civil Code**⁷ (the "Code"), interest is not excessive, and the defendants have not pleaded any issue to warrant reopening the transaction.

The Claimant's Evidence

- [8] At trial, Daniel Eugene, Recoveries Manager testified on behalf of the Bank. He explained that he was familiar with the loan negotiation process and inquiries on loan accounts in relation to recovery of bad debts. He is the officer responsible for recovery of the debt allegedly owed by the defendants under Mortgage Loan No. 575052061. He gave the instructions for demand and subsequent litigation in the matter. His witness statement provided details of the history of the loan and several documents were tendered in support of the claim. He also addressed the process engaged by the Bank in assessing the risk related to the loan, to arrive at the interest rate initially charged, the subsequent reductions in interest rates, accrual of interest after default, amortization of the loan and the requirement for independent legal advice. He stated that in all of the circumstances, the rate of interest was reasonable, amortization of the loan was in line with the relevant laws and the Guidelines, and the Bank was entitled to the principal and interest claimed, for which the defendants remain indebted.

The Defendants' Evidence

⁶ Filed on 17th October 2018

⁷Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

- [9] Anne and Bernadette are sisters and they testified on their own behalf. Anne ordinarily resides in Canada and is a registered nurse. She stated that she has been doing business with the Bank for over 12 years and has had 3 loans for the following sums: - (i) \$37,497.00 in 2002; (ii) \$30,000.00 in 2006; and (iii) \$295,136.00 in 2010. In 2012 and 2014, the Bank restructured her loans and the interest rate was reduced from 10.5% to 9% and then to 8% respectively. The properties offered as security for the loans belong to her and she executed a Power of Attorney to have Bernadette sign documents on her behalf whenever she is out of the jurisdiction. She claims that the Bank advised her to include Bernadette's name on the property which she purchased at Bay Street, Gros Islet when she took the first loan in 2002, for the purchase of that property. Whenever she did business at the Bank, she would be asked to ensure that Bernadette was also present. She observed on one of the loan agreements that Bernadette signed as surety but stated that could not be correct as she (Bernadette) had nothing to offer as security. She stated that Bernadette was required to sign these documents in her capacity as Attorney and not as surety. She surmised that Bernadette was made to sign documents as surety without proper explanation or a directive from the Bank to seek independent legal advice.
- [10] In cross examination, she agreed that in 2002 she wanted to purchase the Bay Street property and approached the Bank for a loan, though she was not residing here at the time. When she applied for that loan she was the one who wanted the property and she completed the loan application. She did not have the full deposit required by the bank, so Bernadette agreed to assist her. She informed Bernadette that she would include her name as joint owner of the land and allow her to operate the property on her behalf. She agreed that both their names are on the land register as the owners of the Bay Street property but insists that although Bernadette's name is included, she does not own that property.
- [11] She stated that although the 2010 loan agreement shows that the Bank lent her \$47,000.00 to refinance an earlier loan for purchase of beach umbrellas and to pay loan fees in 2008, she recalls that she obtained a loan for \$30,000.00 and not \$47,000.00. She says she did not understand the contents of the 2010 loan agreement but did not ask for

clarification. She agreed that she commenced payment of the consolidated loan from 2010. Subsequently, she experienced a reduction in her hours of work at her place of employment in Canada which led to a reduction in her monthly income. She kept the Bank abreast of these matters when in 2012 and 2014 she fell behind on repayments. At her request, the Bank reduced the interest rate to 9% in 2012 and 8% in 2014. She understood that the Bank was under no obligation to do so but had heard her cries and was sympathetic. However, she did not agree that by reducing the interest rate, the Bank was being generous to her.

- [12] In 2016, her income continued to decline and with her other commitments she again experienced a financial strain in meeting the monthly repayments on the loan. She returned to the Bank seeking a further reduction in the monthly installment but was told that the loan had already been renegotiated twice therefore further restructuring was not possible. The bank advised that she was to continue the repayments at the agreed rate or risk being taken to court. Thereafter, the Bank filed this action to recover the amounts claimed.
- [13] She believed that the Bank was unfair to her as she had been a customer for over 10 years, from whom the Bank had earned tremendous interest over the years. She proposed a monthly payment of \$1,500.00 but the Bank refused to consider the offer and waited a further period of one year after further interest accrued before filing the claim. She says the Bank ought to have stopped accruing interest after 90 days in default, yet interest in the sum of \$41,282.36 has been claimed for an unspecified period and the accrual of such interest should be revisited.
- [14] Bernadette resides in Gros Islet and stated in her witness statement that she was unemployed for the past 20 years. She admitted that she has always had a Power of Attorney on behalf of Anne from the time Anne started doing business with the Bank. They were always required to come to the Bank together even when Anne did her own personal transactions. She was not aware that she signed any documents as surety. The Bank never told her so, neither did the Bank's lawyer before whom she signed the documents.

She claims that whenever she went to the Bank to sign documents it was as Attorney for Anne and does not understand why she now appears as surety. She has nothing to offer the Bank as surety and is not liable for any of the loans advanced to Anne.

[15] In cross examination she stated that she wished to correct her name from Bernadette Jacob to Bernadette Harte and that the information in her witness statement was incorrect where it stated that she has been unemployed for 20 years. She has operated a supermarket from the age of 21 and is presently 50 years old. She has also been self-employed as a baker for the past 11 years. She admitted that she lent Anne some money to assist her in meeting the qualifying conditions for the loan to purchase the Bay Street property and her name was included on the land documents. They both took the loan from the Bank to buy that property sometime in 2002. She has not been repaid the money she lent to Anne and if the property should be sold, she expects to receive what she contributed.

[16] She recalled that in 2010 Anne got a loan from the Bank to purchase a property at Beausejour. At that time, she was already in possession of the Power of Attorney from Anne and from time to time she would sign documents on her behalf, if she Anne was off island. She agreed that her signature was on the loan documents and when Anne was on island she would not have to sign as Attorney. She stated that she signed the documents in relation to that loan because Anne was off island and the Bank asked her to sign on Anne's behalf. She further says Anne told her that she was signing as Attorney and she does not know how it turns out that she signed as surety. She now understands that the Bay Street property which they jointly own forms part of the security for the loan. She says that land does not belong to her and she simply did what Anne asked her to do. She trusted Anne because the loans had nothing to do with her. She believed that when she signed these documents she did so as Attorney and not as surety. In her busy schedule, she went to the Bank and simply signed the documents, but Anne never told her about signing as surety because she also has her own personal loan to pay.

- [17] In cross examination she remained adamant that she was only authorized to sign the documents as Attorney. She agreed that her name was included on the Bay Street property because she lent Anne a portion of the deposit. She did so because if she had not, Anne would not have gotten the loan.
- [18] At the close of the case for the defendants and upon commencement of oral closing submissions on behalf of the Bank, Ms Thomas elected to proceed with a smaller component of the debt in the sum of \$50,733.00 against Mrs Harte and withdrew the balance of the claim against her. That sum is the face amount of the Second Hypothecary Obligation registered as Instrument No. 3761 /2010 over Parcel No. 1256C 8 (the Bay Street property), which attracts interest at the reduced rate of 8% per annum.

Is the Bank entitled to the sums claimed?

- [19] On this issue Mrs Clovis says that the defendants do not contest that a debt is owed but contest the quantum of the debt with respect to the accrual of interest once the loan was in default for over 90 days. She says the defendants were negotiating with the Bank to arrange suitable repayments when the Bank filed the claim for the full amount of the principal balance owed plus accrued interest. A period of two years elapsed from the date of default to filing of the claim and interest continued to accrue whilst negotiations were taking place, up to the time of filing.
- [20] She submits that by any account, the interest charged by the Bank is excessive and does not accord with the Guidelines which require that interest on non-performing loans where payment has not been made for at least 90 days should be suspended. Thus, the Bank has wrongly accrued interest on the loan during the period of default.
- [21] Mrs Clovis further argued that there must be a reason why the ECCB requires the suspension of interest on troubled loans and it is that while a customer is unable to service the loan, interest ought not to be accrued to exacerbate the situation. The ECCB cannot

be saying on the one hand that the Bank is entitled to interest and on the other hand require that it should not be shown in its books. She noted that Daniel Eugene stated that the Bank had complied with the Guidelines in terms of renegotiating the loan and followed the standard contained at paragraph 5 of the document. However, the Bank failed to adhere to paragraph 3, which speaks to the suspension of interest and it was not open to the Bank to choose to administer one portion of the Guidelines and neglect another simply because it was unfavorable to them.

[22] Additionally, she says the Bank has acted in bad faith by claiming such interest and not waiting to negotiate repayment so that the defendants could resume servicing the loan. She referred the Court to the case of **National Bank of Canada v Houle**⁸ in support of this argument.

[23] Ms Thomas submitted on behalf of the Bank that the defendants have not disputed that they obtained loans from the Bank. They only say that the quantum of the claim is what is in issue. There is no basis for challenging the quantum as the loan history and other exhibits tendered by the Bank have adequately substantiated the sums claimed and the defendants have not proffered any evidence to disprove this.

[24] In addition, Counsel submits that Article 1008 of the Code provides that the damages resulting from delay in the payment of money, to which a debtor is liable, consists of interest at the rate legally agreed upon by the parties or, in the absence of such agreement, at the rate fixed by law. Further, Article 1004 provides that damages due to a creditor would be the amount of the loss he has sustained and the profit of which he has been deprived. The parties agreed to the amount of interest to be paid and as such, the Bank is entitled both to the principal amount, interest and any other sums agreed to be paid by the defendants.

[25] In relation to the Guidelines, Ms Thomas argued that it is neither a treaty nor a statute and does not say what the defendants allege. Although section 184 of the Banking Act⁹ says that the ECCB may issue prudential guidelines, no such guidelines have been introduced

⁸ [1990] 3 S.C.R. 122

⁹ No. 15 of 2015

under this Act which came into force in 2015. The Guidelines constitute an internal document for the Bank's use, which contemplates that interest on non-performing loans is recorded as an accrual in the Bank's books but is not to be reported as income for accounting purposes, to avoid exaggeration of the Bank's profit margin.

[26] Counsel says that is permissible as the Bank is a publicly traded entity and investors must be safeguarded from misinformation. For reporting purposes, the suspension of interest on non-performing loans gives a more realistic picture of the Bank's profitability, as some of this interest may never be recovered. The Bank has explained that the treatment of interest is what is addressed in paragraph 3 of the Guidelines. Once a loan is classified as non-performing, after 90 days in default, the banking system is automated to suspend interest, and this is reviewed by the ECCB when the Bank is audited. The relevant information in that regard would be captured in the notes to the Bank's audited financial statements.

[27] Ms Thomas argued further that in any event, the defendants have not been able to point to any statutory instrument which incorporates the Guidelines into local law. They were created by the ECCB to regulate the Bank's internal credit activity and do not constitute an international treaty. It is therefore neither legally binding nor an aid to statutory interpretation.¹⁰

Discussion

[28] The first loan obtained in 2002 was to purchase the immovable property at Bay Street, Gros Islet which is registered as Parcel No. 1256C 8.¹¹ Both defendants are the registered proprietors of that property and the hypothecary obligation in relation to that loan was signed by Bernadette in her personal capacity and also as Attorney for Anne. In that document, the defendants are described collectively as the mortgagor. Anne has not disputed that this document was duly signed by Bernadette as her Attorney. By her own testimony, she confirmed that Bernadette was authorized to sign documents as her

¹⁰ See Attorney General v Jeffrey Joseph et al 69 WIR 104 at [55]

¹¹ See Exhibit DE17

Attorney. Bernadette also testified that whenever she signed loan documents in relation to Anne, it was as her Attorney. They both agreed that Anne was unable to meet the deposit requirement for the loan, so Bernadette assisted her and in return, her name was included as joint owner of the Bay Street property.

[29] The second loan was obtained in August 2010 for consolidation of earlier loans to the defendants and the purchase of immovable property at Beausejour in the Quarter of Gros Islet, which is registered as Parcel No. 1256B 727. The terms and conditions are contained in a loan agreement dated 2nd July, 2010.¹² Anne is registered as the sole proprietor of that property and the hypothecary obligation over that property was signed solely by her in her personal capacity as mortgagor. She has not disputed the legality or authenticity of this document. Bernadette is not a party or signatory to this hypothec.

[30] The third loan was obtained in August 2010 and is also captured in the loan agreement of 2nd July, 2010. A Second Hypothecary Obligation over Parcel No. 1256C 8 (the Bay Street property) owned by both defendants forms part of the security and covers the sum of \$50,733.00. These documents were signed by Anne in her personal capacity as principal debtor and Bernadette in her personal capacity as surety. The defendants say that it was never their intention that Bernadette should have signed these documents as surety. Bernadette says she signed believing that she was doing so as Attorney for Anne, but also agreed that if Anne signed the documents in her personal capacity there would have been no need for her to sign as Attorney.

[31] Much was made of the fact that the defendants signed that loan agreement on different dates. The Bank's evidence is that this was not unusual and is normal bank practice if all parties are not available on the same day. Further, Bernadette signed as surety because she is a joint owner of the Bay Street property which was required as additional security for the loan consolidation. I found nothing unusual about these occurrences.

[32] As I understand the transaction, based on the loan agreement of 2nd July 2010 which also consolidated previous loans, it is obvious that if the Bay Street property was to be used as

¹² See Document No. 5

part of the security for the consolidated loan, Bernadette would have had to be involved, as she and Anne are the joint owners of that property. It does not strike me as unusual that she would have agreed to sign as surety for that loan in order to have the benefit of the additional security. There is nothing on the evidence to show that it was otherwise, as Bernadette appeared to have been willing to assist her sister in these transactions with the Bank.

[33] In my view, the documentary evidence which comprised the loan agreements between the parties, the respective hypothecary obligations, the loan activity statements, the loan restructuring agreements, the demand letter issued to each defendant and other correspondence tendered by the Bank remained unchallenged and these documents stand as irrefutable evidence of the sums claimed by the Bank.

[34] In relation to the Guidelines, the provision of law which governs prudential standards is found at section 184 of the Banking Act which states: -

“184. Prudential Standards

The Central Bank may issue prudential standards as may be required from time to time for giving effect to the provisions of this Act, and without limiting the generality of the foregoing, may issue prudential standards respecting:

.....

(d) rules for non-accrual of income on non-performing or impaired assets,

(e) the suspension and reversal of accrued interest;

.....”

[35] The note to the Guidelines on the ECCB website¹³ states: -

“.....[the Guidelines] seek to establish minimum standards for the administration, measurements and monitoring of credit risk in the portfolios of institutions licensed under the Banking Act. It also sets the minimum provisioning requirements and provides guidance pertaining to the suspension of interest, treatment of renegotiated loans and the write-off of loans classified as loss.

[36] It is also stated on the website that the ECCB will issue Prudential Standards pursuant to the authority contained in Section 184 of the Banking Act, 2015. Under the rubric

¹³ See Exhibit DE24

“Enforced Prudential Guidelines” are several guidelines of which the Prudential Credit Guidelines – Revised as at June 1997 is one.

- [37] It appears that the Guidelines were last revised in June 1997 and clause 3 which falls to be considered states: -

“3. SUSPENSION OF INTEREST

Interest should not be accrued on loans classified as non-performing (i.e. where principal and interest have not been paid for ninety days or more) unless such loans are adequately secured and full collection is expected within three months. Neither should interest be accrued on overdrafts when the approved limit has been reached and/or when credits to the account are insufficient to cover interest accruals for at least a three month period.

.....

A non accrual loan may be restored to accrual status when all arrears of principal and interest have been paid or when it otherwise becomes well secured and in the process of collection. In the case of overdrafts, accrual status is restored when the account is operating within the limit and all interest arrears have been cleared or when it otherwise becomes well secured and in the process of collection.

Accrued, uncollected interest should be reflected in an "interest in suspense" account on the balance sheet.' [Emphasis added]

- [38] Daniel Eugene explained that the stipulation relates to the accounting treatment of accrued interest where a loan is in default for more than 90 days. The accrued interest is suspended, and that information is captured in the Bank's audited financial statements. The effect is that the Bank shall not represent or treat such accrued interest as income in its audited accounts. It is simply an accounting requirement to prevent the overstating of income and has nothing to do with the relationship between the Bank and its customers. The reason for the suspension is because the accrued interest may not be reflected as income as it has not been collected by the Bank and would convey the wrong impression to the public, if the Bank's profit margin is not accurately captured. For this reason, the ECCB requires that the Bank not overstate its income or revenue position and should not include such interest as income after 90 days. Thus, it is only in the Bank's audited

financial statement that one would find any statement relating to the accounting treatment of the accrued interest and its suspension. The Guidelines do not affect the collection of interest from customers or change or affect the terms of the loan agreement.

[39] I have given due consideration to the contending positions and conclude that the Guidelines cannot avail the defendants. Whereas section 184 of the Banking Act says that the ECCB may issue prudential standards there is nothing to suggest that the Guidelines which were revised in 1997 before the Act took effect, have been given the force of law. It is clear that the Guidelines are not a treaty or statute or a document that gives rise to any form of contractual relations between the Bank and the defendants. Neither does it give rise to any right in private law which the defendants may enforce against the Bank. While it is prudent that the Bank adheres to the Guidelines to remain in good standing with the ECCB audit and reporting requirements, it is certainly not the case that interest which is suspended by virtue of clause 3 of the Guidelines is not recoverable from the customer.

[40] I accept the Bank's explanation of the application of the Guidelines to the treatment of interest accrued on non-performing loans for financial reporting purposes. It is best practice that if a loan has not been paid for 90 days, interest on that loan cannot be credited to the bank's revenue account until it has been collected and for this reason it remains in a suspense account until it is collected or written off.

[41] The case of **National Bank of Canada v Houle** cited by Counsel for the defendants dealt with abuse of contractual rights where a bank liquidated a company's assets within three hours after demanding payment of the company's loan. The principles espoused in the case are not applicable to the circumstances of this case. I therefore conclude that the Bank has not acted in bad faith by seeking to recover the accrued interest.

[42] Consequently, the claimant would be entitled to the full sum claimed against Anne and the reduced sum claimed against Bernadette, unless it can be shown that the interest rate was excessive or that the transaction itself was an unconscionable bargain.

Have the defendants presented a case for re-opening the transaction on the grounds that the interest rate is excessive?

- [43] Mrs Clovis has argued that the Court has jurisdiction to review the interest charged on the loan and provide relief to the defendants under section 17 of the **Eastern Caribbean Supreme Court (St Lucia) Act**¹⁴. Additionally, the transaction can be re-opened under section 2 of the MLA, if found to be harsh and unconscionable.
- [44] She relied on a mathematical computation of the amortized loan repayments over the life of the loan to say that the Bank would be receiving \$771,000.00 over the life of the loan which translates to a return on the lending which is more than twice the principal sum borrowed. She submits that the sum of \$41,282.36 accrued as interest from the date of default is additional to the amount which ought to be paid over the period stated in the loan agreement. She suggested that based on the loan agreements, interest was already calculated and built into the monthly payments, therefore any accrual of further interest when it ought to be suspended is what makes the interest charges extremely alarming and excessive.
- [45] She submitted that the MLA is designed to protect the customers of money lenders and is a very powerful piece of legislation which empowers the Court to interfere in the sanctity of a contract, by re-opening a transaction if it appears on the evidence that the interest charged is excessive.
- [46] Ms Thomas countered that the interest rate agreed to by the parties and claimed by the Bank is 8% as stated in the most recent loan agreement dated 3rd March 2014 which refinanced the existing loan. By the novation, the parties contracted a new debt to substitute the prior debt by way of a loan agreement dated 3rd July, 2012 which was again refinanced in 2014. There is a cost to borrowing money which is the interest rate and the defendants have not provided any evidence on which the Court can make an informed assessment to determine that interest at 8% was excessive.

¹⁴ Cap 2.01 of the Revised Edition of the Laws of Saint Lucia

- [47] Counsel points out that nothing in the defendants' pleadings or evidence supports a finding that the interest charged was excessive. The defendants have simply put forward their opinion of the interest collected or due to be collected and requested that that it be adjudged as excessive. She therefore contends that they have failed to make a cogent argument which discharges the burden of proving that the interest rate was excessive.

Discussion

- [48] Section 17 of the **Eastern Caribbean Supreme Court (St Lucia) Act** states:-

"17. Extent of remedies

The High Court and Court of Appeal respectively in exercise of the jurisdiction vested in them by this Act, shall, in every cause or matter pending before the Court, have power to grant, and shall grant, either absolutely or on such terms and conditions as the High Court or Court of Appeal may think just, all the remedies or relief whatsoever to which any of the parties appear to be entitled in respect of any and every claim properly brought forward by him or her or them respectively in the cause or matter; so that, as far as possible, all matters in controversy between those parties respectively may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided."

- [49] The applicable provisions of the MLA state:-

"2. Reopening of transactions of moneylender

*(1) Where proceedings are taken in any court by any person for the recovery of any money lent before or after the date of the coming into force of this Act, or the enforcement of any agreement or security made or taken before or after the date of the coming into force of this Act, in respect of money lent, and **there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive**, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, **or that, in any case, the transaction is harsh and unconscionable, the court may re-open the transaction, and take an account between the lender and the person sued**, and may, despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, **re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly chargeable and due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may***

adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him or her to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent by any person shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the court shall have power, despite any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, although the time for repayment of the loan, or any instalment thereof, may not have arrived.” [Emphasis added]

[50] In Daniel Eugene’s testimony, he explained how the Bank arrived at the terms for the loan including the interest rate. The initial rate charged was 10.5% based on the risk element of the loan and prevailing market rates at that time and that rate was stated in the 2010 loan agreement. At Anne’s request, the Bank considered and agreed a reduction in interest from 10.5% to 9% in 2012 and again from 9% to 8% in 2014.¹⁵ In 2016 she requested a further restructuring of the loan but this could not be facilitated because of the Bank’s policy that such loans are not to be renegotiated more than twice within a 5 year period.

[51] The Bank’s testimony is also that the sum of \$41,282.36 claimed as interest represents interest from the last date of payment in 2016 up to and including 20th February, 2018 which is the date on which instructions were sent to the legal practitioners for the Bank, to institute legal proceedings. The documentary evidence supports this.

[52] I agree that the test for re-opening a transaction under the MLA is an objective test and that evidence must be adduced by the defendants, on which the Court can undertake a proper assessment. I accept the bank’s testimony in that regard that the interest rate claimed was agreed by the parties and in-keeping with the prevailing market rates in effect when the loan was granted and subsequently renegotiated. In the absence of some comparable measure or standard to make such finding, there is nothing to persuade the

¹⁵ See Documents No 2 & 3 of the Claimant’s List of Documents

Court that the interest rate of 8% per annum, which is the current agreed rate on the loan, is excessive.

Was the transaction harsh and unconscionable?

- [53] On this issue, Mrs Clovis says that the very fact that the Bank stood to gain a sum which was more than twice the principal sum borrowed, by the end of the agreed repayment period, is sufficiently harsh and unconscionable to warrant re-opening the transaction. That alone is enough to shock the conscience of any court, not to mention the added interest accrued during the period that the loan has remained in default.
- [54] Ms Thomas reiterated that the Bank reduced the interest rate on two occasions and in Anne's own words, the Bank was being sympathetic by doing so. The Bank is selling a product which is a loan, at a price to be paid which is the interest charged. Such interest is determined in accordance with the Bank's risk assessment policy and the interest rate was within the prevailing market rate at that time. The test is not whether one is happy or unhappy about the transaction, but the Court must look at the relative strength of the parties' cases against the criterion set out in the various authorities dealing with the doctrine of unconscionable bargain. She contends that there is nothing harsh or unconscionable about the interest rate or the transaction. Further, in all the circumstances, the Bank was fair and reasonable to the defendants having reduced the interest on two occasions to facilitate Anne's financial woes.

Discussion

- [55] It has been established that there are three tenets to the doctrine of unconscionable bargain which the defendants must prove to succeed. They are that: -
1. The bargain was oppressive to them;
 2. They were suffering from certain types of bargaining weaknesses; and
 3. The Bank acted unconscionably in the sense of knowingly taking advantage of them.

[56] Once these conditions have been met, the burden shifts to the Bank to show that the transaction was fair, just and reasonable.¹⁶

[57] 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’*”¹⁷

[58] It is not disputed that on two occasions Anne required money to purchase property. She approached the Bank and requested the loans with knowledge of the transaction that she was getting into. She has been a registered nurse for 15 years and appeared to be of above average intelligence. Bernadette is a businesswoman who has operated a supermarket from the age of 21 and for the last 11 years she has owned a bakery. She testified that she also has personal loans of her own. The properties were purchased, and they have had the benefits of these purchases. If a loan is to be paid over 216 months and they have defaulted in payments, the immediate effect is that the loan will be repaid over a longer period, unless the entire arrears are sooner settled, and payments resumed. It is standard banking practice that interest continues to accrue on outstanding loan balances. The greater the repayment period, the greater will be the interest paid over the life of a loan. Conversely, if repayment is accelerated interest will be reduced. I agree that it is the cost which a borrower incurs for loans and other credit products from a financial institution. There is nothing harsh or unconscionable about this. I am not persuaded that Bernadette was not fully cognizant of the nature of the transactions she undertook with the Bank. There is not a scintilla of evidence to suggest that the transactions can be categorized as oppressive to the extent of having shocked the conscience of the Court.

[59] Bargaining weakness is often linked to the existence of a special disability, weakness or disadvantage. The defendants would have to show that they suffered from some special

¹⁶ *O’Neil Creese (Representative of the Estate of Benjamin Morgan, deceased) v Kelvin Joslyn* [2008] ECSCJ No. 81

¹⁷ *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489 at 50; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 All ER 944 at 961

disadvantage or disability such as poverty, ignorance or lack of independent legal advice where a disadvantage or disability necessitated such independent legal advice.

[60] Throughout Anne's correspondence with the Bank in re-negotiating the terms of the loan, she did not exhibit any weakness or disability or disadvantage of the kind contemplated by the legal authorities, to lead to the conclusion that she suffered from a special disadvantage, disability or bargaining weakness. In ***Mortgage Express v Lambert [2016] EWCA Civ. 555***, an allegation of unconscionable bargain succeeded in circumstances where a defendant was desperate, vulnerable, naive and lacking in any business common sense or acumen, and unfair advantage was taken of her by the making of an offer known by the maker to be dishonest. This cannot be said to be the case here. Bernadette testified that when she went to the lawyer to sign the deed it was because she was assisting Anne to purchase the Bay Street property. She agreed that it was her signature on all the loan agreements and on the hypothecary obligation executed in 2002 and 2010. She says that in 2014 she went to the lawyers Chambers and met him for the first time. At that time, she only signed documents as Attorney for Anne and nothing else. As I have stated earlier, I am not persuaded that she was unaware of the terms of the loan or what she was required to do. She facilitated Anne in obtaining the first loan and always went to the bank with her whenever she transacted business. She agreed that she would have assisted her as her sister.

[61] The defendants have not alleged that the Bank acted fraudulently towards them or exerted any influence over them in obtaining the loans. Instead they contend that the Bank did not acquiesce to Anne's request to lower the monthly installment payments for a third time to facilitate what she says was a reduction in her income as a result of reduced working hours. There is no evidence of victimization on the part of the bank or that the Bank knowingly took advantage, overreached or exhibited abuse of power over the defendants to warrant a finding of an unconscionable bargain.¹⁸

¹⁸ See: *Boustany v Pigott* (1993) 42 WIR 175

[62] In the circumstances, none of the elements required to succeed on a plea of unconscionable bargain have been established. The plea must fail, and the defendants have not shown that there is any reason to reopen the transaction under the MLA.

Was the Bank under an obligation to direct the defendants to obtain independent legal advice?

[63] On this point, Mrs Clovis argued that there was value in the relationship between Anne and the Bank and that the Bank refused to balance her interest against its own in considering the length of time that she had been doing business with them. She says the Bank is protected by provisions of law and will always have the advantage when dealing with consumers. Thus, the Bank had a duty to advise Bernadette in particular, to seek independent legal advice before signing as surety as she appeared totally confused about signing as surety. Had the Bank directed her to get independent legal advice and produce the relevant certificate, she would have fully understood the risk involved and would not have been so lost as to the capacity in which she signed the documents.

[64] She referred the Court to the case of **Royal Bank of Scotland v Etridge [2002] 2 AC 773** in support of this contention. This case addressed circumstances where a wife stood as surety for her husband and the court held that a bank must be satisfied that when a wife enters into such transaction it is on her own volition and that she has received independent legal advice on the nature of the transaction.

[65] The Bank's response is that the requirement only arises if at the time of the transaction, there is constructive notice, or it is obvious that the transaction may be procured by undue influence by one debtor over another. In such circumstances reasonable steps must be taken by a financial institution to ensure that the co-debtor understands the nature and effect of the proposed transaction.

[66] Ms Thomas submits that there is no allegation of undue influence and no facts which indicate that the Bank exerted any influence on the defendants. There were no circumstances to put the Bank on notice of inquiry into undue influence by Anne over

Bernadette, or by the Bank over the defendants. Thus, the obligation to direct them to obtain independent legal advice did not arise in these transactions. Aside from its usual duties to a customer, the Bank was under no obligation to advise the defendants to obtain independent legal advice and it was for the defendants themselves to conduct their financial affairs appropriately and seek legal advice if they thought it necessary.

[67] Ms Thomas submitted further that there is the hypothecary obligation in evidence which is a notarial document which corroborates the transaction in relation to Bernadette. No steps have been taken to impugn this document, so it is accepted that the statements contained therein, to the effect that Bernadette admitted to being indebted to the Bank for the principal sum of \$50,733.00, agreed to repay the indebtedness and provided the bank with security for failure to pay, are authentic statements. Unless steps have been taken to impugn this notarial document, whatever has been stated therein must be accepted as the truth and to conclude otherwise would be mere speculation as to what happened between Bernadette and her lawyer.

[68] Counsel relied on the case of **Portman Building Society**¹⁹ in contrast to **Royal Bank of Scotland v Etridge** where an English Court of Appeal held that a building society was under no obligation to police transactions of this nature to ensure that a parent was wise in seeking to assist a son in obtaining a loan in circumstances where a father stood as surety for the loan.

Discussion

[69] On the evidence, it is clear that both defendants benefited directly from the loans. With respect to Bernadette she conceded that she willingly signed the loan agreement in relation to the Bay Street property because she wanted to assist her sister in meeting the requirements for the loan. She agreed that if the property was to be sold, she would expect to recover the amount that she contributed. To date she is still a lawful owner of the property.

¹⁹ [2000] All ER (D) 582

[70] The point was considered in **Thelston Connor v Scotiabank Anguilla Limited and another**²⁰ where an ancillary claimant alleged that she was unduly influenced or misled by the bank into entering a credit facility, which was not properly explained to her and for which she received no independent advice. It was held that the bank was under no legal duty to ensure that the claimant received independent legal advice, as the transaction was not disadvantageous to her.

[71] On these facts, I have found nothing which would have placed the Bank on inquiry as to whether undue influence was being exerted over any of the defendants. I therefore conclude that the Bank was under no obligation to direct or ensure that the defendants received independent legal advice.

Conclusion

[72] Based on the foregoing I make the following orders:-

- 1) Judgment is given for the claimant against the first defendant for the sum of \$322,496.48 together with interest on the principal sum of \$281,214.12 at the rate of 8% per annum from 21st February 2018 to date of payment.
- 2) Judgment is given for the claimant against the second defendant jointly and severally for the sum of \$50,733.00 together with interest at the rate of 8% per annum from 21st February 2018 to date of payment.
- 3) Cost is awarded to the claimant, to be paid by the first defendant and is to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

²⁰ AXAHCV 2006/0043, delivered on 7th December, 2009

[SEAL]

By the Court

Registrar