

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2014/0016

BETWEEN:

**[1] CLEMENT LAWRENCE
[2] CLEOPATRA BALLANTYNE**

Appellants

and

FIRST ST. VINCENT BANK LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mrs. Kay Bacchus-Baptiste for the Appellants
Mr. Stanley John, QC, with him, Mr. Akin John and Ms. Keisal Peters for
the Respondent

2018: December 13;
2020: February 24.

Civil appeal – The tort of negligence – Whether the bank owed a duty of care to the appellants – Whether the bank was negligent in the preparation of the mortgage – Undue influence – Whether the appellant entered into the mortgage as a result of presumed undue influence – Whether the finding of negligence or undue influence entitles the appellant to an order setting aside the mortgage

On 2nd September 2004, the 1st appellant, Mr. Clement Lawrence (“Mr. Lawrence”), executed a mortgage deed by which his residential home situated at Stoney Ground in Saint Vincent, was used to secure a loan of \$70,000.00 from the First St Vincent Bank (“the Bank”). The loan was applied for and received by Mr. Selwyn McBarnett (“Mr. McBarnett”), who was at the time the fiancé of Mr. Lawrence’s granddaughter, Ms. Belinda Lawrence (“Belinda”). Mr. Lawrence never went to the Bank, nor was he consulted by the Bank before signing the mortgage. Instead, he executed the mortgage

document before a representative of the Bank at his home. The Bank did not advise Mr. Lawrence to get independent legal advice before signing the mortgage deed. Mr. McBarnett defaulted on the loan, and, as a result, the Bank sought to exercise its power of sale under the mortgage deed. On 23rd June 2006, Mr. McBarnett signed an undertaking to repay the mortgage debt, but nevertheless failed to pay the same.

In the court below, the learned trial judge dismissed Mr. Lawrence's claim in negligence and found that the Bank had no duty of care to advise him in relation to the mortgage transaction. The judge also held that the particulars of undue influence were not properly pleaded by Mr. Lawrence since they concerned events that were unrelated to the execution of the mortgage deed. The judge granted the Bank's counterclaim and ordered Mr. Lawrence to pay the Bank the sum of \$114, 975.00 plus interest.

Being dissatisfied with the decision of the learned judge, the appellants appealed to this Court. Three main issues arose for determination on the appeal, namely: (i) whether the Bank owed a duty of care to Mr. Lawrence and was negligent in processing the mortgage executed by him; (ii) whether Mr. Lawrence entered into the mortgage as a result of undue influence; and (iii) the relief, if any, to be granted to Mr. Lawrence.

Held: allowing the appeal; declaring the mortgage invalid; setting aside the orders made by the learned trial judge; and making an award of costs to the appellants, that:

1. The test to determine whether a duty of care exists in negligence is a three-way test. There must be (i) reasonable foreseeability of damage; (ii) a relationship characterised by proximity or neighbourhood between the wrongdoer and the person damaged; and (iii) that the law would consider it fair, just and reasonable to impose a duty of care. On the facts and circumstances of this case, it was foreseeable that the Bank, in allowing Mr. Lawrence to mortgage his property to secure Mr. McBarnett's loan, was likely to suffer damage if and when Mr. McBarnett defaulted on the loan.

Karak Rubber Company Limited v Burden and Others (No. 2) [1972] 1 All ER 1210 applied; **National Commercial Bank (Jamaica) Limited v Hew and Others** [2003] UKPC 51 applied; **Donoghue v Stevenson** [1932] AC 562 considered; **Caparo Industries Plc v Dickman and Others** [1990] 2 AC 605 applied.

2. The relationship of mortgagor and mortgagee between the Bank and Mr. Lawrence was "equivalent" to contract or "only just short of a direct contractual relationship". Mr. Lawrence was a person so closely and directly affected by the conduct of the Bank in taking the mortgage over his property, that the parties were in a sufficiently proximate relationship to result in the Bank owing a duty of care to Mr. Lawrence.

Donoghue v Stevenson [1932] AC 562 applied; **Hedley Byrne & Co. Ltd v Heller & Partners Ltd** [1964] AC 465 considered; **Junior Books Ltd v Veitchi Co. Ltd** [1983] 1 AC 520 considered.

3. 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.

Osman and Another v Ferguson and Another [1993] 4 All ER 344 considered; **Hill v Chief Constable of West Yorkshire** [1988] 2 WLR 1049 considered.

4. Where the entire pleaded case discloses circumstances that are sufficient to raise the issue of presumed undue influence, it should be considered by the trial judge. Mr. Lawrence's claim form and statement of claim raised sufficient issues to alert the Bank that Mr. Lawrence could have been acting under influence. Therefore, the learned judge should have considered the evidence of the possibility that Mr. Lawrence was acting under presumed undue influence.

Desir and Another v Alcide [2015] UKPC 24 considered; Section 20 of the **Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act**, Cap. 24 Revised Laws of Saint Vincent and the Grenadines 2009 considered.

5. In cases of class 2B presumed undue influence, the complainant will succeed in setting aside the impugned transaction by proof that he or she reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the transaction impugned. On the facts, it is reasonable to infer that Mr. Lawrence reposed trust and confidence in his relationship with his granddaughter and her fiancé, so much so that he allowed them to make the arrangements for mortgaging his home to the Bank. The presumption of undue influence therefore arose and could have been rebutted by the Bank proving that Mr. Lawrence had obtained independent legal advice before signing the mortgage. There is no such evidence and therefore the Bank has not rebutted the presumption of undue influence. Accordingly, the Bank is fixed with constructive notice of the existence of presumed undue influence.

Murray v Deubery and Another; (1996) 52 WIR 147 applied; **Barclays Bank plc v O'Brien and another** [1993] 4 All ER 417 applied; **Hilda Elisabeth**

Stoutt et al v FirstBank Puerto Rico BVIHCVAP2010/016 (delivered 13th February 2012, unreported) considered.

6. When a trial judge does not make findings on an important issue in the trial, the appellate court has the option of remitting the case to the trial judge to make the necessary finding or to re-try the entire case, or to review the material that was before the trial judge and make the findings. This is not a suitable case to remit to the lower court because the main witness, Mr. Lawrence, is now deceased and the claim relates to facts that occurred over 15 years ago.

Kathryn Ma Wai Fong v Wong Kie Yik et al BVIHCMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27th March 2019, unreported).

JUDGMENT

Introduction

- [1] **WEBSTER JA [AG.]:** This is an appeal by Mr. Clement Lawrence and Ms. Cleopatra Ballantyne (collectively referred to as “the appellants”) against the judgment of the learned judge dismissing the appellants’ claim in negligence and undue influence against the respondent.

Background

- [2] Mr. Clement Lawrence (“Mr. Lawrence”) was the owner of a parcel of land situated at Stoney Ground in Saint Vincent and the Grenadines. Ms. Cleopatra Ballantyne is his daughter. The respondent, First St. Vincent Bank Limited (the “Bank”) is a commercial bank operating in Saint Vincent and the Grenadines. The other persons relevant to the determination of the issues arising on this appeal are Mr. Lawrence’s granddaughter, Ms. Belinda Lawrence (“Belinda”) and Mr. Selwyn McBarnett (“Mr. McBarnett”), who were, in 2004, in a relationship and intended to get married.
- [3] The sequence of events culminating in this appeal, as found by the learned judge, began when Mr. McBarnett applied for a loan of \$70,000.00 from the Bank for the purchase of a minivan. The Bank requested security for the loan as his salary was

insufficient to service the loan. However, he had no security. On 2nd September 2004, Mr. Lawrence executed a mortgage by which he put up his only property, the home he lived in at Stoney Ground, as collateral for the loan. Mr. Lawrence never went to the Bank. A representative of the Bank took the mortgage document to his home where he signed it. The Bank did not advise Mr. Lawrence to get independent legal advice before signing the mortgage. It is reasonable to infer that Mr. McBarnett and/or Belinda made the arrangements for the loan with the Bank. Mr. Lawrence did not sign a promissory note binding himself to repay the loan, nor did he hold himself out as a guarantor of the loan. The Bank paid the proceeds of the loan to Mr. McBarnett.

- [4] Mr. McBarnett did not repay the loan in accordance with the terms of the loan agreement and, as a result, the Bank sought to exercise its power of sale under the mortgage deed. He signed an undertaking on 23rd June 2006 to repay the mortgage debt but, once again, he failed to repay the amount due. As a consequence, the appellants instituted proceedings in the court below against Mr. McBarnett and the Bank.
- [5] In the court below, the appellants contended that the loan should be set aside on several grounds, all of which were rejected by the learned trial judge. The two grounds that are relevant to this appeal are that the Bank was negligent in processing the mortgage transaction and it obtained the mortgage from a person who could have been influenced. They sought orders setting aside the mortgage, damages, and an order that judgment be entered against Mr. McBarnett according to his undertaking to repay the debt.
- [6] In his defence, Mr. McBarnett stated that he borrowed the sum of \$70,000.00 from the Bank and Mr. Lawrence voluntarily executed the mortgage as security for the loan.
- [7] The Bank denied the allegations in the claim and contended that the mortgage

deed was valid. It denied any acts of negligence, misrepresentation and undue influence and stated that the property was mortgaged to secure a loan to Mr. McBarnett and therefore, that the appellants were estopped from denying the validity of the mortgage and the liability to repay the loan. The Bank filed a counterclaim for the sums payable under the mortgage deed. Specifically, the Bank claimed the amount of \$114,975.91 comprising \$57,035.40 for the outstanding principal on the loan, \$57,440.51 for accrued interest, \$500.00 for valuation costs, interest at the rate of 15 percent per annum, and costs. The appellants did not file a reply or a defence to the counterclaim.

The learned judge's decision

- [8] The learned judge held that there was no evidence to support the appellants' claim in negligence. She found that the Bank had no duty of care to advise Mr. Lawrence in relation to the mortgage transaction. She stated that the evidence suggested that Mr. Lawrence knew what he was signing. She found Mr. McBarnett to be a truthful witness and preferred his account, which suggested that Mr. Lawrence knowingly executed the mortgage deed because he wanted to help his granddaughter who was getting married to Mr. McBarnett. The judge also found that there was no evidence that Mr. Lawrence had suffered from any mental challenges. She therefore decided that the Bank did not owe him a duty of care. As a result, she concluded that the Bank was not negligent in failing to advise Mr. Lawrence about the mortgage transaction and in not ensuring that he obtained independent legal advice before signing the mortgage deed.
- [9] In relation to undue influence, the learned judge found that the particulars of undue influence were not properly pleaded by Mr. Lawrence as they related to events that occurred some years after the execution of the mortgage deed and therefore could not form a basis for deeming the mortgage deed invalid.
- [10] The judge dismissed the appellants' claim against the Bank. However, she granted Mr. Lawrence's claim against Mr. McBarnett concerning his 23rd June

2006 undertaking to repay the loan and ordered Mr. McBarnett to repay the sums due to the Bank. The judge also granted the Bank's counterclaim and ordered Mr. Lawrence to pay the Bank the sum of \$114,975.91, plus interest. Mr. Lawrence was therefore left in a position where he was liable to lose his house to the Bank.

The Appeal

[11] The appellants were dissatisfied with the decision of the learned judge and appealed. They filed a notice of appeal that contains three grounds of appeal. The following issues arise from the grounds of appeal for determination:

- (a) Whether the Bank owed a duty of care to Mr. Lawrence and was negligent in processing the mortgage executed by him.
- (b) Whether Mr. Lawrence entered into the mortgage as a result of undue influence; and
- (c) The relief, if any, to be granted to Mr Lawrence.

[12] Unfortunately, Mr. Lawrence died before to the hearing of this appeal. At the hearing of the appeal, this Court granted an application for the appointment of Ms. Ballantyne to represent Mr. Lawrence's estate to prosecute this appeal.

Appellants' Submissions

[13] Learned counsel for the appellants, Mrs. Kay Bacchus-Baptiste, relied mainly on the principles of undue influence and negligence in her written and oral submissions to this Court. Her broad complaint of negligence, as I understand it, was in relation to the Bank's conduct in processing the mortgage transaction. She detailed the circumstances of the transaction as follows: Mr. Lawrence was an elderly man of 90 years at the time he executed the mortgage; he was physically incapacitated having lost both legs and was blind in one eye; he was unemployed and had no income and he put up his only property (his home) to secure a loan for Mr. McBarnett; and he derived no benefit from the loan; Mr. Lawrence had not

visited the Bank and relied on the word of Mr. McBarnett; the Bank did not join Mr. McBarnett as a co-mortgagor; and the Bank was fully aware that Mr. McBarnett's salary could not service the loan. She highlighted that even when the loan was in default, no letters to that effect were sent by the Bank to Mr. Lawrence until 27th May 2010, which was twelve months after Mr. McBarnett defaulted on the payment of the loan. She submitted that it was unlikely that Mr. Lawrence, being 90 years old and unemployed, would have offered his property as security if the mortgage were properly explained to him. She contended that, in those circumstances, the Bank owed Mr. Lawrence a duty of care and was negligent in processing the mortgage transaction. In particular, she argued that the Bank was under a duty to ensure that Mr. Lawrence had obtained independent legal advice before signing the mortgage deed and it was negligent in failing to do so. She therefore submitted that the mortgage ought to be set aside

- [14] In relation to undue influence, Mrs. Kay Bacchus-Baptiste, referred to the decision of this Court in **Hilda Elisabeth Stouff et al v FirstBank Puerto Rico**,¹ and submitted that even if undue influence was not properly pleaded, the surrounding circumstances of the mortgage should have alerted the Bank to the possibility that Mr. Lawrence had no incentive to enter into the loan and that he may have been susceptible to undue influence. She contended that there was a special class of undue influence in this case, which arose as a result of the relationship of trust between Mr. Lawrence and his granddaughter, Belinda, which impacted Mr. Lawrence's decision to enter into the mortgage and that that relationship was known to the Bank. She submitted that Mr. Lawrence's signature was obtained without being given an adequate explanation of the nature and, critically, the effect of the transaction.

Respondent's Submissions

- [15] Learned counsel, Mr. Akin John, on behalf of the Bank submitted that the principles for determining whether a duty of care is owed in negligence by a

¹ BVIHCVAP2010/016 (delivered 13th February 2012, unreported).

banker to its client are distinct from the principles which must be considered in determining whether undue influence or the presumption of undue influence arises. Mr. John contended that the Bank did not owe Mr. Lawrence a duty of care and could not have been negligent as there is no evidence that the Bank offered Mr. Lawrence advice in relation to the transaction. Referring to **National Commercial Bank (Jamaica) Limited v Hew and Others**,² he submitted that generally a bank is under no obligation to advise a customer and therefore that the learned judge correctly applied the law and properly evaluated the evidence and there is no basis to challenge her findings on negligence.

- [16] Mr. John's submission on the issue of undue influence was two-fold. First, he contended that the allegations of undue influence were not referenced in the pleadings in the court below and critically they all related to events that occurred subsequent to the parties entering into the mortgage and cannot be considered as factors which influenced Mr. Lawrence to enter into the mortgage. Second, he argued that no relationship existed between the Bank and Mr. Lawrence that gave rise to a presumption of undue influence. He submitted that the appellants have not established a legal or factual basis on which the learned judge's findings in relation to undue influence should be disturbed.

Analysis

Whether the Bank owed a duty of care to Mr. Lawrence and was negligent

- [17] While a bank is not under a duty of care to explain to its customer the nature and effect of a proposed transaction,³ a bank has a duty under its contract with its customers to exercise reasonable care and skill. Brightman J in **Karak Rubber Company Limited v Burden and Others (No. 2)**,⁴ affirmed the decision of **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and others (No 3)**⁵ wherein Ungood-Thomas J at 1118 stated:

² [2003] UKPC 51.

³ *National Commercial Bank (Jamaica) Limited v Hew and Others* [2003] UKPC 51.

⁴ [1972] 1 All ER 1210.

⁵ [1968] 2 All ER 1073.

“... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”

- [18] What is more pertinent to this case is whether the Bank owed a duty of care to Mr. Lawrence in the tort of negligence. The traditional starting point in determining whether a duty of care in negligence exists is the celebrated case of **Donoghue v Stevenson**⁶ where Lord Atkin answered the question of the persons to whom a defendant owes a duty of care by reference to the neighbour principle and the two-prong test of reasonable foreseeability and proximity. 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**⁷ 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. I will deal with these three elements as they apply in this case.

Reasonable foreseeability

- [19] As stated earlier, Mr. Lawrence, at the material time, was an elderly man of 90 years. He was physically incapacitated and partially blind. He was also unemployed and had no income. The Bank’s evidence is that Mr. McBarnett’s

⁶ [1932] AC 562.

⁷ [1990] 2 AC 605 at pp.617-618.

income was not sufficient to service the loan. In fact, neither Mr. McBarnett nor Mr. Lawrence was in a financial position to service the loan. The Bank, being aware of these circumstances, nonetheless, allowed him to mortgage his only property (his home) to secure a loan from which he derived no benefit. In those circumstances, it was undoubtedly foreseeable that the Bank, in allowing Mr. Lawrence to mortgage his property to secure Mr. McBarnett's loan, was likely to suffer damage if and when Mr. McBarnett defaulted on the loan. The possibility of damage to Mr Lawrence was reasonably foreseeable.

Proximity

[20] In this case, Mr. Lawrence was not a customer of the Bank, but his relationship with the Bank should be viewed in context. In addition to the facts recited in the preceding paragraph, Mr. Lawrence signed the mortgage over his property and thereby entered into a relationship of mortgagor and mortgagee with the Bank. Mr. Lawrence did not have any contact with the Bank before signing the mortgage. The document was taken to his home and signed there. His first contact with the Bank was after Mr. McBarnett had defaulted on the loan. However, the existence of a proximate relationship does not depend on physical contact or prior dealings. It extends to "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act".⁸ Neither does the absence of a contractual relationship rule out the duty of care. It certainly did not in **Donoghue v Stevenson**, where the innocent and unknowing ultimate claimant ingested the snail that was in the bottle of ginger beer manufactured by the defendant. The instant appeal is not based on contract but in my opinion the relationship of mortgagor and mortgagee between the parties is "equivalent to contract"⁹ or "falling only just short of a direct contractual relationship".¹⁰

[21] I am satisfied on the facts of this case that Mr. Lawrence was a person so closely

⁸ Per Lord Atkin in *Donoghue v Stevenson* supra, n.5 at p.581.

⁹ Per Lord Devlin in *Hedley Byrne & Co. Limited v Heller and Partners* [1964] AC 465 at p. 529.

¹⁰ Per Lord Fraser of Tulleybelton in *Junior Books Ltd v Veitchi Co Limited* [1983] 1 AC 520 at p. 533.

and directly affected by the conduct of the Bank, in taking a mortgage over his property, that the parties were in a sufficiently proximate relationship to result in the Bank owing a duty of care to Mr Lawrence.

Fairness, justice and reasonableness

- [22] 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.¹¹ In my opinion, the relationship between the Bank and Mr. Lawrence was one of unequal bargaining power and it is more likely that Mr. Lawrence, as the 'weaker' party, would be exploited. Further, the Bank's records showed that the loan could not be serviced by Mr. McBarnett's salary and the taking of a mortgage over Mr. Lawrence's property was entirely in the Bank's interest 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, I find that it is fair and reasonable to impose a duty on the Bank to have taken reasonable care of Mr. Lawrence's interest in taking his property as security for the loan.
- [23] The circumstances, when considered cumulatively, lead me to conclude that the Bank acted negligently in allowing Mr. Lawrence to mortgage his property without obtaining written authorisation from him, without informing him that based on their due diligence Mr. McBarnett was not in a financial position to service the loan, in taking third party security without ensuring that Mr. Lawrence obtained independent legal advice, and in failing to inform Mr. Lawrence that the loan was in default until 27th May 2010. Had Mr. Lawrence been properly informed by the Bank of the full implications of signing the mortgage, and had he received independent legal advice as to the nature and effect of the mortgage deed, it is highly probable that he would not have signed it. The Bank acted in breach of the reasonable standard of care expected from banks. Furthermore, even if Mr. Lawrence knew what he was doing in signing the mortgage, as the trial judge

¹¹ *Osman and Another v Ferguson and Another* [1993] 4 All ER 344 and *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049.

found, the Bank would remain under a duty to take reasonable care to ensure that, as a third-party mortgagor who wished to execute a mortgage as security for a loan to another person, Mr Lawrence obtained independent legal advice. In the circumstances, I find that the above failings on the part of the Bank are sufficient to make it liable in negligence.

Relief

[24] The finding of negligence does not entitle the appellants to an order setting aside the mortgage over the property; an injured party is only entitled to damages. The only evidence of damage suffered by Mr. Lawrence is the registration of the mortgage against his property and the loss of the property if it was sold by the Bank.

[25] I will now address the second issue that arises on this appeal – undue influence.

Whether Mr. Lawrence entered into the mortgage as a result of undue influence

[26] Whether a transaction was brought about by undue influence is a question of fact and the evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.¹² Undue influence may be actual or presumed and a person who has entered into a transaction as a result of undue influence is entitled to have that transaction set aside. In **Murray v Deubery and Another**,¹³ Sir Vincent Floissac CJ explained the doctrine in the following way:

“The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of undue influence and was not the voluntary and spontaneous act of the

¹² National Commercial Bank (Jamaica) Ltd v Hew and others [2003] UKPC 51.

¹³ (1996) 52 WIR 147 at p. 151.

complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is avoidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.

The modern tendency is to classify undue influence under two heads, namely class 1 (actual undue influence) and class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical adviser and patient, parent and child and clergyman (or religious adviser) and parishioner (or disciple). The second sub-head is class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in a dominant party.”

[27] This is not a case of class one or actual undue influence. In cases falling under class two, the relationship between the parties at the time of or shortly before entering into the impugned transaction must be such as to give rise to a presumption of influence. There is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned. Lord Browne-Wilkinson in **Barclays Bank Plc v O'Brien and Another**¹⁴ described the class two classification thus:

“Class 2 Presumed undue influence. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In Class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

¹⁴ [1993] 4 All ER 417 at p. 423

Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.”

[28] The well-known principles in the **Barclays Bank** case were applied by this Court in **Hilda Stoutt**. At paragraph 35 of the judgment, Mitchell JA [Ag.] stated that:

“The mere fact that a transaction is improvident or manifestly disadvantageous to one party is not sufficient by itself to give rise to a presumption that it has been obtained by the exercise of undue influence. But, where it is obtained by a party between whom and the complainant there is a relationship like that of mother and son which is easily capable of developing into a relationship of trust and confidence, the nature of the transaction may be sufficient to justify the inference that such a development has taken place. It becomes unavoidable when the mother in question is proven to be elderly and suffering from a psychotic condition that leaves her mentally incompetent. Where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn.”

[29] On the issue of presumed undue influence, the learned judge, in the court below, found at paragraph 36 of the judgment that:

“The above particulars pleaded by Mr. Lawrence all relate to events which occurred some years after the execution of the Mortgage Deed. They have no bearing on the execution of the Mortgage Deed, and therefore cannot form the basis for deeming the Mortgage Deed invalid as a result of undue influence. This is not a situation where Mr Lawrence is alleging that the bank had actual or constructive belief of a fiduciary relationship between Mr Lawrence and Mr. McBarnett and or Ms. Belinda Lawrence and therefore the bank had a duty to ensure that when Mr. Lawrence executed the Deed of Mortgage, he was not acting under the influence of Ms Lawrence or Mr. McBarnett.”

[30] The learned judge dismissed the issue of undue influence on the ground that it was not properly pleaded. I agree with the judge that the issue was not properly pleaded, but I do not share her conclusion that that disposes of the claim for

undue influence. Where the entire pleaded case discloses circumstances that are sufficient to raise the issue of presumed undue influence, it should be considered by the trial judge. In **Desir and Another v Alcide**,¹⁵ the Privy Council approved of the following statement by Mitchell JA in the Court of Appeal's decision in that case: '[t]he modern rule is that a party is required only to plead sufficient facts which go to show the existence of a cause of action'. The claim form and statement of claim raised issues relating to Mr. Lawrence's relationship with Belinda and Mr. McBarnett, Mr. Lawrence's age, physical and mental health and the Bank's failure to advise him on the risks of the loan. Although these matters were not raised as particulars of undue influence, they were pleaded and were sufficient to alert the Bank that Mr. Lawrence could have been acting under influence. The evidence in the case pointed in the direction of the possibility of presumed undue influence. The learned judge did not consider the evidence in this context because of the way that the case was pleaded. In my opinion, the learned judge should have considered the evidence in the light of the possibility that Mr. Lawrence was acting under the influence of type 2(B) presumed undue influence in signing the mortgage.

[31] Mr. Lawrence complained in ground 3 of his notice of appeal that the learned judge erred in finding that there was no undue influence. The issue of undue influence, and in particular class 2(B) undue influence, was addressed in detail by Mrs. Bacchus-Baptiste in her opening and reply written submissions on the appeal, and was responded to by Mr. John in his written submissions. Both counsel addressed the issue in their oral submissions before this Court. The issue was alive in the appeal and Mrs. Bacchus-Baptiste directed the Court's attention to section 20 of the **Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act**,¹⁶ which directs this Court to determine matters completely and finally –

“The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, shall, in every cause or matter

¹⁵ [2015] UKPC 24 at para. 23.

¹⁶ Cap. 24, Revised Laws of Saint Vincent and the Grenadines 2009.

pending before the court, grant, either absolutely or on such terms and conditions as the court think just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.”

Having regard to the evidence in the case, the extensive submissions by both counsel and the statutory guidance in section 20 of the **Supreme Court Act**, I think this is an appropriate case to consider and determine the issue of class 2(B) undue influence.

[32] The crux of the appellants’ submissions on this issue is that, in these circumstances, Mr. Lawrence was an elderly, unemployed man when he signed the mortgage deed. He put up his only property as security for the loan to Mr. McBarnett, who was in no financial position to service the loan. Mr. Lawrence, to the Bank’s knowledge, did not receive benefit from the loan. In the circumstances, the Bank ought to have been alert to the possibility that Mr. Lawrence may have been susceptible to undue pressure.

[33] The appellants’ position must be considered in the context of the case where there was no evidence of actual undue influence by the Bank, nor evidence that Mr. Lawrence had a relationship with the Bank as its customer before signing the mortgage. Indeed, the learned judge stated at paragraph 33 of the judgment that Mr. Lawrence testified that he had never gone into the Bank until approximately one year after he had signed the mortgage. Therefore, any undue influence must be inferred from the relationship between Mr. Lawrence and Belinda and/or Mr. McBarnett.

[34] The authorities referred to above suggest that, in order for the appellants to succeed on this issue, it must be established that the relationship between Mr. Lawrence, Belinda and/or Mr. McBarnett at the time of or shortly before entering into the mortgage was a relationship of trust and confidence and that, having regard to the circumstances, the mortgage transaction is one which calls for explanation. In

relation to discharging the burden of proof of presumed undue influence, Lord Nicholls of Birkenhead in **Royal Bank of Scotland Plc v Etridge (No.2)**¹⁷ explained thus:

“Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties’ relationship. He preferred his own interests. He did not behave fairly to the other. So, the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.”

[35] Additionally, in the decision of the House of Lords in **National Westminster Bank Plc v Morgan**¹⁸ Lord Scarman explained thus:

“The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In *Poosathurai*’s case the Board recognised that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly, a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence.”

[36] Lord Browne-Wilkinson in **Barclays Bank** explained that a creditor need not have actual notice of the circumstances giving rise to a presumption of undue influence. The risk of class 2(B) undue influence is sufficient to put the creditor on inquiry. His Lordship stated that:

“I am conscious that in treating the creditor as having constructive notice because of the risk of class 2B undue influence or misrepresentation by the husband I may be extending the law as stated by Fry J in *Bainbrigge v*

¹⁷ [2001] UKHL 44 at p.459.

¹⁸ [1985] 1 All ER 821 at p. 829.

Browne (1881) 18 Ch D 188 at 197 and the Court of Appeal in *BCCI v Aboody* [1992] 4 All ER 955 at 980, [1990] 1 QB 923 at 973. Those cases suggest that for a third party to be affected by constructive notice of presumed undue influence the third party must actually know of the circumstances which give rise to a presumption of undue influence. **In contrast, my view is that the risk of class 2B undue influence or misrepresentation is sufficient to put the creditor on inquiry. But my statement accords with the principles of notice: if the known facts are such as to indicate the possibility of an adverse claim that is sufficient to put a third party on inquiry.**¹⁹ (emphasis mine)

[37] Essentially, the law is that in a case of class 2B presumed undue influence the complainant will succeed in setting aside the impugned transaction by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the transaction impugned. The authorities suggest that the presumption of undue influence may be rebutted by proving that the complainant had the benefit of independent legal advice before the transaction. In **Hilda Stoutt**, Mitchell JA [Ag.] stated at paragraph 36 that:

“...As between the wrongdoer and the complainant, the existence of independent legal advice may go some way to rebut the presumption of undue influence. The presumption is not rebutted by showing that the complainant understood what [he or] she was doing and intended to do it. The wrongdoer can rebut the presumption only by showing that the complainant was either free from any undue influence on his part or had been place[d], by receipt of independent [legal] advice, in an equivalent position. This involves showing that [he or] she was advised as to the propriety of the transaction by an adviser fully informed of all the material facts. As regards the bank which has been put on enquiry of the possible existence of some impropriety by the circumstances described above and known to the bank, and [of] which [the] bank wishes to avoid being fixed with constructive notice, one means of doing so is to ensure that the complainant obtains competent and independent legal advice before entering into the transaction.”

[38] As Mitchell JA [Ag.] also noted at paragraph 35 where the transaction –

“... is obtained by a party between whom and the complainant there is a relationship like that of mother and son which is easily capable of developing into a relationship of trust and confidence, the nature of the

¹⁹ Supra n. 13 at p. 430.

transaction may be sufficient to justify the inference that such a development has taken place.”

[39] As stated earlier, Belinda is the granddaughter of Mr. Lawrence. At paragraph 12 of the learned judge’s judgment, she found that Mr. McBarnett was in a relationship with Belinda who resided with Mr. Lawrence at his home in Stoney Ground, and they had plans to get married. She also found that Mr. Lawrence admitted in his testimony that he had seen Mr. McBarnett at his home with Belinda. In light of the judge’s findings and the fact that Mr. Lawrence was an elderly man who was physically incapacitated and partially blind, he would likely have depended on Belinda, who lived with him, for daily assistance and it is likely that he reposed trust and confidence in her. There is no evidence, however, from which a similar inference can be made in respect of Mr. McBarnett. Nonetheless, it is noteworthy that the remarks made on the loan application form which Mr. McBarnett submitted to the Bank state that: ‘Selwyn McBarnette (sic) is a new customer. This loan will be secured by legal mortgage over his father-in-law’s property at Stoney Ground’. In my view, notwithstanding that Mr. Lawrence was not Mr. McBarnett’s father-in-law, it is clear that the Bank thought that Mr. Lawrence, as mortgagor, and Mr. McBarnett shared a familial relationship, one which I consider to be capable of developing into a relationship of trust and confidence. So much so that the Bank did not take any steps to contact Mr. Lawrence before accepting his property as security for the loan to Mr. McBarnett. In my view, the Bank’s knowledge of such a relationship between Mr. Lawrence and Mr. McBarnett, though on a wrong factual basis in respect of Mr. McBarnett, was sufficient to put the Bank on inquiry as to the risk of class 2(B) undue influence.

[40] The learned judge did not consider the issue of class 2(B) undue influence. This puts this Court in a difficult position as a consideration of the issue of class 2(B) undue influence calls ultimately for findings of fact which ought to have been made by the trial judge who had the benefit of observing the witnesses. When a trial judge does not make findings on an important issue in the trial, the appellate court

has the option of remitting the case to the trial judge to make the necessary findings and/or re-try the entire case, or to review the material that was before the trial judge and make the findings. The latter is the less desirable option, but each case has to be decided on its own facts. In **Kathryn Ma Wai Fong v Wong Kie Yik et al**,²⁰ this Court reviewed both options as well as the material that was before the trial judge and opted to make the necessary findings. In my view, this is not a suitable case to remit to the lower court for a re-trial because Mr. Lawrence, who was the main witness for the claimant in the court below, is now deceased and the claim relates to facts that occurred in September 2004, over 15 years ago. Although it is undesirable for this Court to make findings on the printed material, the inconvenience and unsuitability of a re-trial make this an appropriate case for this Court to make findings on the issue of class 2(B) undue influence. Therefore, I will examine the nature of the transaction to see if there was class 2(B) undue influence.

- [41] 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. It is a transaction that calls for explanation. The judge accepted Mr. McBarnett's evidence that Mr. Lawrence wanted to help his granddaughter who was getting married to Mr McBarnett,²¹ and it is not disputed that he was not involved in arranging the terms of the loan with

²⁰ BVIHCMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27th March 2019, unreported).

²¹ Paragraph 32 of the judgment in the court below.

the Bank. On these facts, it is reasonable to infer that Mr Lawrence reposed trust and confidence in his relationship with his granddaughter and her fiancé, so much so that he allowed them to make the arrangements for mortgaging his home to the Bank. This is sufficient to raise the possibility of class 2(B) undue influence.

[42] On the authority of **Barclays Bank**, the risk of class 2(B) undue influence was sufficient to put the Bank on inquiry and it should have been alert to the possibility that Mr. Lawrence in those circumstances could have been susceptible to undue pressure. As the presumption is not rebutted by showing that the complainant understood what he was doing and intended to do it, the learned judge's findings that Mr. Lawrence knew what he was doing in signing the mortgage and that Mr. McBarnett was a credible witness are not fatal to a finding of undue influence. The presumption of undue influence therefore arose in this case and could have been rebutted by the Bank by proving that Mr. Lawrence had obtained independent legal advice before signing the mortgage. There is, however, no evidence that the Bank ensured that Mr. Lawrence obtained independent legal advice before offering his property as security for the loan and therefore the Bank has not rebutted the presumption of undue influence in this or any other way. Accordingly, the Bank is fixed with constructive notice of the existence of presumed undue influence over Mr. Lawrence in offering his property as security for Mr. McBarnett's loan.

[43] I would therefore declare the mortgage invalid.

Conclusion

[44] For the reasons above, I would:

- (1) Allow the appeal.
- (2) Declare the mortgage made by the 1st appellant in favour of the Bank, which was the 2nd defendant in the court below, invalid.

- (3) Set aside the orders made by the learned trial judge dismissing the claim against the Bank, entering judgment against the 1st appellant on the Bank's counterclaim for \$114,975.00 plus interest, and ordering that the appellants pay the prescribed costs of the Bank; and
- (4) Order the Bank to pay the appellants' prescribed costs in the court below based on a deemed value of \$50,000.00, and two-thirds of those costs as the costs of the appeal.

[45] The delay in delivering this judgment, due mainly to the pressures of work, is regretted.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar