

IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

CONSOLIDATED CLAIMS NOS. NEVHCV1996/0177 & NEVHCV2001/0113

BETWEEN:

RBTT (formerly known as the Nevis Co-operative Banking Company Limited and the Caribbean Banking Corporation)

Claimant

and

ALMON NISBETT (by his Lawful Attorney, Masefield Nisbett)

Defendant

AND

ALMON NISBETT (by his Lawful Attorney, Masefield Nisbett)

Claimant

and

RBTT (formerly known as the Nevis Co-operative Banking Company Limited and the Caribbean Banking Corporation)

Defendant

Appearances:

Ms Elizabeth Harper for Almon Nisbett.

Mrs Leonora Walwyn for RBTT.

2009: February 24;
2012: August 14.

JUDGMENT

Background

- [1] **LEIGERTWOOD-OCTAVE:** The parties in these consolidated claims are RBTT Bank [SKN] Limited, the successor of the Caribbean Banking Corporation and the Nevis Co-operative Banking Company Ltd. [“the Bank”] and one of their customers Almon Nisbett, a businessman, now deceased. Almon Nisbett is represented in the proceedings by his son, Masefield Nisbett, the Administrator of his Estate.
- [2] The Agreed Chronology filed by the parties on December 16th 2008, adequately sets out the history of the litigation and I rely on the substance of its contents for that purpose.

- [3] On 29th March 1993, Almon Nisbett mortgaged the property registered at Book 6 Folio 78 ["the First Property"] of the Register of Titles to the Bank in consideration of the sum of \$900,000.00. The terms of that mortgage ["the First Mortgage"] included *inter alia* that interest was at the rate of 13% per annum on the reducing balance repayable on demand and until demand by monthly instalments of \$2,780.00, with the first payment commencing on 4th September 1992 and thereafter on the 4th day of each and every succeeding month.
- [4] On 4th June 1993, the First Mortgage was filed in the Registry of Deeds and noted as a Mortgage on the Certificate of Title of the First Property.
- [5] On 6th September 1993, a Notice to Pay Off was filed requiring Almon Nisbett to pay off the sum of \$958,102.94 with interest at the rate of 13% per annum in accordance with the First Mortgage.
- [6] On 30th May 1994, upon a lump sum payment of \$700,000.00 towards the First Mortgage, and in consideration of the discharge of the First Property, another mortgage was executed to cover the remaining balance on the First Mortgage. A Discharge of the First Mortgage was filed on 30th May 1994.
- [7] Also on 30th May 1994, a Memorandum of Mortgage – Demand ["the Second Mortgage"] in the sum of \$387,088.81 was registered. Almon Nisbett's property registered at Book 31 Folio 349 on the Register of Titles ["the Second Property"], was used to secure the Second Mortgage.
- [8] Under the terms of the Second Mortgage, interest was calculated at the rate of 13% per annum calculated on the reducing balance payable by instalments of \$2,780.00 per week commencing on 30th April 1994 and ending on 31st January 2003 or until demand.
- [9] In October 1996, the Bank instructed its solicitor to commence legal proceedings against Almon Nisbett to recover all sums due and owing.
- [10] On 4th November 1996, the Bank filed a Summons in **Misc. Suit No. 177 of 1996** to settle the Articles of Sale of the Second Property. The Summons was issued under Section 75 of the **Title by Registration Act Cap. 279** ["Cap. 279"] of the Laws of the Federation of Saint Christopher and Nevis. An affidavit in support, Notice to Pay Off, Instructions to Seize Property and Act of Seizure were also filed on the same date.
- [11] On 18th January 2001, the Bank filed a Writ of Summons Indorsed with Statement of Claim in the same Suit claiming monies due and owing to the Bank from Almon Nisbett in respect of a loan extended to him at his request on 30th March 1994. The amount due to the Bank was stated to be \$839,502.83. Interest on the debt until payment was also claimed.
- [12] On 6th March 2001, Almon Nisbett filed a Defence and Counterclaim. He admitted that he had failed to pay the Bank the sum of \$387,088.81 or the sum of \$534,220.07 as referred to in the Notice to Pay off or any such sum. He denied that he was liable to the Bank for the sums claimed or any sums at all.
- [13] In his Counterclaim, he sought declarations that the Articles of Sale were of no legal effect and that the Agreement for the Second Mortgage was unconscionable and had been obtained in circumstances of economic duress. He sought orders that the

Second Mortgage be set aside and that the Bank be restrained from selling the Second Mortgage, along with damages and costs.

- [14] In their Reply and Defence to Counterclaim, filed on 15th October 2001, the Bank denied that they were guilty of undue influence as alleged by Almon Nisbett. They contended that in the execution of the Second Mortgage, Almon Nisbett had not been coerced or compelled but he had done so of his own free and independent will.
- [15] While the proceedings in **Misc. Suit 177 of 1996**, were ongoing, Almon Nisbett filed a Fixed Date Claim in **NEVHCV2001/0113**, on 19th November 2001. The Claim was brought under Section 94 of Cap. 279, to settle questions arising in the course of a sale of land in accordance with the provisions of the Act. He sought 15 Declarations by the Court, including declarations that:
- i. The Second Mortgage was void on the ground of mistake;
 - ii. The Bank be made to render to him an account of all the monies received;
 - iii. The Bank had unlawfully entered into possession of the Second Property because it had failed to comply with the procedure prescribed by Cap. 279; and
 - iv. Related to the Bank's management of the Second Property while it was in its possession.
- [16] In its Defence filed on 14th May 2002, the Bank denied that there was an error on its part with respect to the outstanding balance owed by Almon Nisbett or that it had ever had possession of the Second Property. The Bank counterclaimed for the sum of \$839,502.82. together with interest of 13% until the date of judgment and in the alternative an Order of Sale of the Second Property, to recover the sum outstanding under the Second Mortgage.
- [17] The pleadings raise several issues requiring determination but in my view, they are all related to the following:
- 1) Was the Second Mortgage void because there was a mistake in the material particular of its terms?
 - 2) Was the Second Mortgage procured in circumstances amounting to economic duress and or by undue influence?
 - 3) Whether the terms of repayment in the Second Mortgage amounted to an unconscionable bargain?
 - 4) Whether Almon Nisbett was liable for the outstanding sums together with accrued interest as claimed by the Bank?
 - 5) Were the Articles of Seizure null and void because the Bank had failed to comply with the provisions of Cap. 279?
 - 6) Was the Bank liable for any damage or loss suffered by Almon Nisbett during its possession of the Second Property?

Mistake

- [18] The first issue that I will deal with relates to mistake. The contention by Almon Nisbett is that the Second Mortgage is void because there was a substantial mistake in the material particulars of its terms.

- [19] Phillips MR in the case of **Great Peace Shipping Limited v Tsavlis Salvage (International) Limited**¹ defined mistake simply as an erroneous belief. At common law, a contract may be vitiated on the ground of mistake of one party or both depending on the circumstances of the case.
- [20] Three types of mistakes have been identified in contract: unilateral mistakes; mutual mistakes; and common mistakes. The two sides do not agree which type or types of mistake apply in this case. Miss Harper submitted that there was a mistake in communication between the Bank and Almon Nisbett and that he had operated under a mistake or understanding about the terms of the Second Mortgage. As such it fell within the category of a unilateral mistake or mutual mistake. The Bank's written submissions refer to cases involving common mistake and pleas *non est factum*², which suggests that they have approached it from that position.
- [21] The leading cases on unilateral mistake are **Smith v Hughes**³ and **Hartog v Colin and Shields**⁴. Miss Harper has relied on the latter. These authorities indicate that a unilateral mistake is where only one party to a contract is mistaken as to the terms or subject-matter contained in a contract.
- [22] Mutual mistake was considered by the court in the case of **Raffles v Wichelous**⁵. In that case, the court found that an objective assessment of the negotiations between the parties showed that they were at cross-purposes, the result was that no agreement had been made between them. The case therefore fell into the category of mutual mistake because each party had erroneously believed that the other had agreed to his terms.
- [23] In her written submissions, Ms. Walwyn referred to the case of **Great Peace Shipping Ltd. v Tsavlis Salvage (International) Ltd; the Great Peace**⁶, which considered common mistake. Common mistake arises where the parties to a contract share the same mistake. It exists in three main sets of circumstances:
- 1) a common mistake as to the existence of the subject matter of the contract;
 - 2) a common mistake as to the ownership of the subject matter of the contract; and
 - 3) a common mistake as to the qualities or attributes of the subject matter of the contract.
- [24] Lord Atkin held in **Bell v Lever Brothers**⁷, where a contract expressly or impliedly contains a condition of a contract, it is voidable if the assumption is not true. In that case, common mistake arose because both parties believed that they were bargaining about a service contract, which could only be terminated with compensation. In fact, the contract could have been terminated without compensation.

¹ [2002] 4 All ER 689.

² It is not my deed

³ [1871] LR 6 QB 597

⁴ [1939] 3 All ER 566

⁵ [1864] 2 Hurl & C 906 Court of Exchequer

⁶ See Note 1

⁷ [1932] AC 161

- [25] I have considered the authorities and there are no circumstances in this case gave that rise to common mistake. The Bank has never agreed that there was any erroneous belief on its part in relation to the Second Mortgage, therefore mutual mistake must be discounted. I have therefore concluded that Almon Nisbett is relying on unilateral mistake.
- [26] Where a party asserts that the validity of a contract is affected by a unilateral mistake, he must prove that:
- 1) The mistake was fundamental to the terms of the contract⁸ or “an essential and integral element of the subject matter⁹;
 - 2) The other party to the contract was aware of the mistake¹⁰, or
 - 3) In the circumstances, the mistake would have been apparent to any reasonable man¹¹.
- [27] Miss Harper has submitted that Almon Nisbett operated under a mistake or understanding about the terms of the Second Mortgage and that the Second Mortgage was of a different class and character from what Almon Nisbett believed. The mistake was not just as to content of the document but was fundamental and Almon Nisbett did not intend to accept its terms. The mistake was fundamental because the effect was to ask Almon Nisbett to pay more than what he was entitled to pay. The Bank knew or should have known of the mistake regarding the terms of the contract and they acted recklessly by not rectifying it.
- [28] I turn to the evidence presented in support of those submissions and I come to what to one matter that impacts this the evidence in this case, the death of Almon Nisbett. It is accepted that this matter has continued after Almon Nisbett’s death by the substitution of Masefield Nisbett, as the Administrator of his Estate. However, there are certain evidential matters that neither Masefield Nisbett nor any other witness can speak to, in the place of Almon Nisbett. I have no evidence before me as to what was Almon Nisbett’s mistake in relation to the terms of the Second Mortgage or what mistake he was operating under. That evidence would have to come to Almon Nisbett. I have heard submissions and conclusions drawn on the part of the Bank but I have no evidence in adduced in this trial in support of the allegations.
- [29] This is unlike the case of **Bernadette Liddie and Bernard Liddie v St. Kitts & Nevis Anguilla National Bank Ltd.**¹² relied on by Miss Harper. In that case there was documentary evidence put in by the Liddies that detailed that their transactions with the Respondent bank, which allowed to the Court to conclude that the mistake made by the Respondent fundamental. In this case, for obvious reasons I have no direct evidence from Almon Nisbett and there is no other evidence, written and/or oral on which I can make an determination in relation to his mistake or to find in his favour.
- [30] It is my judgment therefore that the Second Mortgage is not void on the ground of mistake.

⁸ See Note 3

⁹ See Note 7 Lord Thankerton at 235

¹⁰ See Note 3

¹¹ O.T. Africa Line Ltd. v Vickers Plc [1996] 1 Lloyd Rep. 700

¹² Civil Appeal No. 10 of 2003 (St. Kitts and Nevis)

Economic Duress

- [31] I now turn to consider whether the Second Mortgage was procured in circumstances amounting to economic duress.
- [32] Economic duress is a common law concept. In their submissions, both sides refer to the cases of **Pao On v Lau Yiu Ling**¹³ and **Universe Tankship Inc. of Monrovia v International Transport Workers Federation and Others**¹⁴, which are important in the development of the law of economic duress but the doctrine was first discussed by Kerr J in **Occidental Worldwide Investment Corporation v Skibs (The Sibeon & The Sibotre)**¹⁵, where he held that where coercion of the will is found to exist on the facts of a case, it vitiates consent and coerced party should be able to seek to have the contract set aside on that basis. Cases like **Pao On**¹⁶ and **Universe Tankships Inc.**¹⁷ show that the courts have fully recognized economic duress as the basis of a valid claim.
- [33] The courts have given guidance as to what constitutes duress, in these types of matters. In **Pao On's**¹⁸, Lord Scarman held¹⁹:
- “Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in Occidental Worldwide Investment Corporation v. Skibs A/S Avanti [1976] 1 Lloyd’s Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor “which could in law be regarded as a coercion of his will so as to vitiate his consent.”*
- [34] Lord Scarman went on to identify four factors that must be considered in determining whether there was duress²⁰:
- 1) Whether the person alleging to be coerced did or did not protest?
 - 2) Did that person have any alternative course open to him, e.g. an adequate legal remedy?
 - 3) Was he independently advised?
 - 4) Whether after entering into the contract, had he taken steps to avoid it?
- [35] In the **Universe Tankships Inc.**²¹ case, Lord Diplock recognized the development law of economic duress and identified its rationale. He stated²² that it is not that the party seeking to avoid the contract which he had entered into with another party, or to recover money that he has paid to another in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or

¹³ [1980] AC 614

¹⁴ [1983] AC 366

¹⁵ [1976] 1 Lloyd's Rep 293

¹⁶ See Note 13

¹⁷ See Note 14

¹⁸ See Note 13

¹⁹ Ibid at 635

²⁰ Ibid

²¹ See Note 14

²² Ibid at 384

did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind.

- [36] Lord Scarman appeared to review the requirement of vitiation of consent in **Pao On's** case replace it with the absence of choice, when he said²³:

"The classic case of duress is, however, not lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him."

- [37] It was held in **IFR V Federal Trade Spa**²⁴, that because duress has the effect of deflecting the will of the party making the claim, the effect of a finding of duress is always to make a contract voidable and not void.

- [38] The authorities relied on set out the relevant law on economic duress that applies to this case.

- [39] As part of her submission Miss Harper's certain matters that were clear on the documents in the case: that the First Mortgage was executed in 1993; less than one year later a Notice to Pay Off was issued; and Almon Nisbett executed the Second Mortgage in 1994. It followed that the demand to execute the Second Mortgage coupled with the threat/warning that to do otherwise would result in loss of property and all other extenuating circumstances in Almon Nisbett's life amounted to economic duress.

- [40] The legal burden is on Almon Nisbett to prove economic duress. The contents of the First Mortgage and the Second Mortgage speak for themselves. The evidence is that the Second Mortgage was sent to Almon Nisbett in the United States and it was executed and returned. Masfield Nisbett testimony is that he protested to Steadmon Tross and other Bank Directors about the terms of the Second Mortgage but he was ignored because he did not have the requisite authority to act on behalf of his father.

- [41] I have considered the authorities and I have concluded that where economic duress is alleged, any protest must come from the person who is making the claim and it must be made before the contract is concluded.

- [42] Masfield Nisbett gave evidence that his father was old and not in the best of health but there is no evidence or circumstances that could lead me to conclude that the Bank induced him in some way to execute Second Mortgage or exerted any illegitimate pressure on him²⁵. In the same way, there is no evidence that when Almon Nisbett executed the Second Mortgage, that there was no other practical choice open to him²⁶.

²³ Ibid at 400

²⁴ [2001] EWHC 519

²⁵ See Note 13

²⁶ Ibid

- [43] In my judgment, the allegations and submissions have been made but there is a deficiency in the evidence that the cases **Pao On v Lau Yiu Ling**²⁷ and **Universe Tankship Inc. of Monrovia v International Transport Workers Federation and Others** show is required. On the factual evidence, Almon Nisbett has not discharged the burden placed on him to prove economic duress and there is no basis on my which I can find that the Second Mortgage is voidable²⁸ on that ground.

Undue Influence

- [44] I now to consider whether the Second Mortgage was procured by undue influence.
- [45] Lord Nicholls gave this definition of undue influence in the **Royal Bank of Scotland v Etridge (No. 2)**²⁹:

“Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress.

... Here as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: ‘how the intention was produced’ ... If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or ‘undue influence’, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person’s free will. It is impossible to be more, precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.”

- [46] Undue influence has been classified as actual undue influence³⁰
- [47] In her written submissions, Miss Harper set out the authorities on undue influence including **First Caribbean International Bank Barbados Limited (formerly CIBC Caribbean Limited v Panache Limited et al**³¹, where the principle was applied in our jurisdiction.
- [48] She referred to the case of **National Westminster Bank v Morgan**³², where it was held that the relationship of banker and customer does not create a relationship of

²⁷ See Note 13

²⁸ See Note 24

²⁹ [2001] 4 All ER 449 at 457

³⁰ **Bank of Credit & Commerce International v Aboody** [1990] 1 QB 923

³¹ Consolidated Claims Nos. SLUHCv2002/0268 and SLUHCv2002/0269 and SLUHCv2002/0273

³² [1983] 3 All ER 85

confidentiality in the normal course. However, she submitted that on the circumstances of the particular case a special relationship can be found to exist, as this was the case between Almon Nisbett and the Bank.

- [49] Miss Harper made a critical observation at paragraph 56 of her submissions where she stated:

"No presumption of undue influence will arise unless the transaction between the parties is one that is not readily explicable by ordinary motives. In Bank of Credit and Commerce International SA v Aboody, Lord Nicholls stated the question is one of proof. The claimant may prove undue influence directly. Even if he does not do this, if he shows that he placed trust and confidence in the other party in relation to the management of his affairs, and that the transaction in question is one that calls for explanation, that "will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof" and the transaction will be liable to set aside."

- [50] I accept that from the authorities, this is a correct statement of the law. It has not been submitted whether Almon Nisbett has alleged actual or presumed undue influence. The fact that there is no suggestion that the Bank exerted actual influence and the reliance on trust and confidence related to presumed undue influence.
- [51] The question is where has Almon Nisbett shown that he put trust and confidence in the Bank in relation to the management of his affairs. Masfield Nisbett cannot attest to this, his accountants cannot attest to this, these persons can only come to conclusions based on what they knew but only Almon Nisbett can speak to where he placed his trust and confidence. This is critical to a finding of undue influence because without that finding of fact in relation to Almon Nisbett, there is no basis for proceeding to consider the issue undue influence. Trust and confidence must be proven to exist and in this case it was not. Almon Nisbett failed to discharge the burden placed on him.
- [52] It is my judgment therefore that the Second Mortgage was not procured by undue influence.

Unconscionable Bargain

- [53] I now consider whether the Second Mortgage and in particular the terms of repayment of interest amounted to an unconscionable bargain.
- [54] As far back as 1751, the court in the case of *Earl of Chesterfield v Janssen*³³ held that equity would intervene to give relief against unconscionable bargains. An unconscionable bargain has been defined as one which is unreasonable and not in accordance with the ordinary rules of fair dealing³⁴. For example, *"the rate of interest may be so monstrous as to show that by itself. There may be, as Lord Thurlow said in one case, "an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it". Gwynne v Heaton ... "*³⁵

³³ (1751) 2 Ves Sen 125

³⁴ *Samuel v Newbold* [1906] AC 461 at 470

³⁵ *Ibid*

- [55] The doctrine of unconscionable bargains is limited in three ways³⁶: firstly, the bargain must be oppressive to the complainant in overall terms; secondly, it may only apply when the complainant was suffering from certain types of bargaining weakness; and thirdly, the other party must have acted unconscionably in the sense of have taken advantage of the complainant.
- [56] Almon Nisbett has alleged that Second Mortgage and in particular the terms of the repayment of interest amounted to an unconscionable bargain. The first element of the doctrine of unconscionable bargain that he must prove is that he fell within the category of persons who was suffering from a bargaining weakness or under a special disadvantage or disability, such as poverty, ignorance or lack of independent legal advice. This element is the basis of the doctrine, if this element is not proved the claimant cannot proceed to rely on it.
- [57] At the time the Second Mortgage was executed, Masefield Nisbett has testified that his father was old and sick. The Bank has not disputed that. This however, does not put him within the categories established by the authorities. Even if I consider the case of **Barnett v Hartley**³⁷, that Miss Harper has relied on, I have no conclusive evidence before me that Almon Nisbett was a man under “grievous necessity” and “want of money”. I have heard Masefield Nisbett but there no evidence adduced in relation to his entire financial position. What I see is that he borrowed large sums of monies from the Bank but I can conclude nothing else without other evidence which was not provided.
- [58] It is therefore my judgment that the Second Mortgage and the in particular the terms of repayment of interest amount did not amount to an unconscionable bargain.
- [59] Having regard to the conclusions that I have reached to this point, it is now necessary to consider whether Almon Nisbett is liable for the sums claimed by the Bank.

Is Almon Nisbett liable to the Bank for the sums claimed or any other sums?

- [60] The Bank has claimed that the sum outstanding and due to paid by Almon Nisbett is \$839,502.83. Berne Hanley, the Bank’s Loans Officer gave evidence in support of this claim. He gave the details of Almon Nisbett’s loan Account #407060 held at the Bank.
- [61] He referred to the First Mortgage in the sum of \$900,000.00. He stated that Almon Nisbett made a payment of \$700,000.00 towards the First Mortgage on 3rd May 1994, which left a principal balance of \$326,553.00. The First Mortgage was discharged and the Certificate of the Title of the First Property returned to Almon Nisbett.
- [62] The Second Mortgage was executed in the sum of \$387,088.81, which was the outstanding balance on the loan and the Second Property was used as security. The life of the Second Mortgage had expired without any payment whatsoever.
- [63] As a result of Almon Nisbett’s default the Bank had taken steps to the outstanding amounts. At 4th November 1996, when the Bank commenced foreclosure proceedings,

³⁶ Chitty on Contracts 28th ed.7-08o

³⁷ [1886] LR 2 Eq. 787 at 795 per Stuart VC

the outstanding amount totalled \$534,220.07, made up of principal of \$387,088.81 and interest of \$147,131.26. No payments have been made on the Second Mortgage since an undertaking given by Almon Nisbett's Solicitor on 2nd April 1997.

- [64] At paragraph 15 of his Witness Statement, which was made on 13th February 2009, he stated that the Bank was entitled to its claim made on 18th January 2001 for the sum of \$839,502.82. At paragraph 19, he stated that the total debt outstanding including principal and interest was \$631,355.44 and that debt remained wholly unsatisfied
- [65] Miss Harper cross-examined Mr. Hanley in depth about the Bank's recording-keeping of Almon Nisbett's loan account. He admitted that there were missing records and that there might have been some miscalculations.
- [66] Mr. Frank Evelyn, a Certified Public Accountant was appointed by the court with the consent of both parties as Referee to examine Almon Nisbett's accounts with the Bank to determine what sums, if any, were due to the Bank by Almon Nisbett.
- [67] He submitted a report of his finding on 31st May 2008 and it was admitted as part of the documentary evidence in this case. His findings stated that sum of \$380,088.81 was the accumulated sum owed by Almon Nisbett on the Second Mortgage. He confirmed his findings of the accounts to the court on 28th November 2008.
- [68] In her closing address, Miss Harper did not dispute that there was an amount on the Second Mortgage.
- [69] It is possible to reconstruct part of the true position from the agreed documents: the First Mortgage, the Discharge of the First Mortgage and the Second Mortgage. There is no valid challenge to Mr. Hanley's evidence that there no payments were ever made on the Second Mortgage.
- [70] I have reviewed the evidence and the documents and I am satisfied that Frank Evelyn's report is soundly based and for that reason I accept his findings as to what is owed by Almon Nisbett, and I take that figure to be \$387,088.81.
- [71] I note that although the Bank has claimed \$839,502.83, there is actually no evidence given as to how that sum was calculate. It is my judgment that Almon Nisbett is liable to the Bank for the sum of \$387,088.81 on the Second Mortgage and interest calculated at 13% from 30th May 1994 to January 18th 2001.

Were the Articles of Seizure void?

- [72] I now turn to consider whether the filing of the Articles of Seizure was unlawful and therefore null and void.
- [73] Cap. 279 provides for the procedure to be followed in relation to seizure. Sections 71 to 94 which fall under the rubric Sale of Incumbered Lands or Estates.
- [74] Section 71 provides that where a mortgagor has failed to perform the conditions of the mortgage, the mortgagee may lawfully demand the repayment of the sum lent and the mortgagee must serve the mortgagor with a formal notice to pay off within sixty days of the date of service. If the registered proprietor is resident abroad, it should be served on someone holding a lawful power of attorney or in accordance with service out of the jurisdiction provision of the Supreme Court.

- [75] Section 72 provides that if the mortgagor fails to pay off the mortgage in accordance with the Notice to Pay Off, within sixty days of service, the mortgagee can proceed to seize the property.
- [76] Section 73 provides that seizure is to be effected by the bailiff in the prescribed manner.
- [77] The submission on behalf of Almon Nisbett is that the Second Property had been seized. However, there is the evidence of Reuben Wilkinson who was the Bailiff of the High Court in November 1996, that no instructions to seize the Second Property were given to him by or on behalf of the Bank or from the Chambers of Walwyn Law or any other person. At no time was the property seized by him in his capacity as Bailiff of the High Court of the Nevis Circuit or in any other capacity. Mr. Wilkinson's evidence remains uncontroverted, he was not even challenged on it in cross-examination.
- [78] I am satisfied that the Articles of Seizure were filed but Second Property had not been seized under Section 73, therefore the Bank could not be liable to pay damages to Almon Nisbett for damage or depreciation consequent to a seizure, which did not take place.

Did the Bank become the mortgagee in possession of the Second Property after the filing of the Articles of Seizure?

- [79] I now turn to the final issue for determination and that is whether the Bank became the mortgagee in possession of the Second Property after the filing of the Articles of Seizure.
- [80] Section 72 gives the mortgagee the right to seize the mortgaged property once certain conditions are satisfied and Section 73 sets out the how the act of seizure is to be effected. Neither speaks to any issue related to the Mortgagee being deemed to be in possession on the filing of the Articles of Seizure.
- [81] Miss Harper has submitted that as regard the issue of possession, when a legal mortgage is created and no provisions are made for the retention of possession by the mortgagor, the mortgagee is entitled to the mortgagor to immediate possession at any time after the execution of the mortgage, and equity does not interfere, notwithstanding that there has been no default on the part of the mortgagor or that considerable time has elapsed, provided a claim for possession is not statute barred. She relied on the authority of **Halsbury's Laws of England, 4th edition Volume 32 para. 603** and the case of **Wright v Pepin**³⁸ for that legal proposition, one which I accept as being correct.
- [82] The Bank denies that it had ever entered into possession of the Second Property but Almon Nisbett is asking the court to disregard that claim in light of the evidence of Evan Nisbett. Evan Nisbett, a real estate agent testified that he had been instructed by the Nevis Co-operative Banking Company Limited, to sell the Second Property. On those instructions, he had advertised the property, put up a For Sale sign. He had actually identified purchasers but the purchase did not go through.

³⁸ [1954] 2 All ER 52

- [83] It is submitted that it can be inferred from Evan Nisbett's evidence that the Bank went into possession of the Second Property. Evan Nisbett did all things that a real estate with instructions to sell property would do. Those instructions are not conclusive to prove that the person giving them is in possession of the property for sale. I cannot agree that without more, I can make such inference only on his evidence.
- [84] I am not satisfied on the evidence that the Bank entered into possession of the property and it is not liable for any loss or damage.

Costs

- [85] The Bank having succeeded on its claim is entitled to prescribed costs in accordance with **Part 65.5(2)(a)** and **Appendix C of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000³⁹**.

Conclusion

- [86] In light of findings and the reasons that I have given make the following declarations and orders:
- 1) The Second Mortgage is not void on the ground of mistake.
 - 2) The Second Mortgage was not procured in circumstances amounting to economic duress.
 - 3) The Second Mortgage was not procured in circumstances amounting to undue influence.
 - 4) The Second Mortgage and in particular the terms of repayment of interest did not amount to an unconscionable bargain.
 - 5) The filing of the Articles of Seizure on 4th November 1996 was not unlawful and therefore not null and void.
 - 6) There was no seizure of the Second Property by the Bank.
 - 7) The Bank is not liable to pay damages for damage and depreciation to Almon Nisbett in relation to the filing of the Articles of Sale on 4th November 1996 or in relation to possession of the Second Property.
 - 8) Almon Nisbett is liable to the Bank in the sum of \$387,088.81 and interest in accordance with the terms of the Second Mortgage for the period 30th May 1994 to 18th January 2001.
 - 9) Almon Nisbett is to pay costs on the judgment debt in accordance with Part 65.5(2)(a) of CPR 2000.

IANTHEA LEIGERTWOOD-OCTAVE
High Court Judge [Ag.]

³⁹ CPR 2000