

W/mg

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2001/C273

BETWEEN

FIRST CARIBBEAN
INTERNATIONAL BANK
LIMITED

CLAIMANT

A N D

FULLFAM ENTERPRISES
LIMITED

1ST DEFENDANT

A N D

EVA MAE FULLER

2ND DEFENDANT

A N D

CHRISTOPHER FULLER

3RD DEFENDANT

Christopher Kellman and Nigel Jones instructed by Myers, Fletcher and Gordon for the Claimant.

Miss Aisha Mulendwe for the 2nd Defendant.

John Sinclair instructed by Tenn Russell Chin Sang Hamilton and Ramsay for the 3rd Defendant.

**Heard: May 31st 2004, June 1st & 2nd 2004,
July 20th 2004 & February 10th 2005**

Hibbert, J.

1. Fullfam Enterprises Limited was incorporated with two shareholders namely Dr. Eva Mae Fuller and Mr. Christopher Fuller, wife and husband who were also

named as directors. Additionally, Dr. Fuller was designated secretary of the company.

2. To house the operations of the company Dr. and Mr. Fuller in 1995 purchased as joint tenants premises situated at 28 Victoria Avenue in the parish of Kingston. For this they obtained a loan by way of mortgage from C.I.B.C. Jamaica Limited, the name of which was subsequently changed to First Caribbean International Bank (Jamaica) Limited. A further loan was granted to Fullfam in 1997 for the renovation of the property and in 1998 the bank extended to Fullfam overdraft facilities to provide it with working capital.

3. Later, on the request of Mr. Fuller it was agreed that all the loans would be consolidated under the company to allow for ease of debt servicing requirements. As evidence of this consolidation, on the request of C.I.B.C, Dr. and Mr. Fuller executed a promissory note on 16th November, 1998 on behalf of Fullfam representing the total outstanding liability at that date. Dr. and Mr. Fuller also signed an unlimited guarantee as additional support for the security for the loan.

4. In 1999 the loan was classified as non-performing as it was not being serviced and letters of demand dated 28th January 2001 were sent to Fullfam as the principal debtor and to Dr. and Mr. Fuller as guarantors. In those letters the loan balance was stated to be \$4, 054,600.19. In a letter dated 27th February, 2001 Dr.

Fuller enclosed a cheque for the sum of \$560,000 to be applied towards reducing the loan balance of \$4,050,600.19.

5. By writ of summons dated 31st December, 2001 C.I.B.C. sued Fullfam as well as Dr. and Mr. Fuller to recover the debt owed. On the 16th January 2002, Messrs. Tenn Russell Chin Sang Hamilton and Ramsay entered an appearance on behalf of all three defendants and subsequently filed a Defence relative to them. In this Defence Fullfam denied borrowing from or owing any sum to, C.I.B.C. Dr. and Mr. Fuller denied the making of any instrument of guarantee on the 20th August, 1999.

6. On the 4th October, 2002 an Amended Defence was filed in which Dr. and Mr. Fuller, in the alternative, pleaded that even if they made the alleged instrument of guarantee, there was no consideration moving from C.I.B.C. to support the guarantee.

7. On the 7th March 2003 McCalla, J upon hearing an application for summary judgment, ordered that summary judgment be entered against Fullfam but dismissed the summons against Dr. and Mr. Fuller.

8. By Notice of Change of Attorney dated 7th November 2003 Ms. Aisha M.N. Mulendwe took over the legal representation of Dr. Fuller, and on the 20th November 2003 filed a Further Amended Defence in relation to Dr. Fuller. In this Amended Defence, the defence of undue influence was raised as it was then

pleaded that the alleged execution of the instrument of guarantee by Dr. Fuller was procured by the exercise of undue influence of Mr. Fuller and that C.I.B.C. was aware of the relationship which existed and should have satisfied itself that she had received independent legal advice.

9. On the 3rd February, 2004 the Defence of Dr. Fuller was further amended by adding a Counter Claim in which Dr. Fuller claimed from C.I.B.C. the sum of \$560,000, alleging that this amount was paid by her to C.I.B.C. as a result of undue influence exercised by the bank.

10. The Defences of Dr. Fuller and Mr. Fuller both questioned the validity and enforceability of the instrument of guarantee and further, in relation to Dr. Fuller the question of undue influence was raised.

The Guarantee

11. In their pleadings both Dr. and Mr. Fuller denied signing any instrument of guarantee in 1999. During the trial, however, they both accepted that their signatures were affixed to the instrument of guarantee which bore the date of the 24th August, 1999. An explanation for this date was provided in the evidence of Dian Beecher the Manager of the Debt Recovery Unit of First Caribbean who stated that both the promissory note and the personal unlimited guarantee were signed on the 16th November, 1998, but the guarantee was not stamped until 24th

August 1999 and hence was dated then. It seems therefore that the real issue merely concerned the date of the document.

12. Although not raised in the pleadings or witness statements of Dr. and Mr. Fuller it was submitted on their behalf that the instrument of guarantee was signed in blank and so is unenforceable as being in breach of the Statute of Frauds. This first arose during the cross-examination of Mr. Fuller by Miss Mulendwe. Then, he stated that words which were crossed out so as to show that the guarantee was unlimited were not crossed out at the time when he signed. One has only to examine the document to reject this assertion, as his as well as Dr. Fuller's initials appear where these crossings out were made and where Fullfam Enterprises Limited was inserted as the principal debtor.

13. Even, if as claimed by the Fullers, the instrument of guarantee was signed in blank would this render the guarantee unenforceable? An examination of the document reveals that apart from the date and place of execution the only areas which would have been left blank would have been the name of the principal debtor and the amount for which the guarantors would be liable. The equitable remedy of rectification has always been available to correct or complete a document which does not express the intention of the parties. I am supported in this assertion by the judgment of the Court of Appeal in Supreme Court Civil Appeals Nos. 65 and 88 of 1999 **Donovan Crawford and Ors. V. Financial**

Institutions Services Ltd. In this case it was always intended by the parties that the principal debtor would be Fullfam. At the time of the signing of the document the Fullers also executed a promissory note to pay to C.I.B.C. the amount owed to it by Fullfam as at that date. As overdraft facilities existed whereby Fullfam would become further liable to C.I.B.C. it must have been intended that the guarantee would also cover the further indebtedness of Fullfam. Consequently I find that even if the document was signed in blank, it must have been intended that officers of C.I.B.C. would make the necessary adjustments in order to give effect to the intention of the parties, hence the initials of the guarantors where the adjustments were made.

14. A guarantee, like any other contract, is only enforceable if there is consideration moving from the creditor. There is, however, no requirement that the consideration move from the creditor to the guarantor as the benefit which is usually sought is for the principal debtor.

15. Mr. Fuller sought to consolidate the loans for the purchase of the property situated at 28 Victoria Avenue, for the renovation of the property and the amount outstanding on the overdraft facilities.

16. On the evidence of Dian Beecher, as the promissory note was in relation only to the debt as at 16th November, 1998 the unlimited guarantee was required to

provide security for the interest which would be occurring on the debt. Further, additional sums were being made available to Fullfam on the overdraft facilities.

17. Accordingly, I find that there was sufficient consideration to make the guarantee binding and enforceable.

Undue Influence

18. Dr. Fuller has asserted in the alternative that she signed the guarantee as a result of the undue influence of her husband.

19. As pointed out by Lord Nichols in **Royal Bank of Scotland v. Etridge (No.2)**, [2001] 4 All E.R. 449 at page 457:

“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.”

He further stated:

Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats.

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

20. At pages 458 to 459 he further stated:

“Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. 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”.

At page 462 Lord Nichols further stated:

“I add a cautionary note, prompted by some of the first instance judgments in the cases currently being considered by the House. It concerns the general approach to be adopted by a court when considering whether a wife’s guarantee of her husband’s bank overdraft was procured by her husband’s undue influence. Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements of conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more be castigated as undue influence.

21. Similar sentiments were expressed by Lord Scott who at pages 502 to 503 stated:

“The proposition that if a wife, who generally reposes trust and confidence in her husband, agrees to become surety to support his debts or his business enterprises a presumption of undue influence arises is one which I am unable to accept. To regard the husband in such a case as a presumed ‘wrongdoer’

does not seem to me consistent with the relationship to trust and confidence that is a part of every healthy marriage”.

He later stated:

“In the surety wife cases it should, in my opinion, be recognized that undue influence, though a possible explanation for the wife’s agreement to become surety is a relatively unlikely one”.

22. Etridge’s case was cited with approval by the Judicial Committee of the Privy Counsel in an appeal from the Court of Appeal of the Eastern Caribbean States in **Dailey v. Dailey (2003) 63 WIR. 63**, and in **National Commercial Bank (Jamaica) Limited v. Hew and Anor. (2003) 63 WIR. 183**, an appeal from the Court of Appeal of Jamaica.

23. In my opinion, no evidence has been adduced to suggest that Mr. Fuller exercised undue influence over Dr. Fuller. Dr. Fuller is a registered medical practitioner employed to the Ministry of Health and who also operates a private practice. In her evidence she admitted signing several documents pertaining to Fullfam but stated that in most instances, because of time constraints, she signed the documents without fully reading them.

24. The instrument of guarantee was signed by Mr. Harvey Levers on behalf of C.I.B.C. Dr. Fuller admitted to attending at the bank and signing documents presented to her by Mr. Levers sometime in 1998. She said she did so after receiving a telephone call from Mr. Levers requesting that she attend at the bank to

execute certain documents as a matter of urgency. She, however, stated she signed the documents at the places shown to her, but did not read them, did not ask for copies nor ask that the documents be explained to her, again due to time constraints. Although she stated that she attended at the bank because she was being loyal, trusting and faithful to her husband, this clearly could not be interpreted as being the exercise of undue influence over her by her husband.

25. Having seen and heard both Dr. and Mr. Fuller, I have found Dr. Fuller to be an intelligent, self assured woman with above average business sense and would have great difficulty in accepting that in relation to her participation in the affairs of Fullfam she was unaware of what she was doing or that she acted under the undue influence of her husband.

26. Dr. Fuller's claim that she paid the \$560,000 as a result of undue influence exerted by offices of C.I.B.C. is totally inconsistent with the tenor of her handwritten letter enclosing the cheque. This letter clearly demonstrates Dr. Fuller's business savvy. In this letter she indicated that the payment would go towards reducing the principal loan amounting to \$4,054,600.19. She also stated that a similar sum would be paid towards reducing the principal with the implication that **"the interest will be capped"** and that **"a significant amount of the interest already accumulated will be waived."** She ends her letter with these words **"Thank you for your patience and understanding."**

27. Even without this letter, merely asserting in her witness statement **“That out of the fear of losing my personal assets and under duress in February 2001 I paid to the Claimant \$560,000, my retroactive salary payment to allay any legal action contemplated against me”**, could not in my opinion be construed as evidence establishing the use of undue influence or duress on the part of C.I.B.C.

Although some relationships give rise to the presumption of undue influence **Hew’s** case reiterated the statement in **Etridge’s** case that the banker- customer relationship does not fall within this category.

28. Accordingly judgment is awarded on the claim in favour of the Claimant against the 2nd and 3rd Defendants in the sum of \$5,289,625.97 with interest thereon at the rate of 22.75% from October 30, 2001 until February 10, 2005. Costs to the Claimant against the 2nd and 3rd Defendants to be taxed if not agreed.

29. Judgment is awarded in favour of the Claimant on the Counter Claim with costs to the Claimant to be taxed if not agreed.

