

## 2ND DEFENDANT'S SUBMISSIONS

SUIT NO. C.L. R 112 QF 1998

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

BETWEEN	SHEILA ROSE-GREEN	PLAINTIFF
AND	PATRICK ROSE-GREEN	1ST DEFENDANT
AND	BANK OF NOVA SCOTIA JAMAICA LIMITED	2ND DEFENDANT

1. This action should be struck out and the application for an injunction refused because:
  - a. There is no cause of action against the 2<sup>nd</sup> Defendant;
  - b. The action is frivolous & vexatious and an abuse of the process of the court; and
  - c. it is neither just nor convenient that the injunction be granted.

Simply put, there is no triable issue as between the plaintiff and the 2<sup>nd</sup> Defendant.

### There is no triable issue

2. The Plaintiff in her Statement of Claim puts the following forward as triable issues in law:
  - a. Alleged undue influence to which she was subjected by her husband, the 1<sup>st</sup> Defendant;
  - b. Non est factum re the mortgages on the ground that the 1<sup>st</sup> Defendant, her husband, caused her to sign many of the documents in blank.

### Re undue influence

3. The 2<sup>nd</sup> Defendant submits that even if Mrs. Rose-Green succeeds in establishing actual undue influence by Mr. Rose-Green, the Bank of Nova Scotia

will not be affected by such undue influence unless Mr. Rose-Green was, in a real sense, acting as agent of the Bank of Nova Scotia in procuring Mrs. Rose-Green's agreement or the Bank of Nova Scotia had actual or constructive notice of the undue influence. See CIBC Mortgages plc v Pitt, a decision of the House of Lords reported at (1993) 4 All ER 433, per Browne-Wilkinson, LJ at page 441 letter d-e, where he says:

*Applying the decision of this House in O'Brien, Mrs. Pitt has established actual undue influence by Mr. Pitt. The plaintiff [the building society] will not however be affected by such undue influence unless Mr. Pitt was, in a real sense, acting as agent of the plaintiff in procuring Mrs. Pitt's agreement or the plaintiff had actual or constructive notice of the undue influence."* [my emphasis]

4. As regards the 2<sup>nd</sup> Defendant it is not pleaded in the Statement of Claim:
  - a. That the loan transactions were to the manifest disadvantage of Mrs. Rose-Green;
  - b. That Mr. Rose-Green in exerting his undue influence on Mrs. Rose-Green was acting as agent for the Bank of Nova Scotia; or
  - c. That the Bank of Nova Scotia was under a duty to ensure that Mrs. Rose-Green obtained independent legal advice.

The Statement of Claim is completely devoid of any claim or cause of action whatever against the Bank of Nova Scotia.

5. It is instructive that in CIBC Mortgages plc v Pitt, Browne-Wilkinson, LJ (who delivered the decision of the House of Lords in the case of Barclays Bank plc v O'Brien [1993] 4 All ER 417 earlier that same day) at p. 441 letter g-j says:

*"If third parties were to be fixed with constructive notice of undue influence in relation to every transaction between a*

husband and a wife, such transactions would become almost impossible. On every purchase of a home in joint names, the building society or bank financing the purchase would have to insist on meeting the wife separately from her husband, advise her as to the nature of the transaction and recommend her to take legal advice separate from that of her husband. If that were not done, the financial institution would have to run the risk of a subsequent attempt by the wife to avoid her liabilities under the mortgage on the grounds of undue influence or misrepresentation. To establish the law in that sense would not benefit the average married couple and would discourage financial institutions from making the advance."

6. The 2<sup>nd</sup> Defendant submits, therefore, that even if Mrs. Rose-Green were able to establish that she was unduly influenced by her husband and had pleaded the facts set out in paragraph 4 above (which she has not), the bank would be unaffected because, in the circumstances on this case, it is clear beyond doubt that the Bank would not be fixed with constructive notice of the undue influence.
7. The circumstances referred to are the circumstances where (as in this case) the loan is extended to the husband and wife jointly. O'Brien only applies to raise a presumption of the bank having constructive notice the husband's undue influence where the wife is in the position of being a surety only for a loan made only to the husband. See CIBC Mortgages plc v Pitt at page 440 letter d-e and at page 441 letter j where Browne-Wilkinson, LJ says:

"What distinguishes the case of the joint advance [as in Pitt] from the surety case [as in O'Brien] is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee

by a wife of her husband's debts is not for her financial benefit."

8. Where, on the other hand, a loan is made to the husband and wife jointly, there is no basis for saying that the loan is not to the financial benefit of the wife. In other words, there is no basis for the wife to assert that the transaction was manifestly disadvantageous to her. Hence, at page 438 letters b-c of CIBC Mortgages plc v Pitt, Browne-Wilkinson, LJ said:

*"In the present case the Court of Appeal, as they were bound to, applied the law laid down in National Westminster Bank plc v Morgan [1985] 1 All ER 821 ... as interpreted by the Court of Appeal in Bank of Credit and Commerce International SA v Aboody (1988) [1992] 4 All ER 955; a claim to set aside a transaction on the grounds of undue influence whether presumed (Morgan) or actual (Aboody) cannot succeed [my emphasis] unless the claimant proves that the impugned transaction was manifestly disadvantageous to him."*

And, there is no manifest disadvantage, where the claimant is one of the persons to whom the loan was made. See The Modern Contract of Guarantee by Dr. James O'Donovan & Dr. John Phillips at page 202.

9. The 2<sup>nd</sup> Defendant submits that once it is shown that there was a loan to Mrs. Rose-Green directly then, even if there was an allegation (~~which there isn't~~) that the Bank had notice, actual or constructive, of the undue influence, the authority which would be relevant would be Pitt and not O'Brien.
10. The Court must therefore look to see whether there is any evidence that Mrs. Rose-Green was a co-borrower with her husband and/or a co-applicant for any

loan extended by the 2<sup>nd</sup> Defendant for which the land at Unity Hall subject of the mortgages was surety. See exhibit "DWQ 1" to the affidavit of Donovan Quarrie sworn to on December 4, 1998. This exhibit makes it clear that the money borrowed from the bank was borrowed by both Mr. & Mrs. Rose-Green on the security of the land at Unity Hall (their residence) for the purpose of home improvement and repairs to their said residence (and not in respect of her husband's business as is alleged in paragraphs 6 & 8 of her affidavit sworn on October 22, 1998 - at page 5 of the bundle) - The loan to the couple jointly in August, 1993 relates to mortgage no. 780241 endorsed on the title on September 9, 1993 - page 11 of Bundle) . The loan to Mr. Rose-Green alone of \$750,000 in September 1994 (Exhibit "DWQ 2") was for the purpose of settling indebtedness already incurred (by them jointly) for home improvement - It obviously relates to mortgage no. 836428 endorsed on the title on November 3, 1994 - page 11 of the Bundle. Subsequent to the loan to Mr. Rose-Green alone, both Mr. & Mrs. Rose-Green jointly applied to the Bank for credit on September 12, 1995 in the principal amount of 2.2 million dollars on the security of the land at Unity Hall, the purpose of the loan being "Reimbursement for Home Repairs" - See the 'Application for Credit' and the 'Promissory Note' - the first two documents - exhibited as "DWQ 1" to the said affidavit of Donovan Quarrie and mortgage no. 910231 for 2.2 million dollars endorsed on the title on September 3, 1996 - page 11 of the Bundle .

11. Against this background it is impossible for Mrs. Rose-Green to contend that she was not a direct beneficiary of all the loans made (including the one to her husband alone which was made for the purpose of settling debts for home improvement/repairs incurred by them both) or that the loans were "manifestly disadvantageous" to her.

12. If the transaction is not unfair to the wife, then, not only can the transactions not be set aside on the grounds of undue influence, but the bank is under no duty to ensure that she had independent legal advice. See the House of Lords case of National Westminster Bank plc v Morgan [1985] 1 All ER 821 at 827 letter h per Scarman, LJ:

*"Like Dunn LJ, I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced."*

And at page 831 letter c:

*"A meticulous examination of the facts of the present case reveals that Mr. Barrow never 'crossed the line'. Nor was the transaction unfair to the wife [my emphasis]. The bank was, therefore, under no duty to ensure that she had independent legal advice."*

13. ~~As stated before, there is in any event, not even an allegation in the Statement of Claim that the Bank had any such duty.~~

#### Re non est factum

14. The plea of non est factum arises where a person who in fact signed a document is claiming that it is not his/her deed as, for instance, where a blind person intends to sign one type of document and is duped because of the disability and through no fault of his/her own into signing a document of an altogether different type.
15. The plea can only rarely be established by a person of full capacity and cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. In general, a person cannot disown a document on the basis that she signed it in reliance on someone she trusted.

16. This is the case made out by Mrs. Rose-Green. See paragraph 5 of the Statement of Claim and the particulars alleged (at pages 65 - 66 of the Bundle).

It is important to note that, here again, Mrs. Rose-Green's allegations are directed against her husband only. She makes no allegation in her Statement of Claim against the 2<sup>nd</sup> Defendant with regard to the issue of non est factum.

17. In the House of Lords case of Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and County Building Society) [1970] 3 All ER 961 at 963 letters f-j, Reid,

LJ said:

*"I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances;...In general I do not think that he can be heard to say that he signed in reliance on someone he trusted...The plea cannot be available to anyone who was content to sign without taking the trouble to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisors without making any enquiry as to their purpose or effect...Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document whether that was his own mistake or that of his advisor. That has always been the law and in this branch of the law at least I see no reason for any change."*

18. At page 966 letter c Hodson, LJ said:

*"Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant."*

*The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care."*

In this regard it is significant that in her affidavit sworn to on October 22, 1998 at paragraph 5 (page 4 of the bundle) Mrs. Rose-Green says, *"...I reposed great trust and confidence in my husband and during the course of our marriage before our estrangement I allowed him to deal with and take all the business transactions and decisions which affected us."* She also says at paragraph 12 (iv) of the said affidavit (at page 6 of the Bundle), *"on almost every occasion the documents were signed by me in blank and the relevant officer advised that he would complete the document;"*

19. So, rather than showing that she took care, Mrs. Rose-Green's own evidence shows an absence of care on her part. The plea of non est factum is, therefore, not available to her.

20. As Pearson, LJ said at page 977 letter h - 978 letter c:

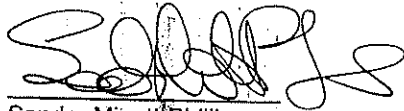
*"I must, however, deal specifically with the broad principle stated by Lord Denning MR as his conclusion from his investigation of the law. It was this:*

*'Whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature - by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences- then, if he does not take the trouble to read it, but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document and once they act on it as being his document, he cannot go back on it, and say it was a nullity from the beginning.'*

*In applying the principle to the present case Lord Denning*

*MR said:*

22. It is the 2<sup>nd</sup> Defendant's submission that on the pleadings there is no cause of action against the 2<sup>nd</sup> Defendant and that it also follows from the absence of a serious issue to be tried that the action as against the 2<sup>nd</sup> Defendant is frivolous and vexatious and an abuse of the process of the court. As regards the latter contention it is clear that the 2<sup>nd</sup> Defendant is entitled to rely on the affidavit evidence to establish this. See The Supreme Court Practice (White Book) extract 1997 Volume 1, Order 18/19/19 (2) on page 334.
23. The 2<sup>nd</sup> Defendant submits that the instant action was filed by the plaintiff, Mrs. Rose-Green on September 15, 1998, after the 2<sup>nd</sup> Defendant had, on August 13, 1998, brought an action against her (See exhibit "DL 1" to the affidavit of Derek Lazarus sworn to on December 3, 1998 - at pages 56 -59 of the Bundle) and is nothing more than an attempt by her to postpone the day of reckoning on spurious legal bases which do not stand up to scrutiny. See The Supreme Court Practice (White Book) extract 1997 Volume 1, Order 18/19/16 (2) last paragraph under (2) on page 333.
24. In the premises the 2<sup>nd</sup> Defendant prays for an order dismissing the summons for an interlocutory injunction and for an order (either under the court's inherent jurisdiction or under under section 238 of the Civil Procedure Code) striking out the action as against the 2<sup>nd</sup> Defendant for disclosing no cause of action and/or for being frivolous and vexatious and/or an abuse of the power of the court as prayed for in its summons.



Sandra Minott-Phillips

April 8, 1999

