

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L.R112/98

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

Mr. John Graham and Mr. Christopher Malcolm
for the plaintiff instructed by
Messrs. Patterson, Phillipson & Graham, Attorneys-at-law.

Mrs. Sandra Minott-Phillips for the
2nd defendant, instructed by Messrs
Myers, Fletcher & Gordon, Attorneys-at-law.

First defendant not appearing and not represented.

Heard: April 9, 16, June 17, 1999 & 7th April, 2000

RECKORD, J

The writ of summons in this action was filed by the
plaintiff on the 15th of September, 1998. The statement of
claim dated 3rd December, 1998 was subsequently filed and later
amended.

The amended statement of claim filed on the 13th of
April, 1999, reads as follows -:

1. The plaintiff is and was at all material times the wife of the first defendant.
2. At all material times, the first defendant was a customer of the second defendant and indebted to them for sums secured by mortgages over property located at lot 45 Unity Hall, Montego Bay in the parish of Saint James and registered at Volume 1183 Folio 480, owned jointly by the plaintiff and the first defendant.
3. On or about the 14th day of October, 1994 the first defendant wrongfully procured and induced the plaintiff to sign and execute an instrument of Guarantee by which she guaranteed the first defendant's indebtedness to the second defendant for unlimited sums.
4. Further, the first defendant wrongfully procured and unduly influenced the plaintiff to sign and execute Mortgage Deeds now registered as numbers 656976, 739002, 976508, 836428, and 910231 on the dates and for the sums set out in the particulars hereunder.

PARTICULARS

<u>Mortgage No.</u>	<u>Date Registered</u>	<u>Amount Secured</u>
659976	February 27, 1991	\$125,000.00
739002	December 17, 1992	53,000.00
796508	February 11, 1994	900,000.00
836428	November 3, 1994	750,000.00
910231	September 3, 1996	2,200,000.00

5. The plaintiff was induced to execute the documents mentioned in paragraphs 3 and 4 hereof by the undue influence of the first defendant and under his direction and pursuant to the faith, trust and confidence she reposed in him as her husband, but without any separate or independent advice and without due consideration of the reasons for or the effect of what she was doing.

PARTICULARS

- (i) The first defendant knew that the plaintiff did not understand the nature and consequence of the documents she was asked to sign.
- (ii) The second defendant in an attempt to further reduce the capacity of the plaintiff to understand the nature of the documents she

was being asked to sign, caused the plaintiff to sign many of the documents in "blank" and after he had received the loan amounts.

- (iii) The first defendant, husband of the plaintiff took deliberate advantage of his position of trust and failed to ensure that the plaintiff sought independent advice in relation to the documents the plaintiff was asked to sign.

5A. The second defendant had actual or constructive notice of the fact that the first defendant was exercising undue influence over her.

PARTICULARS

- (i) That the second defendant knew that the Plaintiff had received no legal advise.
- (ii) That the second defendant failed to ensure that the plaintiff took independent legal advice.

(iii) Alternatively, that the second defendant failed to emphasize and communicate with the plaintiff the need to seek independent legal advice.

(iv) That the second defendant failed to inform the plaintiff of the full extent of the first defendant's liability to the second defendant when she was requested to execute the mortgages, guarantee and security documents.

6. In the premises, the said Instrument of Guarantee and the Mortgages over the property known as Lot 45 Unity Hall, Montego Bay in the parish of Saint James registered at Volume 1183 Folio 480 were or have become null and void and are unenforceable.

AND THE PLAINTIFF CLAIMS:-

1. A declaration that the plaintiff was wrongfully induced to sign and execute an instrument of Guarantee dated the 14th day of October, 1994 and Instruments fo Mortgage numbered 656976, 739002, 796508, 836428 and 910231 over property known as Lot

45 Unity Hall, Montego Bay in the parish of Saint James registered at Volume 1183 Folio 480 of the Register Book of Titles in favour of the second defendant by the undue influence of the first defendant and that the said Instrument of Guarantee and Instruments of Mortgage are null and void.

2. An Order that the defendants do execute all such documents and do all and such other as may be necessary to discharge the said mortgages and revoke the Instrument of Guarantee.
3. An injunction to restrain the second defendant whether by itself, its servants and/or agents or howsoever from transferring or in any way dealing with the said property.
4. Any further or other relief as this Honourable Court deems just.
5. Costs.

It appears that this action was filed as a result of an action filed by the second defendant, Bank of Nova Scotia Jamaica Limited, against the first defendant Patrick Rose-Green and his wife, the plaintiff Sheila Rose-Green, on the 13th of August, 1998, seeking to recover from them the sum of \$28,561,686.17 as monies loaned to them together with interest as at 30th July, 1998. (See Suit No. C.L. B240/98).

Following upon this action being filed, the second defendant, Bank of Nova Scotia Jamaica Limited issued a summons on the 9th of December, 1998, applying for an order that

1. The plaintiff's action be struck out and the writ of summons and all subsequent proceedings filed herein set aside as against the second defendant on the ground that
 - (a) it discloses no cause of action against the second defendant and/or
 - (b) it is frivolous and vexatious and/or an abuse of the process of the Court.

2. The costs of this application and of the action to date hereof be the second defendant's and be taxable immediately.

It is the determination of this summons by the second defendant that I am now engaged.

Mrs. Minott-Phillips tendered a document contained in ten pages the second defendant's submission in support of the summons which is attached.

In response the plaintiff through her Attorney, informed the Court that she was not relying on the doctrine of non - est factum in this summons. Mr. Graham submitted that the question whether an action ought to be struck out is a matter of descretion. He referred to the White Book page 328, rule 18/19/3. Exercise of this descretion is used sparingly and only in clear and obvious cases. Counsel for the plaintiff also referred to the Suit C.L.B240/98 Bank of Nova Scotia Jamaica Limited against Patrick and Sheila Rose-Green.

In view of this claim against the plaintiff as a guarantor of her husband's indebtedness which was unlimited in time or amount which was now at \$28.5M, this was a situation where a wife would need an independent legal advice. Re Undue Influence, Mr. Graham regarded the second defendant's submission on this point as erroneous and referred to the plaintiff's affidavit filed on the 22nd of October, 1998, at paragraph 8. He submitted that the documents executed at the bank were to her manifest disadvantage. She had been married to the first defendant for over twenty years. There should be an adjudication in this case after a trial.

Counsel read the plaintiff's affidavit dated 9th of April, 1999. The exhibit S.R.G. II attached clearly indicated that the plaintiff had been writing to the bank from 1996.

This was long before any suit had been filed. The plaintiff was a guarantor of the loan to her husband, the first defendant, and not a co-borrower despite being described as co-applicant in the application form.

Mr. Graham contends that the question of education is but one of the consideration which a tribunal was to take into account in deciding whether the will of the person relying on the doctrine of undue influence had been so affected. See Bank Exterior International vs. Mann and others, (1995) 1 AER p. 936.

In the instant case the plaintiff was not invited by the bank to seek legal advice - He submitted that all of the decided cases state that where there is the possibility where one party is defendant against the other, then the lending institution is put on notice - it must advise the wife to seek independent legal advice.

Re-Deficiency in pleadings

Mr. Graham submitted that the only thing a person relying on undue influence to do is to plead the facts which gives rise to the equity either by misrepresentation or undue influence. It is then for the defendant in response to the facts being pleaded, to plead and prove that he is a bona fide purchaser for value without notice. See Barclays Bank vs. Boulter & Another (1997) 2 AER. p. 1002;
Royal Bank of Scotland vs. Etridge (1997) 3 AER. p. 628;
Avon Finance Co. ltd. vs. Bridge (1985); 2 AER. p. 281.

Frivolous, Vexatious - Abuse of Process of Court.

See Meadings, Principles & Practice by Sir Jack Jacob, at page 222.

Supreme Court Practice (1997) Volume 1 part 1 - page 334.

Remington vs. Scales (1897) 2 ch. 1.

Mr. Graham submitted that though a Court will not, on affidavit evidence, order a pleading to be struck out on the ground that the statements are false, "the circumstances in the present case showed the defence to be frivolous, and vexatious, and one which ought to be struck out as being an abuse of the procedure of the Court".

Counsel further submitted that in all interlocutory applications the tribunal should be wary of attempting to come to findings of fact based on competing affidavits since choosing between them was the function of the trial judge, not the judge in the interlocutory application - See Day vs. RAC Motoring Services Ltd. - (1999) 1 AER. page 1007.

Linotype Hall v. Baker (1992) 4 AER p. 887.

Counsel submitted the circumstances of the plaintiff: She deponed to the fact that she reposed great trust and confidence in her husband - She was a mere child when she got married. Her husband was a man of some prominence and substance - she was an accounting clerk and then became an insurance agent. Undue influence was exercised over her by him and this affected her will. It was not her will. The bank had an obligation to write her to procure independent advice. There is no dispute

that they did no such thing. In the context of all those circumstances the Court should dismiss the second defendant's claim and strike out the summons.

Mrs. Minott-Phillips on behalf of the second defendant submitted her reply on the law in writing covering three pages which are attached.

Mr. Graham in reference to new matters raised by the second defendant submitted that the question as to which category, whether actual or presumed undue influence cannot arise until after the trial.

In Etridge No. 2, the primary obligation was for the Court to lay down in a comprehensive way what it is that a bank must do in order to discharge its duty to satisfy itself that an individual who contend that he or she had been affected by undue influence that that affect does not fix the bank with notice.

In Etridge No. 1 this dealt with the question of good defence. An application to strike out the writ would not accord with principles of law and practise. This would be driving away the plaintiff from the judgment seat before having heard from her.

This was an end to the submissions.

Conclusion

The central issue arising from this summons is whether there was any duty on either the first or second defendants to ensure that the plaintiff obtained independent legal advice when she signed and executed the following:-

- (i) Instrument of Guarantee on the 14th of October 1994, for her husband's indebtedness to the second defendant for unlimited sums;
- (ii) A number of Mortgage Deeds securing sums totalling \$4,553,000 from the second defendant over the period October 1992 to October 1995;
- (iii) Promissory Notes totalling \$9,910,079.40 due from both herself and her husband in favour of the second defendant over the period August, 1993 to September 1995;
- (iv) Guaranteeing loan of \$3,200,000. made to the first defendant done on the 17th of November, 1994, to settle indebtedness already incurred by the plaintiff and her husband jointly for improvement of their home;
- (v) Guaranteeing Scotia Plan Loans totalling \$4,969,473. 82 made to the first defendant by the second defendant.

The plaintiff is no longer relying on the doctrine of non est factum as a defence. I take it therefore that she is admitting that she was a party to the transactions mentioned above. She claims however, that the part played by her was because of the under influence of her husband, the first defendant. But how does this involve the second defendant, the Bank of Nova Scotia Jamaica Limited. She claims that the Bank owes her a legal duty to advise her to seek independent legal advice before signing these documents, and because of its failure to do so, she signed the documents without legal advice and therefore, is not be liable to the Bank under the guarantee that she gave.

The second defendant contends however, that the Bank had neither actual nor constructive notice of the undue influence and that in any event , the loan transactions were not to the manifest disadvantage of the plaintiff and that infact she benefitted from the loans.

Counsel for the Bank referred to the decision of the House of Lords in C.I.B.C. Mortgages pic vs. Pitt (1993) 4 AER page 433 where Lord Browne - Wilkinson said at page 441.

"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 or 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."

Where the plaintiff is in the position of being a surety only for a loan made only to her husband, then a presumption may arise that the Bank had constructive notice of the husband's undue influence. See Barclays Bank plc vs. O'Brien (1993) 4 AER page 417.

On the other hand, where the loan is made to the husband and the wife jointly, it cannot be said that the transaction was manifestly disadvantageous to her.

"A claim to set aside a transaction on the ground of undue influence whether presumed or actual cannot succeed unless the claimant proves that the impugned transaction was manifestly disadvantageous to him."
(See Pitt (supra) at page 438).

In clear and unchallenged affidavit evidence the plaintiff personally benefitted from several of the transactions entered with the Bank along with her husband. They were all made for the improvement of their matrimonial home.

Save for Scotia Plan loans totalling just under \$5 million made to the husband personally I find that the bank was under no duty to ensure that the wife had independent legal advice.

There will therefore be an order in terms of the second defendant's summons dated 9th December, 1998, paragraph 1 (a) and paragraph 2 as amended.

REPLY ON THE LAW

1. Mr. Graham for the plaintiff has tried to convince the Court that there is no necessity for the plaintiff to establish that there was no advantage to her in the transaction, or in other words, that the transaction was not to her manifest disadvantage. As you will recall even his amended Statement of Claim does not allege that the transaction was to his client's manifest disadvantage.
2. He cited the case of **Barclays Bank plc v Boulter and another** [1997] 2 All ER 1002 in support of his submissions on the adequacy of his pleading. However, in the **Boulter** case the wife had pleaded the necessary material facts in support of her claim. That is not the case here where manifest disadvantage has not been pleaded. See page 1007 letters e-f where it says that "*Procedure and practice require that all material facts should be pleaded.*"
3. Mr. Graham relied on page 439 letter j of **CIBC Mortgages plc v Pitt** to support his contention that there is no need for the plaintiff to prove that she derived no advantage from the transaction. However it is clear that dictum applies only to cases of actual undue influence, of which this is not one. See letters c-f on the same page.
4. The various classes of undue influence are set out on page 423 of **Barclays Bank plc v O'Brien**. Actual undue influence is class 1. The facts of this case

are class 2B undue influence, which is where the plaintiff is hoping to establish presumed undue influence. Candidly, in his submissions, Mr. Graham said that the Bank was an “*innocent party*”. There is therefore, no question of actual undue influence here.

5. Far from dispensing with the need for a plaintiff to establish manifest disadvantage, Lord Browne-Wilkinson in **Pitt’s** case acknowledged that it must be shown to raise a presumption of undue influence, which is precisely the presumption that this plaintiff is trying to raise.
6. **Morgan’s** case which was dealing with instances of presumed undue influence and stressed the need for a plaintiff to prove that the transaction was not to her advantage, was not overruled by **Pitt’s** case, but only explained. At page 439 letter j of **Pitt** Lord B-W said the exact limits of the decision in **Morgan’s** case may have to be considered in the future. And they were in **Royal Bank of Scotland plc v Etridge (no.2)** [1998] 4 All ER 705.
7. My friend relied on **Royal Bank of Scotland plc v Etridge and another** [1997] 3 All ER 628. In its subsequent decision in **Royal Bank of Scotland plc v Etridge (no.2)** [1998] 4 All ER 705, the Court of Appeal said that the earlier **Etridge** case relied on by Mr. Graham “*should not be regarded as good authority in the future*”. See page 722 letters a-b.

8. The requirement to show manifest disadvantage is very much alive and well in cases of presumed undue influence (the category into which this case falls). See **Royal Bank of Scotland plc v Etridge (no.2)** [1998] 4 All ER 705 at page 724 (which sets out the issues for determination by the Court) and pages 726 letter h-728 letter b under the headings Presumed Undue Influence and Were the charges to the manifest disadvantage of Mrs. Etridge?.

9. In summary:

- a. The sine qua non for establishing presumed undue influence, namely, that the transaction was to the manifest disadvantage of Mrs. Rose-Green, is not even pleaded in the Amended Statement of Claim, accordingly the writ and Statement of Claim (as amended) disclose no cause of action against the Bank of Nova Scotia Jamaica Limited;
- b. Alternatively, the action should be struck out on the grounds that it is frivolous and vexatious and an abuse of the process of the court on the ground that the supporting documents for the loans show that Mrs. Rose-Green was a co-borrower/co-applicant for some of the loans with others being a restructuring of loans originally issued to her husband and herself jointly for their joint benefit into a loan to him which she guaranteed.



Sandra Minott-Phillips