ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV1995/062

BETWEEN

**EUSTACE GORDON**

Claimant

And

**ANTIGUA BARBUDA INVESTMENT BANK**

Defendant

**And**

CLAIM NO ANUHCV1996/0089

BETWEEN

**ANTIGUA BARBUDA INVESTMENT BANK**

Claimant

And

**EUSTACE GORDON**

Defendant

**Appearances:**

Marcel Commodore with Craig Christopher for
Antigua Barbuda Investment Bank
Hugh Marshall for Mr. Eustace Gordon

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**2004:** January 19th
February 5th 17th

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## JUDGMENT

(Banker and customer; action for debt, validity of execution of charge and variation of charge; Land Registration Act Cap 347sections 64(1) &108; negligent misrepresentation by Banker)

[1] **Joseph-Olivetti J**: Mr. Eustace Gordon is a businessman and the registered owner of certain land and buildings at Gambles, St. John's

Antigua. He obtained loans from the Antigua Barbuda Investment Bank ("the Bank") by way of overdraft and loan facilities in the sum of $475,000.00 and secured those facilities by a charge on his property. He defaulted in payment claiming that the Bank had misrepresented the value of his property to him, that he had relied on that misrepresentation in embarking on expanding his business , that the Bank had agreed to lend him money for the expansion and that the Bank's failure to do so caused him loss and damage as he was forced to close his operations as a result. Mr. Gordon obtained an interim injunction to stop the Bank from selling his property. He is seeking, among other relief, declarations that the charge and variation of charge are void for undue influence and/or economic distress and for non-compliance with certain provisions of the Registered Land Act Cap.347 and damages for negligent misrepresentation. The Bank denies his claims and in turn is asking for payment of the debt and the Bank's collection fees of 10% of the total sums due.

**Agreed Issues**

[2] The actions were consolidated and at trial the following issues were agreed upon**: -**

(1) Whether or not the Bank can establish that Mr. Gordon is Indebted to it for $733,178.21the amount claimed at the date of the writ;

(2) Whether the loans were secured by a valid legal charge on Mr. Gordon's property and whether such charge was subsequently varied;

(3) Whether in all the circumstances it could be said that the Bank gave any business advice, financial or otherwise to Mr. Gordon;

(4) Whether the valuation obtained by the Bank and relied upon by Mr. Gordon was negligently obtained;

(5) Whether or not the charge and variation of charge had been executed in accordance with Cap. 347;

(6) Whether the Bank breached an agreement with Mr. Gordon to finance the project of a liquor store and slot-machine arcade thereby causing him loss;

[3] Mr. McAllister Abbott, its managing director, gave evidence on behalf of the Bank and so did attorney at law, Mrs. Sylvia O'Marde. Mr. Gordon was his own witness. His evidence in chief was contained in his affidavits filed 13th July 1995, 27th July 1995 and 15th July 1996 in Suit 262. All the documents exhibited to the affidavits and contained in the core bundle were admitted in evidence by consent.

**Whether or not the bank can establish that Mr. Gordon is indebted to it for the amount claimed.**

[4] Mr. Abbott's evidence on the amount due and owing by Mr. Gordon was virtually unchallenged. He deposed that the Bank gave an overdraft facility of $220,000.00 to Mr Gordon on 12th June 1991, a further sum of $50,000.00 by way of overdraft in November 1992 and refinanced the loans in December 1992 whereby his total indebtedness was amounted to $475,000.00. He said the Mr. Gordon defaulted in payment from February 1993. He gave a detailed breakdown of the amount due as at 25th

January, 1996 in para. 17 of his witness statement. He said that Mr Gordon owed $474,913.29 of which $324,768.57 was principal, $145,369.72 interest, $4,275.00 for insurance premiums and $500.00 for valuation report. Mr. Gordon's evidence on this issue bears out the evidence of Mr. Abbot. In cross-examination, he admitted he owed the Bank. He said that in June 1991 he borrowed $220,000.00 and a charge was placed on his property. See his affidavit of 27th July 1995 para. 3. In paragraph 4 of the said affidavit he said that when he applied for the further financing in November 1992 to enable him to open a liquor store and to refurbish his second building he was indebted to the Bank in the sum of $ 270,000 .00. At the that time the Bank advanced him $50,000.00 to stock the liquor store pending, as he claimed, the formal approval by the board of the further loan of $575,00.00 .He admitted that in December 1992 the total facility he had from the Bank was $475,000.00. The charge was varied to reflect this amount. He said he did not repay the loans because when the Bank declined to give him the full amount requested he could not finish his project and was forced to close his business.

[5] The facility letter dated 11th December, 1992 signed by him substantiates this and shows that the facility comprised overdraft and loan components. It provides for payment of interest at 14% per annum and the reimbursement of all legal fees paid by the Bank in negotiation, preparation, execution, administration and enforcement of the agreement.

[6] On the evidence before me I have no difficulty in finding that, Mr. Gordon is indebted to the Bank in the sum of $474,913.29 together with interest on the principal sum of $324,768.57 at the rate of 14% per annum from the 25th January 1996 until judgment. The Bank did not lead any evidence to establish the quantum of its collection fees and will have to be satisfied with prescribed costs.

**The Validity of the Charge and the variation of charge**

[7] Issues 2 and 5 can be considered together under this heading.

[8] Mr. Gordon has challenged the validity of the charge and the variation of charge instruments. He testified that he signed the charge in 1991 in the presence of one of the Bank's officers and that no one explained the nature and effect of the charge to him and that he had no independent legal advice. He denied that he signed it before the Bank's solicitor, Mrs O'Marde. The charge was to secure loan and overdraft facilities of $220,000.00 at the time.

[9] The charge was varied to $475,000.00 by instrument dated 21st December 1992 after the Bank had refinanced his loans. Mr. Gordon said that he only signed the variation of charge because of his desperate economic situation, in other words he said he was forced to sign it because of economic duress. In his affidavit of 27th July, 1995 paragraph 7 he says that he signed the commitment letter and two copies of the

blank signature page of the variation of charge at the Bank in the presence of one of the Bank's officers, Mr. Richardson and that some days later Mr. Richardson sent him a copy of the variation of charge bearing his signature and that of Mr. Richardson's. It is interesting that he took no issue with the document upon its receipt.

[10] Mrs. O'Marde, testified that she knew Mr. Gordon very well; that she prepared the charge and the variation of charge at the Bank's request and that Mr Gordon signed them before her at her Chambers and that on each occasion prior to him signing each instrument she ascertained that he understood the nature and effect of the documents and that he was signing voluntarily. Mrs. O'Marde said that Mr. Richardson and Mr. Abbott signed the variation of charge in her presence but she could not say where they did so and whether they were present at the same time or in what order they attended to sign.

[11] On the other hand Mr. Abbott testified that he signed the variation of charge at the Bank in the presence of Mrs. O'Marde and that Mr. Richardson had signed it prior to him.

[12] Mrs. O'Marde, on being taxed by Mr. Gordon's counsel, was unable to explain how Mr. Gordon came by a copy of the variation of charge bearing only Mr. Gordon's signature and that of Mr. Richardson's. Her signature was notably absent from his copy. This lends credence to Mr. Gordon's

evidence that he signed the document in the presence of Mr. Richardson who also signed it and later sent him a copy and that he did not sign it before Mrs. O'Marde.

[13] I find that Mrs. O'Marde's stalwart attempt to rely on her memory and on her usual practice in preparing and witnessing the execution of documents on behalf of the Bank was both unhelpful and unsatisfactory. It was painfully obvious that she had no office records on which she could rely and that her memory was her only aid to assist her in recalling matters which took place more than ten years ago. The accuracy of her recall is gainsaid by Mr. Gordon's copy of the instrument and Mr. Abbott's evidence. Practitioners have onerous duties and they must be careful to maintain proper records especially in relation to matters concerning the Land Registration Act .

[14] Mr. Gordon relied on sections 64 and 108 of Cap 374.

[15] Section 108 concerns verification of execution of instruments not execution itself which is provided for in section 107. It is helpful to consider section 107 which stipulates that all instruments evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument.

[16] Section 108 provides that any person executing an instrument must appear before the Registrar or a public officer or such other person as is prescribed and unless known to the Registrar, public officer or other person, must be accompanied by a credible witness to establish his identity. The Registrar or public officer or other person shall satisfy himself of the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument and shall complete a certificate to that effect.

[17] The Act does not stipulate the effect of non- compliance with this section. I am of the opinion, on reviewing the Act as a whole, that the section is geared to prevent fraud or any deception used to obtain the execution of an instrument. I note section 108 (5) which gives the Registrar the power to dispense with the verification, if he considers that it cannot be obtained except with difficulty and is otherwise satisfied that the document has been properly executed or in cases in which to his knowledge the document has been properly executed. This to my mind lends support to my view that the absence of verification by itself does not render an instrument void.

[18] There is no evidence of fraud or any deception here. I find that Mr. Gordon executed both instruments, that he knew what he was signing and that he did so voluntarily. He was at the time a businessman of considerable experience and not an untutored person who could have

been easily deceived or misled. The Bank was not in a fiduciary relationship to him and this was not a situation where the presumption of undue influence could be relied on.

[19] Furthermore, in the correspondence Mr. Gordon exchanged with the Bank when it sought to realize its security he never once raised the issue that he had not signed the variation or that he did not understand the nature or effect of the instruments. Rather, he was seeking time to effect a more advantageous sale himself; he never alleged that the instruments were void or obtained through duress or undue influence. See for example his letter of 22nd October 1993.

[20] In all the circumstances it would be inequitable to allow him to take the benefit of the loans and avoid the security. Verification of instruments to my mind is a matter for the Registrar to consider in deciding whether or not to accept the instrument for registration. The instruments were registered and Mr. Gordon cannot now avail himself of any irregularity in the verification of the instruments. Both instruments are valid.

[21] His counsel also challenged the validity of the variation of charge on the basis that it did not contain the special acknowledgement required by section 64.

[22] Section 64 provides that a proprietor may by an instrument in the prescribed form charge his land and the instrument shall contain a special acknowledgement that the chargor understands the effect of section 72 of the Act and the acknowledgement shall be signed by the chargor.

[23] The section is clear. The acknowledgement must be in the instrument of charge itself. However, the variation of charge amends the charge and must be considered with the charge as one instrument. On perusing the charge I note the second paragraph on page 1 which states:

> "And/We the abovenamed chargor(s) hereby acknowledge that we understand the effect of section 72 of the Registered Land Act."

[24] The Registered Land Rules Second Schedule Form 9 set out the prescribed form of a charge . The acknowledgement in the charge is in the exact wording as the acknowledgement in the prescribed form.

[25] Section 69 makes provision for the variation of a charge by the registration of an instrument of variation executed by the parties to the charge. No special form is mandated and no specific provision for a special acknowledgement is made. The variation of charge is not in breach of any of the provisions of the Act. Both instruments must be read together as the variation merely amends the charge and therefore the omission of a special acknowledgement in the variation of charge instrument itself does not invalidate it.

**Whether the Bank is liable for negligent misrepresentation.**

**Issues 3, 4 and 6 can be considered under this head.**

**Law of Misrepresentation**

[26] A misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor') makes a misrepresentation to another ('the representee) which has the object and result of inducing the representee to enter into a contract or binding transaction with him, the representee may generally elect to regard the contract as rescinded - **Halsbury's Direct – Misrepresentation And Fraud para. 701**. See also **Chitty on Contracts Vol.11 24th edn. Para. 351.**

**Undue Influence**

[27] The relationship of bank and customer does not ordinarily give rise to the presumption of undue influence. However, if a bank acquires a dominating position and a manifestly disadvantageous transaction is proved then the presumption may be prayed in aid. **See the Encyclopaedia of Banking Law (para. C58). and the House of Lords case - National Westminster Bank plc v. Morgan [1985] A.C. 686 and CIBC Caribbean Ltd v. George Roberts and Angella Roberts ANUHCV96/2000**

[28] The relevant facts as I find them on this issue are as follows. Mr. Gordon had two buildings on the property. In one he carried on the business known as Gordon's Paint; the other was vacant. Mr. Gordon approached the Bank, through its then general manager, Mr. Abbott, his friend whom he knew when Mr. Abbott was an employee of Mr Gordon's former bank Swiss American, for a loan of $ 8,000.00 and then in June 1991 for the facility of $220,000.00. He offered the property as security.

[29] The Bank engaged Mr. Irving Edwards, an engineer and quantity surveyor and a director of the Bank to value the property. Mr Edwards submitted a valuation to the Bank of EC $1,019,256.00. The Bank apprised Mr. Gordon of this, accepted the valuation and gave Mr. Gordon a loan by way of overdraft facilities of $200,00.00 which was secured by the charge on the property.

[30] Mr. Gordon encountered fierce competition in the paint business and in 1992 he decided to restructure . He planned to convert the building which housed Gordon's Paint into a self-service liquor and beverage outlet and to refurbish the adjoining building and establish a bar, lounge and slot-machine arcade. He applied to the Bank for financing in the sum of $534,000.00 in November 1992. He said he relied on the Bank's valuation of the property as the basis for making his loan application. He supported his application by a cash flow analysis. Again he dealt with the friendly Mr. Abbott

[31] The amount applied for exceeded the limit that Mr. Abbott as general manager could sanction . Mr. Abbott told Mr. Gordon that the board had to approve the loan. Mr. Abbott accepted that he told him that the approval was a mere formality and attempted to explain what he meant by that, which was essentially that he supported the application and did not anticipate that the Board would reject it.

[32] Mr. Abbott said and I accept that the Bank's Credit Committee had concerns about Mr. Edwards' valuation prior to this new loan application but the Bank had not communicated those concerns to Mr. Gordon as the first loan was well within the value of the property, as Mr. Abbott knew it and within the Bank's safety margin.

[33] As a result of representations made to him by Mr. Gordon at the time he applied for the new loan , Mr. Abbott decided to lend him the sum of $50,000 by way of extending his overdraft facilities so that he could stock the liquor shop in time for the Christmas season . I do not find this was an advance on the new loan as Mr. Gordon alleged or any representation or agreement by Mr Abbott as agent for the Bank to grant the facility requested.

[34] The Board rejected the application. Mr. Gordon was told of this and he decided to ask for a lesser sum. The Bank obtained three new valuations

which were considerably lower than Mr. Edward's and they were disclosed to Mr Gordon. The values were respectively $441,000.00; $453,000.00 and $665,000.00. The Bank offered him a lesser amount secured on the property which he accepted. The terms of this facility are set out in the loan facility letter referred to.

[35] The gravamen of Mr. Gordon's evidence on this issue is that Mr. Abbott agreed to lend him the sum of $535,000.00; that he indicated to him the board's approval was a mere formality and he was given an advance of $50,000.00 on the loan. As far as he was concerned that meant that the Bank through Mr. Abbott had contracted with him to give him the new loan. He said that when the Board rejected his application and later offered him a lesser sum he accepted under duress as he had already embarked on his expansion plans. However, the monies were not sufficient to complete his project and he was eventually forced to close his business altogether the arcade never having got off the ground.

[36] He attempted to sell the property himself. However, It would appear that he had no success because as at the date of trial the property had not been sold. He succeeded in restraining the Bank from selling the property on the grounds, among others, that the Bank was forcing him to sell to the National Development Foundation at an undervalue.

[37] In considering all the circumstances of this case I cannot say that the Bank took an unfair advantage of Mr. Gordon by refusing his application and offering him a reduced amount based on its re-assessment of the value of his property. Mr. Gordon was fully aware of the nature of the transaction and he was not obliged to accept the Bank's offer. Duress and undue influence cannot avail him.

[38] I find that Mr. Gordon cannot in law be said to have relied on the Bank's valuation and so hold the Bank liable for any losses he suffered as a result of the initial valuation. The first valuation does not amount to a misrepresentation. In the first place, the property was his and he would have had or ought to have had a good idea of what his property was worth and could have at any time obtained his own valuation if he so wished. The Bank did not procure the valuation at Mr. Gordon's request nor on his behalf. As I understand it, in the normal scheme of things, a prudent lending institution would always obtain its own valuation of any proposed security to assist it in deciding whether or not to make a loan. The Bank owed no duty of care to Mr. Gordon and did not induce him to change his business plans and apply for a loan in November 1992 based on the valuation. Mr Gordon was in a stronger position than the Bank to ascertain the real value of his property. The Bank had no duty to disclose its concerns about the first valuation to Mr Gordon. Mr Abbott as the Bank's agent did not give financial advice to Mr Gordon so as to take this outside the normal banker customer relationship.

[39] In any event there is no challenge to the credentials of the valuer Mr. Edwards and thus no negligence on the part of the Bank even if a duty of care were owed. Furthermore, when the Bank turned down his loan application Mr. Gordon had a duty to mitigate his losses. If his project were as feasible and as profitable as his projected cash analysis seems to indicate then he would have been able to obtain financing from another source without difficulty. There is no evidence that he even attempted to do so.

**Conclusion**

[41] For the foregoing reasons Mr. Gordon's claims stand dismissed and I give judgment for the Bank as follows

(1) Mr. Gordon do pay to the Bank the sum of $474,913.29 with interest on $324,768.57, the principal amount owed at 14% per annum from 26th January 1996 until judgment;;

(2) I declare that the charge and the variation of charge are valid and binding on Mr. Gordon;

(3) The interim injunction granted on the 22nd August 1996 is discharged

(4) Mr. Gordon do pay to the Bank its prescribed costs

Rita Joseph-Olivetti
**High Court Judge**