SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. 693 of 2002

BETWEEN:

BARCLAYS FINANCE CORPORATION OF THE
LEEWARD AND WINDWARD ISLANDS LIMITED

Claimant

and

(1) ST. ROSE VERNEUIL
(2) LEANDRA VERNEUIL

Defendants

Appearances:

Mrs. Kimberley Roheman for the Claimant
Mrs. Kim Camille St. Rose for the Second Defendant

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2004: July 22;
August 05;
October 21,25;
November 01
2005: May 03

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JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES, J: This is a claim by Barclays Finance Corporation (the Bank) to recover an outstanding balance due in respect of a consolidated loan made to the defendants with their matrimonial home being used as security for the debts. The loan fell into arrears. The Bank demanded payment of the outstanding balance but the defendants failed to satisfy the debts. The Bank instituted proceedings against both defendants for the outstanding balance together with accrued interest.

[2] I interpolate to observe that the Bank has already obtained judgment in full against the first defendant, Mr. Verneuil ("the husband") at a Case Management Conference on 12th June 2003. The parties to the loan are jointly and severally liable and the Bank now seeks to obtain judgment as against both parties to the loan. This is its right.

## The basic facts

[3] Mr. and Mrs. Verneuil first met in June 1973 when she was 15 and he was 16. They became boyfriend and girlfriend. In September 1974, after successful results in 8 subjects at the G.C.E. "O" Levels, Mrs. Verneuil taught at the Vieux Fort Secondary School for a year before leaving for England to pursue higher studies. During that time, she made a promise to Mr. Verneuil that he will be her only boyfriend. In August 1982, she returned to Saint Lucia and started cohabitating with him. They lived together as man and wife until their marriage on 1st July 1989. Three children were born out of this union.

[4] On or about 19th June 1989, Mr. and Mrs. Verneuil applied for and obtained lending in the sum of $144,000.00 for the refinancing of a loan with the Bank of Nova Scotia in respect of the purchase of land and house. The loan application was signed and accepted by both parties. ("Exhibit 31").

[5] On 17th October 1997, Mrs. Verneuil appeared before Solicitor and Notary Royal Jennifer A. Remy ("Ms. Remy") and executed a Power of Attorney in favour of her husband empowering him to administer all of her affairs in a manner as he thinks fit. ("Exhibit 30").

[6] On or about 30th September 1998, Mr. Verneuil sought additional financing in the sum of $60,000.00. The financing was approved and both parties signed the application. ("Exhibit 29"). The balance in respect of the loan executed in or about June 1989 and the additional financing of $60,000.00 were amalgamated and a letter of instruction was issued to Ms. Remy for the preparation of the mortgage on behalf of the parties in the sum of $172,000.00. The matrimonial home registered in the Land Registry as Block 1251B Parcel 21 was used as security for the loan. On 27th October 1998, both parties executed the Hypothecary Obligation ("the mortgage") before Ms. Remy. It was registered in the

Land Registry as Instrument No. 4731/98 ("Exhibit 27"). It was alleged that the purpose of the mortgage was to finance Mrs. Verneuil's legal studies.

[7] In early 2000, a further mortgage was negotiated by loans officer Mildred Benjamin for an additional sum of $48,718.00 using the said matrimonial home as security. The Additional Hypothecary Obligation registered as Instrument No. 951/2000 was executed on 18th February 2000 before Ms. Remy. Mr. Verneuil signed on behalf of his wife using the Power of Attorney. It was alleged that this loan was to finance Mr. Verneuil's business. ("Exhibit 23").

[8] On 11th October 2000, Mrs. Verneuil appeared before Ms. Remy to revoke the Power of Attorney which she executed in October 1997. ("Exhibit 14").

[9] The two loans with a principal amount of $223,000.00 went into arrears sometime in June/ July 2000 when Mr. Verneuil failed to pay the monthly instalments.

[10] On 30th November 2000, Mrs. Verneuil filed a Petition for Divorce. On 28th November 2001, the parties settled ancillary matters in their divorce proceedings by entering into a consent order whereby the matrimonial home along with other properties were to be put up for sale and the proceeds of sale be used firstly to satisfy any outstanding debt and any balance remaining be divided equally between the parties.

[11] On 16th July 2002, the Bank commenced these proceedings seeking recovery of the outstanding balance. Some six weeks later, Mrs. Verneuil filed her defence. In it, she pleaded that the transactions were procured by the undue influence of her husband and further she has no knowledge of the additional loan executed on 18th February 2000. She also alleged that the Bank had constructive notice of the undue influence and in the circumstances, should have been "put on inquiry" during negotiations and before executing the loans.

## The issues

[12] In her statement of facts and issues filed on 31st October 2003, Mrs. Roheman appearing as Counsel for the Bank helpfully distilled the issues which have arisen for consideration in this case. They are as follows:

(i) Whether and to what extent it is equitable to expect the Bank to have applied the principles and guidelines in the case of Royal Bank of Scotland plc v Etridge (No. 2)[1] at the time of the grant of the two transactions?

Law pre-Etridge

(i) Whether the presumption of undue influence based on the confidential relationship of husband/wife can be rebutted?

(ii) Whether the loans allegedly undertaken by Mrs. Verneuil were manifestly disadvantageous to her?

Law post-Etridge

(i) Whether Mrs. Verneuil was unduly influenced to enter the two transactions. In other words, whether Mr. Verneuil exercised domination or control over the mind of his wife such that her independence of decision was undermined?

(ii) Whether the Bank was put on inquiry as to an equitable wrong?

(iii) Whether the Bank took reasonable steps and as a result, was fixed with notice of the undue influence?

2. Whether Mrs. Verneuil affirmed the two transactions/ lending by entering into an order by consent for the sale of the property held as security?

3. Whether Mrs. Verneuil is estopped from setting aside the two transactions based on lapse of time/acquiescence?

4. Whether the defence can be considered an abuse of process based on the oonsent order in the ancillary proceedings?

## The Law

[13] For the purpose of considering whether there is an arguable defence, it is necessary to look at what a party in the position of Mrs. Verneuil has to show to establish undue influence. Undue influence is a defence available whenever influence is acquired and abused, where confidence is reposed and betrayed. It negatives contractual consent but

[1] [2001] 4 All ER 476; [2001] 3 WLR 1021 (H.L.)

does not make any contract induced by it void, only voidable, at the instance of the party affected.

Actual undue influence

[14] There are two kinds of undue influence which the courts have considered and refined over the last 20 years. First, there are cases of actual undue influence where it has been used as an instrument of fraud. This case was opened to me albeit vaguely, as one in which presumed, not actual undue influence was alleged. However, in her closing submissions, Mrs. St. Rose appearing as Counsel for Mrs. Verneuil suggested that actual undue influence had been made out from the evidence. She submitted that Mr. Verneuil's use of insults, inducements, abuse and threats including threats against the children and his ability to make good those threats were situations amounting to actual undue influence.

[15] Mrs. Roheman argued that actual undue influence was not pleaded. I have to agree with her and say that, although the defence does not in terms differentiate between actual and presumed undue influence, in the light of Mrs. St. Rose's closing submissions, I am obliged to consider it.

[16] The law is that a person alleging actual undue influence has the burden of showing that the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant, that the influence was exercised, that its exercise was undue and that its exercise brought about the transaction.[2]

[17] The principle was affirmed in Etridge's case. At paragraph 103 of the judgment, Lord Hobhouse of Woodborough said:

> "(Actual undue influence) is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will…He who alleges actual undue influence must prove it."

[2] Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923 at 967, 970-971, per Slade LJ

[18] In CIBC Mortgage plc v Pitt[3], Lord Browne-Wilkinson distinguished the two classes of case as "actual" and "presumed" undue influence respectively. At page 209, he said:

> "Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right."

[19] The issue of actual undue influence is a question of fact the onus of proof of which rests on Mrs. Verneuil. An example of a situation which will be regarded as constituting actual undue influence includes a husband forcing his wife to sign a joint mortgage over their matrimonial home to secure a loan. As I gleaned through the evidence in the instant case, it does not, in my view establish actual undue influence.

Presumed undue influence

A: Law at the time the loans were granted –pre Etridge (No. 2)

[20] The kind of undue influence which arises here is presumed undue influence arising from a special relationship; in this case, the relationship of husband and wife: Class 2B. The complainant must establish the facts. The burden of proof is on Mrs. Verneuil (in this case) seeking to avoid the transaction to establish that undue influence existed. It is necessary for her to demonstrate that the impugned transactions were manifestly disadvantageous to her: National Westminster Bank plc v Morgan.[4]

[21] In Dunbar Bank plc v Nadeem and another,[5] Millett LJ at page 882 had this to say:

> "In my view, the judge's description of the parties' relationship is closely similar to that which has been described in a number of the cases – for example Tufton v Sperni [1952] 2 TLR 516 at 528 –what Jenkins LJ called 'actual domination…over the mind and will' and what Morris LJ (at 532) has called 'complete domination by the defendant over the plaintiff so that the mind of the latter became a mere channel through which the wishes of the former flowed'. Lord Donaldson of Lymington MR in Re T (an adult) (consent to medical treatment) [1992] 2 FLR 458 at 471 said:

[3] [1994] 1 A.C. 200 (H.L.)
[4] [1985] 1 All ER 821
[5] [1998] 3 All ER 875

> 'The real question in each case is: "Does the patient really mean what he says or is he merely saying it for the quiet life, to satisfy someone else or because the advice and persuasion to which he has been subjected is such that he can no longer think and decide for himself?" "

[22] To show presumed undue influence arising from such relationship, the wife had to show not only that she was influenced by the husband but also that the transaction was to her manifest disadvantage. In other words, the question to be asked in each case is whether there was actual domination by the husband over the mind and will of the wife or complete domination so that the mind of the wife became a mere channel through which the wishes of the husband flowed.

## The Evidence

[23] The evidence revealed that Mr. and Mrs. Verneuil were teenagers when their romantic encounter began in June 1973. In 1989, when the first loan was taken, both parties signed the loan application in which Ms. Remy was named as solicitor for the parties. When the loan (refinancing) was re-negotiated in 1998, a letter of instruction was issued to Ms. Remy to prepare the said mortgage (hypothecary obligation) ("Exhibit 28"). Both parties signed the application for advances ("Exhibit 29").

[24] In early 2000, an additional mortgage was negotiated for a further sum of $48,718.00. The Additional Hypothecary Obligation registered as Instrument No. 951/2000 was executed on 18th February 2000 before Ms. Remy. Mr. Verneuil signed on behalf of his wife using the Power of Attorney.

[25] In her sworn testimony, Mrs. Verneuil averred that from the time she started working as Senior Medical Technologist at the Victoria Hospital Laboratory, her salary went into her husband's personal account which later became a joint account and her husband assumed total control of all her finances. At paragraph 6, she stated:

> "That account was a saving/current account and St. Rose kept the cheque book. He paid all the bills, the rent and paid for the groceries. If I wanted any cash I had to ask him for it and also to give reasons why. His reasoning made good sense to me, if both of us had the use of a cheque book each would make reconciling the account difficult. I agreed and for all the years until my divorce that was my way of

> life. St. Rose controlled the finances always. Whatever I had to do he had to be informed, all moneys I spent had to be accounted for, yet he got furious if I asked about the status of the account."

[26] At Paragraph 22 of her witness statement, Mrs. Verneuil averred that her husband used the matrimonial home as security for raising funds for the Company and this concerned her but she did not have a say or choice because there was no other alternative. She stated that in doing so, the Bank never sought to communicate with her.

[27] Further, Mrs. Verneuil's evidence disclosed that she reposed trust and confidence in her husband, despite his treatment of her. He was always the one who took control of the family's finances and she never believed that he would ever jeopardize his family. She left her job as Senior Medical Technologist at her husband's behest to work with him in his business. As a consequence, she became not only totally dependent on him but he had total domination over her. She was unpaid. It was difficult even to get the necessities from him. She had three minor children which caused her as a mother to be entirely vulnerable to his total domination and control. Her will was totally overcome by his. He would threaten, insult and embarrass her whenever the opportunity arose especially in public and she did all she could to avoid this and to keep the peace, being a private person by nature. She hated unnecessary arguments but where there was a good reason to argue she would. But, in her opinion, most circumstances that presented themselves did not seem to warrant an argument or fight.

[28] Mrs. St. Rose submitted that the marriage was one of total domination and control. She described Mr. Verneuil as a 'manipulative and domineering man, a lawless man, untroubled even by court orders against him.'

[29] Mrs. St. Rose next submitted that the circumstances surrounding the loan transactions raise several questions. She argued that the loan transaction entered into in February 2000 raises even more questions since the Power of Attorney was obtained for another purpose as Ms. Remy stated in her evidence. Mrs. St. Rose argued that the evidence adds up to the fact that (i) Mrs. Verneuil was kept in the dark about these transactions; (ii) she

signed the agreement in 1998 because her husband lied to her and (iii) because of the undue influence which he exercised over her. In her closing speech, Counsel suggested that a clear case of undue influence had been made out given the fact that Mrs. Verneuil reposed trust and confidence in her husband in terms of their financial affairs coupled with the domineering nature of their relationship including his total control over her and her vulnerability.

[30] Mrs. Verneuil called two witnesses to testify on her behalf. The first witness to take the witness stand was Carol Odlum, the adopted sister of Mr. Verneuil. She described him as a loud and unkind person, a philanderer who never treated his wife well.

[31] The next witness was Marguerite Desir. She got to know the couple when she was working at the National Commercial Bank (now the Bank of Saint Lucia). In a nutshell, her evidence focused on the irregular and irresponsible manner in which Mr. Verneuil sent inadequate sums of money to his wife while she was studying in England.

[32] Counsel for the Bank, Mrs. Roheman forcefully argued that Mrs. Verneuil was of sufficient intellect to take an interest in the financial affairs. In 1998, Mrs. Verneuil, already the holder of a Bachelor of Science degree, was about to commence her last year of study for a law degree. Mrs. Roheman contended that there is no evidence to suggest that Mrs. Verneuil was unable to verify the status of her financial affairs and that, if she placed total trust and confidence in her husband in relation to their financial affairs, such trust ought not to be blind trust.

[33] Mrs. Roheman next submitted that Mrs. Verneuil was sufficiently independent of mind to negotiate her own loan and to enjoin her husband. At paragraph 10 of her witness statement, she stated:

> "After the land was purchased, St. Rose was not interested in building a house. We were paying at the time $850.00 rental to Mr. Anthony Floissac for his premises at Old Victoria Road, Castries. I thought I might as well put this money towards a mortgage. *I went to St. Lucian Development Bank (as it was formerly named), had a chat with Mr. Owen Barnard determined to get a mortgage on my own since St. Rose showed no interest*....Just before the

loan was approved, St. Rose decided to join in…*and we both convinced Mr. Theophilus that we wanted everything to be done in both our names."* (My emphasis).

[34] At paragraph 27 of her witness statement, Mrs. Verneuil said:

> "In 1996, I left St. Lucia to pursue a Law Degree not for the purpose of wanting to be a lawyer but rather, I was looking for an avenue to get out of a relationship that I was trapped in. My decision to leave St. Lucia was as a result of words told to me by St. Rose namely 'I will make sure your arse burst and when it does my friends and I will be laughing at you.' "

[35] Mrs. Roheman submitted that as far back as 1996, Mrs. Verneuil realized that her marriage was on the rocks. Yet (i) on 17th October 1997, she executed a Power of Attorney in favour of her husband; (ii) on 27th October 1998, she executed a hypothec in the sum of $172,000.00 using their matrimonial home as the security and (iii) on 18th February 2000, she executed the additional hypothec for $48,718.00.

[36] In my judgment, the evidence in the present case comes nowhere near proving that Mrs. Verneuil was so influenced by her husband that the impugned transactions were manifestly disadvantageous to her. On the contrary, the evidence reflected the following: (i) Mrs. Verneuil obtained a beneficial interest in the property held as security in respect of the loans; (ii) the property is the matrimonial home in which Mrs. Verneuil resided from the date of the loan and continues to reside there; (iii) part of the proceeds was to enable her to become a lawyer; (iv) part of the proceeds was to inject in the business of the Company Tyrose in which she was a director and shareholder and (v) in her affidavit sworn to on 14th September 2001 ("Exhibit 6"), she admitted that the balance due on the loan was $247,238.97. She requested that the property be sold for $420,000.00. The upset price fixed by the court was $300,000.00. She requested also, that any remaining balance be divided equally between herself and her husband.

A: Law since Etridge (No. 2)

[37] Following the decision in Etridge (No.2) in the House of Lords, it is now necessary for the wife to show that:

(i) she was unduly influenced to enter into the mortgage;

(ii) the Bank was put on inquiry as to some equitable wrong and

(iii) the Bank did not take reasonable steps and as result, was fixed with notice of the undue influence.

Was Mrs. Verneuil unduly influenced?

[38] As Lord Nicholls pointed out in Etridge (No. 2) at paragraph 8, the law does not permit someone to take unfair advantage over another with whom he has a relationship in which he has acquired a measure of influence or ascendancy. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged and as Lord Nicholls continued at paragraph 13, 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. He went on at para 14:

> "Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

[39] In Gweneth Mary Chater v Mortgage Agency Services Number Two Limited[6], Lord Scott Baker at para 24 said:

> "The two questions on which to focus in the present case are whether the appellant placed trust and confidence in her son in relation to the management of her financial affairs and whether there was here a transaction calling for an explanation."

[6] [2003] EWCA Civ 490 decided on 3rd April 2003

[40] I have already found that there is no evidence to suggest that Mrs. Verneuil was unduly influenced at the time of entering into the two transactions. In my considered opinion, Mrs. Verneuil has failed to satisfy the burden placed on her. As can be gleaned from the various bits of evidence recited above, Mrs. Verneuil showed a tremendous lack of concern in respect of her financial affairs. She turned a blind eye having entered into these transactions. She never paid any mortgage instalments. She never inquired into the status of her indebtedness to the bank. It appeared that she just did not care. She now alleges that the bank should have been put on inquiry.

[41] Going back to some of the salient facts. In October 1997, Mrs. Verneuil executed a Power of Attorney in favour of her husband empowering him, among other things, to obtain advances or loans from any person, bank or corporation whether alone or jointly with others and as security therefore to pledge, hypothecate or mortgage all or any part of her movable or immovable property. This was the year following her departure to study in England not to become a lawyer but to "get out of a relationship she was trapped into."

[42] In her witness statement, at paragraph 29, Mrs. Verneuil gave a specific reason why it was necessary for her to execute the Power of Attorney in favour of her husband. It is passing strange that she chose to execute a general and not a specific Power of Attorney at a time when the matrimonial ship was sinking and she was seeking an avenue of escape. It is difficult for me to accept Mrs. Verneuil's evidence as credible.

[43] In my opinion, the trust and confidence which Mrs. Verneuil reposed in her husband would have been eroded from September 1996 when she opted to leave Saint Lucia to escape an unhappy marriage based on statements made to her by her husband. Mrs. Verneuil is not an ordinary person. She is an extremely intelligent lady. From an early age, she had excelled academically. By age 23, she was already the proud holder of a Bachelor of Science Degree. In 1999, she obtained her Bachelor of Law Degree graduating with honours. A year later, she passed the Bar Vocational Course. Having seen and observed her demeanour in court, I do not agree with her Counsel, Mrs. St. Rose that Mrs. Verneuil was so vulnerable and cowed by her overpowering, domineering and oppressive husband

that she was reduced to a compliant and helpless lamb. On the contrary, I found her to be a resilient, assertive and rational person who rationalized her decisions and voluntarily followed the will of her husband whose business was initially very successful. As Ms. Mildred Benjamin, Loans Officer of the Bank stated at paragraph 5 of her witness statement:

> "The loan (second) was in fact negotiated as an additional hypothecary obligation for an additional $48,718.00 using the same property as security. Given that the defendants/debtors has been satisfactorily servicing their loans and a business loan previously held was repaid ahead of schedule, it was agreed to grant the additional financing."

[44] In Etridge (No. 2), Lord Nicholls at para. 27 and 28 continued:

> "The problem has arisen in the context of wives guaranteeing payment of their husband's business debts. In recent years, judge after judge has grappled with the baffling question whether a wife's guarantee of her husband's bank overdraft, together with a charge on her share of the matrimonial home was a transaction manifestly to her disadvantage.
>
> In a narrow sense, such a transaction plainly ('manifestly') is disadvantageous to the wife. She undertakes a serious financial obligation, and in return, she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the relationship of solicitor and client or medical advisor and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortune of husband and wife are bound up together. If the husband's business is the source of the family income, the wife has a lively interest in doing what she can to support the business. A wife's affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly-owned asset, to obtain the financial facilities needed by the business. The finance may be needed to start a new business, or expand a promising business, or rescue an ailing business."

[45] At para. 32, Lord Nicholls added a cautionary note. He said:

> "…Undue influence has a connotation of impropriety. In the eye of the law, the undue influence means that influence has been misused. Statements or 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."

[46] I return to the present case. The evidence is that both parties executed the loan application form. There is no evidence to suggest that Mrs. Verneuil was coerced or bullied to do so.

She signed many documents because she trusted her husband yet she was always afraid of doing otherwise for fear of embarrassment. In addition, she did not think he would ever jeopardize his family. These facts, in my view, do not raise the presumption of undue influence.

[47] I am afraid that I have to agree with Mrs. Roheman that Mrs. Verneuil appears to have some difficulty in accepting responsibility for her actions. Firstly, she stated in her affidavit in the divorce proceedings that she asked the court for the matrimonial home to be sold because her lawyer advised her to. Secondly, she agreed to a consent order because as a new Attorney, it was embarrassing and she had no choice.

[48] The evidence of Mrs. Verneuil is unreliable and conflicting. At paragraph 20 of her witness statement, she averred "he (her husband) threatened me with divorce and to cut off ties with the children." Yet, she left the island to undertake law studies from 1996 to 1999 leaving the children with her husband's sister.

[49] At paragraph 27, she deposed that she left Saint Lucia to pursue a law degree because she was looking for an avenue in which to get out of a relationship which she was trapped in. Her decision to leave Saint Lucia resulted from the insulting words that her husband used to her. Yet, she continued to place trust and confidence in him so much so that she executed a Power of Attorney in his favour giving him the power to take charge of, manage and administer all of her affairs, business and property in such a manner as he thinks fit.

[50] Mrs. Verneuil stated that she always believed that she and her husband had one share each in the Company, Tyrose Limited yet on 20th August 1998 she signed documents wherein her husband would possess 30,000 shares while she would have 10,000.

[51] In the Privy Council case of Franklyn Dailey v Harriet Dailey[7], their Lordships rejected a finding of the Eastern Caribbean Court of Appeal on the issue of undue influence and found that the trial judge was entitled to hold that the transaction was at arms length, as

[7] Privy Council Appeal No. 45 of 2002

the respondent had failed to establish that her agreement to it had been obtained by undue influence.

[52] As I see it, Mrs. Verneuil brought an independent mind to bear in her decision to undertake the loans. She rationalized each one of them. She undertook the first one because her husband lost his job. There was no alternative. More money was needed to inject into the business if it were to prosper and to pay for her studies. The second loan was to clear a container for the business. She was part and parcel of the business so why not? She knew the consequences of signing the loan applications. By then, she was a lawyer; qualified to give advice on exactly these matters. In my judgment, Mrs. Verneuil has failed to establish that the consolidated loan was obtained by undue influence.

Transactions calling for explanation

[53] The second question is whether the loan transactions called for explanation. Here, it is important to distinguish between the transactions themselves and the steps which led to them as to which there is an incomplete picture and considerable doubt since the evidence of Mrs. Verneuil is unreliable and conflicting and Mr. Verneuil was not present to give evidence.

[54] The Bank's position does not at this stage fall for consideration. What has to be looked at are the facts as known to the court as between Mr. Verneuil and Mrs. Verneuil. Do they call for an explanation? Lord Nicholls said at para 24 that "something more is needed before the law reverses the burden of proof. Something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption is rebutted."

[55] As I have just iterated, there was no evidence from Mr. Verneuil and the question is whether there was sufficient about the transactions to raise the inference that it was procured by undue influence. Was there prima facie evidence that Mr. Verneuil abused the influence he had in the relationship with his wife?

[56] To answer this question, it might be worthwhile once again to examine the loans. On or about 19th June 1989, the defendants applied for and obtained lending in the sum of $144,000.00.The loan application was signed and accepted by both parties. The loan application further named the parties' solicitor as Ms. Remy ("Exhibit 31"). The proceeds of the loan were disbursed to Ms. Remy.[8]

[57] This loan was subsequently radiated. A new loan executed on 27th October 1998 was to consolidate the original refinancing with $60,000.00 required allegedly to assist Mrs. Verneuil with her studies. The application for financing was signed by both parties. The Hypothec dated 27th October 1998 to secure advances up to the limit of $172,000.00 was executed by both parties before Ms. Remy.

[58] Mrs. St. Rose argued that although the documents pertaining to this loan was signed by both parties, the Bank did not act prudently in that it failed to contact, consult and offered personal advice to Mrs. Verneuil and further, by her signing the loan without advice, Mrs. Verneuil was in effect signing away a substantial part of her equity. I pause to remark that Mrs. Verneuil did say to me that even if she were advised, she still would have signed the documents because she was afraid of her husband. I am afraid, once again, I am unable to believe her.

[59] Mrs. Roheman asserted that Mrs. Verneuil signed the application form and supporting documents so personal presence was uncalled for. The evidence of the Bank's Manager, Mrs. Sonia Sifflet was to the effect that contemporary banking practice allows an applicant to forward the application by post so there is nothing wrong in today's banking practices in not seeing and /or interviewing the client.

[60] It cannot be disputed that much of modern day banking is conducted by phone or correspondence without the Bank ever meeting the client. The Court should take cognizance of the need for banks not to be restrained by unnecessary measures that would hamper commercial transactions. At the same time, the court must ensure that the

[8] Additional List of Documents filed 30th July 2004 {"Exhibit 3")

bank takes reasonable steps to satisfy itself that the wife has had brought home to her the practical implications of the proposed transactions. In other words, a wife enters a transaction with her eyes open so far as the basic elements of a transaction are concerned.

[61] Much emphasis was placed on the evidence of Ms. Remy. Regrettably, I have some practical difficulty in accepting her evidence. I found her to be a very kind and sympathetic person who would go and has gone that extra mile to assist Mrs. Verneuil. I came to the conclusion that Ms. Remy was the family lawyer; that the parties relied on her for professional advice and assistance sometimes jointly and sometimes, singly. It is with little wonder that when Mrs. Verneuil sought to execute as well as to revoke the Power of Attorney, she turned to Ms. Remy.

[62] In my judgment, the 1998 loan transaction cannot be categorized as wrongful. It was signed by the parties and executed in the presence of their family lawyer. I do not think that this transaction calls for an explanation or any explanation at all. And I so hold.

[63] Now to the loan which was executed on 18th February 2000. Mrs. St. Rose argued that the loan of $60,000.00 which was given to Mr. Verneuil; $48,000.00 of which was secured by an additional mortgage over the matrimonial home and bringing the total debt to $220,000.00 was a personal one as well as for his business. It is common ground that Mr. Verneuil negotiated this loan using the Power of Attorney. It is also common ground that at the time of the execution of the loan, Mrs. Verneuil was abroad studying. Mrs. St. Rose next argued that the bank knew that the money was not for Mrs. Verneuil and as it was a surety loan, the bank should have been put on inquiry. She contended further, that even if the loan were a joint loan, the bank is put on inquiry in these circumstances.

When is the bank put on Inquiry

[64] I turn now to consider the much-vexed question of when is the bank put on inquiry? At para 48 of Etridge, Lord Nicholls had this to say:

> "As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward

> case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case, the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in CIBC Mortgages plc v Pitt [9]."

[65] Mrs. Roheman contended that Mrs. Verneuil was a beneficiary under the loan because the money was injected into the business which in turn paid for her studies.[10] In addition, she was a director and shareholder of the Company and had been employed by the Company on a full-time basis. In Etridge, Lord Nichols dealing with the issue made this comment:

> "Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view, the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. [My emphasis] The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."

[66] In my considered opinion, the 2000 as well as the 1998 loan were joint loans. It seems to me that on the authority of Etridge, the Bank is not put on inquiry. The loans were joint loans for the beneficial interest of both parties. The loan in 1989 was a loan to refinance a loan already taken at the Bank of Nova Scotia in respect of the matrimonial home. This loan was subsequently consolidated with a request for lending in the sum of $60,000.00 taken to assist Mrs. Verneuil was her studies. As a result, a new mortgage in the sum of $172,000.00 was executed (1998 loan). The 2000 loan was for the business of which both parties were shareholders.

[67] In the Gweneth Mary Chater case, Lord Justice Scott at para 57 said:

> "At this stage the court is considering whether the respondent was put on inquiry as to some equitable wrong. Here the court is not concerned with what was actually happening between mother and son but what the bank knew about it or, by making appropriate inquiries, ought to have known about it…What is the information available to the respondent ("the bank")? That is the crucial question. Was it sufficient to put it on inquiry as to some equitable wrong?"

[9] [1993] 4 All ER 433, [1994] 1 AC 200
[10] See Defendant's exhibit page 21

[68] The first loan was for refinancing or as Mrs. Verneuil suggested, to assist the business. The balance of the 1998 loan was for the purpose of Mrs. Verneuil's studies or as suggested by her, to clear a container. She challenged the purposes for which the funds were used although she admitted that she received funds from Mr. Verneuil for her studies but she had learnt over the years not to question. Lord Justice Scott at para 59 in the Gweneth Mary Chater case said:

> "The stated purpose of the loan in the application form was 'purchase.' The fact that this was not true is nothing to the point if the respondent did not know that it was not true…There is nothing on the documents to suggest this was a loan exclusively for the son's purposes. A lender is not obliged without more to make further inquiries."

[69] Mrs. St. Rose contended that Ms. Remy said that the loans were for Mr. Verneuil alone. The question then is why did Ms. Remy prepare the Hypothecary Obligations in the name of both parties? I do not think it is necessary for me to answer this question.

[70] It is also important to analyze the message being given to the Bank by the loan applications and anything else it received or that occurred before the documents were executed. There was nothing to suggest that the loans were solely for Mr. Verneuil's purposes. On the face of it, the 1998 loan was for a domestic purpose. The 2000 loan was for the business of which Mrs. Verneuil was intrinsically involved. She was a director, shareholder and secretary. She had left a decent-paying job to join the family business. It was not his business per se. It is not uncommon for a husband and a wife to take joint loans and use the matrimonial home as the security. It is also not uncommon for married couples to seek additional refinancing for home improvements or to inject into a business in which they both have a beneficial interest or, for that matter, to educate their children or themselves. In addition, these were not the first loans taken by the parties jointly. As far back as 1989, they sought financing from the very Bank. So, when the parties sought additional financing, there was no justifiable reason for the Bank to turn them down. After all, the previous loan had been serviced well ahead of time. Further, a joint application for a loan is not at all unusual. The mere fact that Mr. Verneuil presented a Power of Attorney to obtain money on behalf of his wife who was abroad studying is not uncommon either. If Mr. Verneuil had preferred his own interest, he could have taken the loan solely in Mrs.

Verneuil's name. He was armed with a Power of Attorney to do so. But, he did not. Instead, he took the loan in their joint names. A question to be asked: why did Mrs. Verneuil execute a general Power of Attorney if she intended it to be specific? How was the Bank to surmise her real intention?

[71] At paragraph 67, Lord Justice Scott in the Gweneth Mary Chater case dealing with a similar situation opined:

> "The respondent ("the bank") is not a detective…There was no reason why the respondent should not take the loan application at face value and this is an application for a joint loan and the reasonable assumption was that it was for improvement of their joint living circumstances. There was nothing to put a prudent lender on inquiry that might in reality be a commercial loan and that undue influence might possibly underlie the transaction?

[72] As Lord Nicholls said in Etridge, "where a joint loan between husband and wife is made, a bank is not put on inquiry unless the bank is aware that the loan is being made for the husband's purposes rather than their joint purposes. In my judgment, this situation does not arise here. The loans were used for Mr. and Mrs. Verneuil's joint purposes. There is no evidence to show that Mr. Verneuil injected the net proceeds of either loan into a business which was owned entirely by him.

[73] Although I found great force in the arguments advanced by Mrs. St. Rose, I was unable to detect anything about these transactions that was sufficient to put the Bank on inquiry as to any equitable wrong.

Reasonable steps

[74] The next question whether the Bank failed to take reasonable steps and is therefore fixed with notice of the undue influence does not arise because I have come to the conclusion that the Bank was not put on inquiry.

[75] In any event, I think that the bank took reasonable steps to ensure that the defendants were represented. It referred the parties to their named solicitor. The loans were not the first taken by the parties in which they named the same solicitor. Indeed, Ms. Remy was

the family lawyer. Both Mr. and Mrs. Verneuil have sought and obtained professional advice from her.

[76] At paragraph 78 in Etridge case, Lord Nicholls said:

> "In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly."

[77] I agree with Mrs. Roheman that what is important is whether or not the Bank in referring the mortgage to Ms. Remy was acting in the belief that Ms. Remy acted for both parties. By virtue of the loan application, it is clear that the Bank was forwarding the letter of instruction to Ms. Remy on behalf of both Mr. and Mrs. Verneuil. In her evidence, Ms. Remy stated that Mr. Verneuil was her client but she never relayed this information to the Bank. The question whether the Bank was put on inquiry has to be answered on the basis of the facts available to it. In that case, in their jointly signed loan application, both parties nominated Ms. Remy as their solicitor. And there is absolutely nothing wrong with that. In Etridge case, Lord Nicholls, at para. 73 and 74 had this to say on the very issue:

> "A requirement that a wife should receive advice from a solicitor acting solely for her will frequently add significantly to the legal costs. Sometimes a wife will be happier to be advised by a family solicitor known to her than a complete stranger. Sometimes a solicitor who knows both husband and wife and their histories will be better placed to advise than a solicitor who is a complete stranger.
>
> …The advantages attendant upon the employment of a solicitor acting solely for the wife do not justify the additional expense this would involve for the husband…"

[78] As the authorities suggest, there is nothing untoward with a husband and wife sharing the same solicitor. In my opinion, the Bank acted properly by referring their clients to their named solicitor.

[79] In the instant case, I hold that there was no undue influence as Mrs. Verneuil entered into both transactions freely and at arms length with independent advice from their family solicitor. It would have been a matter for concern, if the transactions which Mrs. Verneuil entered into jointly with her husband were unfair to her. There might then be a basis for

finding as they were to her disadvantage and she simply did what she was told. But on the face of it, the transactions were not of that character.

## Transactions voidable not void

### Affirmation/ Estoppel/ Abuse of process

[80] A transaction entered into as a result of undue influence is voidable and not void. The right to rescind on the ground of undue influence may be lost either by express affirmation of the transaction by the alleged victim or by estoppel or by delay amounting to proof of acquiescence.[11] Acquiescence must take place after the influence has ceased if it is to be of any value.

[81] It was submitted on behalf of Mrs. Verneuil that since the Bank has denied undue influence, it could hardly show that the undue influence, if proved, has come to an end at any particular time or at all. This argument in my respectful view is now rendered otiose given my finding that there was no undue influence.

[82] The evidence revealed that following the grant of a decree nisi, Mr. and Mrs. Verneuil entered into a consent order on 28th November 2001 wherein it was ordered at paragraphs 2 and 3 as follows:

> "2. That the following properties be advertised for sale and be sold either together or, individually at prices not less than stated adjacent to each parcel:
>
> | | |
> |---|---|
> | Block 1251B Parcel 121 | $300,000.00 |
> | Block 1018B Parcel 99 | $100,000.00 |
> | Block 1251B Parcel 815 | $300,000.00 |
> | Block 1837B Parcel 195 | $35,000.00 |
> | Block 1837B Parcel 226 | $40,000.00 |
> | Block 1053B Parcel 674 | $1,600,000.00 |
> | Block 1053B Parcel 329 | $350,000.00 |
>
> 3. That the proceeds of sale of the said parcels of land be used firstly to satisfy all of the debts of the Parties hereto secured by way of hypothec

[11] Allcard v Skinner op cit.

against the said parcels of land and that any balance remaining be divided equally between the parties or alternatively at a lesser price agreed to by both parties."

[83] Mrs. Roheman contended that the matrimonial property, Block 1251B Parcel 121 was the subject of the lending in this claim and that the divorce proceedings had already settled all property rights. Therefore, Mrs. Verneuil is estopped from re-litigating the same property rights. In support of her submission, Counsel cited the case of Donald Halstead v the Attorney-General et al.[12] In that case a consent order had been agreed between the parties which was made an order of court. The issue before the court was whether a party could bring future proceedings involving the issues covered by the consent order. Floissac, CJ held (affirming the decision of the trial judge) that the appellant was estopped per rem judicata from instituting or carrying on the claim by reason of the consent order.

[84] Mrs. St. Rose submitted that the defence of undue influence against the Bank is not inconsistent with the consent order in the matrimonial proceedings and does not involve the re-litigation of the same issues as the Bank was not a party to the previous proceedings and the court could hardly have made an order therein affecting, negating or denying the rights of the Bank without their being a party to the action.

[85] She next submitted that where the parties to the two suits are not the same, estoppel does not arise and where the first and second claims are of a different nature, compelling reasons are required before the later claim is struck out.

[86] In my view, Mrs. Verneuil affirmed her ownership of the property and her interest therein by entering into a consent order and as such she should be estopped from defending her claim. In her evidence. Mrs. Verneuil admitted that she authorized Counsel Michael Gordon (now Justice of Appeal Michael Gordon QC) to negotiate on her behalf and that she was aware of the terms of the consent order.

[12] Civil Appeal No. 10 of 1993 (Antigua & Barbuda) unreported

[87] In Halstead's case, Floissac CJ said at page 13 of the judgment:

> "A litigant is precluded from relitigating an adjudicated cause of action either by instituting a different kind of proceedings or by relying on a different right of action or by claiming a different remedy. If the previous and fresh proceedings could or should have been consolidated or the new right of action or remedy could or should have been claimed in the previous proceedings in which the original right of action was determined, the relitigation is regarded as an abuse of the process of the court."

[88] In Marie Madeleine Egger v Herbert Egger,[13] Alleyne JA (as he then was) stated at paragraph 67 of the judgment as follows:

> "Where there is a challenge as to the effect of a judgment, the binding authority of the judgment, in the sense of estoppel or res judicata, only arises when the court has had the benefit of argument by counsel on both sides and has actually adjudicated the question. A consent order, like a default judgment, is not the result of adjudication by the Judge, but of agreement between the parties or, in the case of a default judgment, of failure of the defendant to take a procedural step within a prescribed time or at all."

[89] His Lordship was of the view that the appellant was not estopped by the consent order in the Austrian divorce proceedings from pursuing her claim in the civil proceedings in the Eastern Caribbean Supreme Court in Saint Lucia, where the subject property is located. The Court also found that the parties, by mutual agreement, had discharged the consent order of the Austrian Court and paved the way for a determination of the issue by the Saint Lucian High Court.

[90] In my respectful view, the Egger's case is distinguishable from the instant case. A case bearing closer affinity to the present one is First National Bank plc v Walker[14] where similar principles of law arose for determination. In that case, a wife had pursued ancillary relief proceedings on the footing that the former family home was affected by a mortgage and was attempting to defend possession proceedings on the basis that the loan transaction was voidable against her because of her husband's undue influence. The court held that it would be an abuse of process to permit the wife to pursue a defence in the possession proceedings that was inconsistent with her stance in the ancillary relief proceedings. Sir Andrew Morritt V-C said at paragraph 55 he did not think the label to be

[13] Civil Appeal No. 17 of 2002 (Saint Lucia) unreported
[14] 23rd November 2000 Court of Appeal Civil Division

attached, whether estoppel, approbation and reprobation, abuse of the process, affirmation or release was of any importance although he thought on the facts of the case that all of them applied. Chadwick and Rix LJJ decided the case on the ground of abuse of process.

[91] Rix LJ said at para 81:

> "She was facing in two directions. She had obtained relief in the matrimonial proceedings on the basis that the charge was a subsisting charge which bound her as well as her husband. However, in the possession action, she sought to set that charge aside on the basis that it did not bind her but only her husband. As such her stand might be said to be equivocal."

[92] At paragraph 82, his Lordship continued:

> "In my judgment she could not in good conscience maintain both those positions. Either she had to return to the court seised of the matrimonial proceedings and inform it that there was a change of circumstances, as she now understood them, or she had to give up her defence in the possession action based on her husband's undue influence…In these circumstances her attempt to persevere in her defence of undue influence was what at any rate at one time would have been called a case of approbation and reprobation: Narcombe v Narcombe[15] is an example of this court's refusal to accept the feasibility of such conduct. There too the wife in the second set of proceedings was trying to set up the invalidity of a transaction which she had accepted as valid in her matrimonial proceedings, and this court did not permit her to do so."

[93] It seems to me that Mrs. Verneuil should not be allowed to pursue inconsistent remedies. Having elected in the matrimonial proceedings to enter a consent order admitting that she and her husband owe the Bank, she cannot now defend the proceedings brought by the Bank on the footing that the transactions were procured by undue influence. By entering into the consent order, she clearly abandoned any right to invoke her husband's undue influence against him, and it follows against the Bank as well.

[94] Counsel for the Bank identified some other ancillary issues including the issue of abuse of process on the basis of the consent order in the matrimonial proceedings matter. I do not wish to explore these issues as in my respectful view they are unnecessary for the purpose of deciding this claim.

[15] [1985] 1 All ER 65

## Conclusion

[95] Ably and skilfully though the arguments were presented by Mrs. St. Rose on her behalf, I do not think that Mrs. Verneuil has shown an arguable defence.

[96] In the circumstances, and for the reasons given above, I will enter judgment for the Bank as follows:

(1) Total claim $253,323.40 with interest thereafter from 11th June 2002 at a daily rate of $84.11

(2) Costs agreed at Case Management Conference $20,000.00.

[97] On 12th June 2003, at a Case Management Conference, the Learned Master ordered costs in the sum of $20,000.00. I do not think that this court is empowered to reverse that Order. However, I would encourage Mrs. Roheman to persuade the Bank not to pursue the Costs Order.

Indra Hariprashad-Charles

High Court Judge