

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

SAINT LUCIA

CLAIM NOS. SLUHCV 2002/0268
SLUHCV 2002/0269
SLUHCV 2002/0273

CONSOLIDATED

CLAIM NO. SLUHCV 2002/0268

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
formerly CIBC CARIBBEAN LIMITED

Claimant

and

(1) PANACHE LIMITED
(2) NATALIE GLITZENHIRN-AUGUSTIN
(3) ULRIC AUGUSTIN

Defendants

CLAIM NO. SLUHCV 2002/0269

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
formerly CIBC CARIBBEAN LIMITED

Claimant

and

(1) NATALIE GLITZENHIRN-AUGUSTIN
(2) ULRIC AUGUSTIN

Defendants

CLAIM NO. SLUHCV 2002/0273

BETWEEN: FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
formerly CIBC CARIBBEAN LIMITED

Claimant

and

(1) NATALIE GLITZENHIRN-AUGUSTIN
(2) ULRIC AUGUSTIN

Defendants

APPEARANCES :

Mr. K. Monplaisir Q.C. with Mr. A. Richelieu for Claimant
Mr. Kelvin John for Ms. Glitzenhirn-Augustin
Mr. Vern Gill with Ms. L. Verneuil for Panache Ltd and Mr. Augustin

2004: September 20, 21;
November 8, 10; 19, 23, 26
2007: February 8

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JUDGMENT

INTRODUCTION

- [1] EDWARDS J: The Claimant Bank in its 3 claims seeks to recover a total sum of \$466,953.55 and interest and costs from the Defendants. This sum is purportedly for moneys loaned and credit facilities extended to the Defendants in multiple transactions. Some of these transactions were not properly documented, processed or secured at the material time. The claims depend partly upon documents subsequently executed in relation to this indebtedness. Some of the documents are securities and guarantees which were allegedly exacted by Bank officers from the 2nd and 3rd Defendants, in response to audit queries by the Bank's head office.
- [2] The Defendants are resisting the claims on several grounds. They allege that the loans were for the financial benefit of Panache Ltd only. They have alleged also that the subsequent scheme of the Bank in rearranging the indebtedness of Panache Ltd by apportioning it among the 3 Defendants and requiring the 2nd and 3rd Defendant-spouses to sign particular documents in their personal capacity, resulted in the 2nd Defendant being induced to enter into a loan contract, and sign as guarantor whilst under the influence of the Bank's officers and the 3rd Defendant. The 3rd Defendant alleges that he had a special relationship with the Bank's Commercial Account Manager, and Bank Manager, and that he was also pressured by them into signing such documents. The 1st and 3rd Defendants have counterclaimed for damages arising from the Bank's Officers' breach of an alleged oral agreement, to finance their new venture known as Café Panache, by a loan in the sum of \$450,000.00. The Bank's Officers who were directly involved in the transactions have since left the Bank, and were unavailable as witnesses at the trial. The Bank's sole witness has denied these allegations of the Defendants.

BACKGROUND FACTS

- [3] The Claimant Bank (the Bank) has its registered office at Broad Street, Bridgetown, Barbados. It is licensed under the Laws of St. Lucia to conduct banking business in St. Lucia. Its principal office is at William Peter Boulevard, Castries, St. Lucia.
- [4] The Defendant Panache Ltd (Panache) is now defunct. It was a Company duly registered under the Laws of St. Lucia on 6th December 1996. Its Managing Director was the Defendant Mr. Ulric Augustin one of its 2 shareholders. In December 1996 Panache began its duty free store business which proved profitable and successful for a time. It was then operating an account at the Bank of Nova Scotia.
- [5] The Defendant Ms. Natalie Augustin was at the material time the wife of Mr. Ulric Augustin. She is a practicing Attorney-at-law. On 17th June 1997 Panache was continued under The Companies Act of St. Lucia.
- [6] On 30th June 1997 Mr. Augustin incorporated the Company Essence Limited (Essence) under the Laws of St. Lucia. The Sole Director of this Company was Mr. Augustin. Mrs. Augustin was not a shareholder in any of the 2 Companies.
- [7] In or about July/August 1997 Mr. Augustin applied to the Claimant Bank for a business development loan of \$200,00.00 to finance a new duty free outlet at Point Seraphine Shopping Complex. As a result of this loan application, the Current Account No. 21102311 for Essence Ltd was opened with the Claimant Bank in September 1997 and the loan facility was approved. A Hypothecary Mortgage Debenture and Floating Charge by Essence Ltd in favour of C.I.B.C. Caribbean Ltd to secure the loan of \$200,000.00 with interest at the rate of 13 per cent per annum, was executed on 5th September 1997 and registered on 8th September 1997. Mr. Augustin signed a personal unlimited Guarantee and

Postponement of Claim in respect of this transaction on 12th September 1997. The Account's Manager at the Claimant Bank was then Mrs. Dewey Frederick.

[8] On Mr. Augustin's version of the facts, in or about August 1998 he obtained an undisclosed sum from the Claimant Bank as a loan for the purchase of a used BMW. He said that it was a birthday gift for Mrs. Augustin. According to Mr. Augustin the facility was put in place for monthly repayments to be deducted from the account of Panache at the Claimant Bank commencing September 1998. No documents were tendered by the Bank or Mr Augustin concerning this transaction.

[9] Mr. Augustin deposed that between October 1998 and January 1999 the Bank granted him another loan for the purchase of a Toyota Hilux Surf which he imported from Japan. This loan was to be serviced from the Panache account at the Claimant Bank. The documents tendered by the Bank concerning this transaction were a copy of a Bill of Lading for Consignor Ulric Augustin, and a customer copy of CIBC Requisition For Payment Transfer, signed by Mr. Augustin to the Shippers, in the sum of EC\$43,571.05 inclusive of \$43,358.46 plus cable cost \$50 and commission \$162.59. This requisition bears the date stamp of the Bank showing the date 25th November 1998. There is also an undated Bank Plan Note executed by Mr. Augustin evidencing that the Bank loaned him \$149,700.00 at a cost of \$50,898.00. He agreed to pay the Bank \$200,598.00 by monthly installments, being \$4,185.00 on February 25, 1999 and thereafter \$4,179.00 monthly up to and including 25th January 2003. The Bank was directed to pay the proceeds "to myself and CIBC". This document discloses that he agreed to grant the Bank as security for the loan and the cost thereof, a Bill of Sale covering a 1996 Toyota Hilux Surf and a 1994 BMW 3181 plus comprehensive insurance.

[10] By an Amalgamation Agreement dated 20th November 1998, and Certificate of Amalgamation dated 8th December 1998, Panache and Essence were amalgamated and continued as one Company under the name Panache Limited. Though the 2 proposed Directors of this Amalgamated Company were stated in

the Agreement as Mr. and Mrs. Augustin, the Articles of Amalgamation state that the only shareholder and Director then was Mr. Ulric Augustin. It is important to note that though the previously mentioned account no. 21102311 at the Claimant Bank was in the name of Essence Ltd originally, page 3 of the Current Account Statements dated 22nd April 1999 and the subsequent statements issued by the Bank, have the account holder as Panache Ltd. The sole witness for the Claimant Bank deposed in his Witness Statement filed 13th January 2004 that Mr. Augustin was signatory on this account, and in the absence of Mr. Ulric Augustin, Mrs. Augustin acted as Manager of Panache Ltd. This has been denied by Mrs. Augustin.

- [11] The Claimant Bank had originally granted a revolving overdraft facility of \$200,000.00 to Panache for retailing of clothing. In April 1999 the overdraft facility by agreement between the parties, was extended up to a maximum of \$422,000.00. There was no documentation on file to support this extension. It had apparently been allowed to increase from \$146,653.69 in January 1999 to over \$342,000.37 on 25th March 1999 with the tacit approval of the relevant Bank's Officers.
- [12] By then Mr. Augustin was in the process of implementing his plans for a new project in the city of Castries known as Café Panache. This new venture was restructured to consist of a Bistro, Buffet Restaurant, and Wine Bar on the ground floor, and a world class French Restaurant on the top floor. From as early as mid 1998, Mr. Augustin testified, he had presented this business plan with floor plans and projections to Mrs. Frederick the Accounts Manager of the Claimant Bank, in order to obtain \$450,000.00 to finance this venture.
- [13] According to Mr. Augustin, after several weeks of negotiations, Mrs. Frederick indicated that the request had received favourable consideration and had been approved in principle by the Manager of the Bank Mr. Cargill. Based on Mr. Augustin's version of the facts, Mrs. Frederick recommended that he should

initially capitalize the project with the cash flow funds from Panache Ltd with the understanding and promise that the Bank would refund Panache upon the processing of the loan in favour of Café Panache.

[14] Mr. Augustin contends that he acted on Mrs. Frederick's statements. The Bank Manager Mr. Cargill was transferred. The new Manager Mr. Adewale Gbalajobi was impressed with the project and his accomplishments and encouraged the completion of the project, he said.

[15] Mr. Augustin testified further that he utilized the financial resources and facilities of Panache at the Claimant Bank to complete the project in or about May 1999, believing that the loan from the Claimant Bank to Café Panache would eventually be approved.

[16] Instead, he was subsequently informed at a meeting with Mrs. Frederick and Mr. Gbalajobi that loans in excess of \$300,000.00 needed the approval of the Head Office in Barbados, Mr. Augustin said. By then the overdraft of Panache had reached a high of E.C. \$438,000.00 more or less.

[17] According to Mr. Augustin, the Manager informed him that several jobs would be on the line if the unsecured overdraft was not brought in line soon.

THE EVIDENCE

[18] Mr. Augustin's testimony at paragraph 27 (3) of his Witness Statement dated 10th February 2003 was as follows:

"(1) – (2) . . .

(3) I was instructed that in order to assist the management team of the Claimant Bank save face, the overdraft of the First Defendant would have to be reduced by splitting the value of the offending

amount into several lesser facilities, shown to be taken out in names other than Panache Limited.

- (4) Firstly, a loan in the amount of about EC\$114,000.00 was to be taken out in my wife's name, and the proceeds thereof would be deposited into the account of the First Defendant such that the balance of the same would be immediately reduced. This was said to have been eventually put in place in about mid-April 1999.
- (5) Secondly, the existing overdraft facility of the First Defendant had to be increased by EC\$100,000.00 and correspondingly secured to a new limit of EC\$300,000.00 being the Manager's limit for any one entity. This was eventually effected in or about May 1999.
- (6) The newly increased overdraft would have to be further secured by individual guarantees from my wife and myself in order to facilitate the fluidity of all of the operating accounts held by the Claimant Bank.
- (7) Lastly, there was the issue of the Car Loans to be dealt with. It came to light in or about September 1999, that the loans had never indeed been processed or put through the Claimant's system to date, more or less a year after their initial grants in August and October 1998 respectively. This was said to have been due to an internal oversight which now needed to be rectified. However, as the First Defendant's account was already at the maximum E.C. \$300,000.00 limit, this amount of some EC\$162,000.00 would now be converted into a car loan said to have been taken out in my personal name."

[19] Mr and Mrs Augustin testified that the documents evidencing these arrangements, though rejected on several occasions by Mrs. Augustin, were eventually signed by her after she was pressured by Mr. Augustin, and the Bank Manager and Mrs. Frederick to do so. Mr. Augustin testified that he reluctantly signed the documents because of his close friendship with the Bank Manager and the impending consequences for them had he not done so.

[20] Mr. Andrew Baptiste, the Commercial Accounts Manager of the Claimant Bank since February 2003, was the sole witness called for the Claimant. He gave a different account. Prior to February 2003 he was personal assistant to Mrs. Frederick and an Accounts Officer.

[21] He is familiar with the Account of Panache and Essence at the Bank as Mrs. Frederick would pass him files to process. In his Witness Statements filed on 13th January 2004 he deposed at paragraphs 7 to 10 as follows:

"7. It is and has always been the Bank's policy to provide its customers with written offers for loans and other services and verbal promises have never been a feature of the Bank's policies or practices. It was the normal practice for me to attend all meetings between Mrs. Dewey Frederick and our credit customers. I distinctly recall one of those meetings between Ulric Augustin and Mrs. Dewey Frederick, to discuss the matter of the excess in the overdraft account of Panache Limited. At that meeting I recall Ulric Augustin admitting to the forum that he had diverted funds from the clothing business (Panache Limited) to the construction of Café Panache. This was around April 1999.

8. It was at that meeting that Ulric Augustin informally "invited" us/the Bank to finance the project of Café Panache. Ulric

Augustin claimed that it would cost in the region of \$700,000.00 to \$800,000.00.

9. I distinctly recall that Ulric Augustin was asked about the collateral which he proposed to provide. We were informed that the long-term lease which Ulric Augustin had over the property would be assigned to the Claimant.
10. Ulric Augustin was informed that the Claimant will not accept liens against leased property, unless he could provide the Claimant with a first charge against the property and which should be valued at least 167 [per cent] of the proposed loan amount. Ulric Augustin was informed that in the absence of these provisions the Claimant would be unable to assist."

[22] Mr. Baptiste stated further in his Witness Statement filed on 13th November 2003, that in April 1999 when the overdraft was extended to a maximum of \$422,000.00, a meeting was convened between the parties in this suit to discuss how they would reduce the balance within the agreed limit. At that meeting in early April 1999 it was agreed by all the parties that Natalie Augustin would take out a separate loan in her name of \$114,000.00.

[23] He testified under cross-examination that Mrs. Augustin was not present at this meeting, and she had never approached him or had any discussions with him.

[24] He deposed further that when it became evident that Panache Ltd was experiencing financial difficulties, at that point Natalie Augustin was asked to provide a personal guarantee in her capacity as one of the two "principals" of Panache Ltd.

- [25] Regarding the \$162,000 loan to Mr. Augustin, Mr. Baptiste testified that this included an amount of \$136,435.00 to pay off a then existing personal loan for a vehicle owned by Mr. Augustin. He had fallen into arrears with this personal loan despite numerous calls for payment. This personal loan apparently was the \$149,700.00 mentioned at paragraph 9 above.
- [26] The documents tendered disclose that an Application For Consumer Loan of \$114,000.00 at 18.5 per cent per annum, was signed by Mrs. Augustin in the presence of Mrs. Frederick on 15th April 1999. The cost of this loan was stated to be \$59,850.00, and the total of \$173,850.00 was to be paid by 60 monthly installments. The Service Charge was \$1,140.00.
- [27] A Bank Plan Note dated 19th April 1999 signed by Mrs. Augustin and guaranteed by Mr. Augustin, directed the Bank to pay the proceeds of the loan to Mrs. Augustin or CIBC. The Repayment plan was \$2,927.00 on May 29, 1999 and the sum of \$2,897.00 thereafter to 29th April 2004 inclusive. The Account No. 10100783 related to this Consumer Loan to Mrs. Augustin.
- [28] By letter dated May 5, 1999 Mrs. Frederick of CIBC wrote the following letter to Panache Limited:

“Dear Sir,

We are pleased to advise that at the pleasure of the bank, the following line of credit has been approved subject to the terms and conditions recited below:

Amount - \$300,000 Operating Loan

Repayment - Operating Loan is to revolve and fluctuate from cash sales and Accounts Receivable

- Interest Rates - Operating Loan: Prime + 4.5%
- Fees - A 1% loan fee is payable on the Operating Loan (\$3,000)
- Security - Registered Mortgage Debenture stamped for \$200,000 and to be upstamped by a further \$100,000 provided a first fixed and floating charge over the assets of the Company
- Fire and perils insurance over inventory and fixtures for full replacement value with Mortgage clause attached. Guarantee Bond and Postponement of Claim signed Ulric Augustin for full liability
- Covenants - Annual professionally prepared financial statements will be provided within 90 days after year end i.e. March 31.

The credit terms outlined above have been approved at the pleasure of the Bank and it is understood that the Bank also reserves the right to withdraw its support at any time should there be, in the Bank's opinion:

- (a) Any material adverse change in the financial condition of the borrower.
- (b) Any unacceptable change in ownership of the business.
- (c) Any legal implications detrimental to the affairs of the borrower.

- (d) Any unusual delay in the finalization of credit arrangements, including the pledging of security.

This credit is subject to review at any time but, in any event, no later than April 30, 2000. Please acknowledge receipt and acceptance of the terms and conditions on the attached duplicate of this letter . . .”

- [29] Then on 26th May 1999 an Additional Hypothecary Obligation (Mortgage Debenture and Floating Charge) by Panache Ltd, in favour of CIBC Caribbean Ltd, to secure an additional loan of \$100,000.00 with interest thereon at the rate of 13% per annum, making in the aggregate a total of \$300,000.00, was executed by Mr. U Augustin as Director and Mrs. N.E. Augustin as Secretary of Panache Ltd, and Mr. W. Gbalajobi and Mrs. D.S. Frederick as Manager of CIBC Caribbean Ltd Castries, St. Lucia. This was registered at the Office of Deeds and Mortgages on 1st June 1999.
- [30] A Guarantee and Postponement of Claim to CIBC Caribbean Ltd for the liabilities of Panache Ltd was signed by Mr. Augustin on 23rd July 1999. He also acknowledged receiving a copy of this document on 23rd July 1999.
- [31] On 31st August 1999 Mr. Augustin executed a Bank Plan Note for an amount of \$162,600.00 loaned to him by CIBC Caribbean Ltd. The cost of the amount loan is stated to be \$62,194.50, making a total of \$224,794.50. He was obliged to pay \$4,208.50 as monthly installment on 25th September 1999, and thereafter the sum of \$4,162.00 on the same day of each month to and including 25th February 2004. On the 15th September 1999 a Bank Plan Loan Bill of Sale was executed by Mr. Augustin in favour of the Bank, assigning to the Bank a used BMW 3181 and used Hilux Surf motor vehicle to secure the payment of this said loan.
- [32] Despite the documentation of these arrangements configured by the Bank, Mr and Mrs Augustin deposed that the monthly payments for the new loan facilities were

still being serviced only from the Panache Account. Consequently, Panache's performance declined due to the financial strain and to the lack of operational funds, and its inability to purchase and replenish desperately required inventory. Several of Panache's suppliers discontinued favourable credit arrangements established over the years of profitable trading. This resulted in a rapid decline in Panache's operations.

[33] By letter dated 17th January 2001 the Account Manager Mrs. Frederick, wrote the following letter to Panache Ltd –

"Dear Sirs:

We CIBC Caribbean Ltd ("CIBC") are pleased to establish the following Credits for you, subject to the terms and conditions recited below:

Credit A: Operating Line

Credit Limit : The lesser at any time of:
(1) \$100,000 and
(2) the total of:-
50% of the Inventory Value, except
this amount cannot exceed
\$100,000

Description and Rate : A revolving demand credit, for general
business purposes, having the
following parts:

(1) Eastern Caribbean dollars loans
and overdrafts and letters of
Credit Acceptances. The Interest
Rate is as follows: Prime Rate

plus 3% per year. If we sign a letter of Credit Acceptance, the available Credit Limit will be reduced by the amount of the L/C Acceptance.

East Caribbean dollar L/C's . The total amount of L/C's outstanding at any time may not exceed operating line. L/C's may not have terms to expiry of more than 12 months. Fees are CIBC's standard L/C fees (currently 1%), plus out of pocket expenses. Our standard L/C documentation is also required. If there is a drawing under any L/C, we will pay it by drawing on your Operating Account, unless you have made other arrangements with us.

Credit B: Demand Installment Loan

Loan Amount	:	\$200,000
Purpose	:	To term off \$200,000 from the Operating Loan (Overdraft) previously granted for business purposes.
Interest Rate	:	Prime Rate plus 2.5% per year.
Scheduled Payments	:	Unless we make demand you

will pay CIBC as follows: 48 regular blended monthly payments of \$5,316 each. The first regular monthly payment is due on January 30, 2001. The last payment, plus any outstanding principal and interest together with any other amount due under this Agreement, is due on December 30, 2004.

Security

The following security is required:

- | | | |
|------------------------|---|--|
| Debenture | : | Fixed and Floating charge Mortgage Debenture in favour of CIBC Caribbean Ltd stamped for \$300,000 (with power to upstamp), giving CIBC a 1 st charge over the business assets. |
| Guarantee | : | Guarantee from Natalie Augustin in an amount that is unlimited. Guarantee from Ulric Augustin in an amount of \$150,000. |
| Postponement of Claim: | | Postponement of claim from Ulric and Natalie Augustin in an amount that is unlimited. |
| Life Insurance | : | Acknowledged assignment of life insurance on the life of Ulric Augustin in the amount of \$300,000. |
| Insurance | : | Acknowledged assignment of fire and |

other risks/perils insurance on the business assets (fixtures and inventory), with loss payable to CIBC firstly.

Covenants

You will ensure that:

Debt Service Ratio: Your Debt Service Ratio is not at any time less than 1.2:1.

Cash Coverage Ratio: Your Cash Coverage Ratio is not at any time less than 1.2:1.

Interest Coverage Ratio: Your Interest Coverage Ratio is not at any time less than 1.2:1.

Capital Expenditure: Your total capital expenditures for fixed or capital assets in the current fiscal year do not exceed \$25,000 without our prior consent (which consent will not be unreasonably withheld).

Dividends and Withdrawals: No dividends, shareholder loan repayments and other capital withdrawals will be expensed in the current fiscal year without our prior consent (which consent will not be unreasonably withheld).

Other Covenants: Evidence will be provided to the bank annually that payments to the NIS with respect to employee deductions/benefits are current .

Reporting Requirements

- (1) Within 30 days of each calendar month-end, a summary of Inventory Value from various outlets, as of that month-end.

- (2) Within 30 days of the end of each quarter, in-house financial statements for that quarter.
- (3) Within 90 days of each fiscal year-end, professionally prepared financial statements for that fiscal year on a review basis.
- (4) Within 90 days of each fiscal year-end, financial statements from guarantors.

Breach of any of the above requirements will constitute default and may result in the calling of the loan.

Fees

- Set-up: A fee of \$2,000 (payable on acceptable of this officer)
- Review : A fee of \$1000 (payable on the Scheduled Review Date)
- Late Reporting: 0.25% per month increase in interest rates on all facilities

Other Provisions

- Default Interest Rate : The rate for that credit plus 3.5% per year. If the Credit Limit of a Credit or the Credit Limit of part of a Credit is exceeded at any time, interest at the Default Rate is calculated on that excess amount.
- Next Scheduled
- Review Date : May 31, 2001
- Current Prime Rate : The current Prime Rate at date of this Agreement is: 10.5%
- Standard Credit Terms : The attached Schedule – Standard

Credit Terms forms part of this
Agreement

Please indicate your acceptance of these terms of returning a signed copy of this Agreement. Upon acceptance, this Agreement replaces the existing credit agreement, between you and CIBC Outstanding amounts (and security) under this Agreement will be covered by this Agreement. Please be assured that our aim is to maintain close contact with you to ensure that your financing needs are met in the efficient and prompt manner to which you are entitled. If before our next meeting you wish to discuss, or you have any questions concerning the terms of this draft proposal, do not hesitate to contact the undersigned . . .”

- [34] On 28th February 2001 Mr. Augustin accepted this Credit Agreement as “President” for Panache Ltd by signing an Acknowledgment. On this date, an unlimited personal Guarantee to CIBC Caribbean Limited for the liabilities of Café Panache was also signed by Mr. Augustin and he acknowledged receiving a copy in writing.
- [35] Mrs Augustin signed a personal Guarantee limited to \$150,000 for the liabilities of Panache Ltd/Café Panache on 28th February 2001 also.
- [36] Thereafter, a Promissory Note from Panache Ltd to CIBC bearing the date 1st June 2001 for the sum of \$200,000.00 was signed by Mr. Augustin.
- [37] By then there was no longer the friendly relationship which had previously existed between Mr. Gbalajobi, his wife, Mrs. Frederick, and Mr and Mrs Augustin, after the Bank began enforcing its Bank Loan terms in a manner the Augustin’s regarded as hostile.

[38] The financial strain that Panache was experiencing, along with the rapid decline in its business operations, caused the Panache stores to begin closing down from about August 2001. However Café Panache continued its operations.

[39] Then on 14th September 2001 the Account Manager Mrs. Frederick wrote to Mr. Augustin, giving him an ultimatum in the following terms:

“RE Operating and Demand Loans – Panache Ltd and Café Panache

We refer to our numerous telephone calls relative to our concerns with the repayment history of your loan.

Our concern include but are not limited to the continuing incidence of your failure to meet repayments on your loans as well as the absence of monthly statement information and year end financial statement on your business. Accordingly, the bank now views your credit as a high-risk situation. We are also concerned with your company’s apparent current and ongoing viability and view the situation to be sufficiently serious to threaten your ability to service the loan in the near term, and in the future.

In order to provide sufficient time to respond to these concerns, and while nothing in this letter is a waiver of any default/breach of the credit, the Bank will make available interim accommodation on a day-to-day basis until, upon the following terms and conditions:

1. The Demand Loan be fully updated no later than September 28, 2001 (\$15,948 interest inclusive to August 31, 2001).
2. Overdraft to record satisfactorily fluctuation with interest payments to be met monthly.

3. Updated financial statements for your company be provided by September 30, 2001.
4. The terms and conditions set out in our terms letter dated January 17, 2001 will continue in full force and effect.

We remind you that all advances are payable on demand at the option of the Bank, and we reserve the right to abridge the time period set out, if in our sole opinion there is any serious breach of the terms and conditions of the credit, or deterioration of the repayment record.

Please acknowledge receipt and acceptance of the above in the space provided on the attached duplicate of this letter, returning said duplicate to our offices by no later than September 21, 2001 . . .”

[40] On 2nd October 2001 Mr. Augustin attended a meeting with Mr. Gbalajobi and Mrs. Frederick. The letter dated 18th October 2001 written to Mr. Augustin by Mrs. Frederick discloses that at the meeting regarding the status of his accounts, Mr. Augustin agreed to provide a list of the fixtures relative to Café Panache which would be placed on the market for sale, the proceeds of which would be utilized to reduce his indebtedness with the Bank. The letter continued –

“To date we have not received the list which was promised, neither have we been advised of the success of the sale. Further the overdraft is not active as interest for the past month totaling \$2,075 remains outstanding. In addition payment of the Demand Loan is in excess of 90 days in arrears. You mentioned that you are prepared to make a monthly payment of \$4,000.00 towards your liability with us. Please be advised when this is likely to commence.

As you will appreciate we cannot continue to carry the accounts in this manner, and request that you provide us with answers to our concerns by October 26, 2001 failing which we will have no alternative but to refer the matter to our Solicitors for collection . . .”

- [41] Mr. Baptiste testified that the last loan payment in the name of Mrs. Augustin was made on 24th October 2001 by which time the loan had been reduced to approximately \$84,000.00 net. Further, that on 22nd October 2001 Mrs. Augustin issued a cheque of \$500.00 to service the debt relating to Account No. 10100783 when Panache could not service the loan.
- [42] Mr. Baptiste testified that the \$162,600 principal loan plus interest totaling \$224,795.50 to Mr. Augustin was serviced until September 2001. Thereafter the Hilux Surf was repossessed from Mr. Augustin and sold for \$49,500.00 to reduce the debt. He deposed that Mr. Augustin unlawfully sold the BMW which was security under the Bill of Sale without the permission of the Bank, and did not apply the proceeds for servicing the loan. That Mr. Augustin sought to substitute the lien on the BMW with a new Bill of Sale for a Toyota Corolla car which he kept in his bond. Apparently this substitution came to nought as this vehicle was allegedly seized by the Customs and Excise Department for failure to pay customs duties.
- [43] The Solicitors for the Claimant Bank Alberton Richelieu and Associates wrote demand letters to the Defendants between 1st February 2002 to 5th March 2002. In March 2002 all of the 4 stores of Panache were closed down. By July 2002 Café Panache was unable to sustain its own and also had to be closed down.
- [44] The proposals put forward by the Defendants to pay their debts subsequent to the demand letters were found to be unsatisfactory by the Bank. Consequently the lawyers for the Bank filed these 3 claims on 25th March 2002.

THE PLEADINGS

[45] By Claim No. SLUHCV0268 of 2002, the Bank is seeking to recover from the 3 Defendants the sum of \$200,000.00 and \$104,545.01 being the amounts allegedly loaned by the Claimant to the 3 Defendants at the request of the Defendants.

Particulars

- (i) The balance due on Demand loan with interest thereon at the rate of 13% per annum from 30th June 2001 until payment in full - \$200,000.00.
- (ii) The balance due on Operating loan with interest thereon at the rate of 17% per annum from 22nd May 2001 until payment in full - \$104,545.01.

[46] By Claim No. SLUHCV 0269 of 2002, the Bank is seeking to recover the sum of \$79,171.21 being the amount allegedly loaned by the Claimant to Mr. Ulric Augustin at his request.

Particulars

- (i) The balance due on Bank plan loan with interest thereon at the rate of 12.5% per annum from 25th May 2001 until payment in full - \$79,171.21.

[47] By Claim No. SLUHCV 0273 of 2002 the Claimant Bank seeks to recover the sum of \$83,237.33 being the amount allegedly loaned by the Claimant to the Defendants Mr. and Mrs. Augustin.

Particulars

- (i) The balance due on Bank plan loan with interest thereon at the rate of 12.5% per annum from 30th August, 2001 until payment in full - \$83,237.23.

- [48] On each of the 3 claims the Bank has claimed costs and further or other relief.
- [49] The Consolidated Amended Defence and Counterclaim filed on 14th February 2003 recites the background facts/and other details of the Defendants' case, and pleads undue influence as the Defence of Mr and Mrs Augustin.
- [50] Further, they have pleaded that they did not receive any direct financial benefit from any of the loans or the guarantees signed by them.
- [51] Panache and Mr. Augustin have Counterclaimed. They seek to recover general damages, costs and any other relief for the Bank's breach of the terms of its oral agreement through its Managers Mr. Gbalajobi and Mrs. Frederick, that the moneys advanced by Panache for the Café Panache project would be returned to it by the Bank within 6 months of the commencement of the development works.
- [52] The Bank has pleaded in its Reply and Defence to the Counterclaim, that it has never received or reviewed a proposal for the Café Panache business venture, neither did its officers make any of the alleged representations or promises, nor put any pressure on the Defendants to enter into these loan facilities, nor in anyway encourage them. The Bank has also denied that any loan was requested or granted for any vehicles in relation to Panache.

ISSUES

- [53] The issues arising from the pleadings, evidence, law and legal submissions of Counsel for the parties are –
- A. Were the alleged representations and/or promises made by the Bank's Officers to Mr. Augustin? If yes -

- B. (i) Can Panache Ltd and Mr. Augustin successfully rely on the doctrine of promissory estoppel to prevent the Bank from recovering the loan debt from any of the Defendants? or
- (ii) Can Mr. Augustin and Panache recover damages in negligence from the Bank for failure to exercise due care when making such representations?
- C. (i) Whether the Bank's Officers exerted undue influence over Mrs Augustin in procuring her signature on any of the of the relevant documents signed by them after the meeting held in early April 1999?
- (ii) Whether Mr. Augustin exerted undue influence over Mrs. Augustin to secure her signature to any of such documents?
- D. If the answer to C (i) and/or C (ii) is yes, then what are the legal consequences of such undue influence?

THE REPRESENTATIONS AND PROMISES OF THE BANK'S OFFICERS

[54] In dealing with Issue A it is necessary to further consider the Pleadings.

[55] By paragraphs 4 to 6 and 8 of their Amended Defence and Counterclaim Mr. Augustin and Panache pleaded:

"4. In late 1998 or early 1999, the Third Defendant saw a business opportunity, to wit, the development and operation of a Restaurant, Bar and Café Complex to be known as Café Panache, and approached the Claimant for financing for same.

5. After receiving the proposal put forward by the Third Defendant, the Claimant encouraged the Third Defendant to undertake the project but stated that as a new Manager of the Claimant was due to succeed the then Manager in the near future, rather than open a new loan account for the new venture at the time, the Claimant would initially finance the said new venture by way of extending the overdraft of the First Defendant and in due course the matters would be regularized by raising a new and separate loan in the sum of EC\$450,000.00 for and on behalf of Café Panache.

6. Relying on the above representation of the Claimant, the First Defendant lent to Café Panache sums of money in excess of EC\$801,000.00 secure in the belief that EC\$450,000 thereof would be repaid it through the promised loan from the Claimant. The EC\$801,000.00 derived from the said increase of the existing overdraft facility/loan of the First Defendant with the Claimant as well as from the cash-flow of the business operations of the First Defendant.

7. ...

8. Sometime after completion of the Café Panache project, in or about May 1999 the First Defendant, through the Third Defendant approached the Claimant to urge it to regularize the banking and financial arrangements between the First Defendant, Café Panache and the Claimant, because the business operations of the First Defendant was suffering as a result of a lack of working capital, the sum having been used, by the First Defendant to finance the Café Panache project based on the promise and representation of the Claimant."

[56] By paragraphs 22 to 27 of the Amended Defence and Counterclaim, Mr. Augustin and Panache further averred –

- “22. Prior to being encouraged into utilizing its overdraft facility and cash flow for the purposes of the commencement of the Café Panache development, the First Defendant, of which the Third Defendant was the sole shareholder, was a profitable growing company, specializing in the retail of designer clothing, having made profits of \$49,600.00, and \$180,500.00 respectively, in its first 2 full years of operations.
23. The Third Defendant, was at all material times held in high esteem in the local Business arena, and was endorsed by the Claimant itself to be a talented successful, calculating and professional entrepreneur.
24. Being conscious of its daily operating requirements, and determined to continue its profitability, the First Defendant was aware, and so advised the Claimant, that it would only extend the benefit of its overdraft facility and cash flow to the Third Defendant for the purpose of the Café Panache development, for a limited period of time, being no more than 6 months.
25. Being aware of the consequences of over-extension, the Third Defendant advised the Claimant that he would only proceed with the project upon the assurance that the required finances would be extended [to] him by them.
26. Upon the corresponding reassurance of the Claimant, and encouraged by the representatives, promises and oral

agreement further made by them, the Third Defendant commenced works on the Café Panache project, funded solely by the First Defendant for the initial development period.

27. As a show of its support and continued interest in and commitment to the project; the Claimant through its Manager, the Account Manager . . . and other high ranking officers, paid close attention to the advancement of the Café Panache development underway, by visiting the site on a regular basis, offering advice and anxious for its completion.”

[57] In the Reply and Defence to this Counterclaim filed on 15th April 2003, the Bank contended that it has never received or reviewed a proposal for any such business relating to the Café Panache from Mr. Augustin. While admitting that the Bank allows flexible fluctuations in the overdraft facilities of most corporate customers, and that the Defendants were indeed called upon at various times to regularize the status of their overdraft, the Bank denied having knowledge that this was predicated upon any of the matters alleged in paragraphs 8 to 10 of the Amended Defence and Counterclaim.

[58] The Bank has denied encouraging Panache to use its overdraft facility as claimed by Panache and Mr. Augustin or at all. The Bank further, while admitting that at some point Panache was a viable entity, has denied knowledge of the matters stated in paragraphs 24, 25 and 26. It has denied paragraph 27 of the Amended Defence and Counterclaim, and contends that at no point were the Defendants encouraged to act as claimed in paragraph 24. It has by paragraph 13 of its Defence to the Counterclaim averred that in none of its dealings before, during or after the period referred to by the Defendants was any reference made to the facility referred to by the Defendants. Finally, the Bank has put Panache and Mr.

Augustin to strict proof of the matters alleged in paragraphs 4 and 24 of their pleadings.

[59] The submissions of Counsel on the law relating to the Defence of Promissory Estoppel, and the Counterclaim of Panache and Mr. Augustin, fall for the Court's consideration, only where these Defendants have proven on a balance of probability that: (1) Mr. Augustin did submit the business proposal for the Café Panache Venture prior to utilizing Panache's financial resources and overdraft facility to help complete the project; and (2) that Mrs. Frederick and Mr. Gbalajobi made the pleaded statements of fact and promises, agreeing to grant a separate loan of EC\$450,000.00 for and on behalf of Café Panache for the purposes of refunding Panache in due course.

[60] The absence of testimony from Mrs. Frederick and Mr. Gbalajobi has by no means lightened the burden of proof for Mr. Augustin and Panache. Under Article 1137 of The Civil of Code of St. Lucia Cap. 242 and Sections 1 and 3 of The Civil Evidence Act 1995 (U.K.) (The Act), any oral statements made by Mrs. Frederick in response to Mr. Augustin's allegations concerning her representations and promises and the Café Panache business proposal, are admissible as evidence of any fact stated therein of which direct oral evidence by her would be admissible. I am required by Section 4 of the Act to have regard to certain statutory circumstances specified therein, in estimating the weight if any to be given to such hearsay evidence. I shall take such circumstances into account when assessing the reliability and credibility of any such evidence adduced by the parties.

[61] Mr. Augustin deposed in his Witness Statement filed 17th October 2003, that in mid 1998 he had approached the Bank to finance the Café Panache business venture. He stated that:

"A business plan with floor plans and projections was presented to the Claimant Bank in this regard, and a request for financing in the sum of \$450,000.00 was made in order to facilitate this new venture

. . . The above request was presented to Panache Ltd's account manager Mrs. Dewey Frederick, who voiced her excitement with the project, and was of the immediate opinion that the Manager of the Claimant would agree to the request upon her presentation to him of the same."

[62] He deposed at paragraph 9, that after several week of negotiations, Mrs. Frederick indicated that the request had received favourable consideration and had been approved in principle by the Manager of the Claimant. However, she recommended that as he was keen to get going with the same straight away, he should initially capitalize the project with the cash flow funds from Panache Ltd, with the understanding and promise from the Claimant, that the funds so used from Panache Ltd's operating funds for the initial capitalization of Café Panache, would be refunded to Panache, upon the grant by the Bank of the loan facility in due course in favour of Café Panache.

[63] Mr. Augustin testified that he expressed his disapproval with Mrs. Frederick's proposal, and he had ongoing meetings and telephone calls with her concerning her interim counter proposal, urging him to simply complete the intended loan facility documentation and avoid the need for the bridging capital from Panache.

[64] He said that when end of the year 1998 came, he borrowed money from the Bank to pay a deposit to secure the property for the Café Panache venture.

[65] He stated further that he continued to press the Bank to put the loan facility in place, since they had made a promise to facilitate same. According to Mr. Augustin, "The First Defendant had, albeit reluctantly, been convinced to bridge any initial amounts to be expended."

[66] The reasons Mrs. Frederick gave him, as to why he should use the Panache funds to initially capitalize such a foreseeable large project were two fold:

(1) It was the end of the Bank's financial quarter and or year and an audit was being concluded by its Head office. As such it was not a good time to process the loan.

(2) The Bank was about to transfer the Manager Mr. Cargill and his replacement Mr. Gbalajobi was not yet in position. It would be more desirable if the Bank's new manager presided over the arrangements of the loan, having full oversight of the same from inception.

[67] Mr. Augustin's evidence discloses that the new Bank Manager Mr. Gbalajobi and his family, became close friends of Mr & Mrs Augustin. Not only did he establish a cordial and professional relationship with him, but he was so impressed by Mr. Augustin's accomplishments up to then, that he even proposed and nominated him for the Ernst & Young Entrepreneur of the Year Award.

[68] Mr. Augustin's evidence was that "Mr. Gbalajobi echoed the on-going Audit status of the Claimant as first indicated by Mrs. Frederick, so the First Defendant continued to bridge the still promised and impending loan for the benefit of Café Panache. I continued my demands to the Claimant that they make good on their verbal agreement as promised and that the now long overdue loan facility for Café Panache be put in place, such that the funds could be re-imbursed to Panache Ltd."

[69] Mr. Augustin stated that even though the promised loan and re-imburement of the bridging finance was not yet forth coming, Mr. Gbalajobi and Mrs Frederick led him to believe that this still was no real cause for concern, due to their "actual" enthusiasm for the project shown. Between themselves and other senior managers of the Bank, Mr. Augustin said they visited the Restaurant Site on an almost daily basis, giving him encouragement and support and even layout suggestions along the way.

- [70] It is important to look at the Current Account Statements of Panache for the relevant period. The one for 7th January 1999 (Document 185) shows that there was a closing overdraft balance of \$146,653.69. By 15th April 1999 the overdraft was \$360,031.35. By then according to Mr. Baptiste's evidence, the meeting called in early April 1999 between the relevant Bank Officers and Mr. Augustin would have already taken place, with the overdraft having been extended to \$422,000.00.
- [71] Mr. Baptiste testified that the Bank's policy for overdraft facility limits in 2001/2002 was that the Credit Limit of the Country Manager was \$200,000.00 and in excess of that, such amounts had to be referred to the Bank's Credit Risk Management Department at their Head Office in Barbados. Prior to 2001 the same situation obtained. The situation was changed in 2003 he said.
- [72] Mr. Baptiste admitted that an overdraft in excess of \$200,000 up to \$422,000.00 over the Country's Manager's limit was irregular for the Bank. He did not know whether there had been approval from Head Office to exceed the Country Manager's limit. He said the Manager of the Bank had a discretion to go above \$200,000.00 whether or not it was approved by Head Office but he would be out on a limb.
- [73] The Meeting called in early April was to see how the overdraft balance could be reduced within the agreed limit, Mr. Baptiste testified.
- [74] According to him, the excess overdraft balance climbed gradually between January and April 1999, and it was at that meeting in early April 1999 that Mr. Augustin disclosed that he had diverted funds from the clothing business for Panache to the construction of Café Panache. It was at that meeting that Mr. Augustin informally invited the Bank to finance the Café Panache project, claiming that it would cost in the region of \$700,000 to \$800,000. The rest of this evidence has been reproduced at paragraph 21 above.

- [75] Mr. Baptiste testified under cross examination by Learned Counsel Mr. Gill, that he would have been aware if the Café Panache proposal had been presented to the Bank by Mr. Augustin. The proposal would have been on his desk, he said, and he would have been asked to deal with it. Though he admitted that he would not have been aware of any private verbal agreements and undertakings between Mr. Gbalajobi and Mrs. Frederick, he insisted that this had not happened because at the meeting in April 1999 it was revealed that Mrs. Frederick was knowing about it for the first time.
- [76] It is important to note the Bank's procedure for financing Business Proposals. Mr. Baptiste told the Court that the practice was that the Proposal would be reviewed by the Account Manager who would determine whether the Bank has any interest in financing that project.
- [77] If Mrs. Frederick deemed it favourable, she would pass it to him to prepare a Credit Application to be submitted for Approval whether externally or internally.
- [78] If proposal plans existed, they would be passed to him, and he would use it in the process of preparing the Application, and it would remain in the Bank's file.
- [79] Under cross-examination by Learned Counsel Mr. John, Mr. Baptiste said that though the proposals of customers would be made to Mrs. Frederick, approvals of such proposals were not necessarily done by her, although she was the Commercial Accounts Manager. Depending on the amount under the Bank's structure, the proposal would have to be sent by the Bank to higher authority. For an amount over \$200,000 it would have had to be referred to the Credit Risk Management Department at their Head Office in Barbados.
- [80] When shown the Floor Plans and Financial Projections for the Café Panache project, which Mr. Augustin and Panache exhibited as Documents 241 to 248, Mr. Baptiste denied that those had ever been presented to the Bank at any time. He

said he was seeing these documents for the first time in Court. He said that if an Application was being made for financing, the Bank would require this type of documentation among others.

[81] Mr. Baptiste admitted that in April 1999 Mrs. Frederick and himself paid a visit to Café Panache Restaurant. He testified that he had formed the view then that Mrs. Frederick was visiting there for the first time, though it is possible she could have gone there before. Learned Queen's Counsel Mr. Monplaisir submitted that in the absence of written evidence from the Bank of assurances that the loan would be approved, and other evidence to corroborate Mr. Augustin's testimony about the Bank's Officers representations and promises the Defendant, defence and counterclaim should be dismissed.

[82] Having examined the Floor Plans and Financial Projections (Documents 241 to 248) for the Café Panache Project, I note that each of the 4 pages of the Floor Plans for the proposed Café Panache Restaurant bear the name "C.C. Gustave" and date 27th January 1999. It is therefore highly probable that these Floor Plans were prepared on the 27th January 1999, and this inference is inescapable in my view.

[83] The Financial Projections – page 1 – disclose that at the time when the Projections were prepared, the Deposit on the lease \$17,000.00 had already been paid, Shop Improvement costs of \$25,000 was paid already and \$50,000 had already been paid for Fixtures and Furniture for Café Panache.

[84] I have therefore concluded from these documents that Mr. Augustin's credibility is definitely in issue, concerning the existence of these documents in mid 1998, when he testified that he presented them to the Claimant Bank (See paragraph 61 above).

- [85] He testified further that at the end of 1998 he borrowed money from the Bank to pay the deposit to secure the Café Panache property. Assuming these documents were prepared after he had paid this deposit, this probably explains the information on page 1 that \$17,000 deposit had already been paid on the lease.
- [86] It follows therefore that these Financial Projections Documents could not have been submitted to the Claimant Bank in mid 1998 since in mid 1998 he had not yet paid the deposit \$17,000 on the lease to secure the Café Panache property. Neither could he have presented the exhibited Floor Plans which were not yet prepared.
- [87] In the absence of any evidence from Mr. Augustin, explaining this inconsistency, or any submissions from Counsel for the parties, I accept the evidence of Mr. Baptiste that Mr. Augustin did not present any business proposal for Café Panache to the Bank for funding. I accept the evidence that Mr. Augustin disclosed that he was using the Panache financial resources to finance the Café Panache project only in early April 1999 at the said meeting.
- [88] I also find from the evidence of Mr. Baptiste, Mrs. Augustin and Mr. Augustin, that because of the friendship between Mr. Gbalajobi and the Augustins, and the cordial relationship between Mr. Augustin and the Bank, Mrs. Frederick and Mr. Gbalajobi “put their jobs on the line” in extending the Panache overdraft facility beyond the credit limit of the Country Manager for Mr. Augustin, their valued customer.
- [89] I do not believe that Mrs. Frederick and Mr. Gbalajobi made any representation or promises to Mr. Augustin in relation to the Café Panache project as alleged in paragraphs 5 of the Amended Defence and Counterclaim. I accept the evidence of Mr. Baptiste that the agreement between the Bank and Mr. Augustin was for the Panache overdraft facility to be extended from \$200,000.00 to \$422,000.00, I find that this was the only representation promise or oral agreement that Mrs.

Frederick and Mr. Gbalajobi made with Panache and Mr. Augustin at the material times.

[90] I also accept the evidence of Mr. Dwayne Augustin, the former employee of the Bank, that Mr. Ulric Augustin was granted loans to purchase a BMW in August 1998 and the Toyota he imported from Japan in November 1998.

[91] It is obvious that Mrs. Frederick and Mr. Gbalajobi were remiss in their duties in relation to Panache and Mr. Augustin. The officers of the Bank did not document or secure the loan for the motor vehicles in a timely manner, neither did the Bank issue any Overdraft Facility letter in relation to the approval of the overdraft limit from \$200,000.00 to \$422,000.00. Mr. Augustin had evidently mis-calculated, that the Banks financial laxity towards him and Panache would have continued because of the existing friendship with the Bank's Manager, until the Café Panache venture had got off the ground. This probably explains why according to Mr. Baptiste he raised the question of the Bank granting him a loan only in April 1999 at the meeting.

[92] Despite Mr. Baptiste's insistence that this laxity did not attract the attention of the Bank's Head Office, I accept the evidence of Mr. Augustin, that Mrs. Frederick and Mr. Gbalajobi informed him that they had been severely reprimanded for their loose handling of the credit facility and loans to Panache and Mr. Augustin. This obviously was the reason why the Bank reformed its approach to its valued customer.

[93] The Defence and Counterclaim of Panache and Mr. Augustin, which are anchored to the determination of Issue A, have fizzled.

[94] I must therefore move on now to determine Issue C, which deals with the question of undue influence.

LAW ON UNDUE INFLUENCE AND BURDEN OF PROOF

- [95] There were 3 leading cases that Counsel for Mrs. Augustin and the Bank referred to among others: Barclays Bank Plc v O'Brien [1994] 4 All E.R. 417; CIBC Mortgages Plc v Pitt [1994] 4 All E.R. 433; Royal Bank of Scotland v Etridge (No. 2) [2001] 4 All E.R. 449 [2001] 3 W.L.R. 1027, All of these cases are decisions of the House of Lords.
- [96] Undue influence is one of the grounds of relief developed by the Courts of equity as a Court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others, and persuade those with whom they are dealing to enter into transactions. The law will investigate the manner in which the intention to enter into the transaction was secured. If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. "The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will:" (Per Lord Nicholls of Birkenhead in Royal Bank of Scotland v Etridge (No. 2) (supra) at page 457 paras 6 and 7).
- [97] The equitable relief of undue influence has 2 categories, actual or expressed undue influence, and presumed undue influence. Learned Counsel Mr. John has pitched his submissions on both categories
- [98] Actual undue influence comprises overt acts of improper pressure or coercion such as unlawful threats: (Per Lord Nicholls (ibid). It is "an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant part to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for

example, duress or misrepresentation. Indeed many of the cases relating to wives who have given guarantees and charges for their husband's debts involve allegations of misrepresentation . . . Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges undue influence must prove it." (Per Lord Hobhouse of Woodborough in Royal Bank of Scotland v Etridge (No. 2) supra at page 481 para 103). A complainant who proves actual undue influence is not under the further burden of proving that the transaction induced by undue influence was manifestly disadvantageous but is entitled as of right to have it set aside as against the person exercising the undue influence since actual undue influence is a species of fraud: CIBC Mortgages Plc v Pitt and Another supra.

[99] Presumed undue influence arises out of a relationship between two persons where one has acquired a measure of influence or ascendancy over another, of which the ascendant person then takes unfair advantage: (Per Lord Nicholls in Etridge para. 8). "As a result of that relationship one party is treated as owing a special duty to deal fairly with the other . . . Such legal relationships can be described as relationships where one party is legally presumed to repose trust and confidence in the other . . . But there is no presumption properly so called that the confidence has been abused. It is a matter of evidence . . .". (Per Lord Hobhouse ibid at paras 104 to 105).

[100] Lord Scott in Royal Bank of Scotland v Etridge (No. 2) supra, explained that:

"There are some relationships, generally of a fiduciary character, where, as a matter of policy, the law requires the dominant party to justify the righteousness of the transaction. These relationships do not include the husband/wife relationship. In the surety wife cases, the complainant does have to prove undue influence: the presumption, if it arises on the facts of a particular case, is a tool to

assist him or her in doing so" (at paragraph 158 page 502). A banker/customer relationship is like the husband/wife relationship in this regard.

[101] Once there is evidence of the relationship between the dominant and subservient parties, and there is other evidence which is sufficient to justify a finding of undue influence on the balance of probabilities in favour of the complainant, onus shifts to the Defendant. Unless the Defendant introduces evidence to counteract this inference of undue influence that the Complainant's evidence justifies, the Complainant will succeed: (Per Lord Scott at paragraph 161).

[102] Concerning the husband/wife relationship, Lord Scott continued at paragraphs 159 to 160 (pages 502-3):

"For my part, I would assume in every case in which a wife and husband are living together that there is a reciprocal trust and confidence between them. In the fairly common circumstance that the financial and business decisions of the family are primarily taken by the husband, I would assume that the wife would have trust and confidence in his ability to do so and would support his decisions. I would not expect evidence to be necessary to establish the existence of that trust and confidence. I would expect evidence to be necessary to demonstrate its absence. In cases where experience, probably bitter, had led a wife to doubt the wisdom of her husband's financial or business decisions, I still would not regard her willingness to support those decisions with her own assets as an indication that he had exerted undue influence over her to persuade her to do so. Rather I would regard her support as a natural and admirable consequence of the relationship of a mutually loyal married couple. The proposition that if a wife, who generally reposes trust and confidence in her husband, agrees to become

surety to support his debts or his business enterprises a presumption of undue influence arises is one that I am unable to accept. To regard the husband in such a case as a presumed 'wrongdoer' does not seem to me consistent with the relationship of trust and confidence that is a part of a healthy marriage [160] There are, of course, cases where a husband does abuse that trust and confidence. He may do so by expressions of quite unjustified over-optimistic enthusiasm about the prospects of success of his business enterprises. He may do so by positive misrepresentation of his business intentions, or of the nature of the security he is asking his wife to grant his creditors, or of some other material matter. He may do so by subjecting her to excessive pressure, emotional blackmail or bullying in order to persuade her to sign. But none of these things should in my opinion, be presumed merely from the fact of the relationship of general trust and confidence. More is needed before the stage is reached at which, in the absence of any other evidence, an inference of undue influence can properly be drawn or a presumption of the existence of undue influence can be said to arise." (My emphasis).

- [103] The case Barclays Bank Plc v O'Brien [1992] 4 All E.R. 983 was a surety case. I consider it important to set out the facts of this case. The husband had an interest in a Company which had a bank account at Barclays Bank. The Company frequently exceeded its overdraft facility of £40,000 and a number of its cheques were dishonoured on presentation. Both husband and wife were joint owners of their matrimonial home which had a mortgage of £25,000 to a Building Society. The husband had discussed with the Barclays Bank Manager his intention to re-mortgage the matrimonial home in April 1981. The Bank Manager made a note that Mrs. O'Brien might be a problem. The overdraft limit was raised at that stage to £60,000 for one month. Even though no additional security was provided, by 15th June 1987 the Company's overdraft had

risen to £98,000 and its cheques were again dishonoured. On 22nd June 1987 Mr. O'Brien and the Bank Manager agreed that the Company's overdraft limit would be revised to £135,000 reducing to £120,000 after 3 weeks, and that Mr. O'Brien would guarantee the Company's indebtedness and his liability would be secured by a second charge on the matrimonial home. Despite the existence of a covering memorandum accompanying the necessary security documents prepared by the Bank, the Burnham Branch of Barclays Bank where the documents were sent for the O'Briens to sign, ignored the contents of the memorandum. The memorandum had requested that the Burnham branch advise Mr and Mrs O'Brien as to the current level of the facilities afforded to the Bank (£107,000) and the projected increase to £135,000 and ensure that the O'Brien's were fully aware of the nature of the documentation to be signed, and advised that if they were in doubt they should contact their Solicitors before signing.

- [104] The Burnham branch failed to carry out the instructions in the memorandum. Mrs. O'Brien signed the documents the day after her husband had signed. She had been presented with the legal charge on the matrimonial home along with a side letter for her to sign. The letter which she had signed was an acknowledgment that she had received a copy of the guarantee dated 3rd July 1987 of her husband, and an explanation that the liability of her husband is and will be secured by the legal charge dated 3rd July 1987 made between her husband, herself and the Bank over the matrimonial home. This letter acknowledged that the Bank had recommended that the O'Briens should obtain independent legal advice before signing this letter.
- [105] Mrs. O'Brien in fact had not read the letter before signing it, had not received any explanation of the effect of the documents, had not been advised to take independent legal advice, and did not receive a copy of the guarantee of her husband.
- [106] Mr. O'Brien's Company failed to prosper, and its indebtedness rose to over £154,000. Mr. O'Brien failed to meet the Bank's demand under his guarantee. The Bank brought possession proceedings under the legal charge against Mr and Mrs

O'Brien. Mrs. O'Brien sought to defend these proceedings by alleging that she was induced to execute the legal charge on the matrimonial home by the undue influence of Mr. O'Brien and by his misrepresentation.

[107] The trial Judge and the Court of Appeal rejected the claim based on undue influence. The trial judge found that Mr. O'Brien had falsely represented to Mrs. O'Brien that the charge was to secure only £60,000 and that even this liability would be released in a short time when the house was re-mortgaged, but that the Bank could not be held responsible for this misrepresentation. He granted the Bank an order for possession against Mrs. O'Brien.

[108] The Court of Appeal reversed this decision and held that the legal charge on the O'Brien matrimonial home was not enforceable by the Bank against Mrs. O'Brien save to the extent of the £60,000 which she had thought she was agreeing to secure. The Bank appealed to the House of Lords.

[109] The House of Lords considered the existing state of the law relating to Undue Influence. Lord Browne-Wilkinson wrote the leading Judgment which has since, been applied by the Courts, and approved by the House of Lords in Royal Bank of Scotland v Etridge No. 2 (supra), save for his categorization of cases of undue influence. Lord Browne-Wilkinson's judgment has been described by Lord Hobhouse (para 98) as "a masterly exposition of principles designed to give structure to this difficult corner of the law . . ."

[110] Lord Browne-Wilkinson in O'Brien considered the right of a claimant wife to set aside a transaction as against the wrongdoing husband when the transaction has been procured by his undue influence. He then focused on surety cases, in which "the decisive question is whether the Claimant wife can set aside the transaction, not against the wrongdoing husband, but against the creditor bank:" (at page 423). He explained that "if the wrongdoing husband is acting as agent for the creditor bank in obtaining the surety from his wife, the

creditor will be fixed with the wrongdoing of its own agent and the surety contract can be set aside as against the creditor. Apart from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequently of the wife's equity to set aside the transaction) the creditor will take subject to the equity and the wife can set aside the transaction against the creditor (albeit a purchaser for value) as well as against the husband."

[111] In such circumstances, the creditor bank is put on inquiry as to the circumstances in which the wife agreed to stand surety. Lord Browne-Wilkinson opined that in such circumstances, ". . . a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. It follows that, unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights:" (at page 424).

[112] ". . . [T]he question whether the bank has been put on inquiry has to be answered upon the basis of facts available to the bank. Does the bank know that the wife is standing surety for her husband's debts? This should be an easy question for the bank to answer. The bank should know who the principal debtor is and what is the purpose of the facility. Likewise the bank should know of any factors which are likely to aggravate the risk of undue influence. Paradoxically the best place at which to start to assess the risk of undue influence is to consider the true nature of the transaction examine the financial position of the principal debtor and the proposal which he is making to the bank. These are the facts which the bank has most readily to

hand and, if it finds that it lacks relevant information, it is in a position to get it and has the expertise to assess it. A loan application backed by a viable business plan or to acquire a worthwhile asset is very different from a loan to postpone the collapse of an already failing business or to refinance with additional security loans which have fallen into arrears. The former would not aggravate the risk; the latter most certainly would do so. The bank is as well placed as anyone to assess the underlying rationality of the debtor's proposal. It will be the bank that will have formed the view that it is not satisfied with the debtor's covenant and the security he can provide and it will be the bank that has called for additional security. The bank will also probably be aware what has been the previous involvement, if any, of the wife in the husband's business affairs:" (Per Lord Hobhouse in Royal Bank of Scotland v Etridge (No. 2) supra at paragraph 109, page 484.

[113] In considering what are the reasonable steps that the creditor should take to ensure that it does not have constructive notice of the wife's rights if any, Lord Browne-Wilkinson at page 424 in O'Brien stated that in his judgment the following steps should be taken:

- (1) bring home to the wife the risk she is running by standing as surety;
- (2) advise her to take independent advice.

[114] Lord Browne-Wilkinson opined that these requirements may be satisfied if the creditor insists that the wife attend a private meeting with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running, and urged to take independent legal advice.

[115] In CIBC Mortgages Plc v Pitt at page 439-440 supra, the House of Lords approved of this conclusion of Peter Gibson L.J. in the Court of Appeal who in applying the decision in O'Brien stated: "By parity of reasoning, if there is a

secured loan to a husband and wife but the creditor is aware that the purposes of the loan are to pay the husband's debts or otherwise for his (as distinct from their joint) purposes, the creditor, without taking precautionary steps, may be affected by the husband's misconduct." (My emphasis).

[116] Finally, in applying the above stated principles to the issues raised concerning the enforceability of the Agreement and guarantees as between the Claimant Bank and Mrs. Augustin, my decision concerning each document, in the words of Lord Hobhouse (at paragraph 101, page 481) will depend on answering three questions:

- "(1) Has the wife proved what is necessary for the Court to be satisfied that the transaction was affected by the undue influence of the husband?
- (2) Was the lender put on inquiry?
- (3) If so, did the lender taken reasonable steps to satisfy itself that there was no undue influence?

It will be appreciated that unless the first question is answered in favour of the wife neither of the later questions arise. The wife has no defence and is liable. It will likewise be appreciated that the second and third questions arise from the fact that the wife is seeking to use the undue influence of her husband as a defence against the lender and therefore has to show that the lender should be affected by the equity – that it is unconscionable that the lender should enforce the secured contractual right against her."

[117] I must therefore consider the pleadings and evidence relating to this issue.

PLEADINGS FOR UNDUE INFLUENCE

[118] Mrs. Augustin pleaded that she was induced to enter into the contract for EC\$114,000.00 Top-up Loan, and sign the personal guarantee for \$150,000.00 and the Hypothecary Obligation borrowings of Panache Limited, whilst acting under the influence of the Claimant Bank and Mr. Augustin.

[119] The Particulars of Influence pleaded were:

- (a) At the time of executing the said guarantee and undertaking the obligations of the Top-up Loan. Mrs. Augustin lived with Mr. Augustin as his wife and was pressured into signing the said guarantee and the note evidencing the "Top-up loan" of \$114,000.00 which sum had already been advanced to Panache Ltd by both the Claimant and Mr. Augustin.
- (b) Mrs. Augustin was never a customer of the Claimant prior to the entering into of the above arrangements.
- (c) Mrs. Augustin was never advised by the Claimant that she should seek independent legal advice nor did the Claimant ever explain to Mrs. Augustin outside of the presence of Mr. Augustin of the liabilities she was incurring.
- (d) It was made clear to Mrs. Augustin and Mr. Augustin by the Claimant that if they did not enter into the arrangements for the Top-up-loan, their respective guarantees and the Car Loans that the Manager of the Claimant and Panache Ltd's Account Officer at the Claimant Bank would be in serious trouble and stood in danger of losing their jobs.
- (e) The Manager and Panache Ltd's Account Officer at the Claimant Bank had attained a special relationship with Mr. Augustin and

Mr. Augustin relied upon them in the way of their advice to him being in his best interests.

[120] Mrs. Augustin averred that in the premises she is entitled to avoid the obligation to repay the Top-up loan and any accrued interest thereon and to avoid any liabilities under the guarantee for \$150,000.00.

THE WIFE'S TESTIMONY

[121] She deposed in her Witness Statement filed on the 21st January 2004 that at all material times both prior to and following the enforced Consumer Loan and execution of the Guarantee, all transactions between the Claimant and Panache were managed and negotiated by Mr. Augustin.

[122] In April 1999, she stated, she noticed that Mr. Augustin was extremely stressed and anxious as a result of financial and construction pressures leading up to the completion of the Café Panache Restaurant Project.

[123] She never attended any meetings between Mr. Augustin and the Claimant, but she was aware of such ongoing meetings. As a result of the strain and pressure Mr. Augustin was under, she said she inquired as to the reason for such meetings with the Claimant and whether they were proving fruitful. It was then that Mr. Augustin informed her of the re-arrangement plan that the Claimant was pressuring him to agree to. He also informed her of the part that the Claimant Bank wanted her to play in this re-arrangement plan.

[124] Mr. Augustin told her about the last meeting he had had with Mr. Gbalajobi and Mrs. Frederick, and the Memorandum they showed him from their Head Office, severely reprimanding them for the unsatisfactory debit position of the Panache Account which had surpassed their combined authorized limit. This Memorandum

advised them that if this situation was not regularized immediately, their respective positions at the Bank would be under review.

[125] Mrs. Augustin said when she learnt of the role she was to play according to the Claimant Bank, she objected to it and reminded her husband that she had kept herself debt free all these years for a particular reason; and that this plan of the Bank could jeopardize her ability to later execute her intentions.

[126] Mr. Augustin communicated to her how badly he felt about Mr. Gbalajobi's position, since he was his personal friend and had truly tried to assist him.

[127] She said that she told her husband that this was no longer a matter of friendship and favours, that Mr. Gbalajobi and Mrs. Frederick would now do whatever it takes them to get out of the position they were now in, and they would have no concern for the effect the outcome would have on Panache or him.

[128] As a result of the problem, Mr & Mrs Augustin had numerous arguments and disagreements. This was because Mr. Augustin was applying excessive pressure on her to consent to the Claimant's re-arrangement plans. Things climaxed between them when Mr. Augustin became desperate as cheques were being returned by the Bank and suppliers had to be paid. Mr. Augustin kept insisting that she sign the documents.

[129] Mr. Augustin was then an Associate at Floissac Fleming & Associates law firm. She testified that the Consumer Loan Application and the Bank Plan Loan duly filled out were sent to her office. She ignored them for a few days until Mrs. Frederick telephoned her requesting that she sign and return them. She informed Mrs. Frederick that she was not at all happy in being pressured into signing these forms, and pointed out to her that she had plans for her future career progression which required her to have financial flexibility.

- [130] She deposed – “I told her that I was concerned that this proposed re-arrangement scheme may adversely affect my personal plans. I clearly recall telling her how proud I was of the fact that with the exception of credit cards, I had managed to stay debt free all these years, even after two separate University Degrees.”
- [131] Mrs. Frederick totally disregarded her concerns, and told her that she had no other choice but go along with the arrangement as she had previously tried to help Ulric and now she was likely to lose her job and pension because of that, Mrs. Augustin said.
- [132] Apparently in endeavouring to quiet her concerns, Mrs. Frederick also told Mrs. Augustin that though the documents would be drawn up in her name, the existing debt was Panache’s debt and all monthly payments concerning this consumer loan would be settled from the Panache account in any event. Mrs. Frederick had explained that there would be no disbursement as the transaction was being taken to reduce the existing overdraft and give the appearance that funds were being injected to effect same. Mrs. Frederick, Mrs. Augustin said, told her that there would be no need for involvement after this, as no loan would really stand in the Bank’s books to her name.
- [133] Mrs. Augustin deposed that although she was not satisfied or appeased by Mrs. Frederick’s promises, she reluctantly and unwillingly signed the documents for the pressure from Mr. Augustin and Mrs. Frederick to cease.
- [134] She never received the proceeds \$114,000.00 of this loan, and she heard nothing further about it until she received a notice from the Bank in July/August 2001 informing her of past due dates for Payment. This angered her and Mr. Augustin assured her that he was aware of it and was dealing with it, she said.

- [135] Mrs. Augustin also gave similar testimony about her resistance in signing the Guarantee and Mortgage Debenture and Floating Charge for Panache in May 1999. According to her, Mrs. Frederick continued on her war path, and summoned her to a meeting at the Bank, where she briefly ran through the entire re-arrangement scheme again while she Mrs. Augustin scribbled notes on a file jacket.
- [136] It took 1½ years before Mrs. Augustin eventually capitulated. In about February 2001 she reluctantly and under much protest to Mrs. Frederick, executed the Limited Guarantee for the sum of EC\$150,000.00.
- [137] She said, about 4 to 6 months later the various loan facilities were called in by the Claimant, followed by the demand letters from the Claimant's Solicitors and then claims were filed.
- [138] Under cross-examination by Learned Queen's Counsel Mr. Monplaisir, Mrs. Augustin said that the Consumer Loan was forced on her, and that Mr. Augustin requested her to sign the Guarantee and Promissory Note at the time she signed them. She married her husband in 1997.
- [139] She denied that she was in charge of the Panache Ltd's Boutique businesses when Mr. Augustin was away. As a full time practising lawyer her practice did not permit her to do that, she said. Although Mr. Ulric Augustin and Mr. Baptiste testified that she was a signatory on the Panache Account at the Claimant Bank, Mrs. Augustin denied that she helped her husband make transactions at the Bank or that the Bank called her while he was away. She said her husband had a full time Accountant.

Regarding the Consumer Loan, she answered that at the time she signed the documents she was told something different, but she now realizes the consequences of signing it. Though she understood what she was signing and the

nature of the documents, she said she believed Mrs. Frederick that the payments would be made by Panache.

[140] Mr. Augustin admitted that he pressured Mrs. Augustin to sign the relevant documents in question. He was also aware that the Bank had pressured her to do so.

SUBMISSIONS OF COUNSEL

[141] Learned Counsel Mr. John made the following submissions:

- A. The evidence of Mr. Baptiste has proven that Mrs. Augustin was never an informed participant in any of the transactions forming the subject matters of the Claimant's claim, neither did Mrs. Augustin benefit from the Consumer Loan in her name.
- B. The evidence discloses that Mrs. Augustin was not a Shareholder of Panache Ltd
- C. The evidence of Mr. Baptiste confirms that Mrs. Augustin did not enter into any of the disputed transactions of her own free will. She was never present at any of the meetings; and the decision taken for her to participate in the re-arrangement plan by taking out the Consumer Loan for \$114,000.00 was made behind her back in order to urgently reduce the indebtedness of the Company Panache Ltd.
- D. The emphasized underlined portions of Lord Scott's judicial statements reproduced at paragraph 102 of this judgment, are examples (though not exhaustive of instances of 'actual undue

influence which must be established and cannot be presumed as naturally occurring in transactions involving husbands and wives.

- E. Other examples of what can constitute improper and unacceptable methods of persuasion have been identified by Lord Nicholls in Etridge at paragraphs 32 and 33 of his judgment in the following manner:

“32 . . . Undue influence has a connotation of impropriety. In the eyes of the law, 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. Similarly, when a husband is forecasting the future of his business, and expressing his hopes, fears . . .

33. Inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife reposed trust of their financial affairs, prefers his interests to hers and makes a choice for both of them on that footing. Such a husband abuses the influence he has. He fails to discharge, the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.”

- F. Mr. Augustin having described himself as being an enthusiastic and persuasive businessman, misused his powers of persuasion over his wife.
- G. As held by Lord Browne-Wilkinson in CIBC v Pitt, a victim of such undue influence is entitled to have the transaction set aside as of right, regardless of other considerations.
- H. The evidence of Mrs. Augustin clearly encapsulates the exploitation inflicted upon her by both the Claimant and Mr. Augustin in exerting upon her undue pressure and bullying her to execute the Consumer Loan Agreement. The business acumen of Mr. Augustin, who was nominated by the Claimant for an Ernst & Young Entrepreneur of the Year Award, along with his persuasiveness, served to substantially undermine the independence of decision of Mrs. Augustin by the imposition of 'actual' undue influence over her. This Consumer Loan Agreement should therefore be set aside as of right against Mrs. Augustin.
- I. Mr. John reviewed the law which the Court should apply in the event it concluded that 'actual' influence exerted over Mrs. Augustin has not been fully made out. He applied it to the evidence of Mrs. Augustin.
- J. He submitted that the Claimant also imposed undue influence on Mrs. Augustin by summoning her to provide a personal guarantee for the benefit of Panache Ltd.
- K. Counsel argued that in cases alleging actual or presumed undue influence, disadvantage is not a necessary ingredient, and it is not essential for the transaction to be disadvantageous to the pressured

or influenced person: (Lord Nicholls in Etridge at page 459, paragraph 12).

- L. It is obvious that Mrs. Augustin received no benefit from either the Consumer Loan or the Guarantee, this was admitted by Mr. Baptiste.

- M. The law of undue influence makes no qualification or exception of any limitation on the applicability of the principle, based on the professional qualifications, general knowledge or intelligence of the wife. The fact that Mrs. Augustin is an Attorney at Law and arguably may have understood the nature of the transaction, does not negate undue influence. This was confirmed by Lord Nicholls at page 460 para 20 in Etridge where he states that “A person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another.”

- N. Learned Counsel Mr. John argued forcefully, that although Mrs. Augustin was an Attorney at Law, she did not specialize in Banking Law, nor is an appointed Counsel to any Commercial Banking Institution, and although she may have had an understanding of the implications of the proposed arrangements, independent legal advice was nevertheless required to ensure that she not only understood the nature and effect of it, but that it was an arrangement that she was happy to enter into.

- O. Counsel referred to the pronouncements of Lord Nicholls in Etridge who stated at page 466, para 48 and 49:

“48. As to the type of transaction where a bank is put on inquiry, the case where a wife becomes surety for her

husband's debt is in this context, a straight forward case. The bank is put on inquiry. On the other side of the line is the case where money is being 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 that 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 [1993], 4 All E.R. 433 . . .

[49] Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by and her husband. His shareholdings 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. 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."

Mr. John also referred to the observations of Lord Browne-Wilkinson in O'Brien previously stated at paragraph 111 above. He submitted that the circumstances under which Mrs. Augustin had executed the Guarantee and Postponement of Claim for the benefit of the Claimant was a situation where the Claimant was put on inquiry.

- P. As for the Top-up Consumer Loan, the fact that the proceeds of that loan were for the benefit of Panache Ltd, created a situation for the Claimant Bank to be put on inquiry.
- Q. In order not to be deemed to have been fixed with Constructive Notice of Mrs. Augustin's right to have the Guarantee signed by her set aside, and for her to be relieved of the obligations and liability imposed under the terms of the Top-up Consumer Loan, the Claimant Bank was required to take reasonable steps to satisfy itself that the agreement of Mrs. Augustin to participate in the disputed transactions was properly obtained.
- R. Lord Justice Longmore in applying this principle in Yorkshire Bank Plc v Tinsley [2004] E WA Civ. (C.A.) 816 at para 11 confirmed the findings of the trial judge who noted that:

"whenever a wife offers to stand surety for her husband the lender is put on inquiry, the bank was in my view put on inquiry and since there is no evidence at all of any steps which the bank took to satisfy itself that Mrs. Tinley had entered freely into the transaction, I accept that the 1988 mortgage would have been liable to have been set aside as against the Bank for undue influence of which it has constructive knowledge."

- S. It is not sufficient in a case of this kind, for a bank to know that a Solicitor has been retained. Banks must take further steps to satisfy themselves that the Solicitor has been instructed to give independent advice on the transaction to the wife: (Etridge at paras 54-56 and 80 Per Lord Nicholls).

T. In the present case the Claimant failed to take any steps whatsoever to inquire into or satisfy themselves that Mrs. Augustin received independent legal advice on the proposed transactions notwithstanding that she was an Attorney General at Law. As 'only a fool represents himself,' neither the fact of the profession of Mrs. Augustin, nor her admission that she was a former Director on the Board of a Bank, would relieve the Claimant of its responsibility in this regard.

[142] Learned Queen's Counsel Mr. Monplaisir argued that Mrs. Augustin was aware or ought to have been aware of the status of Panache Ltd, and she was fully aware of the reasons for and understood and appreciated what she was signing. This conclusion is deduced from the following facts:

- (a) She is the Secretary of the Company and has signature on the Bank Account.
- (b) The Company is indebted to the Bank which was admitted by Mr. Augustin under cross-examination.
- (c) The issue of facilitating a reduction in the Company loan with the Bank was made known to her over series of discussions.
- (d) She is an Attorney-at-Law and the Company's Solicitor (she signed the documents of incorporation for the Company as such, and there is no evidence of her withdrawing herself as Solicitor.
- (e) She admitted being a Director of a Bank.
- (f) The evidence is that it is Mr. Augustin who induced and insisted that she sign the documents for the loan and not the Bank.

- (g) She understood the reasons for requiring her assistance to facilitate the refinancing of a portion of the Company's debt, and was quite aware of what she was signing. She knew that the loan did not affect any matrimonial property.
- (h) There was no evidence that either the Bank or Mr. Augustin misrepresented to her facts and circumstances for the loan.
- (i) She took charge of the business during the period that her husband was away.

[143] On the basis of these facts, Queen's Counsel argued that Mrs. Augustin's agreement for the loan was properly obtained. Further, he argued, even if the Bank was put on enquiry it had taken reasonable step to satisfy itself that Mrs. Augustin entered into the obligation freely and with the knowledge of the true facts in accordance with the law stated in Etridge supra.

FINDINGS

[144] I accept the evidence of Mrs. Augustin, I find that she was not involved in managing the business affairs of Panache Ltd, though she was the Company Secretary, had her signature on the Company's Account at the Bank, and was the Solicitor who incorporated Panache Ltd.

[145] On the testimony of Mr. Baptiste, Mr. Augustin, and Mrs. Augustin, I find the following facts –

- (i) Mrs. Augustin was neither a Shareholder or Director of the Company, and she had no pecuniary interest in the Company.

- (ii) At the Bank meeting in early April 1999, in the absence of Mrs. Augustin, the Bank's Officers and Mr. Augustin made arrangements which were disadvantageous to Mrs. Augustin in order to reduce Panache's indebtedness and bring the existing overdraft within the agreed limit.
- (iii) Those arrangements were not for the benefit of Mrs. Augustin, they were for the benefit of Panache Ltd and Mr. Augustin as Panache's Director and Shareholder.
- (iv) The Bank indirectly commissioned Mr. Augustin who acted as the Bank's agent in pressuring Mrs. Augustin to sign the required Consumer Loan Agreement and other documents.
- (v) Mrs. Augustin reposed high trust and confidence in Mr. Augustin as his wife and her emotional interdependence on him rendered her a vulnerable person.
- (vi) Mr. Augustin abused the confidence of Mrs. Augustin by exploiting her vulnerability, and pressuring her excessively in order to persuade her to sign the documents. This therefore raises an inference of wrongdoing by Mr. Augustin.
- (vii) I am satisfied that Mr. Augustin exerted undue influence over her to persuade her to sign the Consumer Loan Agreement, guarantee, and other security documents.
- (viii) The Claimant Bank's role in procuring Mrs. Augustin's participation in their re-arranged plan for the overdraft account of Panache Ltd was oppressive behaviour and actual undue influence in my view.

- [146] I am therefore satisfied that the transactions relating to the Consumer Loan Agreement for \$114,000.00, the personal guarantee for \$150,000.00 and the Hypothecary Obligation borrowings of Panache Ltd have all been affected by the undue influence of Mr. Augustin and the Claimant Bank.
- [147] Apart from the evidence that Mrs. Augustin was summoned to the Bank by Mrs. Frederick to a meeting where Mrs. Frederick briefly ran through the entire re-arrangement scheme, there has been no evidence led by the Claimant Bank of any steps which the Bank took to satisfy itself that Mrs. Augustin had entered into the transactions freely.
- [148] The fact that Mrs. Augustin is a lawyer, and a former Director on the Board of the now defunct Crowser Bank, who understood the reasons for requiring her assistance to facilitate the financing of a portion of Panache Ltd's debt, and understood what she was signing cannot assist the Claimant in negating undue influence in my view. "[F]or the purpose of negating undue influence it is necessary to be satisfied that the agreement was, also, given freely in knowledge of the true facts. It must be remembered that the equitable doctrine of undue influence has been created for the protection of those who are sui juris [of full legal capacity] and competent to undertake legal obligations but are nevertheless vulnerable and liable to have their will unduly influenced. It is their weakness which is being protected not their ability to comprehend:"(Per Lord Hobhouse in Etridge (No.2) supra at page 485 paragraph 111).
- [149] The robust and excellent submissions of Learned Counsel Mr. John accurately reflect the law on undue influence. The logical conclusions that Mr. John has invited this Court to arrive at, having regard to the evidence find favour with me.
- [150] Having found that Mr. Augustin was indirectly acting as agent for the Claimant Bank in obtaining the guarantee, Hypothecary obligations for Panache Ltd and

execution of the Consumer Loan Agreement, the Bank is fixed with the wrongdoing of Mr. Augustin in exerting undue influence on Mrs. Augustin. Apart from this the Bank had actual notice of the undue influence of Mr. Augustin. I have also found that the Bank itself acted oppressively and exerted 'actual' undue influence on Mrs. Augustin. The Claimant Bank therefore had notice of the undue influence actual or constructive. In such circumstances the Bank was put on inquiry as to the circumstances in which Mrs. Augustin agreed to execute the relevant documents particularly where she was gaining no benefit from those transactions which are related to postponing the collapse of Panache Ltd's business account and the Bank's call for additional security.

[151] The fact that the transactions did not involve matrimonial property is irrelevant in my view having regard to the purpose of the law

[152] At paragraph 79 to 80, page 473 and 474 in Etridge supra, Lord Nicholls established guidelines that the Bank should take when it has been put on inquiry for future transactions: "(1) . . . the Bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a Solicitor, acting for her, to the effect that the Solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a Solicitor whom she is willing to instruct to advise her separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the Solicitor may be the same Solicitor as is acting for her husband in the transaction. If a Solicitor is already acting for the husband and wife, she should be asked whether she would prefer that a different Solicitor should act for her regarding the bank's requirement for confirmation from a Solicitor. The bank should not proceed with the transaction until it has

received an appropriate response directly from the wife. (2) Representatives of the bank are likely to have a much better picture of the husband's financial affairs than the Solicitor. If the bank is not willing to undertake the task of explanation itself, the bank must provide the Solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a Solicitor for their protection, to send to the Solicitor the necessary financial information. What is required must depend on the facts of the case.

Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the Solicitor. The bank will of course, need first to obtain the consent of its customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed. (3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's Solicitor of the facts giving rise to its belief or suspicion. (4) The bank should in every case obtain from the wife's Solicitor a written confirmation to the effect mentioned above . . .

In respect of past transactions, the bank will ordinarily be regarded as having discharged its obligations if a Solicitor who was acting for the wife in the transaction gave the bank confirmation [in writing] to the effect that he had brought home to the wife the risks she was running by standing as surety."

- [153] Lord Nicholls further pointed out at paragraph 81, page 474 that despite it being a well established principle that a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor expects, in the case of wives, they need a full and clear explanation of the risks involved. The protection needed by wives differs from and goes beyond, the disclosure information. The O'Brien principle is intended to provide this protection.
- [154] It seems therefore that where a Bank is put on inquiry, regardless of whether it be a loan transaction, a surety transaction or a guarantee transaction, the Bank should satisfy the requirements stated by Lord Nicholls at paragraph 152 above.
- [155] The fact that Mrs. Augustin is a lawyer would not absolve the Claimant Bank from these obligations. The maxim: "A lawyer who has himself as his lawyer is a fool" is eminently applicable.
- [156] It is patently clear to me having regard to the requirements stated by Lord Nicholls, that the Claimant Bank did not take reasonable steps to satisfy itself that there was no undue influence.
- [157] I therefore hold that the Consumer Loan Agreement dated 15th April 1999, the Bank Plan Note dated 19th April 1999 and the Guarantee limited to \$150,000 dated 28th February 2001 are unenforceable against Mrs. Augustin and Mr. Augustin by the Claimant Bank.
- [158] Claimant has proven on a balance of probability that Mr. Augustin and Panache Ltd only are indebted to Claimant as claimed in SLUHCV0268 of 2002.

[159] On the Bank Plan Loan to Mr. Augustin in respect of the motor vehicles, by the Claimant, it has been proven on a balance of probabilities that Mr. Augustin is indebted to Claimant as claimed in SLUHCV0269 of 2002.

[160] The debt claimed in SLUHCV0273 of 2002 against Mr. and Mrs. Augustin cannot be recovered for the reasons stated in paragraph 157 above.

CONCLUSION

[161] I enter judgment in favour of the 2nd Defendant against the Claimant in Claim No. SLUHCV 2002/0268 with Costs to be determined. I also enter judgment in favour of the Claimant against Defendants Nos. 1 and 3 in the sums to be determined with Prescribed Costs on such sums.

[162] I enter judgment in favour of the Claimant against the 3rd Defendant in the sum to be determined as claimed with Prescribed Costs on Claim No. SLUHCV2002/0269.

[163] I enter judgment in favour of the Defendants No. 2 and No. 3 against the Claimant in Claim No. SLUHCV2002/0273 with Prescribed Costs to be determined.

[164] The Claimant is to present to the Court Statements in relation to the sums to be entered as the Judgment Debt and the Prescribed Costs on Claims SLUHCV2002/0268 and 2002/0269 on 14th February 2007.

[165] The Defendants Nos. 2 and 3 are to present to the Court their calculations for the Prescribed Costs on Claims SLUHCV2002/0268 and SLUHCV2002/0273 on 14th February 2007.

[166] On 14th February 2007 the Court will enter Final Judgment in respect of the 3 Claims.

Dated this 6th day of February 2007

OLA MAE EDWARDS
HIGH COURT JUDGE