

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

CLAIM NO. AXAHCV 2006/0043

BETWEEN:

THELSTON L CONNOR

Claimant

and

ISHLAYN SMITH

Defendant/Ancillary Claimant

and

SCOTIABANK ANGUILLA LTD.

Ancillary Defendant

APPEARANCES:

Mr. Collin Meade for the Claimant

Mr. Gerhard Wallbank and Miss Tameka Davis for the Defendant/Ancillary Claimant

Mrs. Tara Ruan and Miss Ruth Wigley for the Ancillary Defendant

2008: November 10,11,12,13,17;
2009: December 7.

Property Law – whether parties are joint proprietors or proprietors in common - whether land held on resulting trust – whether land transfer was procured by actual undue influence and ought to be set aside – whether land transfer contained falsities or was improperly executed and ought to be set aside – whether business was jointly owned – whether party entitled to an accounting of expenditure and income

Tort Law - whether instrument of charged was obtained by fraud – whether fraud to be specifically pleaded - whether Bank had duty to explain credit facility – whether Bank had duty to advise as to prudence of credit facility – whether Bank had duty to ensure that defendant received independent legal advice – whether defendant stood as surety for the debts of the claimant

The claimant (“Mr. Connor”) and the defendant (“Ms. Smith”) were engaged to be married and lived together at a house in Island Harbour, a short distance from the home of Ms. Smith’s parents. The land in dispute (“the Land”) adjoins Ms. Smith’s father’s land in Island Harbour and was owned by

her cousin. The asking price was \$10,000 - \$12,000 but Ms. Smith, because of her family connection, was able to negotiate a price of \$8,000. Mr. Connor and Ms. Smith were unsuccessful in obtaining a loan to purchase the Land. Mr. Connor provided the purchase price of \$8,000 through the use of his Scotia bank credit card. Upon payment, the Land was transferred to Ms. Smith, as owner.

The parties commenced development of the land. Ms. Smith, her father, uncle and others did work on the Land. Mr. Connor paid for certain works and improvements or provided payment in kind. In February 2005, Mr. Connor obtained a loan of \$13,500 to pay off the credit card debt incurred in advancing money for the purchase of the Land. The Land attached as security "when purchased" by Mr. Connor. Work began towards the establishment of a business on the Land, Koko's, which opened for business in August 2005. Mr. Connor and Ms. Smith operated as a team in developing, outfitting and running the business.

In May 2005, Mr. Connor approached Scotiabank Anguilla Ltd. ("the Bank") about obtaining financing for Koko's. On 8th June 2005, Ms. Smith executed a transfer of the Land to herself and Mr. Connor, allegedly by coercion or on account of undue influence. For the purpose of obtaining access to the Land, Ms. Smith was granted an easement over her father's land. Neither the document of transfer nor the grant of easement was witnessed or certified as required by law.

In October 2005, Mr. Connor and Ms. Smith obtained a \$50,000 credit facility from the Bank which was used to develop and upgrade Koko's. A charge was registered in favour of the Bank in November 2005, although the Bank failed to have Ms. Smith execute the charge.

Mr. Connor and Ms. Smith's relationship ended in April 2006, whereupon she ceased working at Koko's, allegedly on account of threats by Mr. Connor. Mr. Connor continued to operate Koko's but it closed for some time due to a dispute over the Land access granted by Ms. Smith's father. The Bank later gave Ms. Smith the option of removing her name from the credit facility, but she declined.

In July 2009, Mr. Connor commenced legal proceedings claiming to be entitled to an undivided beneficial interest in the Land and sole ownership of Koko's. By way of defence, Ms. Smith claimed to be the owner of both the Land and the business. The Bank was joined as an ancillary defendant by Ms. Smith who claimed that she was unduly influenced or misled into entering into the credit facility which was not properly explained to her and for which she received no independent advice. Ms. Smith also claimed that the charge and caution in favour of the Bank were made fraudulently and ought to be set aside.

Held: allowing the claim in part with no order as to costs and dismissing the ancillary claim with prescribed costs in favour of the Bank:

- (1) A resulting trust may arise at the time of acquisition of property where it is shown that a party has made a substantial contribution to its acquisition or in its improvement in circumstances where the court may reasonably infer a common intention on the part of the legal owner that by reason of such contribution, the legal owner is to hold the property on a resulting or constructive trust in favour of that party to the extent of that party's contribution.

- (2) Having regard to the totality of the evidence, namely, Mr. Connor's contribution of the full purchase price, Ms. Smith's role in obtaining a discounted price and the discussions and attempts by the parties to pool their resources for the development of the land, it is evident that, at the time of the purchase when the legal title to the Land was passed to Ms. Smith only, a resulting trust in favour of Mr. Connor arose. It is also clear that the intention was that Mr. Connor and Ms. Smith would be joint beneficial owners of the Land.

Hussey v Palmer [1972] 1 WLR 1286 applied.

- (3) The Instrument of Transfer dated 8th June 2005, should be set aside as having been obtained by actual undue influence exerted by Mr. Connor on Ms. Smith and having regard to the fact that the formalities for due execution were patently disregarded. Such finding however, does not affect the legal position as it was prior to the 8th June Transfer, with the effect that both Mr. Connor and Ms. Smith continue to hold an equal beneficial interest in the Land.
- (4) On the totality of the evidence, it is clear that Mr. Connor and Ms. Smith were operating as a team and that the business, Koko's, was a joint venture undertaken for their long term mutual benefit. As such, the court is satisfied that Koko's is jointly owned by Mr. Connor and Ms. Smith. Ms. Smith, who ceased to participate in the management of Koko's from about March 2006, is entitled to an accounting of the expenditure and income of the business from at least 1st April 2006, to the present.
- (5) It is a claimant's duty under CPR 8.7 to set out all the facts on which he/she relies with sufficient particularity as to enable a defendant to know the case he/she is required to answer. No particulars of fraud have been pleaded or particularised, either in Ms. Smith's statement of case or in her witness statement. The plea is accordingly defective and merits no further consideration.

East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006, applying **Three Rivers District Council v Bank of England** (No.3) [2001] 2 All ER 513, followed.

- (6) Having regard to the evidence, the court is satisfied that the Bank explained the credit facility to Ms. Smith as it was required to do. The Bank did not assume, and in the circumstances had no further obligation, to advise Ms. Smith as to the prudence of obtaining the credit facility.

Lloyd's Bank v Cobb (Unreported) Court of Appeal 18th December 1991, (Transcript Association) applied.

- (7) The Bank was not under a legal duty to ensure that Ms. Smith receive independent legal advice for Ms. Smith did not stand as surety for her fiancé's debt; the transaction was not, on the face of it, financially disadvantageous to Ms. Smith, and, she in fact derived a benefit; on the available evidence the Bank did not know nor was it aware of any undue influence being exercised by Mr. Connor on Ms. Smith; and, on the available evidence Mr. Connor did not act as agent for the Bank in procuring Ms. Smith's consent to the

transaction. Further, the failure to have Ms. Smith execute the charge was due to inadvertence and was not part of a scheme between the Bank, Mr. Connor or any other person. The credit facility and the charge are accordingly valid and enforceable obligations of both Ms. Smith and Mr. Connor. Ms. Smith is ordered to comply with the terms of the commitment letter and to execute an instrument of charge in favour of the Bank.

Barclays Bank v O'Brien [1993] 4 All ER 417, **Royal Bank of Scotland v Etridge** (No. 2) [2002] 2 AC773 and **CIBC Mortgages Plc v Pitt** [1993] 4 All ER 433 distinguished.

JUDGMENT

- [1] **GEORGE-CREQUE, J.:** This case is akin to those types of cases brought before the court for the determination of interests in matrimonial property following the breakdown of a marriage. It also has the flavour of those surety cases brought against banks where, normally, a wife without the benefit of legal advice stands as surety for her husband's debts secured by the matrimonial home and later, invariably at the stage where the Bank seeks to enforce its security, the wife seeks to set it aside.

The Action

- [2] The dispute in this action relates to the ownership of a parcel of land described on the land register as Registration Section East Central, Block 89319B Parcel 9 ("the Land"), and a restaurant business operated thereon known as Koko's Beach Bar and Restaurant ("Koko's"). The Claimant, Mr. Connor, claims an undivided beneficial interest in the Land and asserts in effect that he is the sole owner of Koko's. The defendant, Ms. Smith, on the other hand, claims that she is the sole owner of the Land and the sole owner of Koko's. The ancillary defendant, Scotiabank Anguilla Ltd ("the Bank") holds a charge over the Land as security for a \$50,000 line of credit ("the credit facility") made available to Mr. Connor and Ms Smith for the development of Koko's. Ms. Smith joined the Bank to the proceedings as an ancillary defendant and alleges against it that she was misled and was unduly influenced into entering into the credit facility and seeks, inter alia, the setting aside of the credit facility and the charge over the Land.

The Background

[3] In order to place this dispute into context it is necessary to set out certain facts which are not in dispute by way of background. Where other facts are set out with regard to matters which are in dispute, such facts are to be taken as findings by me on the evidence adduced.

- (a) Mr. Connor and the defendant, Ms. Smith were a couple. They were engaged to be married. Their relationship was short-lived lasting only four years.
- (b) Ms. Smith is a beautician by occupation. Mr. Connor is an entrepreneur and holds the office of Registrar of Commercial Activities in the public service of the Government of Anguilla. Mr. Connor is 10 years older than Ms. Smith. At the time of trial she was age 26. At the onset of the relationship, Ms. Smith lived with her parents. Mr. Connor and Ms. Smith then moved in together at a house in Island Harbour a short distance away from that of her parents.
- (c) The Land in dispute adjoins her father's land in Island Harbour and has a beach front. Ms. Smith says that, she wanted to do BBQ's and also braid hair on the Land. Mr. Connor says that he had the idea of developing a restaurant on the Land. I am satisfied on the evidence however, that they both had ideas for the use of the Land and that they shared with each other their respective ideas and that they both intended to put the Land to use for their respective purposes.
- (d) The Land was owned by Ms. Smith's cousin David Harrigan. The asking price for the Land was around \$10,000.00 to \$12,000.00. Mr. Connor says he sent Ms. Smith forward to negotiate a lower price for the Land. Mr. Michael Fleming, in giving evidence for Ms. Smith, stated that he was also interested in purchasing the Land and that Mr. Harrigan was willing to sell to him for US\$10,000. He deferred to Ms. Smith after she expressed her interest in purchasing the Land and also offered to pay for the Land for her. She told him of her plan to braid hair and sell snacks on the Land. At that time Ms. Smith was unemployed.

- (e) Ms Smith was able to negotiate a price of \$8,000 for the Land.
- (f) Mr. Connor and Ms. Smith applied for a loan from Caribbean Commercial Bank to purchase the Land. They were unsuccessful. The result was that Mr. Connor provided the purchase money of \$8,000 by having the credit limit on his Scotiabank credit card increased, which then allowed him to issue a cheque on his credit card account for this sum. Upon payment to Mr. Harrigan, the Land was then transferred to Ms. Smith only, as owner. The Land Transfer was recorded at the Land Registry in January 2005. Ms. Smith says that the payment of the \$8,000.00 by Mr. Connor was in the nature of a loan to her which she intended to repay.
- (g) After the purchase, clearing of the Land occurred. Sand and stones were shifted. Materials were acquired from various places and structures were erected. Various persons did work on the Land, including Ms. Smith, her father, uncle and others. Some were paid for their work by Mr. Connor sometime in 2006. Some work was also performed by others and materials, equipment or furnishings acquired in exchange for services rendered by Mr. Connor.
- (h) Sometime in February 2005, Mr. Connor obtained a loan from the Bank for \$13,500.00. In the Bank's commitment letter even though the loan was being made to Mr. Connor only, reference was made to having the Land as security 'when purchased' by Mr. Connor. The purpose of this loan was to pay off the \$8,000.00 advanced to Mr. Connor through the use of his credit card as previously mentioned.
- (i) Sometime thereafter, Ms Smith became pregnant with Mr. Connor's child and was placed on bed rest given difficulties encountered in a prior pregnancy.
- (j) Sometime in May 2005, Mr. Connor had approached the Bank and had discussions with Mr. Niles and Ms. Carty, both officers of the Bank, about obtaining financing to get the Koko's¹ up and running. Ms. Smith played no part in those initial discussions and prior to October 2005, was not a

¹ Koko's was chosen from a pet owned by Ms. Smith.

customer of the Bank. Mr. Connor however already had a relationship with the Bank as a customer and was well known to Mr. Niles and Ms. Carty. In fact Mr. Niles and Mr. Connor enjoyed a relationship on a social level. The use of the Land as security for a credit facility was discussed.

- (k) Mr. Connor also attended to obtaining planning approval as well as the business licence and liquor licences for Koko's. Business signs or logos were made for Koko's. Ms. Smith said she first hand-painted pieces of wood to make those signs and later professional signs were obtained through the services of Joanne Maron contacted by Mr. Connor. Ms. Smith says that Mr. Connor did all these things by way of helping her set up her business as he had offered to do as she was his girlfriend. She said she trusted he would help her as he had the experience; that he knew of people who she needed and also knew what she needed to start her business.
- (l) In May 2005, Ms. Smith suffered another miscarriage. She was quite ill and depressed.
- (m) About two weeks after the miscarriage, around 8th June 2005, and whilst still at home, she executed as transferor a Land Transfer form in which Mr. Connor and Ms. Smith were the transferees. It is not clear on the Transfer whether they were to hold as joint proprietors or proprietors in common but it is common ground that it purported to be as joint proprietors. This Instrument of Transfer was registered at the Land Registry in August 2005. She says that she was coerced and otherwise unduly influenced by Mr. Connor into signing this Transfer. Mr. Connor says she wished to transfer the Land to him solely in acknowledgment of the fact that the Land was his but that he told her to transfer it into their joint names.
- (n) Notably, a Cindy Mercer witnessed and certified this Transfer, even though Ms. Smith had not executed the Instrument of Transfer in her presence. Neither did she appear before Ms. Mercer so that Ms. Mercer could ensure that Ms. Smith had voluntarily executed the Transfer, or for

satisfying herself, as the certifier of the Instrument, that Ms. Smith had understood the content and purport of the Instrument. The Instrument of Transfer stated no consideration. More will be said about this Instrument later.

- (o) The Land needed access. This was secured by a purported grant of easement over the Land belonging to Ms. Smith's father. Here again the waters are muddy in respect of the execution and certification of this instrument. Ms. Smith says that she sought to obtain from her father the needed access to the Land but he was unwilling to do so. In any event her father was persuaded by Mr. Connor to sign the form purporting to be a grant of easement which Mr. Connor produced to him. This form was taken to Ms. Keesha Webster, a lawyer practicing in Anguilla, who in the absence of Mr. Smith, "witnessed" his signature thereon and completed the certificate at the back. The form of certificate on this grant of easement is similar to that on the Instrument of Transfer. More will also be said later about this document.
- (p) In April or May 2005, Mr. Connor had approached the Bank to discuss financing to develop Koko's. He spoke to Mr. Andrew Niles, Assistant Manager, personal banking. Ms. Carty, the Bank's then relationship officer was assigned to deal with him. After discussing various options Mr. Connor opted for the credit facility called "the ScotiaLine" – a revolving credit facility set up along the lines of a credit card and accessed mainly by the use of cheques.
- (q) In or about June 2005, Mr. Niles wrote to the Department of Lands and Surveys to say that the Bank had no objections to Mr. Connor being added as a proprietor of the Land. It is reasonable to infer that Mr. Connor already had in his contemplation the addition of his name on the Land Register in respect of the Land. At that time however, the Bank held no security over the Land.
- (r) In October 2005, Ms. Smith attended upon the Bank. She met with Ms. Carty and signed the loan documents negotiated by Mr. Connor in respect

of the \$50,000.00 credit facility. She knew it related to Koko's and that it was for \$50,000.00. Ms. Smith said however that Ms. Carty did not explain to her the terms of the credit facility. Ms. Smith accepted however, that she and Mr. Connor and discussed the \$50,000.00 loan which would enable Koko's to be developed and upgraded much faster.

- (s) The credit facility was used to develop and upgrade Koko's. The business actually commenced in August, 2005. At first it operated on a weekend basis and as from January, 2006 it opened daily. Ms. Smith managed the day to day operations of Koko's. Mr. Connor was employed as a full time employee of the Government of Anguilla and so he assisted mainly on evenings. As income was generated from the business a portion went to the Bank to feed the credit facility. It was paid into an account in the name of Mr. Connor but over which he had given to Ms. Smith a power of attorney, enabling her to operate on the account. Other expenses of Koko's were also paid out of that account. Ms. Smith was also written cheques by Mr. Connor from the said account in amounts of \$1,000.00 on various occasions. Mr. Connor called them salary to Ms. Smith. She says they were not, since she owned Koko's.
- (t) Sometime in November 2005, a charge was registered in favour of the Bank over the Land now registered in both their names. Yet another curious event occurred. Mr. Connor was the only signatory, as chargor, on the instrument of charge which, notwithstanding that they were both named as chargors on the instrument, was recorded and perfected as a security over the Land in favour of the Bank. It is said by the Bank that this is an inadvertent omission. I accept this to be so.
- (u) Later, the relationship between Mr. Connor and Ms. Smith foundered and by April 2006, they had gone their separate ways. Ms. Smith ceased working at Koko's. She says this was due to threats made by Mr. Connor. Mr. Connor continued the business for sometime and then it was closed for some time due to a dispute over the Land access formerly granted by Ms. Smith's father.

- (v) She later went back to the Bank to seek updates on the loan. She was asked by Mr. Niles whether she wanted her name off the loan. She declined to take up this offer.
- (w) Mr. Connor launched these proceedings in July, 2009.

[4] **The Issues**

The Parties submitted an agreed list of issues on 30th October 2008. To my mind they may be succinctly stated as follows:

- A. With reference to the Land:
 - (i) Whether the \$8,000.00 paid by Mr. Connor as the purchase price for the Land was paid by way of a loan to Ms. Smith.
 - (ii) If not, whether Ms. Smith holds the Land on a resulting trust for Mr. Connor.
 - (iii) Whether the transfer executed by Ms. Smith on 8th June 2005, to Mr. Connor and herself was procured by undue influence and ought to be set aside.
 - (iv) If the transfer is not to be set aside whether they hold the land as joint proprietors or proprietors in common and if as proprietors in common, then in what proportions.
- B. With reference to Koko's:
 - (v) Whether Mr. Connor holds an interest in Koko's.
 - (vi) If so, the extent of that interest.
- C. With reference to the Bank :
 - (vii) Whether Ms. Smith knowingly and voluntarily entered into the Credit Facility.
 - (viii) Whether the instrument of charge over the Land in favour of the Bank by way of security for the Credit Facility was obtained by fraud.

Assessment of the parties

- [5] Having seen and heard Mr. and Mrs. Connor and observing their demeanour, it is my impression that Mr. Connor is an intelligent, quite sophisticated and astute businessman with great marketing skills. Ms. Smith on the other hand, struck me as a person with a simple approach to business and life in general and certainly no match for Mr. Connor in terms of business acumen.

The purchase of the Land

- [6] Ms. Smith in her evidence said that:
- (a) After she turned down getting the purchase money from her uncle at the urging of Mr. Connor and had also turned down Mr. Fleming's offer, she decided she would raise a loan from her bank, CCB. Mr. Connor agreed to back her up on the loan. She had in the past obtained smaller loans from CCB and knew something about taking out loans with a bank.
 - (b) Mr. Connor accompanied her to CCB. (Mr. Connor accepts this and says that they decided to take out a joint loan at CCB).
 - (c) They were unsuccessful in obtaining the loan.
 - (d) Mr. Connor offered to raise the money to lend to her from his bank (Scotiabank).
 - (e) She accepted and he gave her a cheque for the \$8,000 made payable to the Vendor, Mr. Harrigan.

- [7] Mr. Connor in his evidence stated that he did not offer to lend Ms. Smith the purchase money. In a letter to Ms. Smith of 21st April 2006, he wrote:

"While it was always our intention to purchase the land in both our names, Mr. Harrigan quaried my involvement.... And we decided that we would transfer the land in your name initially and then to both of us once it was secured."

In cross examination in relation to that letter Mr. Connor said:

"...it was always my intention to purchase the land in both our names. The idea was that I would be the owner-from marriage. I had engaged her. The unit of marriage was like a 50:50 split – so we would become one."

Also under cross examination Mr. Connor stated that they are registered as joint proprietors of the Land.

[8] It is to be noted that in Mr. Connor's witness statement (paragraph 8) he stated that he was to be the sole beneficial owner on the initial transfer to Ms. Smith. However, his claim is for a proportionate beneficial interest.

[9] Ms. Smith, in her witness statement² stated that she had asked Mr. Connor to make an appointment at the Bank so that she could pay him back. There is no evidence that a repayment actually occurred.

Was the \$8,000 paid as the purchase price a loan?

[10] This is a finding of fact. I am quite satisfied based on the evidence that the \$8,000 provided by Mr. Connor for the purchase of the Land was not a loan. There is some support in the evidence of each party that Ms. Smith negotiated the purchase which was from a relative at a bargain price. I accept that it was for this reason the Land was transferred into Ms. Smith's name only.

A resulting trust – the Law

[11] The law is quite settled as to the guiding principles in determining whether a resulting or constructive trust has arisen. The concept of a resulting or constructive is a product of equity. In **Hussey v Palmer**³ Lord Denning, in relation to the concepts of a resulting trust and constructive trust said the following:

“The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for or the benefit of it or a share in it.”

[12] Such a trust may arise from the onset at the time of acquisition of the property where it is shown that a claimant has made a substantial contribution to its acquisition or in its

² At para. 22

³ [1972] 1WLR 1286 at 1289-1290

improvement in circumstances where the court may reasonably infer a common intention on the part of the legal owner that by reason of such contribution that the legal owner is taken to hold the property on a resulting or constructive trust in favour of the claimant to the extent of the claimant's contribution.

Conclusion

[13] In the case at bar, Mr. Connor contributed the entire purchase price. It cannot be overlooked however that Ms. Smith played a role in obtaining a bargain purchase based on her family ties. She was able to procure a considerable discount on the asking price.⁴ This is precisely what Mr. Connor wished her to accomplish. Mr. Connor himself stated that the price negotiated by Ms. Smith was at a \$4,000.00 discount⁵. There is also the evidence that they together sought a loan for the purchase monies and were discussing pooling their respective resources in money or kind to developing the Land. Accordingly, I am satisfied that at the time of the purchase when the legal title to the Land was passed to Ms. Smith by a transfer to her only, a resulting trust in favour of Mr. Connor arose. I am equally satisfied based on the evidence of Mr. Connor that the intention was that they would be joint beneficial owners of it notwithstanding what may be considered as Mr. Connor's virtual total contribution of the purchase price of the Land. The reason for this finding will become readily apparent later when I come to consider the ownership of Koko's as in my view the Land and Koko's are inextricable bound up as part and parcel of the same endeavour by Mr. Connor and Ms. Smith.

⁴ See: *Springette v Defoe* [1992] 2 FLR 388

⁵ See *WS T. Lanston Connor* para. 6

Undue influence - the June 8th Transfer.

The Law

- [14] It is well settled that the court may set aside a transaction for undue influence⁶. It is well established that undue influence falls to be considered in two categories: (i) actual undue influence and (ii) presumed undue influence.
- [15] For present purposes I consider that I need only consider actual undue influence. It includes cases of "*coercion, domination, victimisation and all the insidious techniques of persuasion*"⁷.

The evidence

- [16] Ms. Smith detailed in her witness statement and in her oral evidence that she trusted Mr. Connor. At the time he presented the land transfer form to her she was suffering from a state of depression having just lost her baby and was at home recovering. However, she did not want to transfer 'her Land' and suggested that she first speak to the Bank and her father before signing. She states that Mr. Connor became angry, cursed, and threatened to leave her. She did not want him to leave her. She was crying and was also frightened. She says Mr. Connor exhibited violence in blocking her path when she tried running out of the room; that he pulled the telephone from her hand and demanded that she sign the Transfer or repay the \$8,000 there and then and so she signed it.
- [17] It is not disputed that Ms. Smith never appeared before Cindy Mercer who witnessed her signature and completed the certificate on the Instrument of Transfer. Mr. Connor acknowledges he took the Land Transfer form to Ms. Mercer but he says it was on Ms. Smith telephoning and speaking to Ms. Mercer and confirming that she had executed the Land Transfer Form and knew what it was about and had given Ms. Mercer the 'go ahead' to witness her signature and complete the certificate. Ms. Smith denies ever speaking with Ms. Mercer in respect of the instrument. Ms. Mercer was not called as a witness.

⁶ See: *Allcard v Skinner* (1887) LR 36 Ch. D 145 CA

⁷ Per Lord Clyde in *Royal Bank of Scotland v Etridge* (No.2) [2002] 2 AC 773, para. 93

[18] Mr. Connor accepts that Ms. Smith signed the instrument at home, but denies that he unduly influenced Ms. Smith in any way whether by words or deeds. In fact he says she wanted to transfer the Land to him solely in recognition of the fact that he had purchased it and it was his.

[19] On this aspect of the matter I do believe that Ms. Smith displayed some reluctance to execute the Transfer and that this angered Mr. Connor. It is to be borne in mind that by that time, Mr. Connor had already approached the Bank and was making financing arrangements for the bar and restaurant to get up and running. His name did not as yet appear on the register as owner of the Land which was to be the security. He was anxious to have this attended to. The Bank had already written to the Registrar of Lands and Surveys to say that it had no objections to Mr. Connor's name being added to the register in respect of the Land. I accept Ms. Smith's evidence that he brought pressure to bear on her and that he threatened to leave her. She was in fear of this and so she signed the instrument.

[20] I now return to the manner in which the Instrument of Transfer was executed. I had cause to lament in another case that the ease and apparent simplicity with which an Instrument of Transfer can be effected carries a grave risk for abuse by fraudsters, particularly in the circumstances where the very safeguards intended by the certificate to be completed thereon are flagrantly disregarded. It is my view that notaries, commissioners or similar officers charged with the responsibility or qualifications for completing such a certificate should pay due regard to the purpose or rationale for the requirement of such a certificate. Firstly, it ensures that the person appearing as the executor of the instrument has been satisfactorily identified either by personal knowledge of the certifier, or by production of a satisfactory identification document. Secondly and very importantly, it affords the certifier an opportunity to ascertain whether the executor understands the purport or content of the document, before the certifier completes the certificate. These requirements are serious duties since a failure to carry them out in a proper manner may have significant adverse consequences for a party. This case brings this requirement into sharp focus. The practice of paying scant regard to these duties should cease. For completeness I express the same sentiments in respect of the manner in which the grant of easement was

executed where it is common ground that Ms. Smith never appeared before Ms. Webster as a witness to his signature or for certifying of the instrument.⁸

[21] Based on the foregoing, I not only find that Ms. Smith was coerced into signing the Instrument of Transfer, but also that the formalities for due execution were patently disregarded. Accordingly, subject to the view expressed below, I have no hesitation in holding that the Instrument of Transfer of the 8th June 2005, should be set aside for two reasons:

- (i) as having been obtained by undue influence exerted by Mr. Connor on Ms. Smith; and
- (ii) the accepted falsities contained therein as to its due execution.

[22] Having so stated however, the reality is that the setting aside of the Transfer of 8th June does not alter the conclusion of a resulting trust, as I have already found in favour of Mr. Connor. This leaves the legal position as it was prior to the 8th June Transfer, where both Mr. Connor and Ms. Smith hold an equal beneficial interest in the Land.

The ownership of Koko's

[23] Ms. Smith trusted Mr. Connor and given his comparably considerable business acumen of which she was aware and bearing in mind their relationship, she was content to rely on Mr. Connor's business acumen in organising and putting in place virtually all that was necessary to get Koko's up and running as a profitable business. This was the whole purpose of acquiring the Land.

[24] I am satisfied that they were each willing to assist the other in whatever way possible in making the dream of owning a business become a reality. They were looking towards the future together as a family. Ms. Smith also assisted in doing what she could to make it a reality. It was also her dream. She enlisted the help of various family members and relatives.

⁸ This became the subject of another action before the court.

[25] One, Shedrock Fleming, did work with a backhoe on the Land in January, 2005 and he was paid for that work when Mr. Connor produced a document to him in June, 2006. Rupert Richardson did work such as the putting up of a bamboo fence and constructing a bar for which he was paid by Mr. Connor on 29th May, 2006 after signing a document presented to him by Mr. Connor. Ms. Smith's father, Davis Smith did electrical works on the Land but says he never rendered any bill to anyone in respect of that work. At one point the business was serviced with electricity from a line coming from Davis Smith's house which he says he allowed to his daughter for her business. He said that he and Mr. Connor had a good relationship until the incident causing the break-up between Mr. Connor and his daughter. Edwin Smith, Ms. Smith's Uncle, said he shifted soil and sand, moved some stones and some trees on the Land. Ms. Smith asked him to assist. Furnishings were obtained from various places and paid for either by monies by exchange for services rendered to others by Mr. Connor. The credit facility for which they both signed at the Bank was utilized to pay some workers as well as for various other items including construction of a kitchen, bathroom facilities and upgrading the beach bar for Koko's.

[26] From the totality of the evidence given by Ms. Smith and Mr. Connor as well as the other witnesses, it is quite clear that Mr. Connor and Ms Smith were operating as a team and that Koko's was truly a joint enterprise undertaken by them for their long term mutual benefit going into the future as a family. Given their respective areas of assistance and how they were conducting their affairs, in my view it adds no weight in tipping the balance one way or the other, by considering in whose name various services, permits or approvals were contracted for, submitted or obtained. I do not accept that Ms. Smith was merely Mr. Connor's employee given the activities undertaken by her. Equally, I do not accept that Mr. Connor was merely giving of his services and assistance financially and otherwise simply out of love and affection for Ms. Smith and without the expectation that he would have a beneficial interest in the business. I find based on their conduct and course of dealings with each other and third parties, that Koko's was intended to be the joint venture of Mr. Connor and Ms. Smith. Accordingly I hold that Koko's is jointly owned by Mr. Connor and Ms. Smith.

[27] I accept the evidence of Ms. Smith that Mr. Connor, through threats, warned her off the Land and Koko's. The relationship had deteriorated to the level of total discord. Their disagreements escalated into physical altercations which led Ms. Smith one evening to run to her parent's house. I accept that Ms. Smith left Koko's out of fear for her wellbeing. She seeks an accounting from him relating to the expenditure and income of the business as from 1st August 2005, to present. The evidence however, is that she ran the operations of Koko's at least until sometime in March, 2006. I would consider that an order for an accounting ought accordingly to be as from at least 1st April 2006, to present. Given the irreconcilable differences between them it may prove useful as a practical solution that Koko's be valued and one party purchase out the interest of the other or, alternatively, that it be sold on the open market and the proceeds of sale split between them first taking into account any and all debts and liabilities of Koko's.

Ms. Smith's claim against the Bank

[28] In Ms. Smith's case against the Bank it is pleaded that entries in respect of the charge and the caution in favour of the Bank was made by fraud and ought to be set aside⁹. She also complains that the Credit Facility was not explained to her by the Bank and that she was not independently advised with regard to the transaction.

[29] I deal firstly with the allegation of fraud which is a short point. No particulars of fraud have been pleaded; neither in the statement of case nor in Ms. Smith's witness statement. Counsel for the Bank relied on a passage from the text **Bullen & Leake & Jacob's: "Precedents of Pleadings"**¹⁰ for the well settled principle that where a party alleges fraud then such allegations must be sufficiently particularized. In essence, details must be given of any misrepresentation, of breaches of trust and notice and knowledge of facts. *"The facts must be so stated as to show distinctly that fraud is charged"*.

[30] It is to be noted that unlike the former rules of court which contained specific provisions regarding a plea of fraud, such was not specifically transposed into the **Civil Procedure Rules 2000 (CPR 2000)**. However, CPR 8.7 says in effect that it is the claimant's duty to

⁹ See paragraph 49 of Ancillary Claimant's defence and counterclaim.

set out all the facts on which he/ she relies. This is so as a defendant is entitled to know with sufficient particularity the case in respect of which he/she is to make answer. This was made clear in the case of **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**¹¹ a decision of the Court of Appeal from St. Vincent & the Grenadines, in which Barrow JA, cited with approval paragraphs 51 and 55 from the judgment of Lord Hope of Craighead in the case of **Three Rivers District Council v Bank of England (No.3)**¹² Simply to allege that a certain act or state of affairs was fraudulent without setting out the acts or circumstances from which such an inference or conclusion could be drawn makes such a plea defective and liable to be struck out. Lord Hope at paragraph 51 of his judgment in **Three Rivers** stated as follows:

“...as a general rule; the more serious the allegations of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.”

This clearly establishes that the principle is alive and well post **CPR 2000**. Accordingly, no further consideration of this plea is warranted.

Whether the Bank explained the credit facility to Ms. Smith

- [31] In her own evidence, Ms. Smith refers on a number of occasions to asking Mr. Connor to either make an appointment with the Bank to discuss obtaining a loan for her or for arranging with the Bank with a view to obtaining a loan. She says this was so that she could pay off Mr. Connor the \$8,000.00.
- [32] What is clear is that when she was asked to go to the Bank, she knew it was in connection with obtaining a loan. Mr. Connor did go to the Bank and choose the type of credit facility. She and Mr. Connor already had discussions about it. He had told her to take her passport with her when she visited. The credit facility was processed. Ms. Smith went to the Bank sometime after Mr. Connor had gone. He did not accompany her there the day she made her visit. At the Bank, she met with Ms. Carty. She accepts that she knew the amount of the ‘loan’ was \$50,000. She also knew from having prior loans that the Bank

¹⁰ 16th Ed. Vol. 2 49-02

¹¹ Saint Vincent and the Grenadine Civil Appeal No. 12 of 2006 (unreported)

would require security. She also accepts that funds from the credit facility were to be used and were in fact used in connection with the construction of facilities at Koko's. At that stage, the June 8th transfer had been recorded in the names of Ms. Smith and Mr. Connor. Ms. Smith went on to say that Ms. Carty went as far as asking her why she had placed Mr. Connor's name on the Land as she could have obtained the loan in her own name. Ms. Smith said she was too embarrassed to tell Ms. Carty what had transpired. From this, it is clear that if Ms. Smith was unclear about the transaction and was reluctant to consummate it, such a question posed to her by Ms. Carty, would have, in my view, caused her to pause and not proceed with the credit facility as it was then structured. However, she proceeded without alerting Ms. Carty as to how she was made to sign the June 8th Land transfer. On the evidence of both Ms. Smith and Mr. Connor, they were both anxious to get Koko's spruced up as quickly as possible and funds were needed to do so.

[33] Ms. Carty says that she explained to Ms. Smith how the Credit Facility worked, the commitment letter and the nature of her obligations thereunder and she signed the documentation. Much was made of the fact that the commitment letter was not initialled on each page, as the letter had asked, to indicate their acceptance of its terms. However, the letter was signed at the end by both parties and dated 7th October 2005. In my view there is nothing to the point. I accept the evidence of Ms. Carty in this regard. Interestingly, Ms. Smith was given the option after the break-up of her relationship with Mr. Connor of having her name removed from the credit facility. She declined to do so. Ms. Smith says she declined to do so as she did not think it could be easily done. I am unable to accept this reasoning since the task of so doing would have been the Bank's and not Ms. Smith's.

The Law

[34] Counsel for the Bank referred to an article entitled –**The Liability of UK Banks for Financial Advice – Recent Developments**¹² concerning the duty of banks in relation to their customers in which it was stated thus:

“Generally speaking, there is no obligation on a bank to advise potential borrowers about any feature of the proposed borrowing. Unless a bank positively assumes

¹² [2001] 2 All ER 513

¹³ By Alan Ward and Robert E. Wright, J.I.B.L. 1996 11(11) 472-476 at 472

the role of financial adviser and the plaintiff relies on the assumption there can be no remedy in either contract or tort for a bank's failure to comment on the prudence of a proposed loan."

[35] The above principle is one culled from several judicial decisions.¹⁴ In **Lloyd's Bank v Cobb**¹⁵ Scott LJ summarised the principle thus:

"...the ordinary relationship of customer and banker does not place on the bank any contractual or tortious duty to advise the customers on the wisdom of commercial projects for the purpose of which the bank is asked to lend money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted, by the bank, or some arrangement between the customer and the bank, under which the advice is to be given."

"If a customer applied to the bank for a loan for the purposes of some commercial project, and the bank examines the details of the project for the purpose of deciding whether or not to make the loan, the bank does not thereby assume any duty to the customer. It conducts the examination of the project for its own prudent purposes as lender and not for the benefit of the proposed borrower. If the borrower chooses to draw comfort from the bank's agreement to make the loan, that is the borrower's affair..."

[36] I am satisfied that the Bank explained the credit facility to Ms. Smith and that it did not assume any further obligation for advising her as to its prudence.

[37] Counsel for Ms. Smith seeks to rely on the line of cases in which a wife stands surety for the debts of her husband. These cases establish that it is the bank's duty to ensure that the wife receives independent legal advice as to the nature of the transaction and to satisfy itself that the wife's obligation is undertaken freely. They relied on the notable cases of **Barclays Bank v O'Brien**¹⁶ and **Royal Bank of Scotland v Etridge (No.2)**¹⁷ decisions of the House of Lords in England. In the **O'Brien** case, it was held that:

"Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor was aware that they were cohabitees: (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor, (2) if there

¹⁴ See: *Williams and Glyn's Bank v Bames* [1981] Com LR 205, *National Commercial Bank (Jamaica) Ltd. v Hew* [2003] UKPC 51, *Banbury v Bank of Montreal* [1918] AC 626

¹⁵ (Unreported, 18th December, 1991, Court of Appeal) as referred to in *Verity and Anr v Lloyds Bank Plc* [1995] CLC 1557 at 1571

¹⁶ [1994] 1 AC 180

¹⁷ [2002] 2 AC 773

has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in the knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special circumstances, a creditor will have taken reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice."¹⁸

[38] It bears note that the following was stated per curiam in **O'Brien**:

"...a creditor is put on inquiry when a wife stands 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."¹⁹

The case at bar

[39] The features of the case at bar are readily distinguishable from the surety type case with which the **O'Brien** line of cases was concerned. Firstly, Ms. Smith did not stand as surety for her fiancé's debt. They were co-borrowers. Secondly, it could not be said that the transaction on its face was financially disadvantageous to Ms. Smith. To the contrary, she admits that funds were used from the credit facility to upgrade and get Koko's, a business in which she had an interest, upgraded and up and running. There is no evidence that monies derived from the credit facility were used otherwise. She in fact derived a benefit from it. Thirdly, there is no evidence that the Bank was aware or knew of any undue influence being exercised by Mr. Connor on Ms. Smith. It is to be recalled that Mr. Connor did not accompany Ms. Smith to the Bank. Furthermore, if indeed the Bank's officer inquired as to why the Land was transferred to Mr. Connor when Ms. Smith could have raised the loan on her own and Ms. Smith remained silent although Mr. Connor was absent, then this does not, in my view, leave room for arguing in the circumstances that

¹⁸ *Supra*, n. 16 at p. 198

¹⁹ *Supra*, n. 16 at p. 196

the Bank was put on inquiry. There is also no evidence that Mr. Connor was acting as agent for the Bank in procuring Ms. Smith's consent to the transaction.

[40] In **CIBC Mortgages Plc v Pitt**²⁰ Lord Browne-Wilkinson (who also delivered the judgment in **O'Brien**) had this to say:

“ What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry.”

Conclusion

[41] For these reasons Ms. Smith fails in her claim against the Bank. The credit facility and the charge are valid and enforceable obligations of both Ms. Smith and Mr. Connor in favour of the Bank. I also accept that the failure to have Ms. Smith execute the charge was due to inadvertence on the part of the Bank and not part of a scheme between the Bank, Mr. Connor, or any other person. The commitment required a charge to be given over the Land and this was agreed to by the parties. The Bank in its counterclaim seeks an order directing Ms. Smith to comply with the terms of the commitment letter and execute an instrument of charge in favour of the Bank. I consider making such an order appropriate.

The Orders

[42] Based upon the foregoing, I make the following declarations and orders:

- (1) I hereby declare that the claimant and the defendant hold an equal beneficial interest in the Land described as: Registration Section East Central; Block 89319B Parcel 8.
- (2) I declare that the Instrument of Transfer of the Land dated 8th June 2005, executed by the defendant/ancillary claimant in favour of the defendant/ancillary claimant and the claimant though liable to be set

²⁰ [1994] 1 AC 200 at 211

- aside for undue influence does not alter the beneficial ownership as declared under paragraph (a) above.
- (3) I declare that the business known as Koko's situate and operated on the Land is a joint enterprise between the claimant and the defendant and accordingly is owned jointly by them.
 - (4) The claim by the defendant/ancillary claimant for injunctive relief against the claimant is refused.
 - (5) I order that the claimant provide an accounting of the business, Koko's to the defendant, covering the period 1st April 2006, to the date of judgment.
 - (6) The claims made by the defendant/ancillary claimant against the ancillary defendant are dismissed.
 - (7) The defendant/ancillary claimant shall take all steps necessary to execute in favour of the ancillary defendant an instrument of charge in accordance with the terms of the commitment letter dated 6th October 2005.

Costs

- [41] In this case neither the claimant nor the defendant has been fully successful in the claims made. The value of the claim was placed at US\$95,000.00. I have considered carefully the claims made by each party in respect of the other and the conclusions to which I have come. I am also mindful, of the relationship between the parties which gave rise to this action. The result, in essence, is that they are joint owners of the Land and the business, Koko's. Any costs order made as against the other may require to be discounted by 50% in terms of the degree of success. In the circumstances I consider, in the exercise of my discretion, that the appropriate order as between the claimant and defendant/Ancillary claimant is that there be no order as to costs.
- [42] The defendant/ancillary claimant's claim against the Bank has failed in its entirety. Counsel for the Bank noted in her written submissions however, that the defendant/ancillary claimant sought relief from the court notwithstanding that the Bank had of its own volition offered to her (which she admitted) an option which

would have in effect given her the same results as she sought. She declined that offer and pursued her action against the Bank. Counsel seeks costs in such amount as the court deems just. In oral submissions counsel suggested a figure, based on the application of CPR 65.5(2)(a), the sum of US\$5,000.00 in respect of costs. I consider that sum to be fair and reasonable in the circumstances. Accordingly, the Bank shall have its costs, as against the Ancillary claimant in the sum of US\$5,000.00.

[43] Finally, I am grateful to counsel for their assistance.


Janice George-Creque
High Court Judge