EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2015/ 0456

BETWEEN:

THE BANK OF NOVA SCOTIA

Claimant

And

1. PARAMOUNT APPLIANCES LIMITED
2. MALCOLM CHARLES
3. SELMA ANITA KHODRA-CHARLES

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:
Mr. Anwar Brice for the Claimant
Mr. Collin Foster for the Defendants

2018: October 22
November 19, 23 (Written Closing Submissions)
2019: April 16

Undue Influence - Relationship of trust and confidence - Independent legal advice – Applicable interest rate

JUDGMENT

[1] ST ROSE-ALBERTINI, J. [Ag]: The claimant in these proceedings has brought an action against the defendants for recovery of sums loaned to the first defendant, of which the second and third defendants are guarantors. The defendants have defaulted on repayment of the loans, and despite demand for payment, the debts remain outstanding. The debts are also secured by hypothecary obligations with a first fixed charge over immovable property belonging to the second defendant and a floating charge over the movable assets of the first defendant.

[2] The defendants deny owing the debts on the grounds that the loan agreements are unenforceable due to illegality and undue influence exerted upon them by the claimant, within the context of a relationship of trust and confidence reposed in the claimant. Additionally, the second and third defendants say that they were not permitted to fully review the loan documents before signing, and were not advised by the claimant of the need to obtain independent legal advice before committing themselves as guarantors. They assert that they were wrongly induced by the claimant to enter the loan transactions.

The Issues

[3] The issues for the court's determination are:-

1. Whether the sums claimed are due and payable by the defendants?

2. Whether undue influence was exerted on the defendants by the claimant?

3. Whether the claimant was required to advise the defendants of the need to obtain independent legal advice?

4. Whether the interest rate from the date of the alleged breach of payment should be the statutory rate of 6% or 12% as stated in the commitment letters and hypothecary obligations which secured the loans?

Background

[4] The Bank of Nova Scotia ("the bank") is the claimant. It operates as a financial institution which is duly authorized under the laws of Saint Lucia to engage in banking business on the island. Its main branch is located at No. 6 William Peter Boulevard, Castries.

[5] The first defendant, Paramount Appliances Limited ("the company") is duly incorporated as Company No. 57 of 1989 under the Companies Act[1] and has its registered office at Westhall Street, Castries.[2] It is said that the company has ceased operations and closed all outlets on the island. The second and third defendants, Malcolm Charles ("Mr Charles") and Selma Anita Khodra-Charles ("Mrs Charles") respectively are husband and wife and the directors and controlling officers of the company.

[6] At trial, Mr Andre Cherebin gave evidence on behalf of the bank. He joined the bank in Saint Lucia in 2000 having previously worked at branches in Barbados, Canada and the British Virgin Islands from 1965. He was the Senior Accounts Manager at the time that the loans were granted, and is now retired. Ms Mandy Alcindore who is currently the Business Banking Manager also testified. She joined the bank in 1993 and has held several positions leading up to the current one.

[7] Mrs Charles was the sole witness who gave evidence on behalf of the defendants. She described herself as a businesswoman by profession and the managing director and secretary of the company. Mr Charles gave no evidence and did not attend trial.

The Clai**mant's Case**

[8] The bank's claim is for the balance due on two credit facilities advanced to the company and is premised on default in repayment of the loans. The balance due on each facility is particularized in the statement of claim as follows:-

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[1] Cap 13.01 of the revised Edition of the Laws of Saint Lucia
[2] See Exhibit MA7

"The sum of $167,192.14 together with interest on the principal balance of $134,954.23 at the rate of 12% per annum or $44.37 per day from 11th March 2014 until the date of payment with respect to Small Business Loan No. 163301022; and

The sum of $169,150.56 together with interest on the principal balance of $143,730.06 at the rate of 12% per annum or $47.25 per day from 11th March 2014 until the date of payment, with respect to Small Business Loan No. 163301231."

[9] The loans are secured by (i) a Hypothecary Obligation Mortgage Debenture and Floating Charge, executed before a notary royal on 29th September, 1995 and registered at the Land Registry on 16th October, 1995 as Instrument No. 3916/95[3], (ii) an Additional Hypothecary Obligation Mortgage Debenture and Floating Charge executed before the same notary on 30th May, 1996 registered at the Land Registry on 7th June, 1996 as Instrument No. 2266/96[4] and (iii) an unlimited guarantee dated 27th November, 2008 signed by Mr. and Mrs. Charles, for the borrowings of the company.[5] Further guarantees were also included in two Small Business Commitment Letters dated 30th November, 2010 and 12th March, 2012 respectively.[6]

[10] I refer to the hypothecary obligations collectively as 'the hypothecs". They were executed by the company as borrower and Mr Charles as surety. Together the hypothecs covered debts and liabilities up to the aggregate sum of $320,000.00.

[11] It is not disputed that by letter dated 22nd September, 2010 Mrs. Charles wrote to the bank to introduce the company's accounting consultant Mr. Andrew Chitolie, for the purpose of presenting a proposal to the bank, for credit facilities on behalf of the company. Her letter contained an attachment dated 21st September, 2010 addressed to the bank's manager and signed by Mr. Chitolie. It outlined a proposal for a loan of approximately $250,000.00 at 9.5% interest, comprising $100,000.00 to be used for introducing a new product line of

[3] See Exhibit AC1
[4] See Exhibit AC2
[5] Exhibited with the statement of claim
[6] See Exhibits AC 4 & AC5

solar powered appliances and expansion of the company's inventory. Reference was made to the conversion of an existing overdraft facility to a long term loan and consolidation of an existing loan. The proposal stated that security for the undertaking would be in accordance with that presently held by the bank. Included also were (i) the company's financial statements for 2010, (ii) cash flow projections for the new product line and (iii) an invoice from the supplier. The proposal ended with an appeal for a positive review and approval. The bank was also advised that a container of solar products was due to arrive in a few days, which was almost sold out from bookings and requests.[7]

[12] Acting on this proposal, the bank proceeded to approve a loan of $240,000.00 comprising a credit facility of $40,000.00 as working capital for the company and $200,000.00 was advanced as a term loan. The terms and conditions were set out in a commitment letter dated 30th November, 2010.[8] The security for the facilities were (i) the hypothecs which were described as *"Demand continuing fixed sum Mortgage Debenture stamped to cover advances up to a limit of $320,000.00 with a charge over the company's fixed and floating assets and a first fixed charge over 1.93 acres of land EV $1,597,349.00"* and (ii) personal guarantees from Mr and Mrs Charles to cover the amounts borrowed. The interest rate was stipulated as 12% per annum and the monthly repayment was $3,333.33 plus interest, making a total of $5,305.93. The first payment was due on 15th February, 2011 and thereafter on the 15th day of every month, over 59 months. The letter was signed by the company and Mr. and Mrs. Charles as guarantors, on 30th November, 2010.

[13] One year later, by letter dated 22nd September, 2011 Mrs. Charles wrote to the bank requesting an increased limit for the company's overdraft facility. She signed the letter as managing director of the company and stated as follows:-

> "*In the run up to the reopening of the annual Cruise Ship Season (from October onwards) we wish to obtain an increase on our overdraft facility with you, in order to obtain the necessary inventory for the upcoming season.*

[7] See Exhibit MA3
[8] See Exhibit MA4

As our facility currently stands at EC$40K, we would wish to obtain your approval for an increase to say EC$150K, situation permitting.
Please advise soonest."

[14] Acting on this request, the bank approved an increase of the overdraft limit to $120,000.00. A new commitment letter was issued on the same terms and conditions contained in the earlier letter, save that the balance of the term loan at that time was stated as $156,671.00, repayable at the same monthly installment, over 47 months. The interest rate remained at 12%. This letter was dated 12th March, 2012 and signed by the company and the Charles' on 12th March, 2013.

[15] Soon thereafter the defendants defaulted on repayment, demand was made, and the sums remained unpaid. Mr Cherebin testified that the sum of $167,192.14 claimed in respect of loan account no.163301022 relates to the term loan, and the sum of $169,150.56 claimed in respect of loan account no. 163301231 relates to the overdraft facility. He stated that the loans came within the scope of the hypothecs, as borrowing which was permitted from time to time up to the limit of $320,000.00. The credit facilities, in both instances, were below that limit. He explained that it was that bank's practice to continue lending against existing hypothecs up to the aggregate sum covered, and the mortgages referred to in the commitment letters are the hypothes executed in 1995 and 1996. He stated that it was not the bank's practice to capture the full particulars of a hypothec in a commitment letter and in all his years of banking this has never been done. In some instances the security would not be in place as yet and where it was already in place, the bank would briefly state the requirement.

[16] Mr Cherebin denied that the bank had induced the defendants into believing that it was granting a small business loan on the basis of a Small Business Financial Services Agreement, when in fact it was extending their lending under the hypothecs. The collateral for the loans was clearly stated under the rubric "Security" on page 6 of the commitment letters and included the hypothecs. He explained further that the loans were granted on the basis of the defendant's request, which the bank reviewed and approved. Upon approval,

a commitment letter was issued, which stated what the bank was willing to lend, and the defendants signed in acceptance of the offer.

[17] Ms Alcindore's testimony largely mirrored that of Mr Cherebin. She stated that she has been the Business Banking Manager for the past ten years and was responsible for processing the loans and dealing with the defendants. Before signing the commitment letters, the defendants would have been given the opportunity to review the documents and to seek clarification on any aspect of the loans. She stated that Mr. and Mrs. Charles presented themselves as business-minded individuals, who wished to transact business with the bank, for the purpose of developing their company. The bank's relationship with them was no different from that of any other banker/ customer relationship.

The Defendants' Case

[18] Mrs Charles described the company as a small family business. She and Mr. Charles were at all times directors and representatives of the company. The defendants aver in their defence that in or about September 1995, the company obtained a loan from the claimant in the sum of $289,000.00 and in March 1996 they obtained a further loan of $31,000.00. Mrs Charles recalls that the hypothecs were executed at that time and she did receive independent legal advice in that regard. However the defendants deny owing the sums claimed by the bank.

[19] In her witness statement Mrs Charles stated that she and her husband were aware that the company had borrowed the sums stated and were to repay these sums by monthly installments of $5,305.93 commencing from February 2011. Over time, they remained committed to discharging their financial obligations to the bank in-keeping with the agreements they had signed. However from about October 2012, contrary to their expectation, the business began to experience a downward trend due to the global financial crisis and recession on the island. However payments were consistent until sometime in 2013.

[20] She testified that on 22nd October, 2012 she responded to a letter from the bank, indicating that despite the stubborn recession she and Mr. Charles were putting measures in place to settle the loans before the close of the year.[9] Then on 7th December, 2012 she received a letter from the bank's lawyer, demanding payment of $146,711.72 within 14 days, failing which legal proceedings would be instituted[10]. She responded to the demand letter on 18th December, 2012 informing that they were awaiting the sale of a family property, the proceeds of which would go towards liquidating the debts[11]. Despite further exchanges of correspondence concerning settlement, the bank still proceeded to file the claim in June 2015. Upon being served with the claim, a formal request was made for further particulars[12] in an effort to understand the claim, which appeared contradictory to what they believed they had committed to. Almost two years later, in June 2017, some of the particulars were furnished. Mrs Charles says that even after their defence was filed, she continued to make efforts to resolve the matter and went as far as attempting to settle what she considered confusing and conflicting debts, by offering the bank the property which secured the loans. To their dismay, the bank refused to accept the offer.

[21] The defendants further say that the bank has only disclosed commitment letters in relation to the credit facilities, which is insufficient to prove that the loans were advanced to the company. The letters make no reference to the loan account numbers stated in the statement of claim and there is no confirmation that the credit facilities referenced in the commitment letters are the ones referred to in the claim. The bank also failed to provide a detailed statement of payments made towards the original loans from 1995 and 1996. In addition, the Small Business Financial Services Agreement referenced in the commitment letters has not been disclosed, and without this document the terms and conditions contained in the letters are mere speculations. As such the bank has failed to give full and frank disclosure of all the relevant documents required to prove its case.

[22] Mrs. Charles say that at no time were the loans and interest charges clearly and fully explained to them and the interest rate of 12% was never contemplated. She says there is

[9] See Exhibit SAKC1
[10] See Exhibit SAKC2
[11] See Exhibit SAKC3
[12] Pursuant to Part 34 of the Civil Procedure Rules 2000

some ambiguity as to whether the rate is 10% or 12%, interest appears to be compounded, and consequently, is excessive, harsh and unconscionable.

[23] Mrs Charles stated that the bank wrongfully induced the defendants to execute the loan documents and personal guarantees by undue influence, as the loans were obtained under the direction of the bank and pursuant to the defendants' reposing their trust, faith and confidence in the bank. She says the bank knew that they signed the letters without having reviewed them or having obtained independent legal advice. In the circumstances, they did not give due consideration to the full implication of signing the commitment letters as guarantors.

[24] Mrs Charles testified that she was not allowed to review the commitment letters in entirety and was only given the signature pages. There are no initials on any of the eight pages, in the space provided for initials at the base of each page. She also says that the commitment letter dated 12th March, 2012 was signed one year later on 12th March, 2013. The suggestion is that the letters should not be allowed to stand.

Are the sums claimed due and payable by the defendants?

[25] On the evidence, the letters to the bank in September 2010 confirm that the defendants requested a total loan of $250,000.00, to which the bank approved two credit facilities totaling $240,000.00. The commitment letters show that the facilities comprised an overdraft of $40,000.00 and a term loan of $200,000.00 with the latter repayable over a period of time. The bank's witnesses explained that the balances from the earlier loans were consolidated as part of the new loans, as requested by the defendants. Mrs. Charles letter of September 2011 confirms that the defendants made a second request for increase of the overdraft limit. In response the bank approved an increase to $120,000.00. It was clearly stated in the proposal that the security for the facilities would be what was presently held by the bank. That could only mean the existing hypothecs and the personal guarantee signed in 2008. I accept that it is common banking practice to advance loans to customers against existing hypothecs, as long as the aggregate sum and the value of the security is adequate to secure the lending.

[26] The letters were duly signed by the defendants on the signature pages and dated. Ms Alcindore testified that loan account numbers are not placed in a commitment letter because these numbers are only generated when the loan is disbursed. Mr Cherebin testified that it was not the practice of the bank to require that all pages of a commitment letter be initialed and it was sufficient that a customer signed the final page after reviewing the document. When questioned about the purpose of the initial boxes at the bottom of each page he explained that the letter was a standard form from the head office in Canada and it may be that it is required for some jurisdictions. Both witnesses stated that the commitment letters in entirety would have been presented to the defendants for review before they were required to sign. I accept the banks evidence on these matters.

[27] Thelston Connor v Scotiabank Anguilla Limited and another[13] provide some guidance on the issue of a borrower's failure to initial each page of a commitment letter. There, George-Creque J placed little to no emphasis on this omission and treated it as one which was not material to the validity of the agreement between the bank and borrower. It was held that this did not nullify the letter, which had been duly signed and dated by the borrowers, at the end of the letter.

[28] Applying that ruling to the facts of this case, I accept that the absence of initials does not invalidate the letters. I also accept that signing the commitment letter of 12th March, 2012 one year later would not invalidate the obligations, which would have taken effect at the time the letter was duly signed. The main variation was the increased overdraft limit.

[29] I have examined the documents which support these transactions and they are unequivocal in terms of what they purported to do. Mrs Charles initially said she could not recall signing the unlimited guarantee in 2008 but agreed that her signature and Mr. Charles' were on that document. It is clear that they both recommitted themselves as guarantors for the borrowings when they signed the commitment letters. Ultimately Mrs Charles does not deny that the company obtained the loans, and by her own account, she engaged in protracted negotiations to settle the debts, but when the bank refused to

[13] AXAHCV 2006/0043, delivered on 7th December, 2009

accept their proposal it was necessary to continue to defend the claim on the ground of undue influence.

[30] Much was made of a Small Business Financial Services Agreement referenced in the commitment letters, that was not disclosed by the bank. Ms Alcindore explained in cross examination that it is a generic document which is given to a customer whenever a business account is opened. It is to be kept in the possession of the customer and copies can be provided upon request. She stated that a copy would have been given to the defendants when the business account was opened or during the life of the business relationship. She was not aware of the formal request for particulars and could not explain why the document was not disclosed. In my view, the absence of this document does not detract from the obligations which were created through the commitment letters, guarantees and hypothecs. Ii is noteworthy that in response to the defendants' request for further particulars, the bank furnished, amongst other things, the commitment letters and the loan transaction history for each of the loan accounts, which showed that the principal balances owed were as stated in the claim.[14]

[31] I am satisfied that the commitment letters, guarantees and hypothecs are valid and enforceable documents which governed and secured the loan facilities granted to the company, for which Mr. and Mrs. Charles provided personal guarantees. This, coupled with the loan history for each of the loans, attests to the existence of the debts and the sums claimed by the bank. I therefore conclude that the debts are due and payable by the defendants.

Did the Bank exert undue influence on the defendants?

[32] It is settled law that a court may set aside an otherwise lawful transaction on a finding of undue influence. The applicable principles were distilled by our Court of Appeal in the well-

[14] See Exhibits SAKC5 & SAKC6.

known case of Robert Murray v Reuben Deuberry et al[15], where Floissac CJ writing for the court, said the following:-

> "*15 The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of the undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is voidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.*
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> *16. The modern tendency is to classify undue influence under two heads namely Class 1 (actual undue influence) and Class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is Class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical advisor and patient, parent and child and clergyman or religious advisor and parishioner or disciple. The second sub-head is Class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in the dominant party.*
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> 17. In *Barclays Bank PLC v O'Brian* (1994) 1 A.C. 180 at 189 & 190, Lord Browne-Wilkinson explained Class 2(B) in these words:
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> > *"Even if there is no relationship falling within Class 2(A), if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the*

[15] [1996] ECSCJ No. 3 at para 15-18

impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

18. In order to establish a legal presumption that a dominant party exerted undue influence over a complainant to enter into a transaction, the complainant must prove (1) that at or shortly before the execution of the transaction, there existed as between the dominant party (or his agent) and the complainant a relationship of trust and confidence from which undue influence by the dominant party over the complainant will legally be presumed and (2) that the transaction was to the manifest disadvantage of the complainant to a degree where it may be said to be unfair to the complainant or to be otherwise unconscionable."

[33] Applying the above principles to the facts of this case, there is nothing in the evidence to substantiate an allegation of actual undue influence within the scope of Class 1. The defendants bear no relationship with the bank, of the kind which would give rise to the presumption in Class 2(A). Mrs Charles has however asserted that the defendants reposed trust and confidence in the bank and were unduly influenced into signing the commitment letters. It appears that she is seeking to establish a case of presumed influence within Class 2 (B). As a judge of fact, the Court is required to carefully examine all the evidence to determine whether, on a balance of probabilities, there was a relationship of trust and confidence with the bank, which influenced the transactions, such that the loans were disadvantageous to the defendants and may have been unfair or unconscionable.

[34] The law recognizes that where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the

other.[16] As explained in Murray v Deuberry[17] in order to establish this Class 2 (B) presumption, the evidence must show that before or at the time of the transactions, the defendants habitually, frequently or repeatedly expressed or indicated their trust and confidence in the bank, such that the bank assumed the position of a dominant party and exerted that influence, to the obvious detriment of the defendants.

[35] Mrs Charles stated in her witness statement that the events surrounding execution and signing of the documents appeared simple, straightforward and automatic. She recalled signing the documents with a feeling of trust and confidence that the bank was acting honestly and fairly. At no time did the bank explain to her or Mr Charles, the consequences or risk involved in becoming a guarantor for the debts of the company. They both remained confused about what this meant, considering that they had already provided property as security for the loans. She did not recall seeing all the pages of the commitment letters and only saw the last 2 pages, which they signed. She could not recall that the terms of the loans were discussed with them and she did not understand the guarantees that she signed. She contends that the defendants placed their trust and confidence in Ms Alcindore, who gave business advice as the bank's Business Banking Manager and that such advice was given to them over a period of time. In cross examination, Mrs. Charles agreed that the defendants were the ones who approached the bank for the loans on both occasions. She also admitted that they required the banks products in the form of loans, and they were not induced to enter the transactions.

[36] The bank's witnesses testified that the defendants were customers who had done retail and commercial business with the bank from 1994. They held savings, checking and credit card accounts over the years, together with small business accounts on behalf of the company. They were well acquainted with the banking products that they used over the years. The purpose of the loans was to provide working capital, for the continued development of the company. Mr Cherebin stated that the bank's procedure for issuing such loans is standardized. A customer would provide a written borrowing proposal, typically prepared by the customer's accountant. The bank would also require financial

[16] National Westminster Bank plc v Morgan [1985] 1 All ER 821
[17] Supra note 15

statistics to ascertain the customer's ability to service the debt. If the proposal is financially sound the bank would request suitable collateral. Once the collateral was in place, the bank would issue a commitment letter for the customer's acceptance and signature and then proceed to disburse the funds. He stated that Mr. and Mrs. Charles always portrayed themselves as business savvy individuals who were fully cognizant of the effects of their transactions with the bank and were considered experienced borrowers. They were the ones who approached the bank for financing for their company and the loans were not the result of approaches made to them by the bank. They had the benefit of their own accounting consultant who advised them in formulating their proposal. It was at their request that the bank considered and approved the loan facilities, having been satisfied of their ability to repay the loans and the adequacy of their collateral.

[37] Ms Alcindore, in cross examination, explained that as part of her duties she gives advice on business matters including growing the business, securing financing and opening business accounts. Her position allowed customers to approach her for advice and to trust the advice that she gave them. She agreed that she had a long standing positive business relationship with the defendants that would have caused them to trust her, but she qualified this statement by saying that it was no more than the typical banker/ customer relationship, as with any other customer.

[38] The bank contends that the defendants' relationship with Ms Alcindore was not one that would generally be considered as reposing trust and confidence in her, to the extent that the bank would assume a dominating influence over the defendants. The loans were common business transactions entered into by the defendants freely and at arm's length. The defendants benefited from the loans, as there was a vested interest in the company and its expansion.

[39] On this issue, dicta from the House of Lords decision in National Westminster Bank plc v Morgan[18] are instructive and apposite. There their Lordships stated:-

[18] [1985] 1 All ER 821 at 822

> "*a transaction could not be set aside on the grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. The basis of the principle was……..the prevention of the victimization of one party by another, and therefore a presumption of undue influence would not necessarily arise merely from the fact that a confidential relationship existed between the parties, and although undue influence……could also extend to commercial transactions between a banker and a customer, it was not based simply on inequality of bargaining power. On the facts, the bank manager had not crossed the line between on the one hand explaining an ordinary banking transaction in the course of a normal business relationship between banker and customer and on the other hand entering into a relationship in which he had a dominating influence, and, furthermore, the transaction was not unfair to the wife……..*"

[40] It is therefore accepted that even where a confidential relationship may be said to exist, a transaction will not be set aside once it is shown that it was not disadvantageous to the person influenced.[19]

[41] It is settled law that the relationship of banker and customer does not give rise to a relationship of trust and confidence in the normal and ordinary course and is not one which ordinarily gives rise to a presumption of undue influence. Hence, in the ordinary course of banking business a banker can explain the nature of a proposed transaction to a customer without being susceptible to a charge of undue influence.[20] The presumption will only arise if the transaction is one which is not readily explicable by ordinary motives, such that the wrongfulness of the transaction is fully evident.

[42] The question which must then be answered is whether the relationship between the defendants and the bank was such that the bank benefited from an unfair advantage over

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[19] National Westminster Bank plc v Morgan at page 827 of the judgment; Royal bank of Canada v Benetton (St Lucia) Ltd SLUHCV1995/0143 [2004] ECSCJ No. 254; Stoutt and others v Firstbank Puerto Rico (2012) 5 LRC 508

[20] Lloyds Bank Ltd v Bundy [1974] 3 All ER 757

the defendants in granting the loans, and it was not a case where the defendants stood to benefit.[21]

[43] The company's annual returns as at 31st December, 2009[22] indicate that Mr and Mrs Charles were the only directors and shareholders. They were clearly the controlling minds and had a pecuniary interest in the company. Mrs Charles was integrally involved in the operations and affairs of the company. The defendants were the ones who initiated the transactions and suggested that the existing security continue to secure the new loans. Mrs. Charles demonstrated astute business sense, by introducing the accounting consultant, who analyzed and presented the proposal to the bank. The loans were required to inject needed capital into the company's operations. To assist the bank in processing the first request, they provided the company's financial statements, cash flow projections for the new product line, and an invoice from the supplier. The new product line was portrayed as viable when it was said that the container of products, which was due on island in a few days, was almost sold out from bookings and requests. This was a clear indication that the defendants knew exactly what was required to qualify for the loans and took the necessary steps to convince the bank of their suitability for these loans. In relation to the second request, it was Mrs Charles who stated that inventory was required for the upcoming cruise ship season and requested that the overdraft limit be increased. On each occasion, the bank obliged the defendants' request based on the information presented.

[44] In my view, there is not a scintilla of evidence to support a finding that the defendants reposed trust and confidence in the bank's officers to the extent that the bank assumed a dominating influence over them, to warrant an explanation of the bank's conduct in advancing the loans. Considering their approach and the reasons given for the loans, it cannot be said that the loans were not advantageous to them or that they would not have benefited from the transactions. In my view these were ordinary banking transactions, which the defendants appear to have been knowledgeable about. They made the necessary representations to the bank in the hope of obtaining the loans.

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[21] Supra note 18 at page 828-831 of the judgment

[22] See Exhibit MA7

[45] In assessing Mrs Charles demeanor, I formed the impression that she was an experienced business person who was quite familiar with banking transactions and fully understood the nature of the credit facilities requested and the corresponding obligations. Her testimony was at times conflicting and not entirely candid. It seemed strange that Mr. Charles refrained from giving evidence and in so doing the Court did not have the benefit of observing his demeanor or candour, for testing the veracity of the allegation of undue influence.

[46] I found nothing in the evidence which removed the transactions from the realm of normal or ordinary to that which was not readily explicable by ordinary motives. I am satisfied that the relationship between the defendants and the bank's officers never went beyond the normal business relationship of banker and customer and that the bank did not traverse into the realm of exerting a dominating influence over the defendants. The bank did not derive an unfair advantage nor were defendants disadvantaged in any way by the transactions. They stood to benefit substantially, as the company was their family business.

[47] Consequently, I conclude that the defendants have failed to establish undue influence within any of the recognized categories and the allegation that the loans were procured by undue influence on the part of the bank is entirely unsustainable.

Was the claimant required to advise the defendants of the need to obtain independent legal advice?

[48] Mrs Charles testified that she signed the unlimited guarantee and commitment letters blindly. She did not receive any independent legal advice and did not understand the nature of the guarantees that she signed. She agreed that as an experienced businessperson it would have been irresponsible of her to sign documents without reviewing them thoroughly.

[49] The bank, on the other hand has argued that at the time the hypothecs were obtained the defendants had retained a legal practitioner of their choice to prepare the documents on their behalf, who would have advised them of the legal implications of these documents. Mrs Charles agreed this was so. The bank further submitted that the defendants had retained the services of an accounting consultant who would have advised them on the financial implications of the credit facilities. They had presented themselves as business-minded individuals who wished to transact business with the bank for the purpose of developing their company and were fully knowledgeable of what they were doing when they signed the documents.

[50] I considered the circumstances in National Westminister Bank v Morgan instructive on this point. There, the respondent sought to set aside a charge over her property on the premise that she was induced to execute the charge by the undue influence of the bank during an interview with the bank manager at her home. Apart from finding that the bank had not crossed the line of having a dominating influence over her, on meticulous examination of the evidence, the court ruled that in an ordinary banking transaction where the respondent had requested the loan to rescue her home from foreclosure and had obtained an honest and truthful explanation of the bank's intention, the transaction could not be said to be unfair to her. In the circumstances the bank was under no duty to ensure that she had received independent advice.

[51] The point was also considered in Thelston Connor v Scotiabank Anguilla Limited and another[23] where the ancillary claimant alleged that she was unduly influenced or misled by the bank into entering the credit facility, which was not properly explained to her and for which she received no independent advice. It was held that the bank was under no legal duty to ensure that the claimant has received independent legal advice, as the transaction was not disadvantageous to her.

[52] In the instant case the loans were procured by the voluntary acts of the defendants, who exercised their independent will and judgment, with full appreciation of the nature and effect of the facilities they sought from the bank. There is nothing in the evidence which

[23] Supra note 13

points to the bank officers and in particular Ms Alcindore overreaching or exerting a dominating influence over the defendants. It cannot be said that granting the loans to the company was unfair or unconscionable, as it is clear that the defendants stood to benefit from the company's profitability. Apart from the bald assertion that the bank did not request that they seek independent legal advice, the defendants have not been able to discredit any of factual assertions concerning their deportment or the bank's limited role in relation to these transactions. On the totality of the evidence the circumstances were nothing other than ordinary banking transactions initiated by the defendants for their own purposes, which were beneficial to them.

[53] Applying the reasoning in National Westminster Bank and Thelston Connor, I am persuaded that the nature of the transactions were not such that bank would have been under a legal obligation to advise the defendants of the need to obtain independent legal advice. Consequently the commitment letters, guarantees and hypothecs are not voidable on that ground.

What is the applicable interest rate for the sums owed?

[54] In written closing submissions Mr. Foster contends on behalf of the defendants that a request was made for interest at 9.5%. He submits that Ms Alcindore was under a duty to explain to the defendants that the interest rate on the loans was the same as that charged in the hypothecs and there is no evidence that this distinction was explained to them.

[55] Mr Brice countered in his written submissions on behalf of the bank that pursuant to Article 1008 of the Civil Code[24] the defendants are legally bound to repay the debts at the agreed interest rate, until fully liquidated. The Article states:-

> *"1008. The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law."*

[24] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

[56] I have considered the arguments and evidence in that regard. At page 3 of the commitment letters the interest rate was stated as 12% per annum. The defendants expressly agreed to repay the loans at the said rate. The same rate of 12% per annum was also stated in the hypothecs. Mrs Charles admitted in cross examination that to some extent she understood the interest rate was 12%.

[57] In 1st National Bank v Michael Rocton et al[25] our Court of Appeal examined Article 1008 in relation to the question whether the common intention of parties to a hypothec was that the interest rate agreed therein would survive and be applicable post judgment. The court ruled that it was not open to a court to allow a different interest rate, when the contract contained in the hypothec showed that the parties agreed to post judgment interest at an agreed rate. The ruling is likewise applicable to the facts here.

[58] The defendants also submitted that the interest rate was conflicting because on page 3 of the commitment letters it is stated as 12% with conflicts with the following statement at page 6 of the letters;-

> "*The Lending Bank's Prime Rate currently in effect is 10% per annum and may change from time to time"*

[59] Mr Cherebin explained in cross examination that the prime rate is the base rate used to calculate interest rates for various banking products, of which loans are usually calculated at prime rate plus. As I understand the term, it is the rate used as the starting point, to which bankers will usually add a margin, consistent with the risk associated with a borrower and facility type, to arrive at the interest rate for a credit facility. Evidently the prime rate referred to at page 6 is not to be confused with the interest rate on page 3 of the letters, to which the bank's margin has been added in arriving at the interest rate for the loans.

[60] In my opinion, when the defendants agreed that the hypothecs would continue as security for the debts, they were also agreeing to the interest rate as stated at clause 1 (a) and 1

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(b) respectively, of the hypothecs. Article 1008 is unambiguous and would also mean that when the defendants signed the commitment letters they also agreed to interest at 12% per annum. This is the rate legally agreed to by the parties and is therefore the measure for damages resulting from delay in payment of the debts owed to the bank. I conclude that the applicable interest rate pre and post judgment is 12% per annum as agreed by the parties.

Conclusion

[61] I therefore make the following orders:-

That judgment be and is hereby entered for the claimant against the defendants for the following:-

1. The sum of $167,192.14 together with interest on the principal balance of $134,954.23 at the rate of 12% per annum or $44.37 per day from 11th March 2014 until payment in full.

2. The sum of $169,150.56 together with interest on the principal balance of $143,730.06 at the rate of 12% per annum or $47.25 per day from 11th March 2014 until payment in full.

3. Cost is awarded to the claimant to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar