

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. SLUHCV2014/0355

BETWEEN:

1st NATIONAL BANK ST. LUCIA LIMITED

Claimant

and

**[1] EDWARD SLIM FRANCIS
[2] CYNTHIA JOSEPH-FRANCIS**

Defendants

APPEARANCES:

Mrs. Sardia Cenac-Prosper for the Claimant

Ms. Veronica Barnard for the First Defendant/Ancillary Defendant

Mr. Eghan Modeste for the Second Defendant/Ancillary Claimant

2019: February 19th

JUDGMENT

[1] **SMITH J.** The claimant ("the Bank") seeks to recover from the defendants, jointly and severally, the sum of \$1,116,945.77 together with interest on \$685,588.60 at the rate of 14% per annum from 14th March 2014 until date of payment and prescribed costs in the sum of \$97,340.20.

[2] The amount claimed is not in dispute. The first defendant ("Mr. Francis") contends that judgment should be entered jointly against him and his former wife, the second defendant ("Mrs. Francis"), but not jointly and severally as contended by the Bank.

- [3] Mrs. Francis contends that judgment should enter against Mr. Francis only, as she received no independent legal advice when she became a party to the loan which was procured by the Bank's and Mr. Francis's undue influence. She also alleges that she received no benefit from the mortgage proceeds and that a Settlement Agreement ("the Agreement") with Mr. Francis, to which the Bank was not a party, extinguished her obligations to the Bank. She therefore claims, as ancillary claimant, an order that she is entitled to indemnification by Mr. Francis against any liability to the Bank under the Agreement.
- [4] This trial commenced before another judge who heard evidence from Dan Felix for the Bank as well as from the defendants. The learned judge was then assigned to another jurisdiction before completing the case. Some three years having passed since the evidence was taken before that judge, counsel for each of the parties requested that this Court determine the matter on the basis of written closing submissions and the transcript of the evidence that was taken before the learned judge. That, therefore, is how I have proceeded.

Background

- [5] The Francis' were married in 1998 and were both businesspersons. Mr. Francis earned income through property rentals while Mrs. Francis was in the meat and seafood vending business. They subsequently incorporated and were both directors and shareholders of C & S Merchandising Depot Inc. ("C&S") through which the previously established meat retail business was continued.
- [6] Sometime in 2000, they purchased 15 acres of land in Dennery (the "La Caye lands") which was mortgaged in favour of Caribbean Banking Corporation Limited (RBTT Bank Caribbean Limited) (hereafter "RBTT").
- [7] On 18th March 2005, they signed a loan application requesting a loan from the Bank in the sum of \$860,000.00 for the purpose of debt consolidation and property development (the "Loan Application").

- [8] On 27th June 2005, the Bank received a letter from RBTT providing the Francis' pay-off balances on three loans as being \$774,867.83 as at 7th July 2005. It was never denied by Mrs. Francis that this disclosed that both she and Mr. Francis owed the liabilities on these three loans.
- [9] They executed a facility letter dated 17th November 2005 (the "Facility Letter") agreeing to borrow the sum of \$860,000.00 and to repay by agreed monthly installments. The stated purpose of the loan was to pay off the RBTT debt and for development financing of the La Caye lands.
- [10] On 21st November 2005, the Bank received a further letter from RBTT providing the Francis' updated pay-off balances on three loans as \$802,950.21 and noted the daily interest. On 25th November 2005, the Francis' received the loan money. Under cross-examination by Mrs. Prospere, Mrs. Francis admitted that the loan was to pay off the RBTT debt and to develop the La Caye lands which was owned by herself and Mr. Francis.
- [11] The evidence before the Court is that loan proceeds were applied to C&S' current account, with \$812,394.35 being disbursed to the executing notary to pay off RBTT in the sum of \$803,784.05; \$8,600.00 for legal fees and \$10.30 for the bank draft to the executing notary. A balance of \$47,605.65 remained on C&S' current account as was evidenced by an extract of the statement for current account 99900924.
- [12] On 30th November, 2005, the Francis' executed a hypothecary obligation securing the loan (the "Hypothec") prepared by Mr. Daarsrean Greene who represented them, but no independent legal advice form was completed upon execution of the Hypothec. Under cross-examination by Mrs. Prospere, Mrs. Francis stated that "*I chose not to [obtain independent legal advice] because at the time I didn't even think was, that was a criteria.*"

- [13] Between the years 2006-2007, the loan fell into arrears but the Francis's were able to make some lump sum payments from time to time from the proceeds of sale of the La Caye lands.
- [14] The marriage soured, the Francis' separated, entered into the Agreement on 14th February 2008 and obtained a Decree Absolute on 19th January 2012. They defaulted in making payment and the Bank demanded the outstanding balance in full in 2010. Mrs. Francis requested a copy of the Hypothec through her then attorney but nothing further was done and the Bank instituted proceedings in 2013.
- [15] The issues arising for consideration are as follows:
- (1) Whether Mrs. Francis was the subject of undue influence by the Bank such that independent legal advice was required;
 - (2) Whether the Bank was put on inquiry of any undue influence by Mr. Francis such that Mrs. Francis required independent legal advice;
 - (3) Whether the Settlement Agreement extinguished Mrs. Francis' obligations to the Bank; and
 - (4) Whether the Francis' are jointly and severally or jointly but not severally liable to the Bank.

Undue Influence

- [16] Mrs. Francis contends that Mr. Francis coerced her into executing the Hypothec and the Bank never gave her the opportunity to obtain independent legal advice.
- [17] Mr. Modeste, counsel for Mrs. Francis, relies on that portion of her evidence where she maintained that, at the time, she was just being pressured to sign the loan and that if she did not sign, it was not going to be approved. She said, "Yeah at the time I signed the loan I was just pressured to sign it as wife." He refers the Court to Mr. Francis' answer, elicited under cross-examination, that he did not know of any lawyer who was independently representing Mrs. Francis in the transaction.

- [18] It is well established that the doctrine of undue influence applies 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. To the extent that Mrs. Francis contends that Mr. Francis coerced her into executing the Hypothec, the evidence falls hopelessly short. She states that she had doubts, did not want to enter the transaction and was pressured to do so, but this plainly does not rise to the threshold for establishing undue influence.
- [19] Mr. Modeste submitted that Mrs. Francis “felt pressured and compelled to execute the Hypothecary Obligation by her then husband and indeed, she did not want to execute the document but was forced to do so as the Claimant much preferred to have two individuals be obligated to make the monthly payments rather than just one individual.” (Underlining supplied) I suspect that all banks have such a preference in order to safeguard repayment of loans. It is the nature of banking, but does not, *ipso facto*, amount to coercion or undue influence. For the Bank to have told Mrs. Francis that the loan would not be approved unless they both signed cannot amount to coercion or undue influence.
- [20] The presumption of undue influence may arise in relation to the Bank if Mrs. Francis reposed trust and confidence in the banker and/or the transaction was one not readily explicable by ordinary motives. However, no evidence was produced to show that either of the Francis’s, who were both business people, reposed trust and confidence in the banker in question. The transaction, on any reasonable view, was readily explicable by the ordinary motives to consolidate their loan, pay off RBTT and develop lands they jointly held. It appeared a routine banking transaction.

Independent Legal Advice

[21] Mr. Modeste relied on In **Barclays Bank PLC v O' Brien**¹ in which Lord Browne-Wilkinson stated:

“Therefore, in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

It follows that, unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights.

What, then are the reasonable steps which the creditor should take to ensure that it does not have constructive notice of the wife's rights, if any? Normally the reasonable steps necessary to avoid being fixed with constructive notice consist of making inquiry of the person who may have the earlier right (i.e. the wife) to see if whether such right is asserted. It is plainly impossible to require of banks and other financial institutions that they should inquire of one spouse whether he or she has been unduly influenced or misled by the other. But in my judgment the creditor, in order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice. As to past transactions, it will depend on the facts of each case whether the steps taken by the creditor satisfy this test. However for the future in my judgment a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. If these steps are taken in my judgment the creditor will have taken such reasonable steps as are necessary to preclude a subsequent claim that it had constructive notice of the wife's rights. I should make it clear that I have been considering the ordinary case where the creditor knows only that the wife is to stand surety for her husband's debts.” (Second defendant's underlining)

¹ [1993] UKHL 6.

[22] Reliance on **O'Brien** is, in my view, misplaced. At the very first paragraph of his judgment, Lord Browne-Wilkinson stated:

“Shortly stated the question is whether a bank is entitled to enforce against a wife an obligation to secure a debt owed by her husband to the bank where the wife has been induced to stand as surety for her husband’s debt by the undue influence or misrepresentation of the husband.”

[23] This Court has already concluded that, apart from bald assertions that she was pressured, there is no evidence to support an allegation of actual or presumed undue influence by either Mr. Francis or the Bank. The statement by Lord Browne-Wilkinson was made in the context of undue influence or misrepresentation.

[24] In **Royal Bank of Scotland plc v Etridge (No. 2)**², Lord Scott stated that:

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

[25] No evidence, over and above the fact of their marriage, was led to persuade this Court that Mr. Francis in any way coerced Mrs. Francis to execute the Hypothec

² [2002] 2 AC 773.

which was largely for their joint benefit. That benefit was to pay off the existing loan at RBTT, which Mrs. Francis does not deny they jointly made with RBTT.

[26] Mrs. Prospere submitted that the evidence solicited in cross-examination discloses that while Mrs. Francis, a self-made businesswoman, may have had reservations about the profitability of developing the La Caye lands which she jointly owned with Mr. Francis, she was not forced to take the loans. She further submitted that no evidence has been raised to suggest that the Bank was notified or informed of Mrs. Francis's concerns about the loan, whether in relation to the feasibility of the La Caye development and/or the settlement of the RBTT debts and/or the investment in the La Caye lands. I agree with that submission.

[27] It was entirely reasonable for the Bank to have believed that the loan was being advanced to the Francis' for their joint benefit, namely, the settlement of their loans at RBTT and the development of the La Caye lands which they jointly owned. The Bank had no information before it to suggest anything else. It was therefore not put on inquiry of any undue influence and was not obliged to require or advise that Mrs. Francis obtain independent legal advice.

Settlement Agreement

[28] Paragraphs 6 and 9 of the Agreement provides as follows:

"6 Mr. Francis takes over complete ownership and control of the land development situated at La Caye, Dennery. Mrs. Francis surrenders all entitlement and claims whatsoever to any income earned for land sales with respect to the La Caye property.

9 Mr. Francis shall indemnify and hold harmless Mrs. Francis from all debt with respect to the construction project and the Chaussee Branch of C&S Merchandising Ltd as of the date of this agreement."

[29] Mrs. Francis contends that all her obligations under the loan are extinguished by virtue of Mr. Francis's undertaking to indemnify her against all debts in respect of the La Caye project, which includes the loan. I do not think that submission is convincing and I say so for the following reasons.

[30] Firstly, the Bank was not a party to the Agreement. Secondly, Article 1069 of the **Civil Code** of Saint Lucia³ under which all the causes of extinction of obligations are set out, does not contemplate the extinguishment of Mrs. Francis' loan obligations in the manner she contends. Thirdly, as pointed out by Mrs. Prospere, section 50 of the **Divorce Act**⁴ subjugates the divorcees' rights conferred by court order to the bank's pre-existing rights under a hypothec. The Bank's rights under the terms of the loan remain valid and enforceable against the Francis'.

Jointly and severally liable or jointly but not severally liable?

[31] The **Civil Code** provides as follows:

“1034. There is a joint and several obligation on the part of the co-debtors when they are all bound, so that each of them singly may be compelled to the fulfillment of the whole obligation, and that the fulfillment of one discharges the others...

“1036. An obligation on the part of two or more debtors is presumed to be joint and several, unless declared to be otherwise...

“1038. The creditor of a joint and several obligation may apply for payment to any one of the debtors and such debtor cannot claim division of liability.” (underlining supplied)

[32] It is clear from the above provisions that the Francis' obligation is joint and several. The Bank may proceed against either one of them or both. They cannot claim a division of liability. The obligations set out in the Facility Letter and Hypothec bind them jointly and each of them individually.

The Ancillary Claim

[33] Mrs. Francis contends that if she is found to be liable to the Bank then she is entitled to be indemnified against such liability by Mr. Francis. The Agreement provides that Mr. Francis shall indemnify and hold harmless Mrs. Francis against all debt with respect to the construction project. The question to be answered is what is debt with respect to the construction project at the La Caye Lands?

³ Cap. 4.01, Laws of Saint Lucia.

⁴ Cap. 4.03, Laws of Saint Lucia.

[34] Ms. Barnard submits that the proceeds of the \$860,000.00 loan were used to pay the Francis' joint loan at RBTT of about \$812,000.00. After deduction of legal and other expenses, the best evidence is that the only remaining sum that was available to be applied to the construction project at the La Caye lands was \$47,605.65. Under cross-examination by Ms. Barnard, Mr. Felix from the Bank confirmed that the sum of \$47,065.65 would be what was available for project development. This is therefore the sum referable to the construction project.

[35] Based on the terms of the Agreement, Mr. Francis is obliged to indemnify Mrs. Francis against the debt of \$47,065.65 applied to the construction project.

Disposition

[36] I therefore make the following orders.

- (1) Judgment is entered against the defendants jointly and severally in the sum of \$1,116,945.77 together with interest on \$685,588.60 at the rate of 14% per annum or at the daily rate of \$266.96 per day from 14th March 2014 until date of payment.
- (2) The defendants are to pay prescribed costs to the claimant in the sum of \$97,340.20.
- (3) The first defendant/ancillary defendant is ordered to indemnify the second defendant/ancillary claimant in the sum of \$47,065.65.

**Justice Godfrey P Smith
High Court Judge**

By the Court

Registrar