**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2012 CD 00146**

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| **BETWEEN** | **MICHELLE SMELLIE** | **CLAIMANT** |
| **AND** | **NATIONAL COMMERCIAL BANK JAMAICA LIMITED** | **DEFENDANT** |

**Application for summary judgment- Spouse of mortgagor alleging undue influence- Certificate of advice from Attorney-at-law – Whether bank satisfied duty of care – Whether Royal Bank v Etridge (No 2) states applicable duty**

Stephanie Williams instructed by Henlin Gibson Henlin for the Claimant

Alexis Robinson instructed by Myers Fletcher and Gordon for the Defendant

Heard: 27th September 2016 and 11th October 2016.

**IN CHAMBERS**

BATTS J,

[1] The Defendant, by Notice of Application filed on the 14th of June 2016 applied for summary judgment against the Claimant. Alternatively an order to strike out the Claim was applied for. The reason in each case was the same, that is, that there is no real prospect of the claim succeeding. On the 11th of October 2016 I dismissed the Application with costs to the Claimant to be taxed or agreed. I promised to put my reasons in writing. This judgment fulfils that promise.

[2] The Claimant filed an Amended Claim and Amended Particulars of Claim on the 27th of September 2016, the date on which the Defendant's application was to be

heard. The Defendant's Counsel stated that the amendments had no relevant impact, and elected to proceed with her application. I can understand why.

[3] The relevant facts, and facts in dispute, can be shortly stated.

[4] The Claimant and her husband are both shareholders in a company Jatlin Construction and Associates Limited. The Claimant is a minority shareholder and a director of the company. The Claimant also provided routine administrative services for the company. The company was a customer of the Defendant and had received loans over the years. The Claimant signed promissory notes and security documents in respect of each of these loans.

[5] In or about the year 2009 the Claimant's husband convinced her to agree to mortgage their matrimonial home in order to secure a loan for a construction project being undertaken by the company. The Claimant explains it thus in her Affidavit filed on the 5th December 2012:

> *"12. In or about 2009 my husband told me that the company required a loan from the Defendant for the purpose of financing a project that was being undertaken at Steer Town High School.*
>
> *13. Patrick did not inform me of the details of the arrangement for the loan. I did not know how much was being borrowed by the Company at the time.*
>
> *14. I knew that the Company had a banking relationship with the Defendant. Although the Company was indebted to the Defendant in the ordinary course of business as far as I knew at the time that indebtedness was being serviced.*
>
> *15. Patrick told me that the Defendant required collateral to secure the loan. He suggested that we mortgage the property for that purpose. I agreed to do so because I trusted his judgment and the Company needed the loan from the Defendant.*
>
> *16. I did not obtain any financial benefit or other gain from the Company's loan arrangement with the Defendant or for my consent to become a party to the mortgage.*

> *17. In or about July 2009 Patrick brought home a document entitled Mortgage by way of Guarantee. He told me that he got it from the Bank and that it was the mortgage for my signature.*
>
> *18. He and I signed the said document. There was no discussion about the terms of the mortgage / guarantee or the potential risks involved. A copy of the Mortgage by way of Guarantee dated July 22, 2009 is being shown to me and marked "M.S.3".*
>
> *19. At the time of executing the same I did not understand that the document was both an instrument of mortgage and guarantee. I thought it was only giving a mortgage. I did not know that I was also guaranteeing the Company's indebtedness, the amount of which was unknown to me at the time.*
>
> *20.Furthermore I did not appreciate that my liability under the guarantee was secured by the mortgage over the property.*
>
> *21.I did not have the benefit of independent legal advice. This was not the first time my husband asked me to sign documents regarding the Company's financial affairs and I trusted him.*
>
> *22.The Defendant did not contact me about executing the mortgage. At no time did any employee or anyone acting on behalf of the Defendant explain the transaction to me or the risks involved in the same. My husband took the document after I signed it".*

[6] The documents in question, the mortgage and the guarantee have affixed to them the Claimant's signature as well as the signature of an Attorney-at-law with the following endorsement :

> *"Legal Advice Clause*
>
> *I certify that this document has been explained by me to Michelle Antoinette Smellie and she appears to understand the purpose thereof and has signed the same of her own free will and accord."*

[7] The Defendant relied on the Affidavit of Jacqueline Mighten filed on the 4th of January, 2013. That affidavit had been used in a previously concluded application for an injunction. There the bank indicated that the relevant loan officer was no longer available to give evidence. The bank also stated that it was its policy to require guarantors to obtain independent legal advice "*in certain*

*circumstances*". "*It is clear*," said the bank, "*on the face of the security documentation in this case that independent legal advice was provided to each of the Claimants by Douglas A.B. Thompson the Claimant's Attorney-at-law*."

[8] The bank now seeks to enforce its powers of sale under the mortgage as the company has not been able to service the loans.

[9] The Claim was filed on or about the 5th of December 2012. In its amended form it seeks declarations that the mortgage and guarantee ought not to be enforced as it is unconscionable to do so. Further that the said documents ought to be cancelled and set aside. The Particulars of Claim assert that the Defendant failed in its duty to the Claimant in that it did not ensure that the nature, risks and effect of the said document were explained to the Claimant. The Defendant it is alleged entrusted the execution of the documents to the Claimant's husband and did not ensure that the Defendant received independent legal advice. It is also alleged that the Claimant received no notice calling the guarantee dated July 22nd, 2009.

[10] Defendant's Counsel in her submissions seeking summary judgment put forward the following:

a) The Claimant intended to execute a mortgage in order to service loans of which she was aware.

b) The security document bears the signature of an Attorney-at-law who was not acting for the bank and who asserts that the Claimant received independent legal advice.

c) The bank had therefore taken the reasonable steps within the meaning of **Royal Bank of Scotland plc v Etridge (No 2)** [2002] AC 773; [2001] 4 All ER 449.

d) The bank had therefore discharged any relevant duty to the Claimant.

e) The Court had already refused the Claimant's application for an injunction and therefore the Claimant had no reasonable prospect of succeeding.

[11] The Claimant's counsel for her part relied on the same authority viz **Royal Bank of Scotland plc v Etridge (No 2)** and in particular the words of Lord Nicholls in the All England Reports at page 460 para 20 ;

> *"Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."*

[12] Counsel also relied on the decision and dicta in **Lloyds TSB Bank v Holdgate** [2002] EWCA Civ 1543; **UCB Corporate Services Ltd v Williams** [2002] EWCA Civ 555; **Bank Melli Iran v Samadi-Rad** [1995] 2 FLR 367; and **Tanya Susanne Phillips v RBC Royal Bank (Jamaica) Limited** [2014] JMCC Comm 2.

[13] The Defendant's Counsel in reply submitted that the duty of the financial institution as outlined by the House of Lords in **Etridge No (2)** at page 473(d) to 474 (a) is not applicable to this jurisdiction or to the transaction in question because it has not yet been declared to be law here. Counsel relied on the dictum of Mangatal J (as she then was) in **Michelle Smellie et al v National Commercial Bank Limited** [2013] JMSC Comm1;

> *" In my view, if these relatively more demanding steps set out in paragraph 79 of **Etridge** would only be considered applicable to future transactions by banks in England i.e. transactions occurring after the decision, then plainly, these more stringent pronouncements would hardly likely be applicable to banks here in Jamaica. As far as I am aware, no similar judicial pronouncements along the lines recommended by Lord Nicholls for the future , have been made by our highest court. I therefore agree with Mrs Robinson that in this case it would, on the present state of our law, be reasonable for the Defendant to rely upon confirmation from an Attorney-at-law acting for the Claimants, that they have been advised appropriately by him. In my judgment the reference in **Garcia** to the creditor's obligation either to explain the transaction itself, or to satisfy itself that a third party had done so, is fulfilled, just as it was held in **Etridge** by receiving confirmation by an Attorney-at-law acting for the volunteer that he has explained, the transaction to him/ or her."*

[14] Having considered the evidence the law and the submissions, written and oral, I am satisfied that this application for summary judgment must be dismissed.

[15] In the first place, what calls to be resolved are issues of mixed law and fact. The relationship of the Claimant to the borrower, whether her husband exerted undue influence and the extent to which there was legal advice are all to be decided at trial. It is also a mixed question of law and fact whether on the facts known to the bank it was placed on enquiry and if reasonable steps needed to be taken, and whether they were in fact taken.

[16] Let me say also, that I respectfully disagree with the suggestion by my sister Judge that the conduct recommended for the future, as per Lord Nicholls in **Etridge**, does not apply until our highest court so pronounces. Decisions of the highest court in England are highly persuasive and generally speaking declaratory of the common law. The members of the House of Lords (now UK Supreme Court) are also the same Judges who sit in our highest court as the Judicial Committee of the Privy Council. Statements of principle and declarations of the common law are therefore to be accorded some respect. They ought only to be departed from if local circumstances, existing statutory provisions or some

other peculiarity renders it unsafe, unwise or unfair to do so. I can think of no reason in principle or policy to depart from **Etridge**. Therefore any bank in Jamaica being advised as to the law subsequent to **Etridge** would or ought to be cautioned in accordance with Lord Nicholls' guidelines. It will be a mixed question of law and fact whether the Defendant in this case has met the relevant standard of conduct.

[17] There is on the evidence presented by the Claimant sufficient to suggest that the bank may not have met those standards. One glaring aspect is the question whether the information was provided to the attorney as to;

a. The financial state of affairs of the company

b. The project being financed

c. The other outstanding loans if any, and

d. The status of the loans.

There is no evidence that the bank made any effort to ensure that the attorney was selected by the Claimant or that she was aware of her right to have her own attorney advise her rather than one selected by her husband. Those are issues to be resolved at trial.

[18] I should add that the refusal of injunctive relief, on similar facts, is not inconsistent with my conclusion. The test there is what is just in all circumstances. Mangatal J's decision can be supported on a basis other than her view that the Claimant had no real prospect of success. As the learned judge said,

> *"I am of the view that the course which is likely to cause the least irremediable harm or prejudice is to refuse the interlocutory injunction sought."*

Critical to that consideration was whether or not damages would have been an adequate remedy on the one hand and whether on the other the Claimant's undertaking as to damages represented adequate protection. Both these considerations were resolved, not surprisingly, in favour of the Defendant.

[19] The same, it must be noted, may apply to the refusal of an injunction in this claim on the 30th January 2013 by Justice Almarie Sinclair-Haynes (as she then was). There does not appear to be a written judgment delivered and it is therefore, given the many issues that can arise, unsafe to assume that the sole reason for refusal was that there was no real prospect of success or no arguable claim. I have said enough to indicate that in this case and on the evidence before me, it cannot be said that the claim has no real prospect of success.

[20] In the result, the applications for summary judgment and to strike out the Claim are dismissed with costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge