



[2014] JMCC Comm. 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO:2013 HCV 05574

BETWEEN TANYA SUSANNE PHILLIPS APPLICANT

AND RBC ROYAL BANK (JAMAICA) LIMITED RESPONDENT

(Formerly known as RBTT Bank Jamaica Limited)

Interlocutory injunction – whether wife was apprised of all the facts prior to signing guarantee for husband’s business- whether husband exerted undue influence on wife – whether bank was put on notice – whether bank discharged its duty to wife- what constitutes proper advice to wife by attorneys at law

Mr. Allan Wood QC and Ms. Symone M Mayhew instructed by Symone M Mayhew for the claimant/applicant

Mr. William Panton and Miss Maria Burke instructed by DunnCox for the defendant/respondent

Heard: 19 December 2013, 20, 21, 22, 23 and 24 January 2014, 3 and 4 February 2014

SINCLAIR-HAYNES, J

[1] Mrs. Tanya Phillips (claimant) seeks an interlocutory injunction to restrain the defendant Royal Bank Jamaica Ltd, (defendant) from exercising its powers of sale over her matrimonial home. Mr. Phillips, her husband is the owner of National Meats which is heavily indebted to RBC. In 2007 the claimant and her husband guaranteed a loan to National Meats and in 2009 she signed a Loan Agreement, guarantee and mortgage with her husband to finance National Meats.

[2] In seeking to restrain the defendant, Mrs. Phillips is asserting undue influence. In support of that assertion, she avers that she is entirely dependent on her husband and she is dyslexic. She contends that the bank failed in its responsibility to ensure that she understood the contents of the document she was signing. The bank, however maintains that it discharged its duty to her.

Her Evidence regarding her dependence

[3] Mrs. Phillips avers that throughout her marriage she has been a housewife dependent on her husband's financial support. She was not involved in his business nor is she a shareholder. There was never any direct business transaction or communication between her and RBC. She trusted and placed complete reliance on her husband in respect of all financial matters. He instructed her to sign documents for the purpose of borrowing money for his business. She signed documents from RBC at his request.

[4] Marital problems developed about ten years ago as a result of her of having to remain in Kingston during the week with her daughter who attends school in Kingston. Her husband during this time got involved in extra martial affairs as she was only able to go home on weekends. Eventually in 2010, he asked her for a divorce. Her sons were diagnosed with a learning disability. As a result of the challenges she experienced, she decided to be assessed also and was found to be dyslexic. The circumstances of her and her sons' disability and martial problems left her wholly dependent on her husband and she felt compelled to comply with his requests.

[5] In June 2009 she was told by Mr. Ivor Chang, who was the financial controller of National Meats that she was urgently required to sign some documents for a loan but she needed to get legal advice in order to do so. She was not informed what documents she should sign. She was also informed by her husband that he needed to borrow money as the business was in need of more money. She was not told the reason. At the time she and her husband commenced proceedings against the bank,

she relied on him to defend the claim. It was only recently that she obtained separate legal representation and was informed of her right to raise the issue of undue influence.

Claimant's Evidence Regarding dyslexia

[6] It is her evidence that she graduated from high school without passing any external examination. She avers that reading and comprehending complex documents are difficult for her. According to her, Mr. Phillips at all material times was aware that she is slow in processing written information. She relies on, trusts, and complies with his instructions to sign documents which deal with loans for his business.

[7] Ms Angela Bennett assessed Mrs. Phillips and supported her claim of dyslexia. Ms. Bennett's assessment revealed that Ms. Phillips was reading and comprehending at the grade 5 level. As an adult, her expected reading and comprehension level should be at the grade 12 level. She concluded that the reason her reading and comprehension levels were at grade 5 was because she was dyslexic.

[8] Ms. Angella Bennett holds a Bachelor of Science and a Masters of Science degree in Speech Pathology and Audiology. She obtained these degrees from the University of Cincinnati in the United States of America. She also has a Masters of Science degree in Education as a teacher of English from George Washington University, United States of America. She has worked in the field of Education for over 30 years with experience in Jamaica and in the United States of America. In Jamaica she has worked in the Ministry of Health as a speech therapist/audiologist. She has also done volunteer work in the field of Education at different centers for example Mico Care in Saint Andrew.

[9] It is however Mr. William Panton's, submission that Mrs. Angela Bennett's Report is not an experts report as it has not complied with the requirements of the CPR. As a result, no consideration should be given to it. He further submits that in Mrs. Phillips' previous statements of case and affidavits, no mention was made of her inability to understand either her case or that of the defendant's.

[10] Indeed Mrs. Bennett was not deemed an expert. In the circumstances the court cannot rely on her opinion. It can however, consider Mrs. Phillips' assertion that she is unable to comprehend complex documents. It is for the trial judge to attach whatever weight to her evidence the judge thinks fit.

Mr. Panton's submission regarding statements made by Mrs. Phillips in earlier applications

[11] Mr. Panton submits that this application by Mrs. Phillips breaches the rule that litigants must litigate all issues at the same time. He continued that on the 18 June 2009, she was asked by her attorney whether undue influence was exerted on her by her husband. She had the opportunity to allege undue influence in her response to the bank's application for a freezing order and in her several statements of case and affidavits but failed to do so. Having read the defendant's affidavit in support of the bank's, application for a freezing order, she would have been acquainted with the defendant's claim and could have raised the issue. She signed a certificate in which she stated that she was not subject to undue influence by her husband

[12] Additionally, he submits that in neither of the two very lengthy affidavits filed on her behalf in response to defendant's application for a freezing order was the issue raised. She therefore ought not to be allowed to present her case to the court in the piecemeal manner in which she has.

[13] The court is however of the view that those applications were made at the instance of her husband while they shared the same lawyer. He instituted and had control over those proceedings. It is her evidence that her husband sent home documents for her to sign which she signed. If she suffers the challenges as alleged, and was solely dependent on Mr. Phillips it is not improbable that she could have so signed. Whether she signed in "passive obedience" to Mr. Phillips' instructions or of her own free will, are issues of fact to be determined at the trial.

[14] It is his further submission that Mr. Phillips has failed to respond to the claim. The evidential burden shifts to Mr. Phillips. If he fails to answer it is for the trial judge to determine on the evidence, whether Mrs. Phillips has discharged the burden on a balance of probabilities. At this stage, it is not for this court to determine Mrs. Phillips credibility regarding her allegation of undue influence. It should be determined at the trial of the matter.

The law

[15] The general rule which governs cases in which a mortgagor seeks to restrain a mortgagee from exercising his powers of sale is found in **Fisher and Lightwood's Law of Mortgage** (11th edition). At paragraph 20-34 the learned authors state:

“The mortgagee will be restrained from exercising his power of sale if, before there is a contract for the sale of the mortgaged property, the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due. The amount due for that purpose is the amount which the mortgagee claimed to be due to him for principal, interest and costs unless, on the face of the mortgage, the claim is excessive, in which case the amount claimed less such excess must be tendered or paid.”

[16] That principle has been sanctioned by the Court as being the correct statement of the law. In the case of **SSI (Cayman) Limited v International Marbella Club SA** (SCCA No. 571986, judgement delivered 6 February 1987) the Court of Appeal held the view that if mortgagors wish a stay of the mortgagee's hand, he will be required to pay an amount equivalent to the sum borrowed with the interest accrued into court.

[17] Morrison JA, in the Court of Appeal's decision of **Mosquito Cove Ltd v Mutual Security Bank Ltd, National Commercial Bank Limited et al** SCCA No 57/2003, conducted a thorough examination of the authorities on the issue of payment into court by a mortgagor of the amount claimed by the mortgagee to be due under the mortgage where the mortgagor wishes to restrain the mortgagee from exercising its powers of sale. In so doing he examined another Court of Appeal's decision that of **Flowers**

Foliage and Plants of Jamaica et al v Jamaica Citizens Bank Ltd. [1997] 34 JLR 47 in which Rattray P sought to distinguish between cases in which money was borrowed and was secured by a debenture and cases in which the mortgage was secured by a collateral security which supported the guarantee and the applicant in the matter was a guarantor and not the principal borrower.

[18] He also examined the following dictum of Staughton LJ's in English Court of Appeal case of **Linotype-Hell Finance Ltd v Baker** [1992] 4 AllER 887 on which Rattray P relied. In that case Staughton LJ said :

"If a defendant can say that without a stay of execution pending appeal, he will be ruined and that he has an appeal which has some prospect of success, which is a legitimate ground for granting a stay of execution."

Morrison JA observed that in **Linotype**, Staughton LJ sat as a single judge of the English Court of Appeal.

[19] He expressed his disagreement with three aspects of the Rattray's observations: (a) the statements were obiter dictum;

(b) there is no factual distinction between the the nature of the securities in **Marabella** and **Flowers Foliage** as both cases dealt with guarantees and mortgages given in support of guarantees; and

(c) the statement is a fusion of entirely different principles which govern the grant of injunction and applications for stay of execution pending appeal.

[20] He pointed out that the rule which governs the grant of injunction in cases in which the mortgagor is seeking to restrain the mortgagee from exercising its power of sale is subject " *to a special rule flowing from the peculiar nature of mortgage.*" He made it quite plain that "*the Marabella principle is...alive and well.*" He pointed to the unanimous decision of the Court of Appeal in **Leicester Green v JRDF** [2010] JMCA Civ 21 in which Harris JA reaffirmed the principle she had stated earlier in **Paulette Hamilton v Gregory Hamilton and others** (SCCA No. 77/2007, judgement delivered on 31 July 2008) . In that case she said:

“A mortgagee will not be restrained in the exercise of his powers of sale because the amount due is in dispute ...however, he ...may be restricted in the exercise of his powers of sale if the mortgagor pays into court the amount claimed by the mortgagee as due and owing.”

[21] Rattray P had expressed the view at page 452 of **Flowers Foliage** that:

“Courts of equity do not shackle themselves with unbreakable fetters if the justice of the particular case demands a more flexible approach.”

Morrison JA, apparently does not take issue with that statement as at paragraph 57 he expressed a similar view:

“But given that an injunction is a discretionary remedy, it is hardly surprising that there have been exceptional cases in which payment in by the mortgagor has not been insisted on as a precondition to the grant of an injunction.”

[22] At paragraph 64 he said:

“While other or further exceptions to the rule are no doubt to be found in the books and will also emerge in the future, it seems to me that the kinds of instances discussed in the foregoing paragraphs suggest that the court will only sanction departures from the general rule in highly exceptional cases, based on very special facts, such as the existence of a fiduciary relationship between mortgagor and mortgagee or, perhaps, in cases of forgery. I naturally intend these as examples only, which are by no means exhaustive.”

This view is in alignment with Lord Nichols’ restatement of the equitable principle in **Royal Bank of Scotland v Etridge** (No 2) [2002] 2 AC 773, that, *“equity is not past childbearing age.”*

Is this an exceptional case which warrants departure from the general rule?

Submissions on by Allan Wood QC on behalf of the claimant

[23] Mr. Wood QC is firmly of the view that the circumstances of this case warrants a departure from the general rule. Mr. Wood submits that the claimant operated under undue influence from her husband when she signed the 2007 guarantee, of which the defendant had constructive notice. It is his submission that in the circumstances the defendant failed in its duty to ensure that the claimant obtain independent legal advice when she signed the guarantee in 2007.

[24] Regarding the 2009 loan, it is his submission that the circumstances surrounding the loan were not explained to her in accordance with the principles enunciated in **Etridge**. He argues that the meeting of the attorney and the claimant was perfunctory. The attorney's statement to her that she was the guarantor of a loan of US \$ 6.5 million and that if the loan was not repaid she would lose her house was not sufficient to discharge the bank's duty to her. Further, the document referred to in the Certificate of Independent Legal Advice dated 18th June 2009 was provided by National Meats & Distributors Limited.

[25] He also contends that the bank did not provide Mrs. Phillip's attorney with pertinent document and information. It is also his submission that the bank allowed her to sign a further guarantee on the 30th June 2009 and a loan agreement on the 3rd August 2009 with a mortgage over the matrimonial home without informing her of the precarious financial state of National Meats.

The Law

[26] The law (as distilled from Lord Nicholls' speech in **Etridge**, provides protection for certain persons who are vulnerable to undue influence because of their special relationship with others who are liable to abuse the influence they wield. The important consideration is the degree of trust and confidence which the vulnerable party reposes in the other. The relationship a wife shares with her husband falls into this category. The court recognizes that persons within this category can be subject to undue influence without any manifest act of inducement.

[27] The court is mindful that it is also unremarkable for a wife to accede to her husband's requests purely out of love and affection although the result might be wholly

disadvantageous to her. The court is however cognizant that a husband can misuse the trust and confidence she reposes in him. Whether he has, is a question of fact.(see Lord Nicholls' speech in **Royal Bank of Scotland plc v Etridge (No 2)**)

[28] In **Etridge**, at pages 799 and 798 of the case, he said:

“27 The problem has arisen in the context of wives guaranteeing payment of their husband’s business debts. In recent years judge after judge has grappled with baffling question whether a wife’s guarantee of her husband’s bank overdraft, together with a charge on her share of the matrimonial home, was a transaction manifestly to her disadvantage.

28 in a narrow sense, such a transaction plainly (manifestly”) is disadvantageous to the wife. She undertakes a serious financial obligation, and in return she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortunes of husband and wife are bound up together. If the husband’s business is the source of the family income, the wife has a lively interest in doing what she can to support the business. A wife’s affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly owned asset, to obtain the financial facilities needed by the business. The finance may be needed to start a new business, or expand a promising business, or rescue an ailing business.

*29 Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in **Allcard v Skinner** 36 Ch D 145, and adopted by Lord Scarman in **National Westminster Bank plc v Morgan** [1985] AC 686, in the passages I have cited.*

30 I returned to husband and wife cases. I do not think that, in the ordinary courses, a guarantee of the character I have mentioned is to be regarded as a transaction which,

failing proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.

31 I have emphasised the phrase “in the ordinary course”. There will be cases where a wife’s signature of a guarantee or a charge of her share in the matrimonial home does call for explanation. Nothing I have said above is directed at such a case.”

[29] The guarantee which Mrs. Phillips signed in September.2007 was manifestly to her disadvantage. That fact, in isolation, is not sufficient to place her claim within the realm of undue influence in the absence of evidence that her husband misused the influence he had over her. Lord Nichols cautioned that:

“Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that the influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstance should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggeration as misstatements.

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

Is there evidence of impropriety by Mr. Phillips.

[30] It is Mrs. Phillips' evidence that she reposed confidence in Mr. Phillips and that she depended wholly on him to transact their financial affairs. He told her that the business needed money. On her evidence, there is however, no evidence that he explained to her the hopelessness of National Meats' financial situation nor the contents of the documents to her although he knew of her limitation in reading and comprehension. .

[31] The questions which are to be determined at the trial of the matter, is whether in the circumstances, he acted with the necessary propriety. Was he sufficiently fair and forthright in not disclosing to her such vital information? Was her will undermined by her total dependence on him? Did his infidelity result in feelings of insecurity which led her to believe that she had to comply with his instructions?

[32] On the other hand, inspite of the risk, would she have signed in any event out of affection or self interest. In light of her averment of his perfidy, would she have signed out of affection. Would she have risked losing her home for him? These are, in my view important questions. Answers to which can only emerge at a trial of the matter.

[33] Lord Nicholls recognises that there are some inherent problems and limitations in not allowing banks to freely accept a wife's signature as it would others, however he nevertheless acknowledged the wisdom in the principle. At pages 808-809, he said:

“At the same time, the high degree of trust and confidence and emotional dependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognize these realities.”

Was the bank put on inquiry?

[34] Lord Brown- Wilkinson's statement in **Barclays Bank plc v O'Brien** [1994] 1 AC 773 with which Lord Nicholls agrees provides the answer:

"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."

[35] In Lord Nicholls' opinion, this simply means that a bank is put on enquiry 'when a wife offers to stand surety for her husband's debts.' He disagreed with the conditions which the Court of Appeal in **Etridge** considered necessary, such as the state of the marriage or the degree of trust and confidence reposed by the wife in the husband regarding financial matters. (para 46)

[36] In the instant case, the transaction was patently to Mrs. Phillips' disadvantage. She stood to lose her home. There was evidently the risk that her concurrence might have been procured improperly.

The bank's evidence regarding the the 2007 and 2008 guarantee

[37] Ky-Ann Taylor, the bank's Attorney-at-Law and Litigation Counsel avers in her affidavit of 7th June 2013, that National Meats request for additional financing was of concern to the bank. Consequently the bank sought the assistance of the Special loans Group of the bank to enquire into the matter. She was advised by the Group's representative and it was also her belief, that National Meats did not have sufficient cash flow from its business to meet the obligations it already had with the bank.

What were the banks duties to Mrs. Phillips?

[38] In **Etridge**, Lord Nicholls stated that banks are required to take steps to minimize the risk of a wife's concurrence being obtained by undue influence or by misapprehension. In this regard, a bank should take steps to ensure that the wife

understands the nature of the risk involved and instructs her to obtain independent legal advice. Lord Nicholls's advised that those requirements are satisfied if the bank:

(a) demands the attendance of the wife at a private meeting with the bank's representative at which the extent of her liability is explained;

(b) warns her of the risk;

(c) requires her to seek independent legal advice; and

(d) receives from the attorney 'written confirmation' that the 'nature and effect of the documents' were explained to her.

[39] He noted that there were certain cases in which the bank ought to insist that a wife is advised separately. (See para. 50 of his decision). But he recognized however, that in some cases it might not be 'desirable or practicable' for a bank to meet with the wife. In those cases, he is however of the view that the bank's responsibility is to :

"take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned."

"If the bank is not willing to undertake the task of explanation itself, the bank must provide the solicitor with the financial information he needs for his purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for the facility, a copy of the application should be sent to the solicitor. The bank will, of course, need first to obtain the consent of its

customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed.” (Pages 811-812)

Was she properly advised by the solicitor?

The guarantee of September 2007

[40] On the 7th September 2007, she signed a guarantee at her husband’s request. He told her he needed to borrow money in order to expand the cold storage for National Meats. She was taken to the bank’s attorneys by Mr. Phillips. An employee of her husband, Ms. Andrea Brown who worked in accounts was also present at the attorney’s office. Mrs. Phillips attended that office twice in two months to sign documents.

[41] Congeries documents were placed before her and she was instructed to sign. She was given no explanation as to what she was signing and she did not read any of the documents. She simply placed her signature where she was instructed to. The lawyer did not explain to her what she was signing.

[42] As a result of the many documents which were presented to her for signature, she is unable to say whether there was any document entitled, ‘Waiver of Independent Legal Advice’, dated 7th September 2007 bearing her signature which was signed at the lawyer’s office. Her signature was however witnessed by Ms. Christine Foreshaw who was her husband’s executive secretary at National Meats. She does not remember Ms. Foreshaw being present at the attorney’s office. She avers that her husband sent documents with his driver to the home for her to sign.

[43] She returned to the said lawyer’s office to sign other documents because her husband needed additional funds for his business. She was given no information as to the amount that was being borrowed. Again, many documents were placed before her to be signed. She was ignorant as to what they were and no one explained what they were nor advised her. She did not know the amount that was being borrowed.

The law

[44] Lord Nicholls outlined the bank's responsibility to the wife in a most lucid manner. It is necessary to quote him extensively. He said:

" 64 In the type of case now under consideration...

"65 Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She should lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

66 The solicitor's discussion with the wife should take place at a face-to-face meeting, in the absence of the husband. It goes without saying that the solicitor's explanations

should be couched in suitable non-technical language. It also goes without saying that the solicitor's task is an important one. It is not a formality.

67 As already noted, the advice which solicitor can expect to give must depend on the particular facts of the case. But I have set out this "core minimum" in some detail, because the quality of the legal advice is the most disturbing feature of some of the present appeals. The perfunctory nature of the advice may well be largely due to failure by some solicitors to understand what is required in these cases."

[45] Mrs. Phillips signed a document entitled 'Waiver of Independent Legal Advice' which reads:

"The bank has advised me of my right to obtain Independent Legal Advice from an attorney-at-law with regards to my right to my guarantee for loans amounting to the total of the sum of the following amounts:

US \$13,510,346.96 and (b) J50,000,000.00 to National Meats and Foods Distributors Limited.

I further certify that the bank has explained the nature of the Guarantee document to me and I fully understand that by giving it I will become liable for the debt."

[46] She affixed her signature at the bottom of another form entitled '**Certificate of Independent Legal Advice.**' The document was a declaration by the attorney. The said declaration was in standard form which required the erasure of the pronouns which did not relate to the applicant. The form stated that the attorney explained the nature of the document and advised her fully of the liability she was incurring by executing the document. It also stated that she was advised by the attorney as to the manner in which such liability could be enforced by the bank against her and she informed the attorney that she was satisfied.

[47] It is useful to quote that portion of the form verbatim. The document reads:

"That she fully understands the nature and effect of having executed such documents. I am satisfied that she fully understand (a) the nature and effect of having executed such

documents. I am also satisfied that she noted freely and voluntarily and was not under any undue influence by David George Phillips (borrower) or any other person.”

[48] On Mrs. Phillip’s evidence, what transpired at the lawyer’s office fell woefully short of the requirements outlined by Lord Nichols. On her evidence, the seriousness of the risk involved was not adequately driven home to her. the attorney failed to:

- (a) explain the purpose for his involvement and the fact that he could be called upon to counteract any allegation that she might make of undue influence;
- (b) determine whether she wished him to act for her;
- (c) explain fully the nature of the document ;
- (d) inform her that she could become a bankrupt;
- (e) inform her what was the amount of the principal and interest and the fact that it could be increased without her knowledge;
- (f) discuss her means with her;
- (g) ascertain whether she understood the value of the property charged; and
- (h) inquire whether there were other assets from which payment could be made in the event the husband’s business failed.

[49] The attorney also failed to:

- (a) inform her that that it was entirely her decision;
- (b) discuss with her the state of her husband’s finances, for example his indebtedness and overdraft facility;.
- (c) ascertain whether she wished to proceed;
- (d) enquire whether she desired to confirm with the bank the nature of the documents and what the practical implications were;

- (e) determine whether she wished to negotiate with the bank; or
- (d) obtain her permission before confirming with the bank.

Further, the meeting took place in the presence of her husband and his employee.

[50] The attorney, on the evidence before me failed to fully enlighten her as to the nature and effect of guaranteeing her husband's loan. Not only was her meeting with the solicitor deficient in most of the requirement Lord Nicholls regarded as the "core minimum", in addition she was asked to waive her rights of obtaining independent legal advice. The implications of such a decision was not adequately brought to her attention.

[51] Importantly, the bank failed to inform the attorney of the dire financial situation of National Meats of which they had knowledge. The precarious position of National Meats caused the bank to seek the advice of the Special Loans Group. It had determined, by virtue of Mr. Glen Smith's report, that National Meats did not have the cash flow to meet its obligations.

[52] This critical fact was not conveyed to the attorney to enable her to properly advise Mrs. Phillips. If Mrs. Phillips was informed that National Meats could not meet the existing obligations and the implications that not only were they likely to lose their source of income but also the matrimonial home, she may very well not have signed.

The 2009 transaction

[53] It is Mrs. Phillips further evidence that on the morning of June 2009, she was told by her husband that the business required additional funds. He did not tell her how much was needed or why it was needed. That day, she also received a call from National Meats' Financial Controller Mr. Ivor Chang, that independent legal advice was needed in order for her to sign some documents.

[54] Her mother recommended Mr. Alton Morgan. She conveyed the information to Mr. Chang who arranged the meeting with Sharon Morgan, an attorney at Alton Morgan's office. Mr. Chang emailed some documents to the attorney's office. She was accompanied by her mother. The attorney inquired of her if she knew that she was

guaranteeing US\$6.5 million. She told her she did not. The attorney informed her that she was a guarantor and could lose her home if her husband defaulted. She then signed a paper that she received advice.

[55] It is her evidence that she understood that the lawyer meant that RBC would take her matrimonial home and properties which were in Florida. She never understood that other properties in Jamaica which were held by DGP Properties Ltd were also included. It is her further evidence that the lawyer did not inform her about National Meats indebtedness. She was not informed that he was indebted to other banks and that some properties were mortgaged to other banks. Neither was she provided with any financial information. She was not told that she was applying for a loan. She saw no documents pertaining to a loan. She was entirely ignorant that it was a loan application.

The banks duty regarding joint loan applications by husband and wife

[56] The bank has no responsibility to a wife who is a joint borrower with her husband. Mrs. Phillips however, avers that she was not aware that she was applying for a loan. Ordinarily the principle of *non es factum* governs such matters. The circumstances of the case requires close scrutiny of the evidence before this court.

[57] As already noted in Ms. Ky-Ann Taylor's affidavit of 12th July, 2013, in 2007 the bank would have been aware of National Meats' precarious financial position as it was so informed by Mr. Greg Smith, the representative of the Special Loan Group of the bank.

[58] In her affidavit of 7th June 2013, Ms. Taylor further stated that Grant Thornton Limited was retained by the bank with the concurrence of National Meats to "*review, report and make recommendations to the bank on the business, assets, affairs and operations of National Meats.*" Recommendation was made by Grant Thornton to the bank to extend the 'loan facilities in the principal sum of up to US \$6,500,000.00 on an incremental basis in order to provide an opportunity for National Meats to pursue the recovery plan which had been suggested by the claimant.(Mr. Phillips)"

[59] In early 2009, negotiations and discussions had commenced between the defendant and Mr. Phillips for the bank to advance the US \$ 6,500,000.00. It is her further evidence that the sole purpose of the 2009 Agreement was to provide working capital for the needs of National Meats. The disbursement of the loan proceeds was dependent on National Meats' financial performance. This, she said, was reflected in the 2009 agreement signed by the Mr. Philips.

[60] The decision was taken to advance the said sum in tranches. There was no commitment by the bank. Ms. Taylor's evidence is that that plan was abandoned because *"it became increasingly apparent that National Meats financial position was tenuous."* A legal mortgage was granted by the bank on 20 July 2009 which was part security for the 2009 Agreement and guarantee of the 2007 and 2008 loans.

[61] She avers that the loans were 'cross collateralized'. This assertion is repeated in her later affidavit and is a pivotal factor to the outcome of this application. It is necessary to quote her verbatim. She is so quoted at paragraph 63 of the decision, from her later affidavit.

[62] The Mortgage document reflects the fact that the bank would extend credit facilities to the claimant up to US \$6,500,000.00. There was however no commitment by the bank to pay the sum of US\$6,500,000.00 or to advance US \$3,500,000.00. National Meats continued to decline and by November 2009 failed to meet its targets. The bank made no further advances.

[63] Ms. Taylor, in her affidavit of 12 July 2012, said:

"Under and pursuant to a Loan Agreement dated September 7, 2007 and a supplemental Loan Agreement dated November 6, 2008, between the bank and National Meats and Foods Distributions Limited, ("National Meats") ("2007 Agreement" and 2008 Agreement" respectively), and upon the terms and conditions of those Agreements, the bank extended certain credit facilities to National Meats under these facilities to National Meats. The combined total amount of available credit facilities to National Meats under these facilities was for an aggregate amount not exceeding US\$18,010,346.00 and J\$50,000,000.00.

The 2007 Loan and the 2008 Loan were secured by various securities in favour of the bank, including a personal guarantee in favour of the bank issued by the first claimant/applicant and his wife, Tanya Phillips, with respect to the 2007 Loan.

[64] It is her further evidence that 2007 and the 2008 Loans were secured by various securities in favour of the bank issued by the appellants, with respect to the 2007 Loan

“After receiving the additional financing arrangement in November 2008, National Meats did request still additional financing, however, the bank had grown increasingly concerned with National Meats’ seemingly unquenchable need for additional funds and asked for the assistance of Special Loans Group of the Bank’s parent company located in Canada to look further at this matter . I am advised by Mr. Greg Smith of the Special Loans Group and do verily believe that during the relevant period it became more and more apparent that there was insufficient cash flow from the business of National Meats to meet its existing obligations.”

“As agreed with National Meats, Grant Thornton Limited was retained by the bank as its consultant under and pursuant to letter of engagement dated May 6, 2009 to review, report and make recommendations to the Bank on the business, assets, affairs and operations of National Meats.”

[65] She avers that she was advised there were discussions between Mr. Phillips and Grant Thornton’s representatives concerning National Meats’ business growth plans, cash flow management, among other things. Mr. Phillips was aware that any approach by Grant Thornton to the Bank could only have been a recommendation for the Bank consideration. Mr. Phillips was also aware of Grant Thornton role as monitor to which he consented. It was also agreed that Grant Thornton would be paid by National Meats. According to her, any disbursement of US\$6,500,000.00 dependent upon National Meats’ financial performance.

[66] It is her further evidence that:

“The 2009 Loan Facilities were “cross colateralerized” so that the security granted to the bank to secure repayment of sums advanced under the 2007 Loan

Facilities and the 2008 Loan Facilities would also secure the repayment of sums advanced under the 2009 Loan Facilities, and security provided for repayment of sums advanced under the 2009 Loan Facilities would also secure the repayment of sums advanced under the 2007 and 2008 Loan Facilities. The securities included the claimants' guarantees in favour of the Bank of the repayment of debts and liabilities of National Meats to the bank as are outstanding under the 2007 and 2008 Loan Facilities and the securities, and the provision of mortgages over properties owned by the claimants, including the Florida Properties and the Santa Maria property. The mortgage over the Santa Maria property was given by the First and Second Claimants as security for the repayment of the 2009 Loan Facilities and as security for the discharge by the Claimants of their obligations under the 2009 Agreement .

That the instrument of mortgage dated June 30, 2009 over the Santa Maria Property ... reflect the understanding and agreement of the parties that the Bank would extend credit facilities to the claimant up to US\$6,500,000.00. There was no commitment to pay the US\$6,500,000.00 or an advance US\$3,500,000.00 as is alleged."

It is her evidence that only US\$2,551,200.00 were made available by the bank.

"National Meats' continued its financial decline in 2009 and failed to meet its financial targets and projections. By November 2009, National Meats has defaulted on its obligation to the bank under the 2007 and 2008 Loan Facilities and notices of default were sent to the Claimants and National Meats. Under the terms and conditions of the 2009 Agreement, the Bank was entitled at its discretion to make no further advances under the 2009 Loan Facilities. In December 2009, the Claimants, National Meats and the Bank entered into a Forbearance Agreement in writing which included in its terms that the Bank was not obligated to make any further advances and was entirely at the Bank's discretion (sic)."

Assesment

[67] The 2009 document which Mrs. Phillips signed was a complex document which captured the 2007 guarantee which she signed without without proper legal advise. The bank sought to combine guarantees, that is the 2007 and 2009, loans with a mortgage.

The term Cross Collateralization in the sense in which it was used, in my view was a hybridization of a mortgage and a guarantee. It is understandable that the lawyer might have told her that she was signing a guarantee.

[68] Further, she was 'borrowing' from the bank to finance her husband's business in which she had no interest. The "loan" was not to finance the matrimonial home or to acquire property in which she would have an interest. Although the general rule is that a bank is under no obligation to the wife where she is a borrower with her husband, the facts of this case are exceptional.

[69] Paragraph 2.2 of the Loan Agreement states:

"The proceeds of the Loan shall be used by the Borrowers exclusively for the purpose of on lending to National Meats & Food Distributors Limited to meet its working capital needs. However, failure by the Borrowers to so comply shall not prejudice any rights of the Bank. The Bank shall be entitled, without incurring any liability therefore, to monitor the use or application by the Borrowers of the proceeds of the Loan."

[70] Technically the 'loan' on Santa Maria in relation to Mrs. Phillips, amounted to a guarantee since she was neither owner nor a share holder of National Meats. This Loan Agreement had been negotiated since early 2009. The Thorton recommendation was with the bank. It cast gloom over National Meats' ability to survive even with the injection of capital.

[71] The bank was, as early as 2007 skeptical of Mr. Phillips' insatiable need for more and more financing. At the verge of cutting him loose from the unravelled thread which connected them at that junction, they roped her in to provide additional guarantee for National Meat's loan.

[72] The bank was well aware that she was not an owner nor had she any shares in National Meats. They were put on enquiry and was therefore obliged to "*take reasonable steps to satisfy itself that she understood and freely*" signed the 2007 guarantee and the 2009 Loan Agreement. They failed to properly do so.

[73] The Privy Council case of **National Commercial Bank (Jamaica) v Hew** [2003] UKPC 51 demonstrates the difference between a party who derives a benefit from one who does not. Lord Millett who delivered the decision stated that transactions obtained by undue influence must be set aside *ab initio*. Where, however a benefit is derived, it is not enough that the contract is set aside. the borrower must account for the money received with interest otherwise the the borrower would have been unjustly enriched. (See para. 43)

[74] Mr. Panton is of the opinion that the facts of the instant case are distinguishable from **Etridge** as the loan was granted both the Phillip's names to revive a business which provided her and her family to live comfortably. The matrimonial home and other properties were purchased in their joint names with monies from National Meats.

[75] With that submission, this Court disagrees. A reading of the cases does not reveal that a wife who benefits from her husband's business is disentitled to raise undue influence. In any event there is no evidence that at the time, the matrimonial home was purchased from the proceeds of a "cash-rich" National Meats, the defendant provided National Meats with a loan.

Should the bank be restrained?

[76] Lord Hoffman, in **National Commercial Bank Jamaica v Olint National Commercial Bank Jamaica v Olint** [2009] UKPC sets out the principles which should guide the decision to grant or withhold the granting of an injunction, At paragraph 16 he said:

"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975]. AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of

the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.”

[77] At paragraph 19, he continued:

*“What is required in each case is to examine what on the peculiar fact of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irreparable prejudice to the defendant, the court may be reluctant to grant it unless it is satisfied that the chances that it will turn out to be wrongly granted are low; that is to say the court will feel, as Megarry J said in *Shepherd Homes Limited v ...* (1971) 1 Ch 340,351 “A high degree of assurance that at trial it will appear that the injunction was rightly granted.”*

[78] On the claimant’s evidence, she is liable to suffer irreparable harm if the injunction is not granted. The bank was remiss in its responsibility of ensuring that the attorney was informed that National Meats was on the verge of financial collapse. The attorney also failed to instruct the claimant adequately.

Her inability to provide security for costs

[79] Mrs. Phillips has declared her impecuniosity. There are serious issues to be tried. There is likelihood that she may prevail at trial. In the circumstances should she be driven from the seat of justice because of her inability to provide the requisite undertaking. This court considers that it would be inequitable to do so.

[80] In the circumstances:

“An interlocutory Injunction restraining the 2nd Defendant whether by itself, or its servants or agents or otherwise until the trial of this claim from exercising or purporting to exercise its powers of sale or from disposing of or selling or transferring the property ALL THAT parcel of land part of HOG HOLE now called SANTA MARIA, OCHO RIOS in the parish of SAINT ANN being the Strata LOT Numbered FOURTEEN on the Strata Plan numbered Four Hundred and Eight-three and Twenty-eight undivided 1/758th shares in the common property therein and being all the land comprised in Certificate of

Title registered at Volume 1245 Folio 599 of the Register Book of Titles and known as Apartment B6 Santa Maria in the parish of Saint Ann.

Costs to be cost in the claim

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