REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV 2011-02339

BETWEEN

NATURE RESORTS LIMITED

CLAIMANT

AND

FIRST CITIZENS BANK LIMITED

DEFENDANT

DECISION

Before the Honourable Madam Justice Pemberton

Appearances:

For the Claimant: Mr. A. Singh instructed by Ms. N. Ramyard

For the Defendant: Mr. F. Gilkes instructed by Ms. L. Boyack

For Interested parties: Ms C. Bernard holding for Mr. M. George

[1] The short facts of this matter are that the Claimant Nature Resorts Limited (NRL) was the owner of a six (6) acre parcel of land. Mr. Patrick Dankou was the majority shareholder of NRL. NRL formed the idea of developing the land. Suffice it to say that in keeping with this idea, Mr. Patrick Dankou parted with 75% of his majority shareholding to XY and ZV. NRL, to raise money for the development project, executed a mortgage over the said property to the tune of $6mn with the Defendant Bank (FCB). The loan was not

serviced. FCB has since called in the security. This court granted an injunction to halt the process.

[2] **APPLICATION OF 23RD NOVEMBER 2011.**

NRL filed two (2) applications. On the first application NRL sought to ask the court to permit the joinder of two (2) parties. It is alleged that the proposed Defendants defaulted on the payments causing FCB to call in the security. The question is did they? They must be present before the court if only to present and ventilate all the relevant facts the court is asked to adjudicate upon. I am in agreement with this application, so that all the relevant facts can be before the court.

ORDER:

(1) Application granted.

(2) Statement of Claim to be amended to reflect the Order and be filed and served on all parties within fourteen (14) days of the date of this Order.

(3) All Defendants permitted to file Defences and Amended Defences if necessary within twenty-eight (28) days of service of Amended Claim Form.

(4) Costs of and occasioned by the First Defendant by this Application, if any, to be paid by the Claimant to the First Defendant in the sum of $1,500.00.

[3] **APPLICATION OF 13TH NOVEMBER 2011.**

NRL made this application to re-amend the Claim Form and the Statement of Case as summarized below.

[4] Mr. Gilkes succinctly laid out his submissions, in which he objected to the proposed Re-Amended Claim being allowed to stand. They are in summary:

- That the proposed Re-Amended Statement of Claim which seeks to **add to the allegations of actual undue influence and misrepresentation** is deficient in that it makes un-particularised references to "some other unconscionable act, conduct or omission".

- That the proposed Re-Amended Statement of Claim seeks to **add by way of introduction an alternative plea** based on presume undue influence.

[5] **UNPARTICULARISED ASSERTIONS**

I do not read Mr. Gilkes as saying that this course of action is completely unpermitted. I am reading Mr. Gilkes to say that in the present form the proposed amendments should not be allowed as they fail to satisfy the **need for particulars** to be stated in the Statement of Case so that FCB may know and appreciate the case it is being called to answer. In other words and I agree, the aggrieved party must **properly describe** the acts and conduct he complains about to mount his ability to lead evidence to support a successful challenge. Vague and indefinite terms or terms of art without more are not sufficient. That is the gravamen of the submission.

[6] Mr. Singh has countered by advising that the court must read the words "in a context" to arrive at the case that NRL has set out for the FCB to meet.

[7] **ANALYSIS AND CONCLUSION**

I do not agree with Mr Singh. **CIVIL PROCEEDINGS RULES** Part 8.6(1) enjoins a Claimant "to include in the claim form or in his Statement of Case a short statement of **all** facts on which he relies". "Short" in this "context" reads "relevant" and not verbose. "All" is self-explanatory. I wish to make two (2) points. First we must not be led into thinking that the **CIVIL PROCEEDINGS RULES** has drastically changed the time honoured rules of pleading and somehow the overriding objective lays upon a court a duty to "save a case" at all costs. This is not a proper interpretation. This was made clear in **RUSSELL COOKE TRUST CO. v PRENTIS**[1].

[8] The responsibility is placed on the Claimant, in this case NRL to set out its case remains under Part 8. NRL wishes to claim that FCB *"would have been or ought to have been placed on notice of a particular circumstance ...."* It is incumbent upon NRL to state

[1] See Caribbean Civil Court Practice p. 65. "The overriding objective does **NOT** confer in the court a general jurisdiction to do what it thinks right in a particular case". [Emphasis mine].

facts upon which such a conclusion is either to be based or inferred from evidence which it proposes to lead at trial. NRL cannot hope at this early stage to barely make the allegation and supplement it in the Witness Statement. That cannot be allowed.

[9] Further the court cannot be expected to search the Statement of Claim in the hope of putting allegations into "context". That is NOT to be encouraged or countenanced.

[10] Another issue is that the proposed defect cannot be cured by a Part 35 Application[2]. One cannot fall short of a strictures of Part 8 and hope that any deviations can be cured by Part 35 application. The Part 35 application pre supposes that the subject matter of the request for information **is** or **was** contained in the Statement of Case, such as a statement of fact pertaining to an insurance policy or a box of chocolates as the case may be.

[11] From that perspective alone, Mr. Singh's application is on very unstable grounds.

[12] **PRESUMED UNDUE INFLUENCE**

On the issue of *Presumed Undue Influence*, I understand the line of cases, **O'BRIEN**[3] and **ETRIDGE**[4] to be saying is that the party (in this case the FCB must be **aware** of a special relationship existing between the affected party, the influenced (in this case NRL) and the alleged influencer (the Attorney, not a party to this action) so as to presume that the influencer (the Attorney) exercised undue influence on the affected party, NRL.

[13] Following from that therefore is, what is that special relationship between the affected party and the influencer which must exist to trigger the presumption of undue influence? In the **O'BRIEN** and **ETRIDGE** cases, it was a marital and/or emotional bond between the affected party and the influencer. Does this extend to any relationship which exists between parties? There was no authority quoted to lead to a positive answer to this question. In any event, and in case there is such authority, three other factors are readily apparent, and, facts must be pleaded to show:

[2] Part 35 – Requests for Information.
[3] **BARCLAYS BANK plc v O'BRIEN** [1994] 1 AC 180.
[4] **ETRIDGE** (NO. 2) [2002] 2 A.C. 773

(a) **knowledge** of the financial institution's (FCB) of the existence of trust and confidence between the influencer, the Attorney, and the affected party NRL;

(b) **knowledge** of the financial institution, FCB that the transaction was to the manifest disadvantage of NRL; and

(c) that the influencer stood to benefit from the transaction to be impugned.

[14] I do not think that it can be denied that it is stated that there was a relationship between the alleged "influencer and the alleged affected party". But is that all? The issues are:-

(1) Where is it stated in the proposed re-amendment that the Bank knew of the relationship?

(2) Even if not so clearly stated, is the statement of "knowledge of the alleged relationship" sufficient without more?

If these hurdles are crossed, I see other hurdles for NRL to encounter. They are as follows:

(3) Where is the statement that this commercial transaction has stepped out of the usual and has entered the realm of "high risk", where according to Enonchong[5] the **ETRIDGE** extension "ought in principle to be applicable to other relationships where one party can easily acquire influence over the other".

I have perused the Statement and I have found none. Again, in case I am wrong,

(4) What made this commercial transaction manifestly disadvantageous to NRL? If it was the valuation as alleged, **what made** that valuation sufficient to trigger FCB's enquiry? What is NRL relying on?

(5) What are the facts leading to the finding that the influencer desired to benefit or benefitted from this transaction to be impugned?

[15] **CONCLUSIONS:**

(1) I have searched the pleadings and have found no assertion that FCB **knew** of the relationship of Attorney and Client between the influencer and NRL. That **must be** reflected on the Statement of Case. That is the first step in the process.

[5] **DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE DEALING by NELSON ENONCHONG LONDON SWEET & MAXWELL**, 2006 p. 368 para. 24-007.

(2) There is nothing in the Statement of Case to aver that FCB **knew** that the transaction was to NRL's manifest disadvantage. There needed to be some record of this fact, such as, but not limited to a conversation between NRL and FCB to this effect.

(3) Using the Enonchong reasoning, where is the statement of events which turned this commercial transaction to one of "high risk", so as to trigger FCB's being put on enquiry? There is none.

(4) The value of the security and the level of the mortgage it secured were stated. But is that enough? Is it that a lower valuation was used to secure the mortgage rather than this valuation relied upon by FCB? Was/is there such a disparity? To me reliance on this raises more facts that need to be stated.

(5) Finally, there is no allegation that concurrent with the transaction being to NRL's manifest disadvantage, that the influencer derived a benefit from the transaction.

[16] That final point to my mind is the basis of the trigger of a suspicion in the mind of the financial institution, that the person deriving the benefit is the one who exerted the **undue** influence. The **knowledge** of this undue influence causing an unjust benefit to the influencer is **presumed** to be that of the Financial Institution FCB. There is no such allegation or factual matrix in this case.

[17] This is the nature of the facts that the court kept leading Mr. Singh to contemplate and which he stoutly refused to follow. In the premises, I cannot accede to Mr. Singh's application which must be dismissed with costs.

ORDER:

1. **That the Notice of Application filed on 13th December 2011 be and is hereby dismissed.**
2. **Permission is denied to the Claimant to amend the Statement of Claim in the manner sought.**
3. **The Claimant do pay the Defendant's costs to be assessed.**
4. **The Defendant do file Statement of Costs on/before 20th April 2012.**
5. **Claimant to answer on/or before 24th April 2012.**

6. **Assessment to take place on 2nd May 2012 at 11:00 a.m. T'GO #02**
7. **Further Case Management Conference date remains fixed.**
8. **Injunction to continue.**

Dated this 29th day of March 2012.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE