

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. 37 OF 2009**

**BETWEEN**

**MATTHEW BAPTISTE  
KAREN MOHAMMED-BAPTISTE**

**APPELLANTS**

**AND**

**SCOTIABANK TRINIDAD AND TOBAGO LIMITED**

**RESPONDENT**

**PANEL: P. Jamadar J.A.  
N. Breaux J.A.  
G. Smith J.A.**

**APPEARANCES:**

Mr. F. Scoon on behalf of the Appellants

Mr. M. Morgan and Ms. D. Charles on behalf of the Respondent

**DATE DELIVERED: 22<sup>nd</sup> June, 2012.**

I agree with the judgment of Smith J.A., associate myself solely with his comments and have nothing to add.

**N. Breaux  
Justice of Appeal**

**Delivered by G. Smith J.A.**

## JUDGMENT

### INTRODUCTION:

1. This appeal, though dealing with commonplace financial transactions raises issues that have far reaching social and economic repercussions.

The case exposes the conflict that can occur when a wife (or anyone in a like position) charges her interest in the matrimonial home to secure the interests of her husband (or other partner).

On the one hand it is the policy of the law to protect a wife (etc.) from “undue” influence being brought to bear on her in relation to financial transactions concerning the matrimonial home. On the other hand, lenders should feel able to advance money to such parties in the reasonable confidence that their bargains would be upheld by the courts.

2. The law has been developing rapidly in this area, and the lead case of **Royal Bank of Scotland v Etridge (No. 2) and Others (2002) A.C. 773 (HL(E))** (hereafter referred to as “**Etridge**”) has done much to clarify the law in this area. I will be referring to this case at length.

3. The present appeal deals with a loan advanced by the Respondent (the Bank) to the Appellants (the First Appellant is hereafter referred to as “the Husband”; the Second Appellant is hereafter referred to as “the Wife”). The Bank secured the loan by way of a mortgage of the matrimonial home of the Appellants. The Appellants owned the matrimonial home jointly. The Appellants sought to set aside the loan and mortgage transaction principally on the grounds of undue influence. The undue influence was allegedly exerted by (a) the Bank over the Appellants and (b) by the Husband over the Wife.

The trial judge rejected the case of the Appellants, validated the loan and mortgage transaction and granted the enforcement orders sought by the Bank.

4. Both of the Appellants challenged the trial judge’s findings and orders. However, the Husband has abandoned his appeal. It is the Wife who now seeks to set aside the loan and mortgage transaction against her on the ground of the undue influence by the Husband. The Wife contends that the Bank is deemed to have notice of this undue influence and so cannot enforce the loan and mortgage against her.

5. I find that the Wife adequately made out her case on the evidence before the trial judge.

I allow this appeal by the Wife and set aside the loan and mortgage transaction as against the Wife. I also set aside the orders made against the Wife on the Bank's counterclaim.

**The substance of the Case for the Wife:**

6. The Husband had been the Bank's customer at its Branch at Couva. Some time between June and October 2002, the Husband deposited three U.S. dollar cheques into his account at the Bank's Couva Branch. These cheques were each held for six weeks and then cleared. Based on the funds deposited, the Husband withdrew Trinidad and Tobago cash currency of varying sums. These sums totalled \$98,000.00. Sometime between April and May 2003, the Bank discovered that two of the three U.S. dollar cheques were fraudulent and duly dishonoured them. The total of these dishonoured cheques was \$27,450.00 U.S.<sup>1</sup> (approximately TT \$170,000.00).

7. The Husband was now confronted with a debt which was beyond his immediate means. To correct this position the Appellants entered into a certain financial transaction with the Bank. They were given a loan of \$415,000.00 by the Bank. This loan was used:

- (i) To pay off the debt on the dishonoured cheques (approximately TT\$170,000.00);
- (ii) To liquidate an existing mortgage over the matrimonial loan of approximately \$225,000.00;
- (iii) For sundry credits to the Husband's account; and
- (iv) To pay the costs associated with this financial transaction.

8. As security for the loan the Appellants mortgaged their matrimonial home to the Bank.

*The pleaded case of the Appellants*

9. In their Pleadings, the Appellants alleged that this financial transaction had been procured under duress by the undue influence of the Bank. They also alleged that the Bank exercised

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<sup>1</sup> In paragraph 3 of the judgment, the trial judge states that the proceeds of the dishonoured cheques amount to U.S. \$24,450.00. However, the 2 cheques that were dishonoured were for \$8,950.00 and \$18,500.00, giving a total of \$27,450.00.

**“unfair advantage”** over them. They alleged inter alia, that the Bank had threatened to have the Husband criminally prosecuted for fraud and sent to jail.

10. The Wife also pleaded, though indirectly, that the transaction was tainted by the undue influence of the Husband.

In paragraph 12 of the Statement of Claim she stated,

**“...the Second Named Plaintiff (the Wife), in particular did so (sign the mortgage) without reading same and without obtaining independent legal advice as a married woman. The Second named Plaintiff (the Wife) knew nothing whatsoever about the transaction, but only executed same since she was advised that her husband would go to jail if she did not sign the Memorandum of Mortgage.”**

11. In paragraph 13 of the Statement of Claim she gave Particulars of the unfair advantage that the Bank Manager allegedly exercised over the Appellants. However, these Particulars against the Bank Manager were conflated with her allegations of the presumed undue influence of the Husband. I set out these Particulars to illustrate the point:

**“(a) The Defendant (the Bank) dealt solely with the First Named Plaintiff (the Husband).**

**(b) The nature of the document was never explained to the Second Named Plaintiff (the Wife), nor was she advised to consult Attorneys before signing the said mortgage.**

**(c) The Bank well knew that the Plaintiffs were husband and wife and the Second Named Plaintiff (the Wife) was to agree to carry the additional burden of \$170,000.00 allegedly due to the Branch on account of the alleged indebtedness of the First Named Plaintiff (the Husband).**

**(d) The Second Named Plaintiff (the Wife) avers that she had no interest in either of the said accounts of the First Named Plaintiff (the Husband) nor did she have any dealings with the Defendant or the Branch and avers that she is the**

**owner of the matrimonial home together with the First Named Plaintiff (the Husband) as joint tenants and contends that neither the interest of the First Named Plaintiff (the Husband) nor herself has been severed from the joint tenancy, in respect whereof the matrimonial home is held.”**

12. This conflation of cases was exacerbated by the Particulars of the Statement of Case. In response to a request to state the person or persons who perpetrated the alleged undue influence in paragraph 12 of the Statement of Case, the answer was basically that it was one Mr. S (the Manager of the Bank’s Couva Branch).

This answer only dealt with the case of undue influence by the Bank. It begged for further particulars with respect to the Wife’s pleaded case of undue influence against the Husband but the Bank did not pursue this any further.

*The Evidence of the Wife*

13. The witness statement of the Wife raised serious allegations of undue influence against the Bank and the attorneys for the Bank. Especially so, she raised some damning allegations against one Mr. C, an employee of the Bank. Very little was said about Mr. S in support of the allegations against Mr. S that were set out in the Pleadings.

At the trial, the attorneys for the Bank successfully struck out all the negative allegations made in the Wife’s witness statement against Mr. C and the Bank’s attorneys. These references were not in keeping with the pleaded case. The Appellants’ attorneys did not seek to amend the pleaded case, nor have they appealed the decision to strike out the damning allegations against Mr. C that were in the Wife’s witness statement.

14. Shorn of evidence of the undue influence by the Bank over the Wife, this allegation, (not surprisingly) failed at trial for lack of evidence.

15. The only case that could have proceeded before the trial judge was the case based on the presumed undue influence by the Husband over the Wife.

16. The case of the presumed undue influence by the Husband was pleaded and presented in a general (but inelegant) way. The trial judge stated at paragraph 15 of the judgment that the Wife's case as presented at trial was that the Husband exercised undue influence over her "**as agent for the Bank**". The addition of the words "**as agent for the Bank**" are of little relevance to this case. It matters not on whose behalf the Husband is presumed to have exercised undue influence. The essential issue is whether or not there is a case of presumed undue influence by the Husband.

Perhaps some of the confusion was caused by the imprecise arguments of counsel for the Wife at the trial. Counsel for the Wife seemed to argue the case of presumed undue influence by the Husband in a general way at times. At other times he seemed to argue that the case was based on the presumed undue influence by the Husband as agent for the Bank.<sup>2</sup> This differentiation is of little relevance to the present case. In any event the trial judge did consider the case of the undue influence by the Husband in a general way<sup>3</sup> and not specifically "**as agent for the Bank**".

I propose to do the same.

#### *The findings on the Wife's case*

17. Even though the trial judge may have felt that the case of presumed undue influence by the Husband over the Wife had not been fully pleaded she decided to consider that case. The trial judge felt compelled to do so because the Wife appealed to "**the equitable jurisdiction of the Court.**"<sup>4</sup>

18. The trial judge was right. As I stated earlier, the case of presumed undue influence by the Husband over the Wife had been pleaded, even though inelegantly. In any event, the trial judge had allowed the case to be raised in the opening address at trial. It had also been raised by both parties in the closing submissions at the trial. Moreover, the Bank has not appealed the trial judge's decision to consider this "new" case which formed the major part of the decision.<sup>5</sup>

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<sup>2</sup> See e.g. page 547 of the Record of Appeal (page 26 of the transcribed hearing before the trial judge on 10<sup>th</sup> November, 2008) at lines 9–16; page 543 of the Record of Appeal (page 24 of the same transcript) at lines 21–44; and page 537 of the Record of Appeal (page 21 of the same transcript) at lines 3–7.

<sup>3</sup> See paragraphs 23, 29–33, 38 and 42–44 of the judgment of the trial judge.

<sup>4</sup> See paragraph 17 of the judgment of the trial judge.

<sup>5</sup> See the transcript of proceedings in the Court of Appeal at page 3.

19. The trial judge found that a case of presumed undue influence by the Husband had not been proved and dismissed the claim. I now consider the Wife's appeal from this decision.

*Two Judgments?*

20. Before analysing that case I need to mention a subsidiary issue that arose for consideration. On the hearing of the Appeal we discovered that there were two judgments in this case. Both these judgments are dated 15<sup>th</sup> December, 2008.

One is signed by the judge and consists of 45 paragraphs and 22 pages. The other which was made available from the Court Library and the on-line library service, consists of 41 paragraphs and 20 pages. Both counsel suggested that we should treat both of these judgments as "official" and made submissions on each version.

In the absence of any explanation as to how two varying judgments came into existence, I will treat the signed judgment of 45 paragraphs and 22 pages as the official judgment, more so as this was the judgment that formed part of the Record of Appeal.

**Presumed undue influence and Etridge**

21. The Wife's appeal has been centred on the finding of the trial judge that the case of presumed undue influence had not been made out. In deciding this issue the trial judge applied principles of law from **Etridge** to the facts of this case.

I now consider the relevant principles of law from **Etridge** which are applicable here. Before I do this I must point out that **Etridge** is really a decision on eight appeals which raised similar principles. The report itself consists of some 109 pages of analysis and reasoning in a developing and dynamic area of law. There are three major opinions in which varying views were expressed. The principles that are distilled in the headnotes are overly simplistic synopses of the principles to be discerned from the case. I have sought to analyse the three major opinions and to state the relevant principles, but as Lord Bingham of Cornhill (who gave one of the two minor opinions) observed, the opinion of Lord Nicholls "**commands the unqualified support of all the members of the House**" (of Lords). I shall refer to Lord Nicholls' judgment in the main.

22. I shall address three propositions of law from **Etridge**. These are:

- (i) A statement of the general principle;
- (ii) The effect of the Bank being put on inquiry; and
- (iii) How the presumption of undue influence is raised.

(i) *A statement of the general principle*

23. **“A bank is put on inquiry whenever a wife stands as surety for her husband’s debts. It is sufficient that the bank knows of the husband-wife relationship. That bare fact is enough. The bank must then take reasonable steps to bring home to the wife the risks involved.”** (per Lord Nicholls at paragraph 84 of *Etridge*)

It is important to note that the Bank rightly concedes that they failed to bring home to the Wife the risks involved in the transaction.<sup>6</sup> However, they argue that in spite of this, the mortgage is still enforceable against the Wife for reasons which I shall consider later in this judgment.

24. Lord Hobhouse (who wrote the second major opinion) agreed with this general proposition. He states at paragraph 110,

**“The position therefore is that in relation to any guarantee by a wife of her husband’s debts (or those of his company) the bank is put on enquiry and accordingly will have to respond unless it is to run the risk of finding that the guarantee and other security provided by the wife are unenforceable.”**

25. Lord Scott (who wrote the third major opinion) put the position somewhat differently. He opined at paragraph 158 that the presumption against a bank:

**“...arises where the combination of the relationship and the nature of the transaction justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party. Such a conclusion,**

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<sup>6</sup> See the transcript of proceedings before the Court of Appeal at pages 39, 41, 42, 47, 50 and 56.



**reached on a balance of probabilities, is based on inferences to be drawn from that combination.”**

Lord Scott also opined that in a case where a husband and wife are living together there is a presumption that there is reciprocal trust and confidence between them and:

**“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.”<sup>7</sup>**

There is no need to prove these matters. However, Lord Scott was not prepared to accept (as Lords Nicholls and Hobhouse did):

**“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 enterprise a presumption of undue influence arises.”<sup>8</sup>**

Lord Scott felt that more was needed, although he did not state what more was needed.

Nevertheless, Lord Scott did accept that in many cases, the risk of the vulnerability of a wife could put a bank on inquiry that the wife did not understand the transaction and hence she could have the security set aside (see paragraphs 147, 148, 259 and 278).

26. Whether one adopts the accepted view of Lord Nicholls and that of Lord Hobhouse or that of Lord Scott, the present case is one in which the Bank was put on inquiry of the risk of vulnerability of the Wife. The Wife was standing security for the Husband’s debts. The transaction was mainly for the Husband’s benefit and there is no dispute that the Bank knew of this. It was the Bank who proposed this transaction for the purpose of allowing the Husband to repay his debt to the Bank. That being the case, the Bank was put on inquiry of the risk of undue influence by the Husband over the Wife.

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<sup>7</sup> See paragraph 159 of **Etridge**.

<sup>8</sup> See paragraph 159 of **Etridge**.

(ii) *The effect of the Bank being put on inquiry*

27. Simply stated, when a bank is put on inquiry of the risk of undue influence by one spouse (or other similarly circumstanced person) over the other, the evidential burden of proof can shift. Such a bank will then have to prove that it took reasonable steps to bring home to the spouse the risks involved in the transaction. If that bank fails to do this, they will be fixed with notice of any undue influence exercised and the transaction is liable to be set aside. (See Lord Nicholls paragraphs 87-89, Lord Hobhouse paragraphs 108-110 and Lord Scott paragraph 161).

28. As I stated above, at paragraph 23, the Bank in this case rightly concedes that it did not take steps to bring home to the Wife the risks involved in the transaction. The Bank is therefore fixed with notice of any undue influence by the Husband over the Wife and this transaction may be set aside as a result.

The Bank contends that there was no proof of undue influence exercised by the Husband over the Wife in this case; hence, this action and appeal must fail.

This leads naturally to a consideration of the third principle, namely, how the presumption of undue influence is raised.

(iii) *How the presumption of undue influence is raised*

29. In husband and wife cases (or cases of similarly circumstanced persons) undue influence can be actual or presumed/inferred. Where a wife proves actual undue influence there is no need to consider presumed/inferred undue influence since such presumed undue influence becomes irrelevant (see Lord Scott at paragraph 315 of **Etridge**). In other cases the undue influence may be presumed in the sense of being inferred from all the evidence. Both counsel for the Bank and the trial judge erred when they stated that undue influence had to be established by proof of actual undue influence. A case of undue influence could have been inferred or presumed from all the circumstances of this case.

30. In this regard, counsel for the Bank appears to have argued this point inconsistently on appeal. At one stage, he conceded that undue influence can be inferred<sup>9</sup> yet later, he stated that

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<sup>9</sup> See the transcript of proceedings in the Court of Appeal at pages 48 and 50.

there must be evidence of actual undue influence being brought to bear on a wife.<sup>10</sup> I will proceed as if counsel for the Bank did not concede that undue influence can be inferred.

31. In **Etridge** itself<sup>11</sup> there was no proof of any actual undue influence by the husband yet the presumption of undue influence had admittedly arisen in the case of one creditor. There were in fact 2 creditors. One was a body of trustees and the other was a bank. Money was being advanced to buy a property and, in the case of the trustees, to assist a husband to clear his overdraft. The husband had negotiated the transaction and the wife went along.

In respect of the advance to clear the overdraft of the husband, the trustees conceded, both that this was to the manifest disadvantage of the wife and that it could not be enforced against her.<sup>12</sup> There was no actual undue influence alleged, simply that the wife did not appreciate what she was signing.

In Barclays' Bank PLC v Harris (considered separately at paragraphs 229–247 of **Etridge**), there was again:

**“...no allegation of any bullying... or of any pressure on her (the Wife)... that could be characterized as excessive. She (the Wife) signed, without knowing what she was signing, because she trusted him (the Husband).”**<sup>13</sup>

Again, there was no allegation of actual undue influence. The wife simply had trust in her husband (which as I stated before is a matter that can easily be inferred in this case), yet this was enough to at least raise the presumption of undue influence for the purposes of an application to strike out a pleading.

32. In any event, the opinions of the House of Lords in **Etridge** make it clear that undue influence can be inferred from all the facts.

Lord Hobhouse stated at paragraph 106:

**“But any conclusion will only be reached after having received evidence. This evidence will inevitably cover as well whether**

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<sup>10</sup> See the transcript of proceedings in the Court of Appeal at page 51.

<sup>11</sup> See paragraphs 194–228 of **Etridge**.

<sup>12</sup> See paragraphs 214 and 217 of **Etridge**.

<sup>13</sup> See paragraph 244 of **Etridge**.

there has in fact been an abuse of confidence or any other undue influence. The judge may have to draw inferences... but the evidence which she (the Wife) has adduced may suffice to raise an inference of wrongdoing which the opposite party may find itself having to adduce evidence to rebut.” (my emphasis)

Again at paragraph 107 he stated,

“Although the general burden of proof is, and remains, upon her (the Wife), she can discharge that burden of proof by establishing a sufficient prima facie case to justify a decision in her favour on the balance of probabilities, the court drawing appropriate inferences from the primary facts proved.” (my emphasis)

Lord Scott stated at paragraph 158 (quoted above but repeated here):

“The presumption arises where the combination of the relationship and the nature of the transaction justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party. Such a conclusion, reached on a balance of probabilities, is based upon inferences to be drawn from that combination.” (my emphasis)

Again at paragraph 315 Lord Scott highlighted the difference between proof of actual undue influence as against the presumption (inference) of undue influence. He stated,

“Once actual undue influence has been found at trial, the question whether, if the evidence had been confined to the relationship between the parties and the nature of the impugned transaction, undue influence would have been presumed and, if it would, whether it had been rebutted, becomes irrelevant.”

33. Perhaps the reason for counsel for the Bank’s inconsistent argument stemmed from a misunderstanding of the opinion of Lord Nicholls. At paragraph 14 Lord Nicholls stated:

**“Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant’s financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof.”**

At paragraph 21 he restated these two matters namely, (i) trust and confidence and (ii) a transaction which itself calls for some explanation, as prerequisites to shift the evidential burden to the bank.

The Bank argues that Lord Nicholls was stating that at the very least, there must have been some positive statement or proof from the Wife about prerequisite (i), namely, that she reposed trust and confidence in her husband in the management of her financial affairs. There being no such statement or proof from the Wife in this case, the evidential burden never shifted on to the Bank.

34. This argument is without merit. Even though Lord Nicholls states that proof of trust and confidence is needed, this does not rule out the fact that such proof could be by actual evidence or based on inferences from the primary facts.

In fact as I said earlier in this judgment,<sup>14</sup> Lord Scott stated that in every case where a husband and wife are living together, he would assume that a wife does have trust and confidence in her husband in relation to their financial affairs. Further, he would require proof that this was not the case. Therefore, the requirement of trust and confidence could easily be inferred from the facts of this case since the Husband and Wife were admittedly living together, and the trial judge found as a fact that it was the Husband who got the Wife to agree to the transaction with the Bank.<sup>15</sup>

35. Further, a full reading of Lord Nicholls’ opinion leads to the conclusion that such evidence of trust and confidence can be inferred. For at paragraph 13, before reciting the two prerequisites in paragraph 14, Lord Nicholls opined that while the general rule is that he who alleges a wrong must prove it, he was clear that such proof depends, inter alia, on all the circumstances of the case. A quote from paragraph 13 would be very useful here:

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<sup>14</sup> See paragraph 25 above.

<sup>15</sup> See paragraph 55 below.

**“The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.”**

Then at paragraph 14, Lord Nicholls opined that proof of the two prerequisites will normally be sufficient to discharge the burden of proof. He did not attempt to delimit how such proof is to be attained.

36. Again at paragraph 21 when he restates the two prerequisites, Lord Nicholls was dealing primarily with the concept of “*manifest disadvantage*”. This is relevant to the second prerequisite. Nevertheless, he does not attempt to delimit how proof of the prerequisites is to be advanced. In fact, in paragraph 22 he refers to the case in which some gifts are so large that they cannot be accounted for by any manner of relationship but require the donee to support the gift. In other words in the case of some large gifts there is no need for a beneficiary to prove trust and confidence. The same is presumed. The evidential burden of proof of undue influence can be satisfied without proof of actual impropriety/undue influence in some cases.

37. To summarise the position, Lord Nicholls did not rule out the fact that proof of trust and confidence may be inferred from all the circumstances. Further, Lords Hobhouse and Scott expressly refer to inferring proof of undue influence from all the circumstances. It is wrong to argue as the Bank did, that in husband and wife cases, undue influence must be established only by proof of some actual undue influence. It can be inferred/presumed from all the circumstances of a wife’s case.

38. The trial judge also seemed to require actual proof of undue influence in three different ways in order to advance the case of presumed undue influence.

39. Firstly, the trial judge decided that it was for the Wife to prove actual undue influence and/or to lead evidence that she placed trust and confidence in her husband in the management of her financial affairs. As I have stated before<sup>16</sup> the proof of undue influence and/or the necessary

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<sup>16</sup> See paragraphs 29–37 above.

trust and confidence in her husband could be inferred from all the primary facts. The trial judge did not attempt to infer these matters from the primary facts. This was an error of law.

At paragraph 42 of the judgment, the trial judge stated that,

**“...in order to succeed in the case of undue influence... the Wife would have to show... actual undue influence or, if there is evidence that she placed trust and confidence in the Husband in the management of her financial affairs and the transaction is not explainable as being consistent with the ordinary affairs of a husband and wife then there is a presumption of the exercise of undue influence by the Husband...”.**

Much the same is repeated at paragraph 43 of the judgment.

40. Secondly, at paragraph 38 of the judgment, the trial judge stated that,

**“...the Wife must prove that the Bank had constructive notice of improper behaviour amounting to a misrepresentation or exercise of undue influence over her by the Husband...”**

This statement is unclear. The concept of improper behaviour amounting to a misrepresentation is a form of undue influence. Therefore it is difficult to understand exactly what the trial judge intended by requiring proof of improper behaviour amounting to a misrepresentation or the exercise of undue influence over the Wife by the Husband.

The statement is also unhelpful in ascertaining what case the trial judge felt that the Wife was prosecuting. From the addresses, it was clear that the Wife’s case was based on the presumed undue influence by the Husband. There was no suggested case of improper behaviour amounting to a misrepresentation by the Husband.

In any event, in so far as the statement suggests that in order to advance a case of presumed undue influence a spouse must lead evidence of some actual undue influence, it is incorrect. Undue influence can be inferred from the primary facts.

41. Thirdly, at paragraph 44 of the judgment the trial judge (in concluding) stated that in order to rely on the principle in **Etridge** (inter alia) it was:

**“...incumbent on the person alleging improper influence to provide evidence upon which the Court can come to the conclusion that there was some improper behaviour”.**

Again, this conclusion is unhelpful and unclear. It introduces the vague concepts of “improper influence” and “improper behaviour” which were not part of the Wife’s case.

The Wife’s case was based from the outset on an allegation of presumed undue influence by the Husband. There was no allegation of “improper influence” or “improper behaviour”. It begs the question, did the trial judge properly consider the case of presumed undue influence rather than the case of improper influence and/or improper behaviour (actual undue influence).

In any event, in so far as the statement suggests that in order to advance a case of presumed undue influence a spouse must lead evidence of some actual undue influence, it is incorrect. Undue influence can be inferred from the primary facts of a case.

42. The trial judge’s failure to consider a case of presumed undue influence based upon inferences from the primary facts was an error of law.

43. The issue which now arises is whether this failure can be corrected on appeal or whether this matter is to be sent back to a trial judge for the proper determination of the case of undue influence?

44. This would depend on whether there were sufficient primary facts before the trial judge from which the inference of undue influence could have been raised.

45. I find that there were sufficient primary facts before the trial judge upon which a prima facie case of presumed undue influence had been raised. This shifted the evidential burden of proof on to the Bank to negative the case of undue influence. As I have stated before, counsel for the Bank has conceded that the Bank did not take the necessary steps to bring home to the Wife the risks involved in the transaction.<sup>17</sup> The Bank made no attempt to disprove any case of undue influence. The Bank, therefore, is fixed with notice of the presumed undue influence by the Husband over the Wife and this transaction is set aside as against the Wife.

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<sup>17</sup> See footnote 6 above.



46. The primary facts that I just referred to are the facts that were conceded by the Bank or those which the trial judge found to be the facts. I will set out eight of these primary facts. Two of these primary facts are sufficient in this case to shift the evidential burden of proof of undue influence according to Lord Nicholls' prerequisites. I will discuss these two primary facts first. I will then set out the six other primary facts which fortify the shifting of this evidential burden if one prefers Lord Scott's view that more is needed.

*The primary facts which raise a case of presumed undue influence*

47. Firstly, it is undisputed that the Husband and the Wife were living together as such in the matrimonial home at the time of the transaction.

48. As I stated before,<sup>18</sup> when a husband and wife are living together there is an assumption or presumption that a wife does have the required trust and confidence in her husband in relation to their financial affairs. Since it is undisputed that the Husband and the Wife were living together in the matrimonial home at the time of the transaction with the Bank, there is enough to satisfy the first prerequisite of Lord Nicholls to shift the burden of proof of undue influence, namely that the **“complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs”**.<sup>19</sup>

49. Secondly, this mortgage and loan transaction was to the advantage of the Husband and the Bank and to the manifest disadvantage of the Wife. This transaction was arranged for the benefit of both the Husband and the Bank. In the case of the Husband, it was to compromise his indebtedness to the Bank. In the case of the Bank, the transaction was an attempt to recoup the deficit which occurred upon the dishonouring of the two U.S. cheques and to provide security for the repayment of the deficit.

Whereas before this transaction the matrimonial home was mortgaged with a balance of roughly \$225,000.00 and a monthly repayment of about \$1,950.00; after the transaction the mortgage security was roughly \$415,000.00 with a monthly repayment of \$4,000.00.

Even though the transaction also provided for the redemption of the prior mortgage, the Wife gained no benefit from this. In fact, she was now saddled with a greater mortgage debt. The

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<sup>18</sup> See paragraphs 34 and 25 above.

<sup>19</sup> See paragraph 14 of **Etridge**.

matrimonial home was now the security for a debt of almost double the amount and at a repayment figure of twice the old one.

50. A point to note is that in paragraphs 7 and 33 of the judgment, the trial judge wrongly stated that the Appellants had conceded that there was no challenge to the part of the mortgage with the Bank which was used to pay off the prior mortgage. This was not the case. The transcript of proceedings before the trial judge shows that counsel for the Appellants was asking for the Appellants to be put in the position that they were in prior to the new loan and mortgage.<sup>20</sup> Counsel's suggestion of how to achieve this was somewhat vague. However, he did not concede that the new mortgage was valid in part. In fact this is the first finding that is appealed in the Notice of Appeal.

The trial judge should have considered the challenge to the loan and mortgage transaction with the Bank as a whole instead of separating out the repayment of the prior mortgage.

51. In any event, the trial judge did find that the loan transaction for the repayment of the Husband's debt to the Bank as a result of the dishonoured cheques was not to the Wife's benefit.<sup>21</sup> In my respectful view this is an understatement. This transaction was to her manifest disadvantage.

52. This transaction which was to the manifest disadvantage of the Wife was one "**which calls for explanation**"<sup>22</sup> (according to Lord Nicholls' second prerequisite). In some surety wife cases, a finding of manifest disadvantage is one of the most sure evidential pointers to an inference of undue influence. In the words of Lord Hobhouse:

**"It will be appreciated that the relevance of the concept of "manifest disadvantage" is evidential. It is relevant to the question whether there is any issue of abuse which can properly**

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<sup>20</sup> See page 529 of the Record of Appeal (page 17 of the transcribed hearing before the trial judge on 10<sup>th</sup> November, 2008); pages 675 and 677 of the Record of Appeal (pages 25 and 26 of the same transcript) from line 38 of page 25 to line 9 of page 26); and page 679 of the Record of Appeal (page 27 of the same transcript) at lines 4–44, especially lines 41–44.

<sup>21</sup> See paragraph 33 of the judgment of the trial judge.

<sup>22</sup> See paragraph 14 of **Etridge**.

**be raised. It is relevant to the determination whether in fact abuse did or did not occur.”<sup>23</sup>**

53. The fact of the manifest disadvantage of this transaction satisfies the second prerequisite of Lord Nicholls to raise the presumption of undue influence.

54. Having found that the primary facts established the 2 prerequisites of Lord Nicholls, namely (i) trust and confidence in the other party’s management of the complainant’s financial affairs and (ii) a transaction which calls for explanation, the Wife’s case of presumed undue influence had been properly raised. The evidential burden of proof had shifted to the Bank.

I will now consider six other primary facts to meet Lord Scott’s statement that more may be needed to shift the evidential burden of proof of undue influence.

55. The third primary fact is that the trial judge found as a fact that the Husband got the Wife to agree to the transaction.<sup>24</sup> The Wife did not come forward on her own accord with this transaction. This fact raises 2 relevant inferences. Firstly, that it was the Husband who may have used his position of “influence” over the Wife to persuade her to complete the transaction. Secondly, it also suggests that there was a real risk that the Husband may have abused his position of trust and confidence in getting the Wife to agree to the transaction.

56. The fourth relevant primary fact is that the trial judge found as a fact that the Wife never read the mortgage deed.<sup>25</sup> This again suggests that the Wife did not fully understand the nature of the transaction she was entering and opens up the inference that she went along with the transaction either (a) out of the trust and confidence she reposed in her Husband’s handling of their financial affairs or (b) she went along with the transaction out of the undue influence brought to bear upon her by her Husband.

57. I will deal with the next four primary facts together. Fifthly, the trial judge found as a fact that it was the Bank that proposed the transaction.<sup>26</sup> Sixthly, the Bank conceded that it wanted the transaction to correct the problem with the dishonoured cheques. Seventhly, the Bank conceded that it knew that the property was the matrimonial home of the Appellants. Eighthly,

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<sup>23</sup> See paragraph 104 of **Etridge**.

<sup>24</sup> See paragraphs 32 and 33 of the judgment of the trial judge.

<sup>25</sup> See paragraph 32 of the judgment of the trial judge.

<sup>26</sup> See paragraph 32 of the judgment of the trial judge.

the Bank conceded that it made the arrangements for the execution of the mortgage with their attorneys.<sup>27</sup>

58. From these facts, it is clear that the Bank instigated, facilitated and enabled a transaction which it knew was to the manifest disadvantage of the Wife. This put the Bank on enquiry of the risk of undue influence yet they took no steps to offset that risk. This also suggests that this was not a case where a wife was coming willingly to her husband's rescue. She was being led by the Husband and the Bank.

There is no overriding policy objection that this was a case where a third party creditor (the Bank) innocently or unwittingly got caught up in the middle of a husband and wife issue and hence would merit the protection of the Court. The Bank was party to the Wife standing security for the Husband's debts knowing that the same was to her manifest disadvantage and to its advantage. There is every reason to support the policy of the law in protecting a wife from undue influence being brought to bear upon her in relation to financial transactions concerning the matrimonial home. In this case, the presumption of undue influence is not one which would be negated by any overriding policy considerations.

59. There were enough primary facts before the trial judge to raise an evidential presumption of undue influence by the Husband in relation to this transaction. The Bank failed to discharge the evidential burden that then shifted onto it, and according to the principles in **Etridge**, they are affected by this undue influence. That being the case, the transaction is set aside as against the Wife.

## **CONCLUSIONS**

60. The appeal is allowed. I set aside the loan and mortgage between the Bank and the Wife. I also dismiss the Bank's counterclaim against the Wife.

**G. Smith**  
**Justice of Appeal**

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<sup>27</sup> See paragraph 31 of the judgment of the trial judge.

**Delivered by P. Jamadar, J.A.**

61. I have read the opinion of Smith J.A. and I agree with his careful and comprehensive analysis and conclusions. However, I wish to add the following comments.

62. In the circumstances of this case (and presuming bona fides), the Respondent/Bank had nothing to lose and everything to gain by taking reasonable steps to ensure that the Second Appellant/Wife knew what were the risks involved in securing the loan of \$415,000.00 by mortgaging the matrimonial home.<sup>28</sup>

63. Indeed, fundamental fairness necessitated that the Bank take all reasonable steps to ensure that the Wife knew and understood what those risks were. As Smith J.A. has aptly explained,<sup>29</sup> this re-mortgage of the matrimonial home was directly as a result of the dishonouring by the Bank of two fraudulent US dollar cheques tendered by the First Appellant/Husband (and initially cleared by the Bank); which resulted in a debt which was beyond the Husband's then existing security; and which obviously was arranged for the mutual financial advantage of both the Husband and the Bank; and which, on the evidence, bestowed no increased advantage to the Wife, but rather created a distinct financial disadvantage for her.

64. It needs to be stated that in the context of Trinidad and Tobago, there remain many spouses (particularly wives) who vest a somewhat naive trust and confidence in their partner's (particularly husbands) management and control of the family's and their own financial affairs, supporting without critical reflection or analysis proposed transactions and decisions. This is a circumstance that is well known and of which judicial notice can be taken. Indeed, there are many cases that have come before the courts that reveal this to be true. The facts of this case provide a good example of this reality as it presents in Trinidad and Tobago. As Smith J.A. has pointed out, the Husband got the Wife to agree to the transaction and the Wife in fact never even read the mortgage deed.<sup>30</sup> In circumstances such as occurred in this case, the Bank had a duty to ensure that the Wife knew both what was the nature of the transaction she was entering into and

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<sup>28</sup> See paragraph 7 of the judgment of Smith J.A.

<sup>29</sup> See paragraphs 6, 7 and 49 of the judgment of Smith J.A.

<sup>30</sup> See paragraphs 11, 55 and 56 of the judgment of Smith J.A.

the attendant risks. In Trinidad and Tobago public policy demands this kind of vigilance and care from lending institutions such as the Bank.

65. If the law were to weight in favour of upholding transactions in circumstances as occurred in this case, the consequences could be deleterious on naive and trusting spouses. The loss of matrimonial premises is not just the loss of an economic asset, but a trauma to family—the loss of a home in its fullest sense. However, if the law were to weight in favour of demanding greater responsibilities from lending institutions in circumstances such as these, then the likelihood of the above occurring is at least reduced, and at best any risk taken is entered into with greater awareness of possible consequences. Where there are imbalances of power, increased by the need or desperation of one party, then the value of justice demands that the law intervene to balance the scales in favour of the disadvantaged, and to do so in ways that cause no disproportionate hardship to the other party. In this way the courts seek to ensure there is no (or little) gap between law and justice.

66. The common law of Trinidad and Tobago, if it is to develop in ways that are responsive and relevant to the evolving needs of society, must demand that lending institutions take special care when dealing with spouses, in particular where what is involved is the matrimonial home, to ensure that both are fully informed of all the implications and the risks that are involved in the taking out of mortgages, loans and lines of credit. Wherever and whenever possible, best practice should include, in addition to all that exists, the unequivocal directive that independent advice be sought. In circumstances such as this, lending agencies should go beyond merely securing the signatures of borrowers on standard form documents, and should take the time to explain and ensure that both spouses have a clear understanding of both the benefits and risks involved in these kinds of financial transactions before they commit themselves and their property. Though this may be viewed in some quarters as somewhat onerous, it is I believe necessary at this time in Trinidad and Tobago. And it is the responsibility of the judges and the law to respond accordingly, in discharge of the obligation of judicial governance vested in those who have responsibility for the administration of justice. In my opinion this is how the balancing of the policy questions posed by Smith J.A. in paragraph 1 of his judgment ought to be resolved. In this

way the law evolves to achieve justice, and in so doing protects and secures the interests of the more vulnerable. It must not be forgotten that the ultimate aim of law is the welfare of society.

67. Finally, it is important to state that our adoption and application of the principles and values articulated by the majority of the House of Lords in **Etridge**, are less because of any genuflection to status or even to the policy of stare decisis; but more because these are principles and values that we as the indigenous court think are relevant and appropriate to local conditions in this sphere of the law as it develops in Trinidad and Tobago. We are however indebted to the scholarship and insights of their Lordships, which have opened this path for us to follow. It is therefore with deep appreciation and acknowledgement that we have adopted their insights and reasoning. In any event, the value of **Etridge** as precedent is extant.

**P. Jamadar**  
**Justice of Appeal**