THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. T.043 of 2015

Claim No. CV.2011-02339

Between

NATURE RESORTS LIMITED

Appellant/Claimant

And

FIRST CITIZENS BANK LIMITED

SIMON PALER

CHRISTOPHER BRIAN JAMES

Respondents/Defendants

PANEL: A. Mendonça J.A.

M. Mohammed J.A.

A. des Vignes J.A.

Date of Delivery: May 27, 2019

APPEARANCES:

Mr. A. Singh instructed by Ms. N. Ramyad for the Appellant

Mr. F. Gilkes instructed by Ms. L. Boyack for the First Respondent

REASONS

Delivered by Mendonça J.A.

1. On May 17, 2019 we dismissed this appeal and indicated then that we will give our reasons for so doing at a later date. This we now do.

2. The issue in this appeal is whether a mortgage granted by the Appellant, Nature Resorts Limited, over lands in Tobago in favour of the Respondent, First Citizens Bank Limited, was procured by the exercise of undue influence by the Respondent on the Appellant.

3. The Appellant is a limited liability company which was incorporated in or around 2000 to build and manage a five-star eco-resort and villas in Tobago. The Respondent is a commercial bank.

4. In February 2001 the Appellant acquired the Culloden Estate which comprised approximately 148 acres of land in Tobago at and for the price of USD 2,200,000.00. The funds for the acquisition of the Culloden Estate were provided by three "silent" investors from Germany and Mr. Patrick Dankou, who is also a German national but had lived in Tobago for a number of years. Mr. Dankou provided approximately 20% of the money required to purchase the Culloden Estate. He was at all material times a director of the Appellant and the person through whom the Appellant carried out all its affairs. Mr. Dankou was also at all material times prior to March 28, 2008 the sole shareholder of the Appellant holding all 200 shares of issued share capital of the Appellant.

5. In July 2003 the Appellant obtained outlined approvals to build the intended hotel resort and villas on Culloden Estate. Delloite and Touche with the benefit of these approvals (but with environmental approvals) valued Culloden Estate in the range of USD 6,000,000.00 to USD 6,500,000.00.

6. The investors in the Appellant discussed options to finance the project. According to Mr. Dankou, favoured among the options were joint venture arrangements with a financial institution or with the Tourism Development Company of Trinidad and Tobago. The evidence is silent whether these options were pursued but nothing materialised in relation to them. Eventually, as the Trial Judge put it, the investors became "restive" and attempts were made to sell the Culloden Estate.

7. In October 2005 the Appellant agreed to sell Culloden Estate to a St. Lucian company, North Bay Limited. In the Heads of Terms agreed between the Appellant and North Bay Limited, it was stated that two of the silent investors wished to sell their shares for USD 2,200,000.00. Mr. Dankou and another of the silent investors agreed to remain shareholders with shares to the value of USD 1,100,000.00 in a special purpose company to be incorporated to build the resort and villas. However, that agreement fell through and was not completed.

8. On May 14, 2007 the Appellant entered into another agreement with a local company, Sychar Holdings Limited, to sell Culloden Estate for the price of USD 8,000,000.00. That agreement also fell through.

9. Around that time the Appellant, in order to develop Culloden Estate, needed financing to the tune of USD 60,000,000.00. But the silent investors wanted to sell the estate as they needed cash. Mr. Dankou, however, did not want to sell the estate but wanted to see the development through.

10. In or around 2007 Mr. Dankou held discussions with Mr. Simon Paler and Mr. Christopher James. On September 10, 2007 they made a non-binding agreement to the effect that Messrs Paler and James would purchase 75% (150) of the shares held by Mr. Dankou in the Appellant for the sum of USD 2,750,000.00. The parties subsequently signed a formal share purchase agreement on January 8, 2008. That agreement provided that a deposit of

USD 275,000.00 was payable to Mr. Dankou on the signing of the agreement and the balance of USD 2,475,000.00 was to be paid on or before March 14, 2008. According to Mr. Dankou, he agreed to that price as the money would allow him to "pay off the private investors and also for [him]" to have money in hand.

11. Messrs Paler and James subsequently applied to the Respondent for financing to facilitate their acquisition of the shares. They applied for a loan of USD 2,340,000.00. The Respondent however agreed to lend them the sum of USD 1,925,000.00 on the security of an assignment of the 150 shares to be acquired by Messrs Paler and James as well as a first demand mortgage over Culloden Estate. Messrs Paler and James agreed to these conditions.

12. The Respondent instructed the Tobago office of Lex Caribbean, a firm of attorneys-at-law (and one of the firms of attorneys-at-law on the Respondent's panel of attorneys who did their legal work) to prepare the deed of mortgage and the assignment of the shares to be acquired by Messrs Paler and James.

13. At that time Mr. Richard Wheeler, who was an attorney-at-law of some 35 years experience, was a partner of Lex Caribbean with responsibility on behalf of the firm for the management of the affairs of its Tobago office.

14. Mr. Wheeler had acted for Mr. Dankou in the incorporation of the Appellant and after its incorporation he was made a director of the Appellant. According to Mr. Wheeler this was for the specific purpose of maintaining the Appellant as a local company for the purposes of the Foreign Investment Act Chapter 70:07. After the incorporation of the Appellant, Mr. Wheeler had done legal work for the Appellant on instructions of Mr. Dankou and for Mr. Dankou.

15. Acting on the Respondent's instructions, Mr. Wheeler prepared the security documents which consisted of a first demand mortgage over Culloden Estate

and an assignment of the shares in the Appellant to be acquired by Messrs Paler and James.

16. Mr. Wheeler also received instructions from Messrs Dankou, Paler and James to prepare a shareholders agreement between Mr. Dankou and Messrs Paler and James and the Appellant and two share transfers for the purpose of transferring the 150 shares which Messrs Paler and James intended to purchase from Mr. Dankou. The shares were to be transferred equally to Messrs Paler and James so that each would hold 75 shares in the Appellant.

17. Mr. Wheeler prepared a promissory note by which Messrs Paler and James promised to pay to Mr. Dankou the sum of USD 975,000.00, being the balance that would be payable to Messrs Paler and James in respect of the purchase price of the shares. This arose, it appears, because the Respondent did not agree to lend to Messrs Paler and James all of the money they had asked the Respondent to lend them, and further Messrs Dankou, Paler and James had agreed that only a portion of the loan proceeds (amounting to USD 1,500,000.00) would be applied to the purchase price of the shares.

18. Arrangements were made for Messrs Dankou, Paler and James to attend the offices of Lex Caribbean on March 28, 2008 to execute and sign the documents. Mr. Dankou was also informed that the secretary of the Appellant, Ms. Tanya Mohammed was also required to be present and that the seal of the Appellant was also needed.

19. All parties attended on Mr. Wheeler at his offices on March 28, 2008. Mr. Dankou and Ms. Mohammed executed the deed of mortgage on behalf of the Appellant. The deed of mortgage was also executed by Messrs Paler and James, who were also parties to the deed of mortgage. The other documents prepared by Mr. Wheeler were also signed by the parties.

20. After the execution of the deed of mortgage, Mr. Dankou gave instructions to Mr. Wheeler in relation to the disbursement of the USD 1,500,000.00 which was paid by Messrs Paler and James towards the acquisition of the shares.

21. Messrs Paler and James defaulted in the payment of the loan to the Respondent. According to the Trial Judge, "not one cent was recovered either from Paler or James". Accordingly, the Respondent decided to exercise its power of sale under the mortgage and advertised Culloden Estate for sale. On July 8, 2011 the Respondent entered into an agreement with the highest bidder, "the Tobago House of Assembly", for the sale of the property at and for the price of TTD 19,000,000.00. The sale has not been completed in view of these proceedings.

22. The Appellant commenced these proceedings against the Respondent alone. Messrs Paler and James were joined as parties at the insistence of the Trial Judge. But they paid no regard to the action and took no part in it. They have also taken no part in this appeal.

23. By these proceedings the Appellant sought a declaration that the deed of mortgage is void and unenforceable and an order directing the Registrar General to cancel the deed of mortgage.

24. At the trial the Appellant advanced two grounds in support of the relief sought namely, (1) that the Respondent through Mr. Wheeler misrepresented the nature of the deed of mortgage which was executed by the Appellant, and (2) that the execution of the deed of mortgage by the Appellant was procured by the exercise of undue influence on Mr. Dankou by Mr. Wheeler.

25. The evidence on behalf of the Appellant surrounding the execution of the deed of mortgage came from Mr. Dankou and the Appellant's secretary, Ms. Mohammed. Mr. Dankou's evidence in chief was essentially that he was never told nor was it ever stated or intimated by anyone, even up to the time

the Respondent advertised Culloden Estate for sale, that a deed of mortgage over the lands existed. According to him he was asked by Mr. Wheeler to come to his office on March 28, 2008 to sign documents necessary for the transfer of the shares to Messrs Paler and James. He was only told that the Respondent required a pledge of the shares and he knew nothing of the mortgage of Culloden Estate. At the meeting on March 28, 2008 Mr. Dankou stated that he was given several documents and simply told where to sign them. He signed the documents without reading them. He was not told of the mortgage and did not realise that he was asked to execute a deed of mortgage on behalf of the Appellant. It was reiterated at that meeting that the share transfers had to be signed by the secretary of the Appellant and him. He was not given an opportunity to make enquiries or to ascertain the nature of the documents.

26. Mr. Dankou's evidence in chief was supported by the evidence in chief by Ms. Mohammed who stated, *inter alia*, that Mr. Wheeler did not explain to either Mr. Dankou or her what the terms of the documents were and did not explain what the document on which she had to affix the Appellant's seal was for or what was its purpose. She did not realise that the document was a deed of mortgage. She stated that Mr. Wheeler did not advise either her or Mr. Dankou before executing the deed of mortgage that they should read it or obtain legal advice.

27. The Respondent disputed this evidence. Both Mr. Wheeler and his legal secretary, Ms. Cassandra Joseph Farrell, gave evidence. According to the evidence in chief of Ms. Farrell, Messrs James, Paler and Dankou along with Ms. Mohammed came to the offices of Lex Caribbean on March 28, 2008. She met them and gave them documents to read before escorting them to Mr. Wheeler's office to execute and sign the documents. She recalls that one of the documents was a deed of mortgage.

28. Ms. Farrell outlined the practice when a client of the firm visited its offices to execute any legal document. Her practice she stated was as follows:

> "a. I would normally present the relevant documents to the clients in the reception area where they are advised to read the documents they have to execute. They are then escorted into the office of Mr. Richard Wheeler.
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> b. After the client reads the document, Mr. Wheeler would then ask the client whether he or she understood the document they had read, whether they were in agreement with its contents and if they understood the legal consequences of the document.
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> c. Mr. Wheeler would then ask whether there were any further questions concerning the documents.
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> d. Upon being satisfied that the relevant parties understood what they were signing, the parties would then be directed to sign.
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> e. My presence is required throughout the entire process."

She stated that practice was followed on March 28, 2008 when Messrs Dankou, Paler and James and Ms. Mohammed came to execute the deed of mortgage and sign the other documents.

29. Ms. Farrell further said that she recalled Mr. Dankou asking a question concerning the schedule to the deed of mortgage. She also said that Mr. Dankou specifically asked whether his shares in the Appellant were to be subject to the deed of mortgage to which Mr. Wheeler replied that the "land alone was to be mortgaged and not his shares". The parties then executed the deed of mortgage and signed the other documents.

30. Mr. Wheeler in his evidence in chief stated that he met with Messrs Dankou, Paler and James and Ms. Mohammed on March 28, 2008 at his offices in Tobago. He explained the documents to them including the deed of mortgage before they were executed. He denied simply instructing Mr. Dankou to execute the deed of mortgage.

31. Mr. Wheeler stated that after presenting and explaining the various documents, he fielded a number of questions from the parties. He recalled Mr. Dankou specifically enquiring whether his 25% shareholding in the Appellant would be affected and he explained that his shareholding was not being mortgaged to the bank. Mr. Wheeler also explained to Mr. Dankou that he and Ms. Mohammed would have to execute the deed of mortgage on behalf of the Appellant.

32. Mr. Wheeler also stated that after Mr. Dankou read through the deed of mortgage, he asked him whether he understood the document and he stated that he did.

33. The Trial Judge dealt first with the issue of misrepresentation. She observed that for there to be a misrepresentation there must be a representation that is untrue. The representation may be by word or conduct. The Trial Judge then assessed the evidence and found Mr. Dankou an unreliable witness and disbelieved his evidence on the issue of misrepresentation. The Trial Judge also found the evidence of Ms. Mohammed to be unreliable as it "was led to corroborate" the evidence of Mr. Dankou and since she did not believe his testimony, she found that Ms. Mohammed's evidence was "of little assistance in changing [her] course of direction". She accordingly held that the Appellant had not proven that any misrepresentation had taken place.

34. With respect to undue influence the Trial Judge stated that undue influence "assumes two categories actual and presumed". She treated first with actual undue influence and noted that there was no "direct plea" that Mr. Wheeler

or the Respondent exerted any actual undue influence on Mr. Dankou or Ms. Mohammed to execute the deed of mortgage. She also noted that there was no evidence to support such a claim and that counsel for the Appellant made no submissions on the point. The Trial Judge in the circumstances assumed that the issue of actual undue influence was not relied on by the Appellant and was abandoned altogether.

35. The Trial Judge then turned her attention to presumed undue influence which she said formed the largest part of the Appellant's submissions. She set out the law as she understood it and what she considered to be the relevant evidence and concluded that the Appellant had failed to establish that there was undue influence.

36. Before this Court the Appellant did not seek to challenge the Trial Judge's conclusions on misrepresentation or actual undue influence and rested its case solely on presumed undue influence. The Appellant contended that the Trial Judge was wrong to find that the Appellant had not established that the deed of mortgage was procured by the exercise of undue influence.

37. The Appellant's case on undue influence, as alluded to earlier, was that Mr. Wheeler, as attorney-at-law and agent of the Respondent, procured the execution of the deed of mortgage by the exercise of undue influence on Mr. Dankou and by extension the Appellant.

38. Counsel for the Respondent refuted the proposition that if the execution of the deed of mortgage was procured by the exercise of undue influence by Mr Wheeler on Mr. Dankou, that the Respondent without more would be fixed with liability. He argued that the Appellant also needed to prove that the Respondent was aware of the existence of a relationship between the parties that gave rise to the presumption of influence. For the Respondent therefore to be liable for the acts of its attorney-at-law, it was submitted, the evidence

must establish that the Respondent was aware that there existed between Mr. Wheeler and Mr. Dankou a relationship of influence.

39. In support of this submission counsel for the Respondent relied on **Barclays Bank plc v O'Brien [1994] 1 AC 180** and **Royal Bank of Scotland Plc v. Etridge (No. 2) [2002] 2 AC 773** particularly paragraphs 82 to 89 of **Etridge**. We, however, do not agree with the submission.

40. Neither **O'Brien** nor **Etridge** was concerned with the case where the security is procured by exercise of the undue influence of the creditor's agent, such as his attorney-at-law, over the provider of the security. They were concerned with the position where the creditor has obtained security from a person who is in a relationship of influence with the debtor in a non-commercial setting, the circumstances in which the creditor would be open to claims of undue influence exercised by the debtor over the provider of the security and what the creditor may do to protect himself. Essentially they decided that where the creditor has notice of or is put on enquiry of circumstances that render the presence of undue influence possible and the creditor has not taken reasonable steps to satisfy himself that the provider of the security understood the nature and effect of the transaction that he or she was entering into, the creditor may lose the benefit of the security. That is a very different case to the facts of this case where the allegation is that the Respondent's agent (i.e the creditor's agent) procured the security by the exercise of undue influence over the Appellant as the provider of the security. In those circumstances, in our view, the Appellant can rely on the wrongful acts of the Respondent's agent to fix the Respondent with liability for undue influence. We will therefore proceed on the basis that the Appellant can succeed on its claim for undue influence against the Respondent if it establishes that its agent, Mr. Wheeler, procured the execution of the deed of mortgage by the exercise of undue influence.

41. Counsel for the Appellant sought to challenge the Trial Judge's acceptance of Mr. Wheeler's evidence in preference to Mr. Dankou and asked this court to find, as Mr. Dankou had testified, that Mr. Wheeler did not explain the deed of mortgage to him, that he was not told of the deed of mortgage and that he was unaware that he executed a deed of mortgage on behalf of the Appellant, and that Mr. Wheeler simply and without more pointed to where on the deed of mortgage Mr. Dankou and Ms. Mohammed were to sign. In the end, however, counsel abandoned that effort and accepted that he could not demonstrate that the Trial Judge was plainly wrong to prefer Mr. Wheeler's evidence. In those circumstances the following facts which are relevant to this appeal are not in dispute:

    a. Mr. Wheeler on March 28, 2008 presented Mr. Dankou and Ms. Mohammed with the deed of mortgage. Mr. Dankou read the deed and indicated that he understood it and asked questions in relation to the mortgage. Mr. Dankou was therefore fully aware that what he had executed was a deed of mortgage over Culloden Estate in favour of the Respondent; and

    b. Mr. Wheeler explained the mortgage to Mr. Dankou and that the mortgaged property (i.e. Culloden Estate) could be sold by the Respondent if the borrowers defaulted in the payment of the loan.

    It is accepted however that the evidence does not go so far as to enable a finding that Mr. Wheeler explained to Mr. Dankou the effect that the sale of Culloden Estate would have on the value of the remaining shares held by Mr. Dankou in the Appellant.

42. There was no dispute as to the applicable law. Undue Influence is one of the grounds developed by courts of equity as a court of conscience. The objective is to ensure that the influence one person has over another is not abused and it "arises whenever one party has acted unconscionably by

exploiting the influence to direct the conduct of another which he has obtained from the relationship between them" (See **National Commercial Bank (Jamaica) Ltd. v Hew &Ors [2003] UKPC 51**, at para 29).

43. Unlike actual undue influence where the claimant has to establish that his free will was impaired by overt acts of pressure or persuasion, where a claimant relies on presumed undue influence he is relying on circumstances where the law presumes undue influence. In other words, he is relying on a presumption of undue influence.

44. To raise this presumption what has to be established is that there was a pre-existing relationship between the parties in which the alleged wrongdoer has acquired influence or ascendency over the other and that the transaction is one which calls for an explanation. The burden to establish these two matters is on the claimant or in other words the person alleging undue influence.

45. Where these two matters are established, the burden shifts to the defendant to provide a satisfactory explanation from which the court may conclude that the transaction was not procured by undue influence. It was put this way in **Etridge (supra)**at para 14:

> "14. 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. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the

> evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

46. Where the defendant fails to provide a satisfactory explanation, the claimant would then have succeeded in his claim in undue influence.

47. In relation to the first of the matters that must be established i.e the pre-existing relationship of influence, the Appellant's case is that there existed a relationship between Mr. Dankou and Mr. Wheeler in which Mr. Wheeler acquired influence or ascendency over him.

48. Mr. Dankou had led evidence that he and Mr. Wheeler were close personal friends who socialised together regularly. Mr. Wheeler denied this and the Trial Judge preferred that evidence as it was open to her to do. There are, however, some relationships, which because of their very nature, the law presumes irrebuttably a relationship of influence. One such relationship is that of attorney and client. In such a relationship there is an irrebuttable presumption that the attorney has acquired influence over his client.

49. In this case it is clear on the evidence that the Appellant and Mr. Dankou were clients of Lex Caribbean and Mr. Wheeler, who was a partner of Lex Caribbean, had conduct of those matters on behalf of the firm. This has really not been disputed by anyone in these proceedings.

50. In those circumstances the Appellant has established the first fact that it must prove to raise the presumption of undue influence.

51. The next consideration is whether the transaction in this matter is one that called for an explanation. Of course this raises the question when is a transaction one that calls for an explanation. In **Etridge (supra)**, Lord Nicholls said that the person alleging undue influence must prove that the transaction "is not readily explicable by the relationship of the parties" (see para 21). This suggests that a transaction that calls for an explanation is one that is not

readily explicable by the relationship of the parties. Lord Nicholls then went on at paragraphs 20 to 25 to cite with approval the cases of **Allcard v. Skinner 36 Ch D 145** and **National Westminster Bank Plc v. Morgan [1985] AC 686**. He stated:

> "22. Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner* 36 Ch D 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185 "But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift." In *Bank of Montreal v Stuart*[1911] AC 120, 137 Lord Macnaghten used the phrase "immoderate and irrational" to describe this concept.
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> 23. The need for this second prerequisite has recently been questioned: see Nourse LJ in *Barclays Bank plc v Coleman* [2001] QB, 20, 30-32, one of the cases under appeal before your Lordships' House. Mr Sher invited your Lordships to depart from the decision of the House on this point in *National Westminster Bank plc v Morgan*[1985] AC 686.
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> 24. My Lords, this is not an invitation I would accept. The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would

> be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest thatsomething may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.
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> 25. This was the approach adopted by Lord Scarman in *National Westminster Bank plc v Morgan*[1985] AC 686, 703-707. He cited Lindley LJ's observations in *Allcard v Skinner* 36 Ch D 145, 185, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence. Lord Scarman concluded, at p 704:
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> > "the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

52. In view of the above, in determining whether a transaction is one that calls for an explanation, the advantage gained by the alleged wrongdoer and the disadvantage suffered by the person allegedly unduly influenced are relevant

considerations. As was said in **Duress, Undue Influence and Unconscionable Dealing, Nelson Enonchong (2nd edition, 2012)** at para 11-009 "in many cases [whether a transaction is one that calls for an explanation] may depend on the disadvantages falling on the influenced party and the advantages gained by the other party to the transaction". It seems to me therefore that if the advantage gained by the influencer and the disadvantage falling on the influenced party are sufficiently serious and are not readily explicable by the relationship of the parties, the transaction is one that calls for an explanation.

53. In this case, the deed of mortgage was executed by the Appellant to secure the loan granted by the Respondent to Messrs Paler and James. The loan was to enable Messrs Paler and James to purchase 75% of the shareholding of Mr. Dankou in the Appellant. On the face of it, the Appellant derived no benefit from the mortgage and was exposed to the risk that its only asset could be sold by the Respondent if Messrs Paler and James failed to repay the loan to the Respondent. The Appellant on the face of the transaction received no benefit from it. On the other side of the coin, the Respondent by the mortgage to it obtained adequate security in respect of the loan it intended to make and enabled the loan to be made. The benefit to the Respondent and disadvantages falling on the Appellant on the face of the transaction do not appear to me to be readily explicable by the relationship of the parties. In the circumstances, in our judgement the transaction is one that calls for an explanation.

54. As the Appellant has established that there existed a relationship of influence between Mr. Dankou and Mr. Wheeler and that the transaction is one that called for an explanation, this gives rise to a rebuttable presumption that the influence of Mr. Wheeler had been undue. The stage is now set for the Court to infer that in the absence of a satisfactory explanation, the transaction can

only have been procured by undue influence. The burden is on the Respondent to provide an explanation to counter the inference.

55. In order to rebut the presumption it must be established that Mr. Dankou and by extension the Appellant, entered into the transaction only after free and informed thought about it or in other words that Mr. Dankou entered into the transaction as a result of the exercise of his own free will.

56. It is not unusual for the person seeking to rebut the presumption to pray in aid that the person who claimed to have been unduly influenced had received independent legal advice. It is fair to say in this case that Mr. Dankou did not receive such advice. That, however, is not the only way that the presumption of undue influence may be rebutted. In **Duress, Undue Influence and Unconscionable Dealing, Nelson Enonchong (2nd edition, 2012)** at paragraph 12-013 it was noted that a wide range of circumstances may show that the claimant entered into the transaction on his own free will which includes the education of the claimant, his general sophistication, his business experience or commercial knowledge. As was said in **Etridge (supra)** (at para 13) the evidence required to rebut the presumption "depends on the nature of the alleged undue influence, the personality of the parties, the relationship, the extent to which the transaction cannot be readily accounted for by the ordinary motives of ordinary persons in the relationship, and all the circumstances of the case".

57. While the essential nature of the transaction in this matter is clear, it is necessary to have regard to the surrounding circumstances. On the evidence, Mr. Dankou without any encouragement from anyone, and certainly not Mr. Wheeler, decided to sell 75% of his shares in the Appellant. He negotiated the price for these shares with Messrs Paler and James. That price was freely negotiated between the parties and Mr. Wheeler played no part in the negotiations. Indeed it seems that Mr. Wheeler only learnt of the agreement

to sell the shares and the price at which they were to be sold when he received instructions to prepare the formal share purchase agreement.

58. According to Mr. Dankou, the price for the shares was fixed by him so as to allow him to pay off the silent creditors and so that he could have money in hand. He had as much interest in seeing the transaction to completion as anyone and perhaps more so. It should be noted that the price (USD 2,750,000.00) which Messrs Paler and James agreed to pay for the shares was more than the initial investment in the Appellant by Mr. Dankou and the silent investors so that with the sale of the shares Mr. Dankou was already ahead of the game.

59. The Appellant's case before the Trial Judge, as we mentioned earlier, was that the nature of the deed of mortgage was misrepresented to him by Mr. Wheeler and that he was unaware there was a deed of mortgage. Mr. Dankou said that he was simply told to come to the offices of Lex Caribbean to transfer the shares to Messrs Paler and James. But quite to the contrary the deed of mortgage was explained to Mr. Dankou by Mr. Wheeler and Mr. Dankou understood the terms of the mortgage and knew that Culloden Estate could be sold if Messrs Paler and James defaulted in the payment of the loan. Mr. Dankou executed the deed of mortgage with that knowledge and this points to him entering into the mortgage transaction on his own free will. This is also indicated by what we have said above that he had an interest in seeing the completion of the sale of the shares through as he needed to settle the silent investors and to get cash for himself.

60. Counsel for the Appellant has argued that Mr. Wheeler did not explain to Mr. Dankou that a sale of Culloden Estate by the Respondent under the mortgage could affect the value of Mr. Dankou's shares. It is accepted by the parties that Mr. Wheeler did not say that he did so. But it is more probable than not that Mr. Dankou would have appreciated that a sale of Culloden Estate could

affect the value of the shares which he retained. He was an educated businessman. He had formed the company, Yes Tourism Limited, and was its Chief Executive Officer. That company had operated in Tobago since 1998 in the tourism industry. He was the main mover behind the formation of the Appellant and the acquisition of Culloden Estate. It is highly unlikely that Mr. Dankou would not have appreciated that a sale of Culloden Estate could negatively impact the value of his shares. As Lord Nicholls observed in **Etridge (supra)** (at para 88) those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of security. That we consider to be true in this case. In our judgment Mr. Dankou would have fully understood the risks involved in entering into the mortgage as security for the loan to Messrs Paler and James.

61. Counsel for the Appellant also submitted that the Respondent had knowledge that there was something about the transaction that was awry, that the Respondent knew that there was a presence of undue influence. This submission was premised on the basis that the Respondent in its instructions to Lex Caribbean in relation to the preparation of the deed of mortgage had requested that a clause be inserted in the deed that there was "no undue influence on the vendor to sell". That, however, does not point to the fact that the Respondent had any knowledge that Mr. Dankou was under any undue influence to grant the mortgage to it over the Culloden Estate. What this clause clearly refers to is the agreement by Mr. Dankou to sell the shares to Messrs Paler and James and not the grant of the mortgage. As Mr. Ramlal, who was a senior manager of the Respondent and gave evidence on its behalf, said, the clause was designed to protect the Respondent against possible claims that the agreement between Messrs Dankou, Paler and James was an unconscionable bargain.

62. The instructions to include that clause in the deed of mortgage was motivated by the Respondent's information that Culloden Estate had been valued at USD 7,400,000.00 and Mr. Dankou was selling in effect three-quarters of it for USD 2,750,000.00. The Respondent had no knowledge that anything was amiss. And as the evidence shows the price was freely negotiated between the parties and Mr. Wheeler played no part in it.

63. On the evidence therefore, the sale of the shares by Mr. Dankou to Messrs Paler and James was an arms-length transaction. Mr. Dankou negotiated the price with Messrs Paler and James and that price was set at the said sum of USD 2,750,000.00 for the reasons already stated. Messrs Paler and James, to raise the finance to facilitate the sale, negotiated a loan with the Respondent and agreed that the loan would be secured by a mortgage over the sole asset of the Appellant. It is perfectly lawful for a company to provide financial assistance for the purchase of shares issued by it. No one has suggested that the transaction was anything but lawful or usual. Of course although Messrs Paler and James on the acquisition of the shares were to become the majority shareholders of the Appellant, at the time that the Respondent offered to lend the money on the security of the mortgage they were not shareholders and could not compel the Appellant to agree to that condition. Mr. Dankou however was the sole shareholder of the Appellant and on the evidence he executed the deed of mortgage after understanding the risks involved in granting the security. He wanted to see the transaction through.

64. It is not surprising that the Respondent would have required security for the loan. The request for security by way of a mortgage over the Appellant's property is also not surprising as Messrs Paler and James would become the major shareholders of the Appellant and persons with a 75% stake in the company. The security requested by the Respondent is not likely to have been greater than any other commercial bank might have required. Quite

simply the Respondent granted a loan and obtained security for its repayment.

65. In our judgment, the evidence reflects that Mr. Dankou entered into the mortgage transaction on his own free will knowing what he was doing and fully appreciating the risks involved. The evidence provides a satisfactory explanation for the transaction.

66. For the above reasons this appeal was dismissed. The parties agreed that the Trial Judge was correct to make an order as to costs in favour of the Respondent on the prescribed costs scale. In those circumstances, it was agreed that this Court should treat with costs under Rule 67.14(b) of the Civil Proceedings Rules 1998, as amended and accordingly the Appellant shall pay to the Respondent the costs of the appeal in the amount of two-thirds of the costs in the court below.

A. Mendonça
Justice of Appeal

M. Mohammed
Justice of Appeal

A. des Vignes
Justice of Appeal