In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 007

BETWEEN:

HSBC BANK BERMUDA LIMITED

Plaintiff

-and-

KEITH PERCIVAL JAMES — **1st Defendant**

KEIMON LAVAN LAWRENCE — **2nd Defendant**

Before: **Hon. Chief Justice Hargun**

Appearances: **Mrs Jennifer Haworth, MJM Limited, for the Plaintiff**
Mr Marc Daniels, Marc Geoffrey Ltd, for the Defendants

Dates of Hearing: **28 – 29 October 2019**

Date of Judgment: **15 November 2019**

JUDGMENT

Alleged undue influence by one joint guarantor over the other joint guarantor; whether bank had constructive notice of such undue influence; whether bank took reasonable steps; effect of such undue influence on the bank's rights under the guarantee.

Introduction

1. This is an application by the Defendants to set aside a Default Judgement entered on 17 February 2017, whereby it was adjudged that the Defendants do pay to the Plaintiff $3,609,666 and all interest and charges continuing from 17 February, 2017 together with all costs and costs of execution. The Defendants also seek an injunction restraining the Plaintiff from selling a property owned jointly by the Defendants and known as "Before Dawn", No. 2 Tribe Road No. 6 in Warwick Parish ("the Property").

Procedural History

2. These proceedings were commenced by HSBC Bank Bermuda Limited ("the Bank" or "the Plaintiff") by Specially Endorsed Writ Of Summons dated 12 January 2017 claiming against Keith Percival James ("Mr James") and Keimon Lavan Lawrence ("Mr Lawrence") (collectively "the Defendants"), seeking judgement in the sum of $ 3,609,666 claimed under a guarantee given by the Defendants to the Bank dated 13 June 2008 ("the Guarantee"), and the sale of the underlying security represented by the Property owned jointly by the Defendants.

3. On 17 February 2017, Judgement in default of appearance was entered against the Defendants in the amount of $3,609,666 and all interest and charges continuing from 17 February 2017 (being $692.26) together with all costs and costs of execution.

4. On 4 May 2017, the Registrar made an Order that the Defendants deliver possession of the Property pursuant to Order 45 rule 3(2) of RSC 1985 and that the Bank was granted an Order for the sale of the Property pursuant to the Judgement.

5. On 17 May 2018, the Defendants filed an ex parte Summons seeking an order that the Bank "*be restrained, whether by itself, or howsoever otherwise until judgement herein or further order, from selling the property of [the Defendants]"*

6. On 17 May 2018, Hellman J. gave directions in relation to the filing of the evidence and the hearing of the ex parte Summons dated 17 May 2018 seeking to enjoin the Bank from selling the Property.

7. On 25 October 2019, at the commencement of the hearing of the Summons dated 17 May 2018, I gave leave to the Defendants to apply to seek to set aside the default Judgement dated 17 February 2017 and that that application be heard same time as the application seeking to restrain the Bank from selling the Property. I also ordered that the affidavit evidence filed in support of the injunction proceedings also stand as evidence in relation to the application seeking to set aside the default Judgement.

Factual Background

8. According to the affidavit evidence of Mr James he was approached in early 2008 by one Alexander "Jerry" Ming asking Mr James if he could guarantee a loan Mr Ming was seeking to obtain from the Bank. Mr Ming explained that he was intending to buy a business and that he had approached Mr James as he knew that Mr James owned a sizeable property.

9. Initially Mr James was completely against the idea and politely rebuffed his sales pitch and business venture. However, Mr Ming was persistent in his approach and eventually persuaded Mr James to agree to provide necessary guarantee to the Bank. As part of the persuasion, Mr Ming offered Mr James $50,000 a year "*as a return on my investment by way of the guarantee".*

10. Mr James was not the sole owner of the Property and in fact the Property was jointly owned by him with his son, Mr Lawrence. When Mr James informed Mr Lawrence of Mr Ming's proposal he voiced objection to the proposal and considered that it was a bad idea. Mr Lawrence warned that he felt that Bermuda was headed towards a recession and as a result the proposed business was unlikely to do well.

11. Mr James' evidence is that he explained to Mr Lawrence that Mr Ming was a businessman and that Mr Ming had showed Mr James that it was a sound business venture. Mr Lawrence explained that his father expressed the view to him that Mr Ming was "*flush with cash and appeared to be a good person to invest in*". As a result of Mr Lawrence's view and expressions of concern regarding the loan, Mr James arranged a meeting with Mr Lawrence and Mr Ming. Eventually Mr Lawrence agreed to act as a surety and sign the necessary guarantee to the Bank.

12. At the time of this transaction and the execution of the guarantee in favour of the Bank, Mr James was aged 53 and Mr Lawrence was aged 33.

Meeting at the Bank

13. In his affidavit Mr James confirms that upon meeting the officers from the Bank, they advised that Mr James and Mr Lawrence "*should seek legal advice about the responsibilities of being a Guarantor for the loan"*. Mr Lawrence in his second affidavit accepts *"that the bank representative, on behalf of HSBC, encouraged my father and I to obtain legal advice'*. He states that the Bank advised them that "*as guarantor, [the Bank] needed a letter stating that we were given legal advice"*

14. Both Mr James and Mr Lawrence accepted in cross examination that they were advised by the Bank to obtain independent legal representation before deciding whether to provide the guarantee to the Bank.

15. According to the affidavit evidence of Susan Tessitore, filed on behalf of the Bank, she questioned Mr James as to why he was putting up the Property as security when he was not an owner in the business and did not appear to have any commercial interest in the transaction. Mr James advised Mrs Tessitore that he and Mr Ming were close friends and that he was assisting a friend. Mrs Tessitore, in accordance with standard Banking procedure, advised that both Mr James and Mr Lawrence need to obtain independent legal advice. In this case, she gave evidence, that the Bank went a step further and inserted a condition precedent in the Loan Facility dated 29 May 2008, that the Bank must receive a letter of opinion from a reputable attorney confirming that the terms of the Guarantee have been explained to Mr James and Mr Lawrence and that they professed to understand the same.

16. Mrs Tessitore also suggested to Mr James that he should obtain all the information from Mr Ming regarding business financials, business plans and financial projections to review these with an accountant. She recalls emphasising that he should ensure that he is fully informed and seek guidance from an accountant in reviewing the business financial of the proposed venture, the company being purchased, as well as legal advice.

17. Mr James and Mr Lawrence gave evidence that the Bank did not recommend any lawyer or law firm they should consult for the purposes of obtaining independent legal advice. Mrs Tessitore accepted that this was the case and explained that this was in accordance with the Bank's policy. She explained that the Defendants seem to have misunderstood the meaning of independent legal advice. One of the important aspects of independent advice, she explained, is not just independent from the borrowers and the guarantors, but also between the Bank and the guarantors. This is why neither she nor her colleagues would have recommended a specific attorney or made arrangements for the meeting to take place because to do such would not be independent of the Bank. Instead, it would be for the guarantors, in this case the Defendants, to see an attorney of their choosing.

18. In his second affidavit, Mr Lawrence states that his father, Mr James, explained to him that Mr Ming had promised to pay him $50,000 per annum, during the duration of the terms of the Facility Letters. Mr Lawrence says that he was not to receive the benefit of any money but explains that he believes that the length of the Facility Letters was to be about eight years and therefore, *"my father had hoped to receive some $400,000 over that period in exchange for serving as an additional guarantor on the commercial business loan".*

19. Mr James and Mr Lawrence accepted that they made no mention to any representative of the Bank that as part of the arrangement to give the guarantee to the Bank, Mr James had agreed with Mr Ming that he would be paid $50,000 per annum and that for the duration of the Facility Letters Mr James expected to receive a sum in the region of $400,000. Mrs Tessitore confirmed that Mr James made no mention of this arrangement and that she had assumed, as she was told by Mr James, that the guarantee was being given by Mr James because of his friendship with Mr Ming.

20. Mr Lawrence's position is that he had concern about the wisdom of entering into this guarantee to the Bank. However, it is to be noted that no such concern was expressed either by Mr James or by Mr Lawrence to the representatives of the Bank at any of their meetings. In cross-examination, Mr James accepted that his son, Mr Lawrence, did not raise any concerns with the Bank in relation to the signing of the guarantee. Mr Lawrence himself accepted in cross examination that any concerns he had in relation to the entering into of the guarantee were not expressed in front of the Bank's representatives. Mrs Tessitore confirms this to be the case on behalf of the Bank.

21. Mr Lawrence did not assert that he advised any of the representatives of the Bank that his father was exerting undue influence or that he was in any way been pressured to sign the Guarantee. It was clear evidence of Mrs Tessitore that at no time, did Mr Lawrence ever say, suggest or hint to her or was it apparent in her

presence, that he was being pressured into acting as a guarantor in this transaction by his father. Her evidence is that had Mr Lawrence come to her and said that his father was pressuring him into the transaction, she would have notified her appropriate superiors right away and the Bank would have refused to accept the Defendants as guarantors.

22. Mrs Tessitore also states that, given that Mr Lawrence was an employee of the Bank at that time, he had access to ask questions or raise concern of herself and/or any of her colleagues on the lending team if he had any concerns in relation to undue influence in executing the guarantee. She confirms that at no time did Mr Lawrence or any of her colleagues on his behalf, raise any such concerns with her.

Obtaining independent legal advice

23. Following the advice from the Bank that Mr James and Mr Lawrence should obtain independent legal base prior to executing the guarantee they sought advice from Peniston & Associates. It is the evidence of Mr James that he informed Mr Ming of their meeting with the Bank officials and Mr Ming arranged for them *"to see the lawyer at Llewellyn Peniston's Law Firm".*

24. Mr James confirmed in cross-examination that he recalls Mr Peniston being at the meetings. He says that his son, Mr Lawrence, was at the meeting when Mr Peniston was present. Mr James gave evidence that there were in fact two meetings at the Peniston law firm and he believes there was another lawyer present at those meetings. He accepted that Mr Bannister could be one of the other lawyers present at those meetings.

25. In cross-examination, Mr James stated that despite the fact that the Bank had advised him and Mr Lawrence to obtain independent legal advice, Mr Ming was in fact present at both meetings at the Peniston Law firm. Mr James accepted that

at no time did he advise the Bank that Mr Ming had been present at the meetings at the Peniston Law firm.

26. Both Mr James and Mr Lawrence accept that they attended the Peniston law firm for purposes of obtaining advice in relation to the proposed guarantee and as advised by the Bank. Mr James maintains that he attended two such meetings whilst Mr Lawrence states that he only attended one such meeting.

27. Both Mr James and Mr Lawrence accept that at the relevant meeting at the Peniston Law Firm they were advised that in the event there was a default on the loan they could lose the Property. In his second affidavit, Mr Lawrence states that;

> *"I accept that during our only meeting with Mr Peniston, Mr Peniston did explain that there was a risk, in the event that Mr Ming et al failed to make payments to HSBC, that our house could be seized as collateral. At no point, however, did Mr Peniston ever explained to us that not only could our house be taken, but that we would likely be held personally liable the balance of any debts that remain payable pursuant to the Guarantee that we signed as referenced in the various Facility Letters".*

28. In a letter on the notepaper of Peniston & Associates dated 4 June 2008 and signed by Mr Edward King the firm stated: *"Please be informed that Mr Keith Percival James and Keimon Lawrence have sought and received legal advice from Edward King, Barrister and Attorney, in relation to their involvement in transactions related to the above captioned Group".*

29. In another letter on the notepaper of Peniston & Associates dated 13 June 2008 and signed by Mr Graveney Bannister the firm stated: *"I hereby confirm that on the 11th day of June, 2008 I advised Mr Keimon Lawrence Mr Keith James of the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional Guarantee, Further Charge and Facility Letter dated May*

29, 2008 from the Bank of Bermuda Limited to The Fitz Group Ltd and they profess to understand the same and accepted the opinion given to them".

30. Mr James and Mr Lawrence executed the Facility Letter dated 29 May, 2008 in their capacity as Additional Guarantors on 11 June 2008.

Default and demand under the Guarantee

31. In March 2016, Mr James and Mr Lawrence received a letter from the attorneys for the Bank dated 4 March 2016, which demanded full payment of the debt on behalf of HSBC. Mr James and Mr Lawrence were advised by the Bank that the borrower was not making payments and that as guarantors, they were now liable outstanding balance.

32. In May 2016, Mr James and Mr Lawrence agreed to pay $4000 per month towards the debt and made those payments in May and June 2016. At the end of June 2016 they asked the Bank to increase the payments to $7000 which was to be deducted directly from Mr James' account. In total, Mr James and Mr Lawrence paid $134,000 towards satisfying their obligation under the Guarantee.

33. Subsequently in 2017 the Bank informed Mr James and Mr Lawrence that the Bank was seeking possession of the Property

The Defendants' contentions

34. In his submissions to the Court, Mr Daniels accepted on behalf of Mr James that his agreement to act as a guarantor could properly be looked upon as a commercial arrangement. This was so because Mr James had agreed to become a guarantor in exchange for payment by Mr Ming to him of $50,000 per annum. Mr James expected to receive approximately $400,000 over the lifetime of the underlying loans. This was, in my judgement, a correct concession and no doubt

Mr Daniels had in mind paragraph 88 of the judgement of Lord Nicholls in *Royal Bank of Scotland PLC v Etridge (No. 2*) [2002] 2 AC 773 where he said:

> *"Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in giving of guarantees".*

35. Mr Daniels argues that as far as Mr Lawrence is concerned, his agreement to become a party to Guarantee was not a commercial arrangement as he did not receive and was not expected to receive any part of the $50,000 per annum received by his father, Mr James. He says that the case of Mr Lawrence should be looked at as separate and independent from the arrangement made by Mr James. Mr Daniels challenges the liability of Lawrence on following grounds.

36. First, the Bank was on constructive notice in relation to disadvantageous nature of the transaction. Mr Lawrence was giving a guarantee to support the lending advanced to the business entities controlled by Mr Ming in circumstances where he obtained no benefit from the transaction. Mr Daniel concedes that the Bank took some steps to protect the position of Mr Lawrence but that those steps did not go far enough.

37. Second, the Bank should have appreciated from the two letters received from the Peniston law firm that Mr James and Mr Lawrence had not received appropriate legal advice and should have taken further steps to ensure that they did receive such advice.

38. Third, the Bank should have realised that the relationship of Mr James and Mr Lawrence, as father and son, was such that there was a risk that Mr Lawrence may

be subjected to undue influence on the part of Mr James. In the circumstances, the Bank should have insisted that Mr Lawrence should receive separate and independent advice from the advice received by Mr James

Discussion

The relevant legal landscape

39. In *Etridge* the House of Lords reviewed the concept of undue influence and the circumstances in which a transaction can be impugned on the ground of undue influence and the steps which a creditor such as a bank can take in order to protect itself. As to the burden of proof in relation to undue influence, Lord Nicholls said at [13]:

> "*Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. 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."*

40. Lord Nicholls recognised that in the ordinary course a bank which takes a guarantee security from the wife of its customer will be entirely ignorant of any undue influence the customer may have exercised in order to secure the wife's consent. However, there are circumstances when the bank is put on enquiry:

"44. In O'Brien *the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):*

'Therefore in my judgment a creditor in put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.'
In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

41. Lord Nicholls recognised at [51] that the banks are unwilling to assume the responsibility of advising the wife at a private meeting with the banks representatives:

"*Instead, the banking practice remains, as before, that in general the bank requires a wife to seek legal advice. The bank seeks written confirmation from a solicitor that he has explained the nature and effect of the document to the wife".*

42. Lord Scott also appeared to be of the view that the bank's requirement that the wife take independent legal advice was sufficient to insulate the bank from the effects of any undue influence:

> *"191. 3. If the wife's consent has in fact been procured by undue influence or misrepresentation, the bank may not rely on her apparent consent unless it has good reason to believe that she understands the nature and effect of the transaction.*
>
> *4. Unless the case has some special feature, the bank's knowledge that a solicitor is acting for the wife and has advised her about the nature and effect of the transaction will provide a good reason for the purposes of 3 above. That will also be so if the bank has a reasonable belief that a solicitor is acting for her and has so advised her. Written confirmation by a solicitor acting for the wife that he has so advised her will entitle the bank to hold that reasonable belief."*

Did the Bank take reasonable precautions

43. In this case the Bank appreciated that as Mr James and Mr Lawrence did not appear to have any connection with the proposed business of Mr Ming and the transaction was potentially disadvantageous to Mr James and Mr Lawrence. Accordingly, in accordance with the Bank's policy, Mr James and Mr Lawrence were advised to seek independent legal advice. This evidence is accepted by Mr James and Mr Lawrence.

44. The Bank in fact went a step further and introduced a special condition precedent in the Facility Letter which required that before the Bank would make the loan, the Bank would have to be provided with "*a letter of opinion, reputable attorney confirming that the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional Guarantee, this Letter and the*

Further Charge had been explained to [Mr James and Mr Lawrence] and that they professed understand the same".

45. It is accepted by Mr James and Mr Lawrence that as a result of the Bank's advice they sought legal advice and that they were advised that in the event of default there was a risk that both of them could lose the Property.

46. The Bank also received the legal opinion which was a condition precedent to the underlying lending in the form of a letter from Peniston & Associates dated 13 June 2008, which tracked the wording of the condition precedent in the Facility Letter. Peniston & Associates appear to be independent attorney in the sense that they did not act for the borrower (who was represented by Trott and Duncan) or for the Bank and was not on the panel of attorneys who acted for the Bank on a regular basis.

47. In the circumstances, the Bank had done enough to insulate itself from the consequences of any undue influence on Mr James and Mr Lawrence by the borrower, Mr Ming. The Bank was not aware that Mr Ming had in fact introduced Mr James and Mr Lawrence to Peniston & Associates or that Mr Ming attended the meetings with the lawyers from that firm. Mr James accepted in cross examination that he did not advise the Bank that the firm of Peniston & Associates was introduced to him by Mr Ming or that Mr Ming attended the meeting with him and Mr Lawrence. These facts of which the Bank was wholly unaware cannot, in my judgment, affect the rights of the Bank under the Guarantee.

48. Likewise the alleged fact that Mr James and Mr Lawrence did not receive adequate advice from Peniston & Associates cannot affect the Bank's rights under the Guarantee as the Bank had no reason to believe that this was the case. Mr Lawrence complains that the lawyers from Peniston and Associates did not advise that his liability under the Guarantee extended beyond the loss of the security

represented by the Property. He says that he was not advised that he would be responsible, as the guarantor, for any shortfall. However, neither Mr Lawrence nor Mr James ever suggested that they advised the Bank of the alleged limited nature of the legal advice received by them.

49. I accept the evidence of Mrs Tessitore that not only did she advise Mr James and Mr Lawrence to seek independent legal advice in relation to their desire to act as guarantors, but she also suggested to Mr James that he obtain all information from Mr Ming regarding business financials, business plans and financial projections and the review these with an accountant. I accept the evidence that she emphasised to Mr James that he should ensure that he is fully informed and seek guidance from an accountant in reviewing the business financials of the company being purchased, as well as legal advice.

50. Mr James and Mr Lawrence also complain that the Bank failed to advise them that they should take independent legal advice when they were asked to sign amendments to the Facility Letter and in particular, the amended Facility Letters dated 5 October 2010 and 30 October 2012. As Mrs Tessitore pointed out the Bank was always relying upon the original Facility Letter dated 29 May 2008 and the guarantee set out in that document and that guarantee was carried forward in the subsequent amended Facility Letters. If Mr James or Mr Lawrence had refused to sign the amended Facility Letters, the Bank would not have agreed to the amendments and their liability would remain as the guarantor as set out in the Facility Letter dated 29 May 2008.

51. In the circumstances, I am satisfied that the Bank had taken all reasonable steps which it could be expected to take and none of the complaints made about lack of competent legal advice can affect the rights of the Bank under the Guarantee.

The relevance of two opinion letters from Peniston & Associates

52. Counsel for Mr James and Mr Lawrence also argues that the Bank should have been on notice that his clients did not receive proper legal advice because the Bank was in receipt of two letters from Peniston & Associates dated 4 June and 13 June 2008. Counsel submits that the fact that two letters were written is an indication that something has gone wrong in the provision of legal advice.

53. In this connection it is relevant to set out what is accepted by both Mr James and Mr Lawrence. The both accept that they attended the law firm of Peniston & Associates and each time Mr Peniston was present. Mr James says that he visited the firm twice and that on each occasion there were two lawyers in the meeting. He accepts that one of the lawyers could have been Mr Bannister. Both accept that they were advised that in the event that there was a default by the Borrower they may lose the Property. Both accept that they signed the Facility Letter dated 29 May 2008 as Additional Guarantors. They also accept that they signed the Guarantee dated 13 June 2008.

54. As far as the two letters from Peniston & Associates are concerned, I accept the evidence of Mrs Tessitore that it is likely that the second letter was requested by the Bank because the first letter dated 4 June 2008 was not specific enough. In my view it is clear that the letter of 4 June 2008 does not comply with the condition precedent set out in the Facility Letter dated 29 May 2008 requiring, *" A letter of opinion from a reputable attorney confirming that the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional guarantee, this Letter and the Further Charge have been explained to them and they have professed to understand the same*" The second letter dated 13 June 2008 and signed by Mr Bannister tracks exactly the language of the condition precedent set out above.

55. In the circumstances I am bound to reject the suggestion that the mere fact of the receipt of two letters from the firm of Peniston & Associates should have put the bank on enquiry that Mr James and/or Mr Lawrence may not have received proper advice from that firm.

The issue of undue influence by Mr James over Mr Lawrence

56. Counsel for Mr Lawrence argues that in this case the Bank was on notice that Mr Lawrence might be under the undue influence of his father, Mr James and in these circumstances the Bank was duty bound to advise Mr Lawrence that he should take separate and independent advice from the advice received by Mr James.

57. The assertion that the Bank should have had constructive notice that one joint guarantor may be exercising undue influence over the other joint guarantor is conceptually different from the tripartite relationship envisaged in *Barclays Bank PLC v O'Brien* [1994] 1 AC 180 and in *Etridge*. As Lord Nicholls makes clear in *Etridge*, it is the disadvantageous nature of the transaction between the borrower and the surety which gives rise to constructive notice on part of the bank:

> *"43. The route selected in O'Brien ought not to have an unsettling effect on established principles of contract. O'Brien concerned suretyship transactions. These are tripartite transactions. They involve the debtor as well as the creditor and the guarantor. The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. Thus the decision in O'Brien is directed at a class of contracts which has special features of its*

own. That said, I must at a later stage in this speech return to the question of the wider implications of the O'Brien decision.

The threshold: when the bank is put on inquiry

44. In O'Brien the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):

> *'Therefore in my judgment a creditor in put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.'*

In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

58. Here of course there is no disadvantageous transaction between Mr James and Mr Lawrence. They are both on the same side of the transaction, both being joint sureties. In the circumstances it is not clear how, if at all, the reasoning of cases

such as *O'Brien* and *Etridge* applies to the relationship between Mr James and Mr Lawrence.

59. Leaving aside the conceptual difficulty the factual basis for saying that the Bank should have been put on enquiry is the fact that Mr James had agreed to become a surety in consideration of being paid $50,000 and whilst Mr Lawrence was not receiving any such payment. However, it is agreed by all concerned that the Bank was not apprised of the fact that Mr James was receiving such a payment from Mr Ming. Mr Lawrence told the Court that he did not advise the Bank that Mr James had agreed to become a surety in exchange for payment of $50,000 per annum. This accords with the evidence of Mrs Tessitore in relation to this issue. Indeed it was the evidence of Mr James that his son, Mr Lawrence, did not raise any issues with the representatives of the Bank in relation to the signing of the guarantee. Mr Lawrence himself accepted that he did not express any concerns with the representatives of the Bank in relation to entering into the guarantee. In the circumstances there was no reason for the Bank to be on notice or suspect that James was entering into the guarantee for commercial reasons whilst Mr Lawrence was doing so at the request of his father, Mr James.

60. Counsel of Mr Lawrence also relies upon a representation and warranty (No. 11) in the amended Facility Letter dated 30 October 2012 which provided that: "*By signing and returning the duplicate copy of this Facility Letter the Borrower and/or the Guarantor (as appropriate) hereby represent and warrant to the Bank…that the Guarantors our competent to enter in and perform and comply with the respective obligations under each of the Finance Documents to which they are a party and the granting of the Guarantees in support of their liabilities and obligations of the Borrower is for commercial benefit of the Guarantors"*. Counsel argues that this representation shows that the Bank was aware that the Guarantors (Mr James) was potentially receiving a commercial benefit. However, this argument is misplaced and based upon an erroneous reading of the word "Guarantors". This is a defined term and in section 2 of the definition section the

term “Guarantor” is defined and it will be seen that it does not include Mr James and Mr Lawrence. In the Guarantee, Mr James and Mr Lawrence are defined as “Additional Guarantors”.

Conclusion

61. In my judgment, Mr James and Mr Lawrence do not have any meritorious defence to the claim made by the Bank under the Guarantee either for the principal sum claimed or in relation to execution on the security of the Property. Accordingly, I am bound to refuse the Defendants’ application to set aside the Judgement dated 17 February 2017 as well as the Defendants’ application that the Bank be restrained from selling the Property jointly owned by Mr James and Mr Lawrence.

62. I will hear the parties in relation to any application for costs.

Dated 15 November 2019

NARINDER K HARGUN
CHIEF JUSTICE