

IN THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL NO. 70/2001

BETWEEN:

1. HAROLD DHANRAJ (SNR.)
2. CHANDROUTI DHANRAJ a/k CHANDRA
DHANRAJ
3. HAROLD IAN DHANRAJ (JNR.)
4. NEIL DHANRAJ

Appellants

- and -

NATIONAL BANK OF INDUSTRY &
COMMERCE LIMITED

Respondents

BEFORE:

Hon. Madam Justice Desiree P. Bernard	-	Chancellor
Hon. Madam Justice Claudette M.C. Singh	-	Justice of Appeal
Hon. Mr. Justice Nandram Kissoon	-	Justice of Appeal

Messrs. V. Persaud, P. Mohanlall & R. Satram for Applicants/Appellants
Mr. R. Khan for Respondents/Respondents

2002: May, 8
June, 14
August, 6

J U D G M E N T

BERNARD, C. delivered the judgment of the Court:

On 18th September, 2000 the Respondents filed proceedings against the Appellants claiming the sum of \$101,312,826.00 together with interest on the sum of \$96,397,545.00 at the rate of 19.25% from 30th June, 2000 until payments and foreclosure orders. The sum represented loans by the Respondents to the Appellants under six promissory notes secured by mortgages on property situate at Lot 23 Bel Air, East Coast Demerara.

The Appellants filed an Affidavit of Defence in which they alleged that they had no independent legal advice about the implications of a mortgage, and the Respondents owed them a duty of care to ensure that they received independent legal advice; further, the Respondents were guilty of deceit and undue influence.

After hearing submissions from both Counsel for the Appellants and the Respondents the learned trial Judge entered judgment for the Respondents in the sum claimed and ordered foreclosure of the mortgages. The Appellants have appealed to this Court from the said order.

On 29th June, 2001 they filed a summons applying for a stay of execution of the judgment pending the hearing and determination of the appeal. This summons was heard by a single Judge of the Court sitting in Chambers, and after hearing arguments by both Counsel for the Appellants and for the Respondents refused the stay of execution. Under **Order 2 Rule 16(2)** of the Court of Appeal Rules the Appellants have sought a variation or discharge of the order of the single Judge.

The learned Justice of Appeal laid before us written reasons for the refusal of the exercise of his discretion to grant the stay of execution chief among them being that the appeal had no real prospects of success.

Counsel for the Appellants challenged this finding and submitted that in order to succeed in the substantive appeal the Appellants must show that the learned trial Judge at the hearing of the action was wrong in finding that the Affidavit of Defence disclosed no triable issue. He adverted the Court's attention to several issues raised in the Affidavit of Defence which needed to be tried, e.g. inducement, no independent legal advice, duress, breach of fiduciary duty and undue influence. He referred us to the cases of **Linotype-Hell Finance Ltd. v. Baker (1992) 4 AER, 887**, **Bank of Nova Scotia v.**

Emile Elias & Co. Ltd. (1995) 46 WIR, 33 and Scotland District Association Inc. v. Attorney General & Others (1996) 53 WIR, 66. He contended that there was a great prospect of success in the substantive appeal. Since the test for prospect of success applies to the appeal and not to the trial at first instance then it matters not whether the Appellants would have succeeded there if given an opportunity. It was only necessary to show that a triable issue was disclosed in the Affidavit of Defence, and it is clear that that was done. He contended that the learned Justice of Appeal considered the prospect of success at the trial in the lower court rather than the prospect of success of the appeal.

Counsel for the Respondents on the other hand while conceding that the cases referred to by Counsel for the Appellants were relevant when considering prospects of success of an appeal in an application for a stay of execution he contended they were not applicable to the circumstances of the present appeal. He submitted that the triable issues of inducement, undue influence and lack of independent legal advice raise equitable considerations which are not applicable to mortgages. He made reference to the cases of Jaigobin v. Dias (1965) LRBG, 530, and Van Sluytman & Another v. New Building Society Ltd. & Others (1996) 54 WIR, 270, and to Edgar Mortimer Duke's "A Treatise on The Law of Immovable Property in British Guiana" and "The Development of Land Law in British Guiana" by Dr. Fenton Ramsahoye.

The learned Justice of Appeal in determining that the appeal had no real prospect of success found that the Appellants had not alleged in their Affidavit of Defence that they had been induced by the Respondents to execute the mortgage deeds by any specific fraudulent act or conduct. He further stipulated that one must distinguish between presumed undue

influence which arises in equity from special or de facto fiduciary relationships and actual undue influence which is a species of fraud, and concluded that the Appellants could not rely in equity on a presumption of undue influence.

If, as the learned Justice of Appeal inferred, the Appellants in their Affidavit of Defence seemed to have raised the issue of undue influence based on the fact that they had no independent legal advice, their appeal based on the failure of the learned trial Judge to find that these issues disclosed a triable issue, has no prospect of success.

Dr. Ramsahoye in his text "The Development of Land Law in British Guiana" at page 239 posited:

"Equitable doctrines have been excluded rather than applied in relation to mortgages In other respects the very nature of the Roman-Dutch mortgage is such that no situation can be created which will attract equitable principles, and it would appear inconceivable that equitable principles should operate in the normal course to stultify the course of the law between judgment and execution. Moreover, it seems clear that in expressly providing for the retention of the law and practice relating to conventional mortgages the legislature was preserving the status quo and did not contemplate a mixture of English principles of equity with the alien institution."

Mortgages in Guyana are governed by Roman-Dutch law, and not English law, and are of a special nature. A mortgage under this system is one of "voluntary and willing condemnation" and is in reality a judgment. This point was made in Edgar Mortimer Duke's "A Treatise on The Law of Immovable Property in British Guiana." The learned author expressed the view that a mortgage deed is a registered judgment against the land and the mortgagor admits that he is justly and truly indebted to the mortgagee in the sum in the deed. He also pointed out that there are two distinct elements in a mortgage deed, first, the charge itself, and secondly, the judgment. He made reference to the case of In re Demerara Turf Club (1915) LRBG 193 in

