In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 261

IN THE MATTER OF A MORTGAGE ACTION

BETWEEN:

THE BANK OF N. T. BUTTERFIELD & SON LIMITED

Plaintiff

and

(1) ALFRED MINORS

(2) PATRICE MINORS

Defendants

JUDGMENT

(Home renovations, Mortgage action, Application for possession in order to sell, Three-party situation – bank, borrower and surety, Allegation by borrower (husband) of undue influence by wife (surety) to take a loan as opposed to the regular circumstances of wife (surety) alleging undue influence by borrower (husband) to be the surety, Whether bank on inquiry where there is a non-commercial relationship, Loans to married couple, wife no longer a surety, whether constructive notice)

Date of Hearing: **4 November 2024, 5 May 2025, 25 June 2025**
Date of Ruling: **12 August 2026**

<u>Appearances</u>: **Jonathan O'Mahony, Conyers Dill and Pearman Limited, for Plaintiff**

Vaughan Caines, Forensica Legal, for First Defendant

JUDGMENT of Mussenden CJ

Introduction

1. The Plaintiff (the "**Bank**") caused an Originating Summons dated 31 August 2022 to be issued against the Defendants ("**Alfred**" and "**Patrice**", together the "**Minors**") for delivery by the Minors to the Bank of possession of the property "In De Trees", situated at 2 Jackies Castle Lane, Southside, St. Georges DD 03 together with the dwelling house erected on it (the "**Property**"), as mortgaged to the Bank under a mortgage dated 7 December 2001 between the Bank and the Minors (the "**Mortgage**").

2. The Minors were married but at some time before the trial were divorced. Patrice no longer lives at the Property and has not participated in these proceedings.

3. It was a term of the Mortgage that monthly payments would be made to the Mortgage. It is not disputed by Alfred that no mortgage payments have been made by the Minors since September 2019. He is defending the possession action, relying on his defence of undue influence, by which in his Counterclaim he seeks damages.

Background

4. On 7 December 2001 Alfred, then the sole owner of the Property, was granted a 125-year sub-lease of the Property by the Land Development Company Limited. On the same date the Bermuda Housing Corporation (the "**BHC**") granted him a Mortgage of $265,500 and additionally assigned the Mortgage to the Bank.

5. On 3 March 2003 by way of a charge (the "**2003 Charge**"), the Bank made an additional loan of $113,250 to Alfred. The loan was made in part to pay off a separate outstanding mortgage on the Property (of $73,265.38) and in part to pay for a new wooden flooring on the Property as well as wedding expenses for the Minors. Patrice stood as guarantor under the 2003 Charge. Alfred and Patrice were married soon afterwards in 2003.

6. On 5 April 2007 by way of a charge (the "**2007 Charge**") the Bank made an additional loan of $15,000 to the Minors to pay for the conveyancing fees for the assignment of the Property on the same date, for the remainder of the term of the sub-lease to himself and Patrice as joint tenants. By this time, Patrice was working for the Bank, and as they were now married, the couple could benefit from a beneficial interest rate given to Bank employees. Accordingly, Patrice ceased to be a guarantor and became a co-owner of the Property and jointly liable with Alfred under the 2007 Charge.

7. In May 2008 the Minors applied for a further loan of $575,000 to carry out renovations on the Property. They wanted to turn the Property from a three bedroom/one-and-a-half bathroom residence to a four bedroom/three-and-a-half bathroom residence. In January 2010 they submitted some tender documents for $780,000 but the Bank did not approve that amount. On 24 June 2010 by way of a charge (the "**2010 Charge**") the Bank made an additional loan of $690,000 to the Minors to fund the renovation, which was then carried out and completed. I refer to the 2003 Charge, the 2007 Charge and the 2010 Charge collectively as the "**Further Charges**".

8. The Minors divorced sometime in 2015. As a consequence of the divorce, it appears that Alfred became the sole occupant of the Property. No application was made to have either party removed from the Mortgage and it is the Bank's position that following the divorce, both remained liable for the Mortgage debt. Around this time, at the request of the Minors, the Bank agreed to interest only payments for two separate six-month periods: from 2 September 2015 to 2 February 2016 and from 2 March 2016 to 2 September 2016. The Bank refused a further similar request in September 2016 as by then, further payments had been missed. It appeared that Alfred had retired in the spring of 2019, no full payments were made on the Mortgage from July 2019 and no payment was made from September 2019. In 2020 Alfred sought to sell the Property to which the Bank agreed. His realtor, Mr. Outerbridge failed to secure an offer anywhere close to the market price. In June 2021, the Bank appointed a realtor, Mrs. Edwards, but Alfred failed to cooperate, refusing her access to the Property.

9. On 15 and 18 March 2022, the Bank served demands for payment of the aggregate principal sum, interest and late fees on the Minors. On 25 August 2022 the Bank filed these proceedings to enable it to exercise its power of possession and sale. Thus, Alfred has been living at the Property for a number of years without making mortgage payments. As at 16 August 2023, the amount outstanding to the Bank was $1,222,031.51, being $953,103.50 in principal, $268,748.01 in interest, and $180 in late fees. The Property was valued in June 2023 at $675,000 and thus there was at this time a deficit of $547,031.51. The figure excludes legal fees to enforce the Mortgage and the additional interest incurred since August 2023.

The Pleadings

10. The Bank filed its Originating Summons on 25 August 2022. It filed evidence in the form of affidavits (and exhibits) of Ms. Talitha Davis sworn 25 August 2022 and 24 November 2022 ("**Davis1**" and "**Davis2**" respectively). It also filed a witness statement of Ms. Davis dated 24 August 2023 (and exhibits) which consolidated the two affidavits.

11. Alfred filed evidence in the form of affidavits (and exhibits) sworn 28 September 2022 and 19 July 2023 ("**Alfred1**" and "**Alfred2**" respectively).

12. The normal course of litigation was being followed until a hearing on 16 May 2023 when counsel for Alfred raised a defence of undue influence. I then ordered that Alfred set out his case by way of a Defence and gave further directions.

13. Alfred then filed his Defence and Counterclaim dated 23 May 2023. He denied that the Bank was entitled to possession of the Property on the basis that the Bank had breached its obligations to him as set out in the "*Etridge Principles*" as defined in the case of *Royal Bank of Scotland plc v Etridge* (No. 2) [2002] 2 AC 773. He set out a number of issues in support of that contention including that: (i) the Further Charges were at the insistence, demand and undue influence of Patrice; (ii) the assignment of his equity and leasehold to Patrice was at her insistence, demand and undue influence; (iii) as he was too old, per the Bank's policies, to take on the new debt of the Further Charges, he had forcefully objected

to them; (iv) the Further Charges were based on Patrice's employment with the Bank and her age until retirement; (v) the Bank had failed in its due diligence to advise him to seek independent legal advice on the risks associated with the Further Charges; (vi) the Bank was put on constructive notice and it failed in its obligations owed to Alfred; (vii) the Bank is only pursuing him but not Patrice, who owns another property, a condo (the "**Condo**") which could be sold to extinguish the full debt; (viii) he refused access to the Property by Mrs. Edwards because his daughter and her child were living there; and (ix) his daughter offered to purchase the Property.

14. Alfred's Counterclaim set out that as a result of the Bank's failure to exercise its obligations owed to him, he had suffered loss and damage. He claimed: (i) damages in the amount of monthly mortgage payments made to the Bank for a void (voidable) mortgage charge; alternatively (ii) damages in the amount of his portion of monthly mortgage payments under the principle of unjust enrichment against Patrice.

15. The Bank filed its Defence to Alfred's Counterclaim dated 13 June 2023 in which it denied the allegations in Alfred's Counterclaim as follows: (i) it denied that it owed any obligations to Alfred described as the *Etridge Principles*; (ii) in respect of the 2003 Charge, Alfred applied for the loan of which $40,000 was to be used for home renovations and wedding expenses for the benefit of both Alfred and Patrice; (iii) in respect of the 2007 Charge, the application was made by both Alfred and Patrice jointly, conveying the leasehold and the mortgage into their joint names; (iv) in respect of the 2010 Charge, the application was in the name of both Alfred and Patrice and denied that Alfred voiced objection to the 2010 Charge; (v) in respect of the Further Charges, any claim for equitable relief was barred by the doctrine of laches; (vi) the allegation that Patrice exercised undue influence over Alfred was incredible; (vii) it denied that Alfred was too old to be granted a mortgage and/or new debt; (viii) it denied that the Bank was under a duty to advise Alfred to seek independent legal advice; (ix) it denied that it failed to approach Patrice regarding her failure to pay the monthly mortgage payments; (x) it denied that it was on constructive notice or was under any obligation to Alfred in respect of any constructive notice; (xi) it denied that the Condo was used as collateral for the 2010 Charge as alleged or at all; (xii)

it was entitled to effect insurance on the Property; (xiii) it determined that Alfred's daughter was not approved for funding to purchase the Property; and (xiv) further/alternatively, if Alfred is entitled to rescind any of the Further Charges and Mortgage and receive compensation for such rescission, then any such entitlement is conditional upon Alfred returning to the Bank any benefit he has received in respect of each transaction;

<u>The Trial – Evidence</u>

16. The trial took place with the affidavits and witness statements as evidence-in-chief and the cross-examination of Ms. Talitha Davis for the Bank and Alfred.

17. Davis1 set out the terms and details of the Mortgage and the Further Charges and the failure to pay the monthly mortgage payments and then the full amount outstanding on demand.

18. Alfred1 set out details of his and his family's background and daughters, for whom he was paying child support, before meeting Patrice. He set out details about the marriage to Patrice and their daughter, noting that Patrice prospered in her employment at the Bank and being a parliamentarian and Government Minister. He set out details on how the renovations came about. He stated that the 2010 renovations were completed, having gone over budget and that Patrice provided the Condo as collateral. He then fell ill and needed extensive medical care. Patrice left the marital home in 2014, then left employment at the Bank, lost re-election, and then commenced divorce proceedings with terms for their way forward in respect of their child, the Property and the Mortgage. Alfred then set out details of the discussion with the Bank including about addressing the Mortgage, payment terms, insurance and a possible sale of the Property.

19. Davis2 set out a response to Alfred1 in essence denying that Bank had caused the Minors any loss or had acted improperly during the course of the Mortgage as alleged or at all. She set out details of how the Bank treated the Minors after their divorce, noting that the Bank did not treat any party with favour when determining the interest rates and monthly installment amounts for the Property after the divorce and that the rates used were market rates. She set out the details of the arrears under the Mortgage, the details of the Property

insurance, noting that Alfred has lived in the property without making payments towards the Mortgage and has received house insurance and a repaired roof without incurring any immediate expense, whilst refusing to engage with the bank for a voluntary sale or surrender of the Property, thus preventing the Bank from exercising its right of sale.

20. Alfred2 set out issues about the Property and his and Patrice's finances and the background to the renovations and Further Charges. He set out that with his knowledge and qualifications in accounting and economics, he was aware of the oncoming recession in or around 2008, leading to his strong objections and warnings against the renovations. In any event, the 2003 Charge and the 2007 Charge took place as well as his voluntary assignment of the Property to him and Patrice. He states that those two Further Charges should have put the Bank on notice of its obligations to him as Patrice was a Second Vice-President of the Bank and he could no longer obtain further loans due to his age. By the time of the 2010 Charge, he was fifty-six years old and nine years from retirement such that he could not qualify for a loan of $695,000 for renovations. He asserted that only Patrice could qualify for the loan as she had enough years before retirement, she was a Bank Vice-President and a Government Minister, a fact which made her a Politically Exposed Person (a "**PEP**"), leading to the assertion that it was highly unusual for the Bank to grant such a substantial loan and not advise him to seek independent legal advice. In any event the renovations went over budget, financial difficulties ensued, the marriage broke down, and the Bank was pursuing him rather than pursuing him and Patrice together, in order to sell the Property and the Condo, with the proceeds being used to extinguish the debt.

<u>Cross-examination of Ms. Talitha Davis</u>

21. Ms. Davis was cross-examined. In my view, she was an impressive and reliable witness who gave her evidence clearly and fairly with references to contemporaneous documents.

22. Ms. Davis stated that Alfred's original mortgage was for 18 years and would have been paid off when he reached the age of 65, a usual age for retirement. She stated that up to 2003 Alfred made his payments on time without issue. She stated that there was no maximum age or age discrimination for borrowing, although a minimum age of 18. In the

Credit Presentation Form, the Bank would take into account the number of dependents and any child support payments.

23. In respect of the 2003 Charge, Ms. Davis stated that Alfred was consolidating loans that would total $370,000. Patrice was involved although they were not yet married. At that time, Alfred had equity in the Property. The Credit Presentation Form stated that: (i) Patrice owned the Condo with her mother, but it did not state that it was used as collateral for the 2003 Charge; (ii) they both had stable jobs; and (iii) the Property was the major investment. Ms. Davis also stated that no money was involved with the guarantee, that Patrice as the guarantor would be responsible for the amount they guaranteed, the Bank knew of the non-commercial relationship between Alfred and Patrice, to her knowledge the Bank did not tell Patrice and Alfred to seek separate legal advice, and when Alfred owed $73,265.38, the original interest rate was 7.5%.

24. In respect of the 2007 Charge, when Patrice and Alfred were a married couple and Patrice's name was to be added to the Property, the total proposed debt, after the $15,000 loan for conveyancing fees, was going to be $370,817, with bank fees waived as Patrice was a member of staff, and the interest rate would be 1% below the base rate. The documents did not show that the Bank informed Patrice and Alfred to take independent legal advice.

25. In respect of the 2010 Charge, in 2008 Patrice and Alfred signed the Personal Credit Application Form (>$100,000 and complex requests) for a loan for renovations, HSBC credit cards and a computer. At that time Patrice was a trust manager for the Bank and had been a Government Minister and long-serving MP, making her a PEP, for which there were policies. Alfred was listed as joint applicant, was 54 years old and a long-serving employee at BLDC. The form stated that they owned an asset of 50% of the Condo valued at $350,000. She did not know why the source and amount of downpayment was "N/A". The loan which was approved brought the total debt to $927,576. The loan of $575,000 was re-amortized over 25 years and the DSR was now 49%, which was close to the acceptable DSR of 50%. By May 2010 the Bank was aware that Alfred was unemployed but was due to start a new job, leaving Patrice's salary to support a loan of $400,000. There was a

Property Inspection Report for Mortgage Valuation Purposes dated 27 April 2010 which named Patrice as the applicant. It stated that the total appraised value of the Property was $1,181,100 but that it would be overdeveloped for the location and would not hold its true value, so the estimated fair market value was $950,000 leading to a loan of 85% of the fair market value, that is $807,500. There were letters of 31 August 2015 and 18 February 2016 extending interest only payments to Patrice and Alfred for six months in both cases.

Re-examination of Ms. Davis

26. Ms. Davis was re-examined minimally.

Cross-examination of Alfred

27. Alfred was cross-examined. In my view, he was not an impressive witness and I did not find his evidence to be clear or reliable. He was generally vague, hesitant and evasive and his answers were inconsistent with each other at times and at times with the volume of contemporaneous banking documents.

28. In respect of the 2003 Charge, he admitted to signing the Personal Credit Application form, and the Application for Mortgage Loan although he maintained that he did not fill out the forms and it was not his writing, maintaining that Patrice had filled out the documents and told him to sign such. He agreed that there was nothing on the forms that indicated that he did not want the loan being applied for. He admitted that he signed the First Deed of Further Charge but added that he does not normally sign haphazardly. He denied that the 2003 Charge was a benefit to him in the long run because the original mortgage was going to expire on his 65th birthday although he accepted that the new flooring was a benefit to him. He denied that the funding for the wedding was a benefit to him because he did not want a big expensive wedding, but ultimately it was a benefit as he wanted to be married and the loan funded his desire to be married.

29. In respect of the 2007 Charge, he agreed that the Voluntary Assignment of Equity of Leasehold (signed by both Alfred and Patrice – he recalled signing it), stated that it was "*in the consideration of the love and affection which he bore to his wife*", that he assigned the Property from his sole ownership to him and his wife jointly, explaining that if she was

making payments then she should have value. He accepted that the Second Deed of Further Charge (signed by both Alfred and Patrice) set out that there was an outstanding principal of $344,056.76 and the 2007 Charge of $15,000 for a total of $359,056.76 and that both he and Patrice, defined as the "Mortgagor", would pay the outstanding amounts on demand. He accepted that it was his signature but that he did not recall signing it. In respect of the Personal Credit Application Form, he accepted that he signed the document but stated that the contents were not in his handwriting. In my view, he avoided the question as to whether there was anything on the form to suggest that he did not want the loan. He accepted that he signed the Application for Mortgage Loan document although he added his signature was in the second position and accepted that it set out that the interest rate would be the staff rate. He disagreed that he wanted the transaction to proceed because Patrice was his wife and they were getting the staff rate. He maintained that all the applications were not in his handwriting and that he was the second signature, stating "*Happy Wife, Happy Life*".

30. In respect of the 2010 Charge, he accepted that he signed the Third Deed of Further Charge in respect of the loan of $690,000. He also accepted that he signed the application form in 2008 for a loan of $575,000 to renovate the Property although stating that the form was not completed in his handwriting. When asked if there was anything on the application form or the Credit Presentation Form of 2008 to suggest to the Bank that he did not want the loan, he stated that the forms were not in his handwriting, he had read the documents and he had signed them. He agreed that on 22 January 2010 he wrote an email to Jennifer Fray of the Bank setting out details about the architects, the approved plans, the progress to date and the immediate steps forward. He accepted that he signed both his name and Patrice's to that email and conceded that there was nothing on the face of that email that would suggest that he did not want to proceed with the renovation. He accepted that in some emails with Jennifer Fray in January 2010 about updated salary information, there was nothing on the face of those emails that suggested he did not want to proceed. He accepted that on the Application for Mortgage Loan (Internal) document in June 2010 he had read the document and signed it, noting his signature was in the second place. When asked if there was anything on the document to suggest he did not want to proceed with the loan, he stated that the contents were not in his handwriting. He then explained to the Court that

he considered the first line of signatures or the one to the left to be the primary signature, then accepting that there was nothing on the document to support that contention. When challenged that in the Deed of Third Further Charge that his name was first thus making him the senior signature by his logic, he stated that it gave him precedence over Patrice, which was a common business practice. He agreed that he signed the Bank's offer letter dated 6 May 2010 for a loan of $690,000 noting that Patrice signed on the left, in the "senior" position. He accepted that there was nothing in the document to suggest that he did not want to proceed with the loan.

31. Alfred was cross-examined on his written submissions in their divorce case. When challenged that he wanted to keep the Property and be responsible for the debt, he explained that he was countering threats of divorce and he wanted to sell both the Property and the collateral, the Condo. When challenged that he submitted that they had both consented to the debt associated with the Property, he explained that he wanted to sell both properties, noting that as he was faced with divorce, he had child dependents and he needed to ensure shelter and a roof, then he was given a *fait accompli*. When challenged that he could have said the Property was saddled with a lot of debt that he did not consent to, he replied that that was not the context of the divorce proceedings. He denied being happy to have the loans many years ago but now having buyer's remorse as he was about to lose the Property.

<u>Re-examination of Alfred</u>

32. In respect of the 2003 Charge, Alfred explained that when Patrice told him to sign the documents, he signed them in order to keep the peace, noting that they had had heated discussions during their courtship. Thus, he would not agree to such loans unless Patrice was a guarantor. He stated that he was not the originator for the loan. He stated that he was ok with the flooring but Patrice wanted better flooring, thus it was not a benefit to him. He stated that he did not have the funds for a lavish wedding, but that Patrice had influence at the Bank to get a loan that he would not be able to get.

33. In respect of the 2007 Charge, Alfred stated that he did not want the loan because he already had a mortgage and a second mortgage, but Patrice had arranged a dinner with other middle class couples to persuade him about the renovations.

34. In respect of the 2010 Charge, Alfred explained that the reference to "client borrowing $690,000" in handwriting was a reference to Patrice as it was her name on the application form. I should add here that on the application form, it is Patrice's name but both Alfred and Patrice signed the application.

35. Alfred explained that once divorced and Patrice was no longer employed at the Bank, he no longer had access to the staff interest rate, which resulted in an increased payment amount. He explained that "Happy Wife, Happy Life" meant that there had to be compromise in a marriage, noting that it was Patrice who was pushing for everything, not him.

<u>The Law on Mortgage</u>

36. A mortgagee's power of sale is a long-established right in mortgage law and while enshrined in statute in England and Wales, in Bermuda it is protected through the express terms of mortgage agreements and the development of the common law. In *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 320, Harman J stated as follows:

> *"The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there is an attornment clause, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course."*

37. Harman J's position was applied in Bermuda by Hellman J in *HSBC Bank Bermuda v John Percival White* [2017] Bda LR 71 at paragraph 25 when he stated:

> *"I have every sympathy with Mr White. But, as his counsel recognised, these points are no answer to the Bank's right of sale and claim for possession. Harman J summarised the position in stark terms in the Four Maids case at 320".*

The Law on Undue Influence

38. In respect of the two broad categories of undue influence, in *Snell's Equity* (34th Ed) at 8-017 and 8-021 it stated as follows:

> *"8-017 The decision of the House of Lords in Etridge, as noted above, contains important warnings against placing too much store on categories and sub-categories of undue influence. Lord Nicholls nonetheless noted that: "[e]quity identified broadly two forms of unacceptable conduct". The first "comprises overt acts of improper pressure or coercion such as unlawful threats". Such a case can be described as involving "actual" undue influence, as B may well be able to point to such coercion to show that he or she acted under an undue weight of influence. The second form "arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage". In such cases, the existence of such a relationship of influence, if coupled with a transaction calling for explanation, may give B the benefit of an evidential presumption of undue influence, and thus assist B in discharging the onus of proving undue influence. Where B seeks to rely on such a presumption, the case may be seen as involving "presumed" undue influence."*
>
> *"8-021 - A case of actual undue influence is simply one in which B discharges the burden of showing that a transaction was entered into as a result of undue influence without needing to rely on the evidential presumption of undue influence that arises where B is in a relationship of influence and makes a transaction requiring explanation. B may, for example, be able to provide proof of blackmail, threats, coercion, or misrepresentations that had a sufficient effect on B's consent to a particular transaction as to amount to undue influence, but there is no "special species of evidence" on which B must rely.*
>
> *The term "actual" undue influence should not be taken to mean that B must provide proof of specific acts of A, or X, occurring at the time of B's decision to enter a particular transaction; the facts may nonetheless support an inference of undue influence. "A vast penumbra of effects" may be relevant, and the court must take account of all the circumstances of the case, including "the nature of the alleged undue influence, the personality of the parties, their relationship, and the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship.""* [Emphasis added]

39. In the House of Lords case of *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 Lord Browne-Wilkinson stated [at 209] as follows:

> *"Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right.*

… The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice." [Emphasis added]

40. In respect of the relationship and the transaction, *Snell's Equity* stated as follows:

> *"8-022 A case of presumed undue influence is one in which B discharges the burden of showing that a transaction was entered into as a result of undue influence with the assistance of an evidential presumption of undue influence. Two primary facts must be shown before that presumption will arise. <u>First, there must have been a relationship of influence between B and the party (A or X) exerting the claimed influence. Secondly, the impugned transaction must be one that calls for explanation. Once those two primary facts are proved, "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.</u> In other words, proof of these two facts is prima facie evidence that [A or X] abused the influence he acquired in the parties' relationship.* [Emphasis added]
>
> *Such cases can themselves be divided by looking at how B establishes the first primary fact: the required relationship of influence. B can either show that the relationship is of a type that falls in the special class of relationships (e.g. parent and child, trustee and beneficiary) to which the law "has adopted a sternly protective attitude" and so regards as necessarily involving influence, irrespective, it seems, of the specific nature of the relationship between B on the one hand and A or X on the other. Alternatively, if the relationship does not fall into such a class, then B must bring forward evidence to show that there was in fact a relationship of influence.*

41. The special class of relationships is well established. It does not include wives or fiancés. In respect of special classes of established relationships of influence and fiancés, *Snell's Equity* stated as follows:

> *"8-030 - The relationship between B and the man to whom she is engaged to be married has been seen as a relationship of influence on the basis that B:*
>
> > *"reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her."*
>
> *The presumption has been applied to substantial gifts or benefits provided by an intended wife for her intended husband and is not dependent on the age of the donor. It is however extremely doubtful that this special protection for women, will continue to be recognised. First, Lord Nicholls did not refer to fiancés in his list of examples of categories in which the irrevocable presumption applies in Etridge. Secondly, the reason given by Lord Nicholls for finding that the relationship between spouses is not such a category also applies to the relationship between a couple engaged to be married: "there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband". Thirdly, as noted by Lord Diplock in a related context, "it would be an abuse of legal*

technique" to rely on such outmoded rules as a means of viewing modern relationships. Fourthly, the High Court of Australia in Thorne v Kennedy rejected the submission that a fiancée is entitled to the benefit of the presumption, noting that: "Common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other". Finally, engagement gifts are now regulated by statute and no longer covered by the equitable doctrine, and rules have also been developed for wedding presents.

42. In proving a relationship of influence outside the special class, *Snell's Equity* stated as follows:

    "8-031 … One point worthy of note is that the mere fact that the relationship falls into a particular general category (e.g. husband and wife; older person and younger friend) will not be enough, by itself, to establish a relationship of influence: such a general characterisation should suffice only if the type of relationship is in the special class. Moreover, a court will be wary of acting on an assumption that all relationships of that particular general class would be ones of influence, as this could lead in practice to undue influence being presumed whenever a large gift is made within such a relationship."

43. In the absence of a special class of relationship, B will need to show that the relationship was in fact one of influence. In *Rosesilver Group Corp v Paton* [2015] EWHC 1758 (Ch) at [41] Mann J stated:

    "So far as undue influence is concerned, the original Defence contains no reference to it. Nor does Miss Clutterbuck's witness statement foreshadow such a claim, or lay down any of the facts necessary to it. There is no evidence whatsoever of express undue influence. … Undue influence cases cannot be allowed to go forward on the basis of vague statements in evidence, coupled with speculative submissions on the part of counsel, especially in circumstances in which it appears to be a point added as an afterthought, and I find that the evidence as it stands does not raise an arguable case of undue influence."

44. In *Perwaz v Perwaz* [2018] UKUT 325 (LC) Cooke J stated [at 58]: "*The two elements that have to be proved for the presumption to arise are generally regarded as sequential. Notice the word "then" in the words of Lord Nicholls quoted above. There must be a relationship of influence, and then a transaction that calls for explanation. The term "relationship" itself denotes something that continued over time.*"

45. In family or marital relationships, there must be some additional factor, such as circumstances of illness leading to a dependency, or a background of trust and confidence in relation to the family's financial affairs, if a relationship of influence is to be found. In

Re Smith (Deceased) [2014] EWHC 3926 (Ch) [at 210 – 217] a relationship of presumed influence was found where an elderly mother in ill health had, at her daughter's insistence, moved to live with her daughter and then to a nearby care home, and was isolated from other members of her family, the daughter having instructed the care home staff not to allow contact between the mother and those other family members.

46. A presumption of undue influence will arise only if, in relation to that specific transaction, there is "something more … something which calls for an explanation". In *Etridge,* Lord Nicholls stated [at 24]:

> *"… 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 advisor. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. <u>So something more is needed before the law reverses the burden of proof, something which calls for an explanation.</u> 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."* [emphasis added]

47. The presumption that the transaction was procured by undue influence does not arise unless the nature of the transaction is sufficiently unusual or suspicious. In *National Westminster Bank Plc v Morgan* [1985] A.C. 686 at 704 Lord Scarman stated as follows:

> *"Whatever the legal character of the transaction, the authorities showed that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, 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 and 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."*

48. In respect of agreements between spouses, *Snell's Equity* stated as follows:

> *"8-032 Where B agrees to mortgage his or her property or to give a guarantee to secure the debts of another the transaction may call for an explanation. Following*

Etridge, however, the agreement of one spouse or partner to guarantee the debts of the other will not be treated as a transaction which automatically calls for an explanation; although there may of course be cases in which the terms of the guarantee or the security, or other features of the transaction, are so out of character or so disadvantageous to B as to call for an explanation. One relevant factor will be whether B obtained or expected to obtain some value in return for the impugned guarantee or transaction; although, where B guarantees the debts of a company controlled by B's spouse the transaction may call for explanation even if B has a shareholding in the company."

49. In this case, it is asserted that Patrice was the influencer, not the Bank, resulting in a three-party situation. Thus, in addition to Alfred demonstrating that the Further Charges were procured by undue influence by Patrice, he must demonstrate that the Bank was put on notice, actual or constructive. In respect of such a three-party situation, *Snell's Equity* states as follows:

"37-023 - The most common example of a three party situation, which has come before the courts on numerous occasions in recent years, arises where a wife agrees to join in a mortgage of the jointly owned matrimonial home in favor of a bank which has lent money to the husband or to the husband's company and the wife's agreement to the mortgage is induced by the husband's undue influence. In such a case, the wife seeks to set aside the mortgage that she granted to the bank on the basis that her agreement to act as surety was brought about by the undue influence of her husband, the principal debtor. There is no need, however, for the surety and the principal debtor to be married, and no reason why the person who exercises undue influence (or acts unconscionably) cannot be the wife rather than the husband. In three party situations, therefore, the gender-neutral nomenclature of "principal debtor" and "surety" is adopted to represent, respectively, the party who is alleged to have exercised undue influence and the party who is seeking to set aside the mortgage on the basis of that undue influence."

50. Where the surety is induced by the undue influence of the principal debtor to enter into a transaction with a third party who has not exercised undue influence – such as the Bank which takes the Mortgage – the surety can set aside the transaction against the third party if the third party had actual or constructive notice of the principal debtor's use of undue influence. In the House of Lords case of *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 195 Lord Browne-Wilkinson stated as follows:

"(a) Wives

…

In my judgment, if the doctrine of notice is properly applied, there is no need for the introduction of a special equity in these types of cases. A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation *or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (e.g. against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.*

The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand in surety.

…

Therefore in my judgment a creditor is 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. [Emphasis Added]

It follows that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor would have constructive notice of the wife's rights.

…

51. In *Etridge*, in respect of when a bank is put on inquiry when a wife stands as surety, Lord Nicholls made reference [at 44] to the case of *O'Brien* to the judgment of Lord Browne-Wilkinson (as emphasized above). He went on to state [at 48] as follows:

"As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's

purposes, as distinct from their joint purposes. That was decided in CIBC Mortgages plc v Pitt [1994] 1 AC 200."

52. In the House of Lords case of *Pitt*, Lord Browne-Wilkinson stated [at 211] as follows:

"If third parties were to be fixed with constructive notice of undue influence in relation to every transaction between husband and wife, such transactions would become almost impossible. On every purchase of a home in the joint names, the building society or bank financing the purchase would have to insist on meeting the wife separately from her husband, advise her as to the nature of the transaction and recommend her to take legal advice separate from that of her husband. If that were not done, the financial institution would have to run the risk of a subsequent attempt by the wife to avoid her liabilities under the mortgage on the grounds of undue influence or misrepresentation. To establish the law in that sense would not benefit the average marriage couple and would discourage financial institutions from making the advance.

What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."

53. In *UCB Group Ltd v Hedworth* [2003] EWCA Civ 1717 Parker LJ stated [at 124] that he had agreed with the judge's observation that *"... a transaction which involves a remortgage with any surplus funds being applied for a purpose which is to the apparent benefit of husband and wife would not normally arouse suspicion.*"

<u>The Law on the Doctrine of Laches</u>

54. In *Nelson v Rye* [1996] 1 WLR 1378 Laddie J stated as follows:

"The courts have indicated over the years some of the factors which must be taken into consideration in deciding whether the defence runs. Those factors include the period of the delay, the extent to which the defendant's position has been prejudiced by the delay and the extent to which that prejudice was caused by the actions of the plaintiff. I accept that mere delay alone will almost never suffice, but the court has to look at all the circumstances, including in particular those factors set out above, and then decide whether the balance of justice or injustice is in favor of granting the remedy or withholding it. If substantial prejudice will be suffered by the defendant, it is not necessary for the defendant to prove that it was caused by the delay. On the other hand the plaintiff's knowledge that the delay will cause such prejudice is a factor to be taken into account."

55. In *Fisher v Brooker* [2009] 1 WLR 1764 Lord Neuberger stated as follows:

> *"64. Fifthly, laches is an equitable doctrine, under which delay can bar a claim to equitable relief. In the Court of Appeal, Mummery LJ said that there was 'no requirement of detrimental reliance for the application of acquiescence or laches' — [2008] EWCA Civ 287, para 85. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, 239, the Lord Chancellor, Lord Selborne, giving the opinion of the Board, said that laches applied where 'it would be practically unjust to give a remedy', and that, in every case where a defence 'is founded upon mere delay ... the validity of that defence must be tried upon principles substantially equitable.' He went on to state that what had to be considered were 'the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'."*

<u>The Bank's Submissions</u>

56. Mr. O'Mahony made several submissions including as follows:

a. This case was a three-party situation, which differed from a two-party situation.

b. It was clear that the Bank had no notice of actual or presumed undue influence.

c. This case was not a surety case between Patrice and Alfred where Alfred would get a benefit. This case was about loans where both Patrice and Alfred benefitted, thus that would be the end of the matter.

d. The relationship between Patrice and Alfred as husband and wife did not fall into a special class.

e. The Further Charges do not call for an explanation as they are ordinary transactions for funding to turn the Property into a family home.

f. The Bank cannot look behind the walls of the family home and does not know what is going on.

g. In respect of the 2003 Charge, there was no case authority in which the undue influence was exerted by the surety over the principal debtor; the loan was to Alfred's benefit to pay off his mortgage of $73,000 and for wooden flooring; the transaction was plainly explicable by motives of ordinary people in a relationship; thus in the absence of a transaction procured by undue influence, the question of the Bank's constructive notice does not arise. If the Court found that the 2003

Charge was procured by undue influence then the defence of laches arises as it was more than 20 years since the 2003 Charge was entered into.

h. In respect of the 2007 there was no evidence to conclude that the 2007 Charge was procured as a consequence of undue influence. Alfred's evidence on the relationship with Patrice was non-existent. The transaction was plainly explicable by the ordinary motives of ordinary people in a relationship. In the absence of a transaction procured by undue influence, the question of the Bank's constructive notice does not arise. If the Court found that the 2007 Charge was procured by undue influence then the defence of laches arises as it was more than 18 years since the 2007 Charge was entered into.

i. In respect of the 2010 Charge Alfred's evidence of the relationship in 2008-2010 was non-existent. The transaction was plainly explicable by the ordinary motives of ordinary people in a relationship. In the absence of a transaction procured by undue influence, the question of the Bank's constructive notice does not arise. If the Court found that the 2010 Charge was procured by undue influence then the defence of laches arises as it was more than 15 years since the 2010 Charge was entered into.

<u>Alfred's Submissions</u>

57. Mr. Caines made several submissions in respect of Alfred including as follows:

a. Due to the nature of the non-commercial relationship, the Bank knew or ought to have realized its obligations as it regards security.

b. At the very least the Bank should have demanded certain conditions prior to engaging in at first instance, a guarantee between the parties and any Further Charges.

c. There was a clear change in position regarding Alfred from his initial dealings with the Bank in 2001 and then in respect of the Further Charges. Once the Bank was aware of the material change, it knew it was on inquiry due to the non-commercial relationship.

d. The Bank knew or ought to have known it was to follow the *Etridge Principles* guidelines, or risk losing its protection.

e. Due to the inaction of the Bank, the Minors were not provided an opportunity to seek independent legal advice.
f. The onus was on the Bank to ensure that there was no undue influence.
g. The Bank failed in taking reasonable steps to satisfy itself regarding the required consent of the parties had been properly obtained.
h. There was no special condition precedent in any of the Facility Letters requiring the parties to provide them with a letter of opinion from a reputable attorney confirming that the Minors understood the terms of the Guarantor's liabilities and the Further Charges.
i. There was actual undue influence. Patrice had a reason for entering into the transactions, ie the Further Charges.
j. There was presumed undue influence.
k. The transactions call for explanation. They were manifestly to the disadvantage of Alfred, who had almost $1 million added to the debt of the Property. He had had a modest/cautious financial history with the Bank juxtaposed with the Further Charges for renovations once married.
l. Patrice was a high level executive of the Bank, and was a Member of Parliament, and at times a Government Minister making her a PEP, who required extra scrutiny pertaining to loans.
m. The Bank had the opportunity to service the loan by way of the Condo, which would have cleared the debt.
n. When Patrice stood as guarantor for Alfred, the Bank was put on inquiry of the risk of undue influence.
o. Alfred seeks to rescind the Further Charges as well as any overage charges.
p. Due to the Bank's conduct, the defence of laches is not available to it.
q. Alfred should be placed back in the position he was in before the Further Charges.

Analysis

58. In my view, I shall grant the Bank's application for several reasons.

59. This is a three-party situation involving Patrice, Alfred and the Bank. Before dealing with the Further Charges, I will address some general issues.

60. At an early stage I should deal with Alfred's evidence of the location of his and Patrice's signatures on the documents in respect of the Further Charges. I reject that evidence as on none of the documents is there any indication that the location of the signature means one signatory has a priority or precedence or greater or lesser liability than the other. I do not accept Alfred's evidence that there is a common business practice of inferring who is a primary or secondary signatory based on the locations of the signatures. His logic failed in respect of the 2010 Charge when cross-examined and his explanation about having a precedence over Patrice lacked any merit. In my view, if the position of the signatures on the documents meant to convey a meaning, then it is reasonable to expect that a long-standing financial institution such as the Bank would have provided some explanation on the document to that effect. Thus, I find that the location of the signatures is of no effect, those signatures standing for what the documents state they are.

61. Similar to the point above, I do not accept that there is any significance to Alfred's assertions that he did not complete the various forms and that they were not in his handwriting. On cross-examination, he conceded that he had read the documents and then he had signed them. In my view, it is clear that someone, most likely Patrice, filled out the forms in her handwriting. It would be most unusual to have Patrice and Alfred fill out one form in both their own handwriting or to fill out separate forms in their handwriting to make what were essentially joint applications. Thus, I find that the fact of the forms not being filled out by Alfred is of no merit.

62. Alfred has asserted that the Bank would not lend him any funds because of his age, and thus it was the involvement of Patrice that caused the loans to be extended to them. He could not point to any documentary evidence in the form of a Bank policy on that point. However, I am satisfied by Ms. Davis' evidence that there was not an upper age limit imposed by the Bank for loans. As events turned out, the Bank did make loans to Alfred and then jointly to Alfred and Patrice.

63. In relation to the Condo, I am not satisfied on the evidence that the Condo was used as collateral for the Further Charges. In my view, there was no documentary evidence to state such and no formally executed documentation to support that contention. It appears to be speculation and revisionism.

64. In relation to Alfred's assertions that Patrice was a PEP at material times, there was no evidence from the Bank or Alfred on any PEP policies and how they applied to Patrice. As I understand it, Alfred was asserting that because Patrice was a PEP that the Bank had an obligation to conduct extra scrutiny. In my view, applying the principles of the range of case authorities cited, there is nothing to suggest that because Patrice was a PEP that there should be enhanced scrutiny in the context of undue influence in respect of her relationship with her husband Alfred and loans made to them jointly. Thus, in my view, the PEP argument in this context of undue influence has no weight.

65. Mr. Caines made a number of submissions portraying Patrice and the Bank in a certain light, including that: Patrice exploited Alfred, that the Bank facilitated Alfred's exploitation, that Patrice was the primary decision-maker and drove the applications, that Alfred was overborne by and vulnerable to Patrice, that Alfred was overruled, and that the Bank gave preferential treatment to Patrice. I have reviewed the evidence in this case and I note that Patrice has not given evidence. However, I am not satisfied to accept this portrayal of Patrice and the Bank because the evidence does not support such assertions. The Bank provided contemporaneous documentary evidence in the case and in my view, the applications were being processed and determined according to Bank policy, because there are various notes and statements on the documentation by Bank employees giving explanations and reasons. In respect of the assertions about the relationship between Patrice and Alfred, I deal with them in turn below, but generally they do not support Mr. Caines'sportrayal of Patrice as exploiting and overbearing Alfred and that she drove the applications for the Further Charges. On the contrary, the applications were joint applications voluntarily signed by Alfred.

66. Mr. Caines made submissions that Alfred's life was transformed after he married Patrice in that his debt increased significantly after each Further Charge to his financial detriment.

The evidence does show that Alfred's debt was increased as a result of the Further Charges. As set out in the evidence above and in the analysis below, in my view, there was a reason for such increase, namely that Patrice and Alfred just before they were married, and then once married, were borrowing money solely and then jointly to renovate and improve their home at the Property.

Actual Undue Influence

67. I have considered all the evidence in this case. I am not satisfied that there was actual undue influence by Patrice onto Alfred to cause him to enter the Further Charges. In considering *Snell's Equity* at 8-017 which referred to *Etridge*, actual undue influence involves overt acts of improper pressure or coercion such as unlawful threats, blackmail or misrepresentation. Thus, Alfred would have to satisfy the Court to the proper standard with some evidence that there were such overt acts by Patrice at the material times, on him to cause him to enter into each of the Further Charges. However, in my view, Alfred has not advanced any such evidence and there is no contemporaneous evidence of such actual undue influence. To that point, I am not satisfied that there is even circumstantial evidence to infer actual undue influence. In my view, relying on *Pitt* [at 209], I am not satisfied that there is any evidence to support the contention that Alfred did not freely and knowingly enter into the Further Charges. On the contrary, Alfred's evidence was that he read and understood the documents, and then signed them, describing the process as "Happy Wife, Happy Life". Further, I agree with Mr. O'Mahony, that it is quite extraordinary that there is no evidence of Alfred, or anyone else, saying words to the effect that Patrice did something, or said something, or pressured him, or forced him, amounting to coercion, to enter the Further Charges. Thus, in my judgment, there was no actual undue influence by Patrice on Alfred in respect of the Further Charges.

Presumed Undue Influence

68. In my view, the claim also fails on the ground of presumed undue influence. For each of the Further Charges, I have below considered the first primary fact of the relationship between Patrice and Alfred and then I have gone on to consider the second primary fact of the transaction.

The 2003 Charge

69. Alfred and Patrice were fiancés who were soon to be married and were making plans for their wedding. In applying *Etridge* and *Snell's Equity* at 8-030, the special class of relationships does not include wives or fiancés, as Lord Nicholls stated there is nothing unusual or strange in a wife, from motives of affection conferring substantial benefits on her husband. Switching that around for the present case, Alfred is asserting that Patrice exerted undue influence over him when they were fiancés and when she became a guarantor or surety in the 2003 Charge for $370,000. However, in my view, this contention is completely illogical and runs strikingly contrary to the case authorities where the person receiving the benefit is the one who it is asserted was exercising undue influence on the other party to become a surety. Thus, I accept that there are no authorities in which the undue influence is exerted by the surety, that is Patrice, over the principal debtor, Alfred.

70. In respect of the first primary fact, I remind myself, applying *Snell's Equity* [8-031] where fiancés would be in a general class, to be wary of acting on an assumption that such relationships of that general class would be ones of influence. Also, in applying *Rosesilver Group Corp*, I remind myself to be cautious of vague statements in evidence and speculative submissions by counsel, as an afterthought. To those points, I accept that Alfred has only recently, in the course of these proceedings, raised the issue of undue influence and I accept that Alfred conceded that there was nothing on the face of the documents to show that he did not want to proceed with the 2003 Charge. I also rely on *Re Smith (Deceased)* in that I am not satisfied that there were some additional factor such as illness or a background of trust and confidence in relationship to their financial affairs. Thus, I am not satisfied that the evidence of Alfred, in particular Alfred2, supports the contention that there was a relationship of influence when they were fiancés. I note that Alfred stated that he had knowledge and qualifications of accounting and economics, not simple subjects by any means, which leads me to conclude that it was implausible that he signed the 2003 Charge documents simply because Patrice told him to do so. Thus, in my view, there was not a relationship of influence.

71. In respect of the second primary fact, relying on *Etridge*, in my view the transaction was clearly explicable. Alfred wanted to be married to Patrice and thus was moving to another significant phase of his life. Thus, I accept that there was an ordinary motive by Patrice, as an ordinary person, soon to be married to Alfred, to be a surety for funds used for: (i) paying off the outstanding separate mortgage of $73,000; (ii) funding for new flooring to the Property; and (iii) funding for the wedding because he desired to be married. I note that Alfred stated that he did not want an expensive wedding, but in any event, I accept that they agreed on an amount to apply for in respect of the wedding expenses.

72. Thus, in the absence of a transaction procured by undue influence, I find that the question of the Bank's constructive notice does not arise. To that point, I also accept that there are no case authorities to support the contention that the Bank is put on constructive notice in a surety mortgage application where it is asserted that the undue influence is exerted by Patrice over Alfred.

73. Mr. Caines has argued that the Bank was put on inquiry when Patrice stood as a guarantor for Alfred, because it was a non-commercial relationship and the transaction did not appear to be to the financial advantage of Patrice. Thus, the Bank should have advised Patrice and Alfred to get independent legal advice. He relied on the cases of *Etridge*, *O'Brien,* and *Keimon Lawrence v HSBC Bank Bermuda Ltd.* which cited the English Court of Appeal case of *First National Bank plc v Achampong and others* [2003] EWCA Civ 487. In my view that line of cases is in respect of the Bank's duty to the surety and for protection afforded to such surety. The cases do not support the contention advanced by Mr. Caines that Alfred can invoke the *Etridge Principles* in order to challenge the 2003 Charge on the basis that Patrice, as surety, exerted undue influence on him. The Bank's duty was to Patrice as the surety, not to Alfred as the borrower. Thus, the Bank was not put on inquiry in relation to Alfred, as the principles do not operate in his favour as the borrower.

<u>The 2007 Charge</u>

74. Once married, Patrice and Alfred were in a relationship of husband and wife. I remind myself as I did for the 2003 Charge of *Snell's Equity* [at para 8-031] in respect of a husband and wife being in a general class and of *Rosesilver Group Corp* about vague statements

and speculative submissions. To those points and in relation to the first primary fact, I am not satisfied on the evidence that there was a relationship of influence. As stated above, the claim of undue influence has come only recently in these proceedings and I am satisfied that there was nothing on the face of the documents to show that he did not want to proceed with the 2007 Charge, although I noted above that Alfred avoided that question in cross-examination. I also rely on *Re Smith (Deceased)* in that I am not satisfied that there were some additional factor such as illness or a background of trust and confidence in relationship to their financial affairs.

75. In respect of the second primary fact, relying on *Etridge*, I find that the transaction was clearly explicable. The 2007 Charge was for a loan for the assignment of the Property from Alfred to himself and Patrice, who was moving from a guarantor to being a mortgagor with Alfred. In my view, this was an ordinary motive, by ordinary people who were husband and wife and planning their lives together. To that point, I am persuaded by Alfred's signature to the Voluntary Assignment which professed the "love and affection which he bore to his wife" and to Alfred2 where he considered Patrice as his equal in marriage. I also find that there was another motive for both Patrice and Alfred, in that Patrice was an employee of the Bank and thus she enjoyed a more favourable rate for loans.

76. Thus, in the absence of a transaction procured by undue influence, I find that the question of the Bank's constructive notice does not arise. To that point, I accept that the loan was made to Patrice and Alfred jointly and thus the question of constructive notice does not arise.

77. Mr. Caines submitted that the 2007 Charge should have caused a red flag to go up for the Bank because one of its vice-presidents was applying for a loan. I disagree with this submission because on the evidence, Bank employees do get loans because the Bank offers them a staff rate. Thus, in my view, there was nothing to cause a red flag to go up merely because Patrice was a vice-president at the Bank.

<u>The 2010 Charge</u>

78. I remind myself as I did for the 2003 Charge and the 2007 Charge of *Snell's Equity* [at para 8-031] in respect of a husband and wife being in a general class and of *Rosesilver Group Corp* about vague statements and speculative submissions. To those points and in relation to the first primary fact, I am not satisfied on the evidence that there was a relationship of influence. As stated above, the claim of undue influence has come only recently in these proceedings and I am satisfied that Alfred conceded that there was nothing on the face of the documents to show that he did not want to proceed with the 2010 Charge. I also rely on *Re Smith (Deceased)* in that I am not satisfied that there were some additional factor such as illness or a background of trust and confidence in relationship to their financial affairs. Further, I am satisfied that the evidence shows that Alfred was taking a leading role in respect of the renovations with both the contractor and with the Bank.

79. In respect of the second primary fact, relying on *Etridge*, I again find that the transaction was clearly explicable. The 2010 Charge was for a loan for a major renovation of the Property. In my view, this was an ordinary motive, by ordinary people who were husband and wife and continued to plan for their lives together in a family home. I find further support in the evidence that between 2008 and 2010, the amount sought for the loan had increased, in effect refuting the evidence of Alfred who asserted in his evidence that he did not want to proceed with such a loan. I also find that there was another motive in that Patrice was still an employee of the Bank and thus she enjoyed a more favourable rate for loans.

80. Thus, in the absence of a transaction procured by undue influence, I find that the question of the Bank's constructive notice does not arise. To that point, I accept that the loan was made to Patrice and Alfred jointly and thus the question of constructive notice does not arise.

<u>The Bank's entitlement to an order for possession under the Mortgage</u>

81. In light of the above reasons, relying on *John Percival White* which cited *Four Maids Ltd*, in my judgment, the Bank is entitled to exercise its power of possession in order to sell the Property.

82. As stated above, Patrice did not participate in these proceedings. For the avoidance of doubt, the Bank is entitled to exercise it power of possession against Patrice also in order to sell the Property.

The Counterclaim

83. In light of the above reasons, I find that the Bank did not fail to exercise its obligations owed to Alfred. Thus, Alfred fails in his Counterclaim, and consequently, it is dismissed in full.

Conclusion

84. In summary I have made the following findings:
    a. In respect of the Further Charges, I am satisfied that there was no undue influence by Patrice over Alfred.
    b. Alfred's Counterclaim fails, and consequently, it is dismissed in full.

85. I grant the Bank's claim against Patrice and Alfred as set out in the Originating Summons, namely delivery by them to the Bank of possession of the Property as mortgaged to the Bank under the Mortgage.

86. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Bank against Alfred on a standard basis, to be taxed by the Registrar if not agreed.

Dated 12 August 2026

SIGNED

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HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE