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

JUDGMENT

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

this regard. He further stated that "by the law of this colony, a mortgagee has a right upon failure by his debtor to observe and perform any of the covenants, stipulations and conditions contained in the instrument of mortgage to take proceedings."

Dr. Ramsahoye in his book mentioned earlier also referred to mortgages in Guyana as usually containing "an act of willing condemnation under which the mortgagor by the instrument of mortgage consents that a willing and voluntary condemnation should be decreed and adjudged against him by the Court before which the mortgage is passed." He made reference to the cases of **Macaulay v. Marks (1858) LRBG,** 1 and **British Guiana Electric Lighting Co. Ltd. v. Conrad (1897) LRBG, 115** which held that a mortgage bond passed before a Judge containing a willing and voluntary condemnation was a sentence or judgment, and until it had been revoked, rescinded, or set aside the debt dealt with by it was res judicata. These cases were followed in **Tinne v. Tebbutt (1921) LRBG, 84**.

From all of the foregoing it seems that the equitable defence of undue influence or lack of independent legal advice raised by the Appellants in their Affidavit of Defence, even though not flowing from the Respondents cannot avail them as no equitable principles apply to mortgages in Guyana. Further, a mortgage under the Roman-Dutch system is a judgment. In **Jaigobin v. Dias** (supra) **Bollers, J**. held that a mortgage, whether over movable or immovable property, creates a movable debt.

A perusal of the terms and conditions of the mortgage deeds signed and executed by the Appellants (the mortgagors) and the Respondents (the mortgagees) and tendered as exhibits in the Court below reveals that the Mortgagors requested the Registrar "to condemn the Mortgagors in the faithful and punctual payment of the capital sum on demand and of the

interest to become due and payable thereon at the rate aforesaid and at the time or times hereinbefore mentioned for payment thereof . . . . . as well as in the due and faithful observance, performance and fulfilment of the several covenants, agreements, conditions and stipulations . . . . . fully consenting to such condemnation (Judgment)." By the deed the Registrar condemned the Mortgagors in the faithful and punctual payment of the capital sum on demand and of the interest to become due and payable.

This is in similar form to the one referred to in **British Guiana Electric Lighting & Power Co. Ltd. v. Conrad** (supra). Counsel for the Appellants sought to distinguish it from the present case in that it was mentioned that certain specific elements must be present in a mortgage deed to make it a sentence or judgment, and the Court found that those elements were present as the mortgage in question was in the usual form, and I so find in the instant case. I am afraid I do not appreciate the distinction Counsel was seeking to make.

Counsel also made reference to **Tribhowan Sawh v. Ramjeet Sahabdeen (1968) GLR, 532** where it was held that the Labour Workers on Sugar Estates Ordinance created an exception to proviso (b) of Section 3D of the Civil Law of Guyana Ordinance in that the legal title to property when mortgaged passed to the lender. This case, of course, turned on the peculiar terms and conditions of a mortgage granted to sugar workers by the Sugar Industry Labour Welfare Fund Committee, and is not of general application. It was also held that the mortgage created thereby was of a type known to the common law of England, and so long as payment is effected within the specified time, the assignment thereby created would come to an end automatically without any further act; if the debtor fails to repay the loan within the time specified the Committee would become the absolute owner

of the property subject to the filing of proceedings to recover the loan. Until the proceedings are heard the debtor has an equity of redemption in the property.

This is totally unlike mortgages under Roman-Dutch law where there is no equity of redemption as the legal title to the mortgaged property remains at all times in the mortgagor.

Returning to the question whether the appeal has prospect of success one of the arguable points is that there was a triable issue as the Appellants raised the issue of undue influence and its ingredient of lack of independent legal advice. Of significance is the fact that at least seven mortgages were executed by the Appellants, particularly the first and second-named Appellants over a period of four years (from 1995 to 1999), and one is hard pressed to accept that the Respondents exerted undue influence over the Appellants and they did not obtain independent legal advice. One may have understood this being raised if only one mortgage had been executed, but certainly not seven. As stated earlier for this and other reasons I do not consider that the appeal has any prospect of success.

Both Counsel for the Appellants and for the Respondents had agreed that their submissions in relation to the application for a stay of execution should be considered as submissions for the substantive appeal which should be considered at the same time

In the circumstances the stay of execution is refused and the appeal dismissed. There will be costs to the Respondents fixed in the sum of $50,000.00.

Dated the 6th day of August, 2002.

D. P. Bernard

Desiree P. Bernard
Chancellor.