BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 2 of 2015

BETWEEN:

RBTT BANK BARBADOS LIMITED Appellant

AND

FITZROY ADOLPHUS DAVIS First Respondent
LISA DAVIS Second Respondent

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2015: June 10
2016: September 1

Mr. Ramon O. Alleyne and Ms. Shena-Ann Y. Ince of Messrs. Clarke Gittens Farmer for the Appellant

Mr. Alphonso Carew holding a watching brief for the First Respondent

Mr. Michael R. Yearwood and Ms. Nicole C. Roachford for the Second Respondent

DECISION

INTRODUCTION

BURGESS JA

[1] The appeal before this Court arises out of a transaction in which a wife charged her interest in the matrimonial home in favour of a bank by consenting to her husband executing a mortgage deed in favour of that bank to secure bank finance for his business enterprise. Surety wife transactions of this nature are of comparatively recent vintage in Barbados and are rapidly assuming greater and greater social and economic importance day by day. This is so because a significant proportion of privately owned wealth in this country is invested in the matrimonial home in which both spouses invariably have either a legal or a beneficial interest. Thus, the provision of security by way of mortgage of the matrimonial home requires the consent of both spouses to render such security enforceable by the lending bank. Under the provisions of the **Stamp Duty Act, Cap 91 (Cap 91)**, also, to be enforceable, such security must be stamped to secure the money to be lent, advanced or paid to the business enterprise or which may become due on its current account and must be up-stamped by way of further charges where any advance or loan is made in excess of the amount originally stamped on the security.

[2] The specific issue raised in this appeal relates to a wife's liability under her surety in respect of up-stamped amounts by way of further charges to secure further advances or loans by the bank to her husband's business enterprise without the wife's express knowledge of, and/or specific consent to, such up-stamping. The learned trial judge hearing this matter in the High Court, **Clarke J (Ag)**, in her judgment delivered on 20 October 2014, held that the wife's liability under her surety was limited to the amount originally stamped on her husband's mortgage security in favour of the bank and was not liable in respect of the later up-stamped sums by way of further charges. **Clarke J (Ag)**, further held that the bank's interests and rights in the matrimonial property under the husband's mortgage security did not rank in priority to the wife's rights and entitlements in the matrimonial property.

[3] The bank has challenged **Clarke J (Ag)**'s decision before this Court.

FACTUAL BACKGROUND

[4] The appellant is the company formerly known as Caribbean Commercial Bank Limited ("CCBL"), a company incorporated under the former-Act and continued under the **Companies Act Cap. 308**. By special resolution CCBL changed its name to RBTT Bank Barbados Limited ("RBTT"). The first respondent, Mr. Fitzroy Davis, is the owner of Roy Davis Construction

Limited (RDCL), his company through which he conducted his construction business. The second respondent, Mrs. Lisa Davis, is his wife.

[5] Mr and Mrs Davis reside at No. 27 Hanson Heights, Saint George, which property is titled in the deed of conveyance as Lot 27 Dash Valley in the parishes of Saint George and Saint Michael ("the matrimonial property"). Legal title to the matrimonial property was held in the sole name of Mr. Davis.

[6] Under a "Facility Letter and Overdraft Agreement" ("the facilities agreement") between RDCL and CCBL, CCBL granted to RDCL banking facilities and other financial accommodation by way of overdraft account and demand loans. It was a term of the facilities agreement that the indebtedness of RDCL be secured by a mortgage of the matrimonial property by Mr. Davis and guaranteed by him upon the terms and conditions contained in and implied under that mortgage.

[7] By way of mortgage executed on 19 March 1999, Mr. Davis created a mortgage over the matrimonial property in favour of CCBL. Clauses 2 and 3 of the mortgage are of signal importance in this case. Clause 2 reads:

> "In pursuance of the said recited agreement and in consideration of the banking facilities and other financial accommodation by way of overdraft on current account or otherwise made by the Bank to the customer the Mortgagor hereby covenants with the Bank to pay to the Bank on demand all moneys which are now due or at any time hereafter may be due or owing by the customer

> to the Bank or for which the customer may be or become liable to the Bank on any current or other account or in any manner whatever and discharge all liabilities incurred by the customer to the Bank in any manner whatever (and in the case of both money owing and liabilities incurred whether alone or jointly with any other person in whatever style or name and whether as principal or as surety) limited for principal in accordance with the provisions of the Stamp Duty Act, Cap. 91 of the Laws of Barbados…"

RDCL was "the customer" referred to in the mortgage.

[8] Clause 3, called by **Clarke J (Ag)** "the Continuing Clause" in her judgment, reads:

> "This security shall not be considered as satisfied or discharged by any intermediate payment of the whole or part of the moneys owing as aforesaid but shall constitute and be a continuing and running security to the Bank notwithstanding any settlement of account or other matter or thing whatsoever and shall in addition to and shall not operate so as in any way to prejudice or affect the security created by any deposit which may have already been made with the Bank or the title deeds and writings relating to the said property or any other securities which the Bank may now or any time hereafter hold for or in respect of the moneys hereby secured or any part thereof."

[9] Prior to executing the mortgage, CCBL requested and obtained from Mrs. Davis a "Release" executed by her on 31 December 1998. This release states as follows:

> "To: Caribbean Commercial Bank Limited
>
> Broad Street
>
> BRIDGETOWN
>
> In consideration of your giving time credit loan mortgage facilities or other accommodation to FITZROY ADOLPHUS DAVIS of No. 27 Hansen Heights in the parish of Saint George in this Island (hereinafter

> referred to as "the Borrower") upon the security of a legal charge over the property described in the schedule hereto (hereinafter referred to as "the property"), I LISA MICHELLE DAVIS, his wife, also of No. 27 Hansen Heights in the parish of Saint George abovesaid by this Release:-
>
> 1. Consent to the Borrower creating a legal charge in favour of Caribbean Commercial Bank Limited ("the Caribbean Commercial Bank Limited's charge") over the property;
>
> 2. Agree that the Caribbean Commercial Bank Limited's Charge (sic) and all money and liabilities secured by it shall have priority over all the estate interest or rights in the property or the proceeds of its sale to which I may now or at a later date be entitled;
>
> 3. Charge all my estate interest and rights in the property or the proceeds of its sale to Caribbean Commercial Bank Limited as a continuing security for all money and liabilities secured by the Caribbean Commercial Bank Limited's Charge (sic);
>
> 4. Agree not to assert or maintain any estate interest or right in the property adverse to that of Caribbean Commercial Bank Limited or which will obstruct delay or hinder the orderly realisation by Caribbean Commercial Bank Limited or its security;
>
> 5. Agree that I shall immediately vacate the property and give up possession of it to Caribbean Commercial Bank Limited upon the exercise by Caribbean Commercial Bank Limited of its rights under the Caribbean Commercial Bank Limited's Charge (sic);
>
> 6. Agree that none of the above shall in anyway be affected by the giving of time or other indulgence to or any arrangement with the Borrower or any other matter whatsoever."

[10] This release agreement was drawn and prepared by Mr. Edmund Hinkson, attorney-at-law for Mrs. Davis. Mr. Hinkson, it is to be noted, was also acting on behalf of Mr. Davis in the mortgage transaction with CCBL. During the course of the mortgage transaction, Mr. Stephen Farmer of the former firm of

Evelyn, Gittens Farmer (now Clarke Gittens Farmer), attorneys-at-law for CCBL, issued certain requisitions on title under cover of letter dated 23 June 1998 to Mr. Hinkson. The requisition was headed: "**REQUISITION** on the title to All that land situate at Hansen Heights, Saint George and being the lot numbered 27 which Fitzroy A. Davis (the mortgagor) is mortgaging to the Caribbean Commercial Bank Limited (the Mortgagee) for the sum of $200,000.00." Mr. Hinkson issued a reply to this requisition to Mr. Farmer under that title on 2 September 1998 and subsequently sent to him the release executed by Mrs. Davis.

[11] The mortgage was executed on 19 March 1999 and was stamped on 23 March 1999 to secure the sum of $200,000.00. It was later up-stamped by way of further charges dated 21 March 2000, 6 November 2001 and 16 September 2005 to secure the sums of $250,000.00, $400,000.00 and $800,000.00, respectively.

[12] RDCL made default in the repayment of the monies loaned to it by CCBL under the facilities agreement. By registered letter dated 31 October 2008, CCBL demanded repayment by Mr. Davis and RDCL of the monies due to CCBL under the facilities agreement within seven (7) days of the date of the letter. Later, by notice dated 14 January 2009, CCBL gave Mr. Davis statutory notice that unless the monies secured by the mortgage and further charges

were repaid, CCBL would take steps to sell the property charged by the mortgage and further charges. On 7 December 2009, CCBL wrote to Mr. Davis demanding payment forthwith of the monies loaned under the facilities agreement.

THE ACTION BEFORE THE HIGH COURT

[13] Mr. Davis failed to comply with CCBL's demand and, on 18 June 2010, by fixed date claim form, RBTT, the changed name of CCBL it will be remembered, instituted proceedings in the High Court titled CV No. 757 of 2010. In its claim, RBTT sought the following relief: (1) payment of the monies owed to it by the first respondent under the mortgage; (2) possession of the property; and/or (3) foreclosure; and/or (4) sale of the property; (5) further or other relief; and (6) costs.

[14] By notice of application dated 10 November 2010, Mrs. Davis filed an application before the High Court. In that application, Mrs. Davis sought *inter alia* the following orders: (1) that she be joined as a defendant to the action. (This was granted on 17 December 2010); (2) a declaration that she was beneficially entitled to an undetermined share in the property and a declaration as to the quantum of such share; (3) a declaration that the claimant took the mortgage and further charges subject to her rights in the said property, and that any claim thereto by the defendant do not rank prior to her rights and

entitlement; and (4) a declaration that she is not bound by the subordination of claim dated 31st December 1998.

[15] The grounds stated by Mrs. Davis in support of her application were that:

> "1. The Proposed Defendant was never advised by either (sic) the Claimant, the Attorney-at-Law for the Claimant nor the Attorney-at-Law for the Defendant of the need and importance of independent legal advice;
>
> 2. The Proposed Defendant was never advised by the Claimant, the Attorney-at-Law for the Claimant or Attorney-at-Law for the Defendant that she had the right to and it was preferable to use an Attorney-at-Law other than who was used by the Defendant;
>
> 3. The Proposed Defendant was never advised that in using the Attorney-at-Law for the Defendant that her interest ranked lower than that of the Defendant;
>
> 4. That the Proposed Defendant was never advised by either the Claimant, the Attorney-at-Law for the Claimant or the Attorney-at-Law for the Defendant that there was a conflict of interest when the said Subordination dated 31st day of December 1998 was executed;
>
> 5. The Proposed Defendant was never advised that the initial mortgage of 1998 was upstamped to $250,000.00 in 2000, $400,000.00 in 2001 and $800,000.00 in 2005 and the Proposed Defendant never signed a Subordination of Claim in respect of those Further Charges;
>
> 6. That the Proposed Defendant was never advised of the possibility of the Defendant applying for and obtaining Further Charges using the matrimonial home as security without her written acquiescence;
>
> 7. That the Claimant knew or ought to have known that as a result of her relationship with the Defendant that there was undue influence".

[16] The application was heard before **Clarke J (Ag)** in the High Court and she delivered her judgment on the application on 1 September 2011. The essence

of **Clarke J (Ag)'s** decision is captured in **paras [28]** to **[31]** of her judgment. They read as follows:

> "[28] What then of a wife who does not know that the mortgage deed to which she gave consent and to which she executed a Subordination of Claim was up-stamped on more than one occasion (without her knowledge).
>
> [29] It may be the practice of the banking sector to up-stamp such deeds without more but there is a legal requirement that a wife must give informed consent showing evidence that she received the benefit of independent advice.
>
> [30] In the matter before the Court the Second Defendant received independent advice on Subordination of Claim which related to $200,000.00. Any transaction to up-stamp the mortgage should have been communicated to her so that she was in a position to again seek independent advice. The Claimant was aware of the relationship between the First and Second Defendant and should have been put on enquiry.
>
> [31] This Court holds that any Continuing Clause refers to $200,000.00 of which the Second Defendant had knowledge and gave informed consent. It follows that the further charges made by the Claimant to the First Defendant do not rank in priority to the Second Defendant's interest in the property situated at Lot 27 Hansen Heights, St. George."

THE APPEAL

Grounds of Appeal

[17] By notice of appeal filed on 5 February 2015, RBTT appealed against the decision of **Clarke J (Ag)** seeking an order reversing that decision and an order that the further charges rank prior to any interest of Mrs. Davis in the mortgaged property on two main grounds of appeal. The first ground is that **Clarke J (Ag)** "erred in law in concluding that by reason of the Respondents

being husband and wife, the Appellant was under a duty to bring the Further Charges to the attention of the Second Respondent and seek her informed consent in circumstances where there is no legal requirement that a mortgagee seek the consent of the mortgagor or any similarly interested person before up-stamping a mortgage which is a continuing and running security." The second ground is that **Clarke J (Ag)** "erred in finding that the Further Charges do not rank in priority to the Second Respondent interest in the property even though there was no evidence or finding that the Second Respondent had an interest in the Property."

Appellant's Main Submissions

[18] In his written and oral submissions to this Court, Mr. Alleyne of Clarke Gittens Farmer, counsel for RBTT, maintained that the law on the enforceability of Mrs. Davis' release agreement with RBTT was that laid down in respect of a lender and a surety wife in the English House of Lords decisions in **Barclays Bank Plc v O'Brien [1994] 1 AC 180 (O'Brien)** and **Royal Bank of Scotland Plc v Etridge (No 2) [2002] 2 AC 773 (Etridge)**. These cases make it plain, contended Mr. Alleyne, that Mrs. Davis, a surety wife, was bound by her release agreement with RBTT unless there was proof of three things. These are (i) that Mrs. Davis proves what is necessary to be satisfied that the transaction was affected by the undue influence of the

husband; (ii) that the lender was put on inquiry; and (iii) that the lender did not take reasonable steps to satisfy itself that there was no undue influence.

[19] Mr. Alleyne noted that, at trial, "no acts of improper pressure or coercion or abuse of trust and confidence were alleged" and no evidence of any such acts adduced. In the absence of any evidence of undue influence by Mr. Davis, Mr. Alleyne argued, there was no basis for **Clarke J (Ag)** to consider the second or third element of the **O'Brien** and **Etridge** test. **Clarke J (Ag)** therefore fell into error in holding that RBTT was put on inquiry and had a duty to ensure that Mrs. Davis obtained independent legal advice.

[20] The second limb of Mr. Alleyne's argument was that, on a proper interpretation of Mrs. Davis' release agreement, she consented to further charges by way of up-stamping of the mortgage. Mr. Alleyne maintained that Mrs. Davis' release agreement embraced the continuing security clauses in clauses 2 and 3 of the mortgage. He contended that **Clarke J (Ag)** did not interpret these clauses and in not so doing came to the erroneous decision that Mrs. Davis lacked knowledge of and did not consent to the further charges and was only liable up to the sum of $200,000.00.

[21] Mr. Alleyne raised as a matter for this Court's "consideration" the fact that **Clarke J (Ag)** had not determined whether Mrs. Davis had an interest in the matrimonial property. This, Mr. Alleyne claimed, was at variance with

section 57 of the **Family Law Act Cap. 214**. After questioning by this Court, Mr. Alleyne abandoned this matter and so it is not addressed any further in this judgment.

Second Respondent's Main Submissions

[22] In his written and oral submissions to this Court, Mr. Yearwood, counsel for Mrs. Davis, supported the decision of **Clarke J (Ag)**. At paragraph 14 of his written submissions, he posited that:

> "Whilst the issue of independent legal advice is not germane to the matter before this Court, the issue of not having further independent legal advice in respect of up-stamping is."

[23] As regards this issue of "further independent legal advice", Mr. Yearwood argued that particular steps are required to be taken by a mortgagee in a surety wife transaction. He noted that there was no evidence that RBTT complied with these steps "either for the original Mortgage or most importantly the further up-stamping". Because of this, he argued, **Clarke J (Ag)**'s decision that Mrs. Davis lacked knowledge of and did not consent to the further charges and was only liable up to the sum of $200,000.00 was correct.

[24] Mr. Yearwood further argued that **Clarke J (Ag)**'s decision that Mrs. Davis was only liable up to the sum of $200,000.00 should also be upheld on the basis that, on a proper interpretation of clause 3 of the mortgage, that was the extent of what Mrs. Davis agreed to in her release. Mr. Yearwood

contended that that clause was to be interpreted in the context that the mortgage "was actually a guarantee by the First Respondent on the facilities of a separate and distinct customer. The Mortgage/guarantee was for an overdraft facility". Interpreted in that context, Mr. Yearwood submitted, the expression "running and continuing" in clause 3 of the mortgage "can only mean as long as the overdraft of the $200,000.00 remains in force, unpaid and available to the customer for whose benefit it was made". Thus, according to Mr. Yearwood, the release as executed by Mrs. Davis "contemplated that the continuing and running security was in respect of the continuing overdraft that was available to the customer up to the sum of $200,000.00".

COURT'S ANALYSIS AND CONCLUSIONS

Issues in the Appeal

[25] In our view, whether or not **Clarke J (Ag)**'**s** decision may be upheld depends on the answer to two intimately intertwined questions. The first of these is whether or not Mrs. Davis' release agreement, the surety on which RBTT's claim rested, was enforceable by RBTT. The second, which only arises if the answer to the first is in the affirmative, is the extent of Mrs. Davis' liability undertaken under that surety. Everything in this case depends upon resolution of these two questions because RBTT's enforcement claim is founded upon Mrs. Davis' release agreement. It is our judgment that the

pleadings and submissions of counsel on both sides may be subsumed within these two questions.

[26] Accordingly, we address these two issues *seriatim* hereafter.

The Enforceability of Mrs. Davis' Release

[27] As decided by **Clarke J (Ag)**, the law on whether a bank or other lender is entitled to enforce against a wife an obligation to secure a debt owed by her husband to the bank or other lender is now regarded in our jurisdiction as being authoritatively laid down in the English House of Lords decisions in **O'Brien** and **Etridge**. In **O'Brien**, Lord Browne-Wilkinson summarised this law as follows at **p 198**:

> "Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees: (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice."

It is worth noting here that Lord Browne-Wilkinson went on to explain that his reference to the husband's debts include the debts of a company in which the husband (but not the wife) has a direct financial interest.

[28] In **Etridge,** Lord Hobhouse said at **para [101]** that Lord Browne-Wilkinson's statement of the law:

> "…provides a structured scheme for the decision of cases raising the issue of enforceability as between a lender and a wife. It can be expressed by answering three questions: (1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband? (2) Was the lender put on enquiry? (3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence? It will be appreciated that unless the first question is answered in favour of the wife neither of the later questions arise. The wife has no defence and is liable. It will likewise be appreciated that the second and third questions arise from the fact that the wife is seeking to use the undue influence of her husband as a defence against the lender and therefore has to show that the lender should be affected by the equity—that it is unconscionable that the lender should enforce the secured contractual right against her."

[29] It is clear from **O'Brien** and **Etridge**, then, that the fulcrum on which enforceability of a surety wife's obligations to a lender pivots is proof by the wife of what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband. Without such proof, consideration of whether the lender is put on enquiry or whether the lender took reasonable steps to satisfy itself that there was or was not undue influence cannot arise. So that, in the present case, the paramount question for

consideration in the determination of whether Mrs. Davis' release is enforceable by RBTT against her is whether the release was brought about by the undue influence of Mr. Davis.

[30] In the very recent decision of the Caribbean Court of Justice in the Guyanese case of **Errol Campbell v Janette Narine [2016] CCJ 07 (AJ) (Campbell v Narine)**, the CCJ at **para [6]** accepted that the law on the question of whether a transaction arising 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 was brought about by undue influence was correctly enunciated in **Etridge**. In **Etridge**, Lord Nicholls stated that that question is a question of fact and that the legal burden of establishing undue influence rests on the person complaining of it. As to how this burden is discharged, Lord Nicholls stated at **para [14]**:

> "Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn."

[31] Lord Nicholls explained that what is involved here is the use, in the course of the trial, of the forensic tool of a shift of the evidential burden of proof, or in other words, a rebuttable presumption of undue influence. This evidential presumption is to be distinguished sharply from another type of presumption which arises in some cases where the law has adopted "a sternly protective attitude". Examples of such cases are parent and child, guardian and ward and trustee and beneficiary. In these cases there is an irrebuttable presumption that one party had influence over another.

[32] **O'Brien** and **Etridge** explain that the theory of law (said to have emanated from the Privy Council in **Turnbull & Co v Duvall [1902] AC 429** and applied in Australian High Court in **Yerkey v Jones [1939] 63 CLR 649, 675** and more recently by that court in **Garcia v National Australian Bank Ltd [1998] 194 CLR 395** that there was an "invalidating tendency" or "special equity" in the case of wife surety transactions that is to be understood in the context of these presumptions. Very importantly, Lord Nicholls in **Etridge** at **para [19]** noted that it is well established that the husband and wife relationship is not one of the relationships falling within the irrebuttable presumption category. This notwithstanding, he stated that:

> "Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her

> husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, "it is not difficult for the wife to establish her title to relief": see In re Lloyds Bank Ltd; Bomze and Lederman v Bomze [1931] 1 Ch 289, 302, per Maugham J."

[33] Given the foregoing, the conclusion at **para [30]** of the learned trial judge's decision that the mere fact that RBTT knew of the husband and wife relationship between Mr and Mrs Davis put RBTT on enquiry cannot be supported on the authorities. The clear law is that RBTT could only have been put on enquiry if Mrs. Davis pleaded and presented evidence that she had placed trust and confidence in Mr. Davis in relation to her financial affairs and that the release was a transaction which called for an explanation. As Hayton J pointed out at **para [54]** in delivering the judgment of the CCJ in **Campbell v Narine**, the pleadings needed to be clear.

[34] Evidence that she had placed trust and confidence in Mr. Davis in relation to her financial affairs and that the release was a transaction which called for an explanation was necessary for the judge to be satisfied that the transaction with RBTT was affected by the undue influence of Mr. Davis and therefore that RBTT was put on enquiry. But as Mr. Alleyne points out, no abuse of trust and confidence or other acts of undue influence were alleged and no evidence of any such abuse or acts adduced before the judge. We agree with

Mr. Alleyne that, in the absence of any evidence of undue influence by Mr. Davis, there was no basis for the judge to consider whether RBTT was put on enquiry, or in other words, to go to the second element of the **O'Brien** and **Etridge** test.

[35] By the same token, the mere existence of the husband and wife relationship did not cast upon RBTT an obligation to ensure that Mrs. Davis had independent legal advice in respect of the up-stamped further charges as held by the learned trial judge. As is plain from the **O'Brien** and **Etridge** test of enforceability of a wife's surety, the judge could only have gone to the third element of that test, namely whether RBTT took reasonable steps to satisfy itself that there was no undue influence by Mr. Davis, upon proof by Mrs. Davis that she had placed trust and confidence in Mr. Davis in relation to her financial affairs and that the release was a transaction which called for an explanation. As already noted, Mrs Davis presented no such proof. No issue of RBTT being under a duty to ensure that Mrs. Davis had independent legal advice in respect of the release could therefore have arisen. Accordingly, to the extent that the judge held that Mrs. Davis' release was not enforceable by RBTT because RBTT was in breach of a duty to ensure that Mrs. Davis had independent legal advice, the learned trial judge erred in law.

[36] To conclude on the question of enforceability of Mrs. Davis' release, then, Mrs. Davis did not adduce any evidence that her release agreement or any part of it was obtained by any undue influence on the part of her husband. There was therefore no basis for the judge's decision that Mrs. Davis' liability "related to $200,000.00" only, since RBTT "was aware of the relationship between [Mr. Davis] and [Mrs. Davis] and should have been put on enquiry". Mrs. Davis' release agreement was unaffected by any undue influence on the part of Mr. Davis and was therefore enforceable on its terms by RBTT.

Mrs Davis' Liability under the Release Agreement

Basic Guiding Principles of Interpretation

[37] Given our conclusion that Mrs. Davis' release agreement is enforceable against her by RBTT, the second question as to what interests did she surrender under that release agreement arises. Doubtlessly, this question can only be answered on a proper interpretation of the release agreement. Unfortunately, the learned trial judge did not essay any interpretation of the release agreement. We therefore do so now turning first to the applicable principles that ought to guide such an interpretation.

[38] In the recent cases of **E. Pihl & Sons A/S (Denmark) v Brondum A/S (Denmark) Civil Appeal No 24 of 2012 (Unreported), Systems Sales Ltd. v Arletta O. Brown-Oxley and Sonja Patsena Suttle Civil Appeal No. 10**

of 2006 (Unreported) and Gypsy International Ltd. and **Royston Beepat v Canadian Imperial Bank of Commerce Ltd Civil Appeal No. 27 of 2012 (Unreported)**, this Court held that the basic principles which should guide our courts in the interpretation of contracts are those enunciated by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912-13 (Investors Compensation Scheme).** The **Investors Compensation Scheme** guiding principles were also accepted and applied by the Caribbean Court of Justice in the Barbadian cases of **Sea Haven Inc v Dyrud (2011) 79 WIR** at **146 para [30]** and **Canadian Imperial Bank of Commerce Ltd v Gypsy International Ltd.** and **Royston Beepat [2015] CCJ 16**. There can be little dispute therefore that we are bound to apply the **Investors Compensation Scheme** guiding principles in the interpretation of Mrs. Davis' release agreement.

[39] The **Investors Compensation Scheme** guiding principles are succinctly captured by Lord Steyn in the later English House of Lords decision of **Sirius International Insurance Co (Publ) v General Insurance Ltd [2005] 1 All ER 101 at 200**, where he said:

> "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be

> gathered from the text under consideration and its relevant contextual scene."

[40] In the very recent Supreme Court of the United Kingdom case of **Arnold v Britton [2015] UKSC 36** at **para [15] (Arnold v Britton)**, Lord Neuberger, in interpreting specific provisions in a lease, restated **Investors Compensation Scheme** principles as follows:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

[41] The English Court of Appeal decision in **Egan v Static Control Components (Europe) Ltd [2004] 2 Lloyds Rep 429** at **para [13]** makes it plain that the **Investors Compensation Scheme** guiding principles apply in the interpretation of contracts of guarantee. In applying these principles to the case at bar, we are concerned to ascertain the contextual meaning of the release agreement by reference to, in the words of Lord Hoffmann in **Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101** at **para 14 (Chartbrook)**, "what a reasonable person having all the background knowledge which would have been available to the parties would have

understood them to be using the language in the contract to mean". Following Lord Neuberger in **Arnold v Britton,** this we must do by focusing on the meaning of the surrender clauses, (1), (2), (3) and (4), of Mrs. Davis's release agreement in their documentary, factual and commercial context.

Application of Interpretative Principles to the Release Agreement

Pre-Release Requisition Documents

[42] Before consideration of the surrender clauses, we deem it necessary to deal with the learned trial judge's treatment of Mr. Farmer's requisition and Mr. Hinkson's reply thereto. At **para [21]** of her judgment, she appears to have treated those pre-contractual documents as relevant textual background in deciding the extent of the charge consented to by Mrs. Davis under the release agreement. In particular, the judge appears to have treated the mention in Mr. Farmer's requisition that the mortgage which was to be executed by Mr. Davis was "for the sum of $200,000.00" and Mr. Hinkson's reply mentioning that same sum as evidence that the release was in respect of that sum. She writes at that paragraph that "…the accompanying documentation pointed to the fact that the property at Lot 27 Hansen Heights, St. George was being subjected to a charge in the sum of $200,000.00".

[43] We observe that there is no suggestion in her judgment that she considered the mention of the sum of $200,000.00 in the requisition and reply thereto prior to the execution of the release agreement as ever becoming a term of

that agreement. And we would add, there was no principle of law that would have allowed her to so treat that mention. Her reference to the requisition and reply "documentation" appears to us, even though she did not say so, to be more consistent with her treating that "documentation" as factual background in aid of construing the release agreement. The question of whether it was permissible for her to so treat that documentation therefore arises.

[44] The pre-**Investors Compensation Scheme** law on the use of extrinsic evidence, including preliminary documents, as admissible background in construing written agreements was very well settled. It was that extrinsic evidence could be so used only where the sense and meaning of the words of the written agreement was doubtful or difficulty arose in applying the language of the agreement to the circumstances under consideration. In **L Schuler v Wickman Machine Tool Sales [1974] AC 235 at 261**, Lord Wilberforce explained this exclusionary rule as follows:

> "The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive."

[45] The pre-**Investors Compensation Scheme** law has not been changed by that decision. Thus, in **Chartbrook**, Lord Hoffmann accepted that while "in

principle" previous negotiations "may be relevant" and that evidence about them could be used for purposes other than interpretation, such as establishing that a fact relevant to the background was known to the parties, the general exclusionary rule should be maintained "on pragmatic grounds". He spelled out these grounds as follows:

> "[35] The first is that the admission of pre-contractual negotiations would create greater uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration. Everyone engaged in the exercise would have to read the correspondence and statements would have to be taken from those who took part in oral negotiations. Not only would this be time-consuming and expensive but the scope for disagreement over whether the material affected the construction of the agreement … would be considerably increased. …
> [38] … [P]re-contractual negotiations seem to me capable of raising practical questions different from those created by other forms of background. Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations of one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded. But the imprecision of the line between negotiation and provisional agreement is the very reason why in every case of dispute over interpretation, one or other of the parties is likely to require a court or arbitrator to take the course of negotiations into account."

[46] It is plain from the foregoing that it was impermissible for the judge to use the requisition documents in interpreting the release agreement except to elucidate the words and meaning of words in that agreement. There were no

words in that agreement which necessitated elucidation, or indeed which could have been elucidated, by reference to the requisition documents. In consequence, we hold that the judge's finding at **para [21]** of her judgment that those documents established that "the property at Lot 27 Hansen Heights, St. George was being subjected to a charge in the sum of $200,000.00" was based on an erroneous application of the law on extrinsic evidence as admissible background.

Consideration Provision

[47] The foregoing having been said, we now embark on our interpretation of the release agreement to determine the interests surrendered by Mrs. Davis under that agreement. In approaching this task, it is our judgment that the consideration provision in the release agreement is critical textual background against which the surrender clauses are to be construed. This is so because the interests surrendered by Mrs. Davis in clauses (1) to (4) are given up in pursuance of the consideration provision. In this regard, it is to be underlined that the consideration for Mrs. Davis' release agreement is CCBL "giving time credit loan mortgage facilities or other accommodation" to Mr. Davis "upon the security of a legal charge" over the matrimonial property. It is also

worth noting here that there is no credit period or credit limit stated in this provision.

[48] Against the backdrop of the consideration provision, we turn to the interpretation of clauses (1) to (4) of Mrs. Davis' release agreement.

Clause 1 and the Extent of Mrs. Davis' Liability

[49] By clause 1, Mrs. Davis consented to Mr. Davis creating a legal charge over the matrimonial property in favour of RBTT. It follows from this that Mrs. Davis' liability to RBTT is coterminous with Mr. Davis' liability to RBTT under the mortgage executed by Mr. Davis and RBTT on 19 March 1999 in pursuance of Mrs. Davis' consent to the creation of that mortgage. Accordingly, to determine the extent of Mrs. Davis' liability to RBTT, it is necessary to determine Mr. Davis' liability under the mortgage.

[50] Clauses 2 (reproduced at para [7] of this judgment) and 3 (reproduced at para [8] of this judgment) of the mortgage are of vital importance in making that determination. To begin with, it is evident from clause 2 that the mortgage executed by Mr. Davis is a contract of guarantee given for the banking facilities and other financial accommodation provided by RBTT to RDCL, Mr. Davis' company. In our judgment, the nature of obligations created by Mr. Davis' contract of guarantee is best understood by interpreting clauses 2 and 3 within their commercial context.

[51] We begin with some basics. In the world of commerce, a contract of guarantee is given to a financier either in respect of fixed-sum credit or revolving or running-account credit. Contracts of guarantee are fixed where the guarantee is on a specific transaction or transactions and where the amount of the financial accommodation to be provided is delimited at the outset. On the other hand, contracts of guarantee are continuing where the guarantee covers a series of transactions pursuant to a facility or master agreement. The guarantor's liability is not fixed but varies according to the debtor's liability to the creditor at any given time.

[52] Professor Roy Goode's explanation in his monumental work, *Commercial Law (Penguin, 2nd ed)* at p 826 is particularly helpful in identifying a continuing contract of guarantee. Professor Goode writes there:

> "…in the case of a continuing guarantee there is no specific amount of credit the repayment of which is guaranteed; there is merely a fluctuating *balance*, which rises as [the debtor] utilizes the credit and falls as he makes payment in reduction of his indebtedness, and it is the ultimate debit balance for which [the guarantor] is responsible in the event of [the debtor's] default. This is why a bank guarantee of a customer's overdraft commonly provides that the guarantee is not to be treated as discharged by an intermediate satisfaction of the customer's indebtedness. The customer may clear his overdraft by a payment to the credit of his account, reducing the debit balance to nil, but if a week later his account goes into debit again as a result of fresh drawings, the guarantor under a continuing guarantee is not out of the wood, for the undertaking relates to the customer's indebtedness from time to time, and the extinction of the debit balance at any particular time does not bring an end to the debtor-

> creditor relationship nor, in consequence, to his guarantee of defaults arising from that relationship."

[53] Given the foregoing explanation of contracts of guarantee, it is our view that Mr. Davis' mortgage was a continuing contract of guarantee and not a fixed contract of guarantee. There are a number of indications in clauses 2 and 3 which point to the mortgage being a continuing guarantee.

[54] The first is in clause 2, where it is stated that Mr. Davis' obligations undertaken under the mortgage are in consideration of RBTT providing "banking facilities and other financial accommodation by way of overdraft on current account or otherwise". In commercial usage, "banking facilities" and "overdraft on current account" are consistent with revolving or running-account credit. Correspondingly, a guarantee given for revolving or running-account credit is without more to be regarded as a continuing guarantee. Stated differently, the words "banking facilities" and "overdraft on current account" contemplated that RBTT had the power to increase the facilities by way of overdraft on current account and to increase the security on such facilities by up-stamping the mortgage deed.

[55] The second is that, by clause 2 also, Mr. Davis' liability was to pay to RBTT "all moneys which are now due or at any time hereafter may be due and owing by the customer or for which the customer may be or become liable to the bank on any current or other account". There is no credit period or credit limit

expressly stated in that clause, or for that matter, in any other clause in the mortgage. The cited words constitutes clause 2 an "all moneys" clause and such clauses are to be interpreted to give effect to their natural and ordinary meaning. So interpreted, Mr. Davis' liability to pay to RBTT is unlimited both as to time as well as to amount.

[56] The third is the phrase "limited for principal in accordance with the provisions of the Stamp Duty Act, Cap 91 of the Laws of Barbados", again in clause 2, in demarcating Mr. Davis' obligation to discharge all liabilities incurred by RDCL. "Principal sum" is defined in clause 1 of the mortgage as "the moneys lent and advanced by the Bank to the customer and additionally secured by this Mortgage". It is clear from this definition that the principal sum secured by the mortgage is unlimited as to credit period or credit limit; it includes not only moneys lent and advanced but also includes sums "additionally secured by the mortgage". The relevant provision of **Cap 91** is therefore **section 5 (2)**. That section provides as follows:

> "Where [the] total amount [secured] is unlimited, the security shall be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument bearing the date of the day on which the advance or loan is made."

[57] In a nutshell, the phrase "limited for principal in accordance with the provisions of the Stamp Duty Act, Cap 91 of the Laws of Barbados" therefore means any sum which the mortgage was stamped to secure. Indeed, because of **section 5 (2)**, the phrase contemplates up-stamping of the mortgage and that each up-stamping of the mortgage be deemed a new and separate mortgage.

[58] The fourth is the stipulation in clause 3 that the security given by the mortgage was to "constitute and be a continuing and running security to the Bank". As noted in *Halsbury's Laws (4th Edn, 1993) vol 20, para 200*, a continuing guarantee will normally be appropriate as security for an overdraft facility, since the overdraft will fluctuate in amount and will often continue for an indefinite period. In our view, this captures the essence of the meaning of the expression "a continuing and running security". It denotes "security with a floating subject matter", as was said in the English Court of Appeal case of **Bank of Credit and Commerce International SA (in compulsory liquidation) v Simjee and Another (Transcript: Smith Bernal) 3 July 1996**.

[59] Our conclusion on Mrs. Davis' liability to RBTT pursuant to clause 2 of her release agreement is that it was unlimited both as to time as well as to amount secured by the mortgage. True, the mortgage which was executed about three

months after the release was originally stamped to secure $200,000.00. However, that figure was neither a limit stipulated in any term of the release agreement nor of the mortgage. For this and all the other reasons just discussed, there is no basis for treating Mrs. Davis' liability to RBTT as limited to $200,000.00.

Clause 2 and Priorities

[60] By clause 2 of her release agreement, Mrs. Davis agreed that the legal charge created by Mr. Davis, with her consent, in favour of RBTT and all money and liabilities secured by it "shall have priority over all the estate interest or right" in the matrimonial property to which she "may now or at a later date be entitled". On the plain words of this clause, Mrs. Davis agreed to an alteration of the priorities in the matrimonial property. By this clause, she agreed to postpone her priority to that of RBTT. In our judgment, this is what a reasonable person having all the background knowledge which would have been available to Mrs. Davis and RBTT would have understood them to be using the language in clause 2 to mean.

[61] On the express words of clause 2, Mrs. Davis postponed her priority over "all the estate interest or right" in the matrimonial property to which she "may now or at a later date be entitled" to RBTT. In the absence of evidence of undue influence by her husband or some other vitiating factor, Mrs. Davis is

bound by those words. Consequently, it is difficult to divine how, as was held by the learned trial judge at **para [31]** of her judgment, the priority in the matrimonial property over which RBTT was given by Mrs. Davis was only in respect of the $200,000.00 stamped on the mortgage executed in favour of RBTT some three months later.

Clause 3 and the Nature of Mrs Davis' Security to RBTT

[62] By clause 3 of her release agreement, Mrs. Davis charged all her "estate interest and rights" in the matrimonial property to RBTT "as a continuing security for all money and liabilities" secured by Mr. Davis' mortgage in favour of RBTT. We have already explored the nature of continuing security in commercial law at paras [51] to [52] of this judgment. For all the reasons given there, we hold that the security given by Mrs. Davis to RBTT pursuant to clause 3 was unlimited both as to time as well as to amount secured by the mortgage.

Clause 4 and Mrs. Davis' Assertion of Rights in the Property Charged

[63] The language of clause 4 is crystal clear. In it Mrs. Davis agreed "not to assert any estate interest or right adverse to that of Caribbean Commercial Bank Limited" in the orderly realisation by CCBL of its security. This clause captures the essence of the overall purpose of the release agreement. It is that Mrs. Davis would, in consideration of the appellant providing financial

accommodation to assist her husband's business, postpone her right to claim her interest in the property until the appellant enforced its security or recovered any debt owing.

Conclusion on Mrs. Davis' Liability under the Release

[64] In our judgment, four consequential conclusions may be drawn from the foregoing. The first is that the sum of $200,000.00 was not included as a term in either the release agreement or the mortgage limiting Mrs. Davis' liability on the security given by her to CCBL. The second is that, on the contrary, by clause 2 of the release and clauses 2 and 3 of the mortgage, Mrs. Davis' liability under her security was unlimited both as to time as well as to amount secured by the mortgage. It was a continuing security on all moneys lent and advanced and additionally secured by the mortgage. The third is that, by clause 2 of the release, Mrs. Davis postponed her priority in the matrimonial property to that of CCBL. The fourth is that, in any event, by clause 4 of the release, Mrs. Davis surrendered her right to assert any rights or interest as against CCBL in that property.

DISPOSAL

[65] For all of the foregoing reasons, the appeal is allowed and the orders of **Clarke J (Ag)** are set aside.

[66] We will hear the parties as to costs.

Justice of Appeal

Justice of Appeal

Justice of Appeal