IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. 1998/ F - 086

BETWEEN	LORNA CHRISTINE FLOWERS	CLAIMANT
AN D	BANK OF NOVA SCOTIA (JAMAICA) LIMITED	DEFENDANT

Barrington Frankson and Kadian Lewis instructed by Barrington E. Frankson & Co. for the Claimant

Malaica Wong and Lisa Russell instructed by Myers Fletcher and Gordon for the Defendant

Banking Law – Circumstances allowing for a finding of undue influence – Question of fact as to whether loans disbursed – Question of fact as to whether creditor insurance policy in place - Security document dated subsequent to date of execution in order to evade Stamp Duty penalties – effect on security document

June 13, 14, 15, 21, September 6 and 28, 2007

BROOKS, J.

Mrs. Lorna Flowers and her husband Mr. Carlton Flowers were customers of the Bank of Nova Scotia (Jamaica) Limited. Mr. Flowers died on 12th August 1997. Mrs. Flowers says that she had been assured by the bank's officers that, upon his death, an insurance policy securing the payment of mortgage loans the Flowers' had taken from the bank, would have satisfied the debts. The bank however insists that the policy covered Mrs. Flowers' life only and so the debt remains unsatisfied. Mrs. Flowers now accuses the bank's officers, with whom she and her husband dealt, of

taking advantage of them, of misleading them, of not disbursing all the alleged loans and of receiving the proceeds of the insurance policy, but not applying those proceeds for the intended purpose. The bank has counterclaimed for the amounts it says are due to it.

The issues involved are mainly questions of fact. An examination of the documentary evidence will be critical in assessing many of Mrs. Flowers' allegations against the bank and its officers. I shall examine the allegations individually.

Undue Influence

In her Statement of Claim, Mrs. Flowers alleges that two bank officers, Messrs. Gladstone Wright and Donovan Quarrie, created and encouraged such a relationship with the couple, that the Flowers' placed great reliance on them and trusted them for advice in relation to the operation of their accounts. Those allegations were not supported in her evidence in chief. At paragraph 17 of her second witness statement she says that Mr. Wright, upon assuming the duties of manager of the branch, advised the couple that they would be dealing directly with Mr. Quarrie in relation to their file. Thereafter she speaks of various bits of advice that were given to her husband and herself, by either one or other officer. All the bits of advice

to which she refers, spoke to matters of getting loans to achieve the couple's goal of completing the construction of their house.

Mrs. Flowers has not demonstrated that there was any special relationship between these officers and her husband and/or herself. Nor has she established that there was any unfair exploitation by those officers, of the relationship which in fact existed. In *National Commercial Bank (Jamaica) Limited v Hew* [2003] UKPC 51 (delivered 30/6/03), their Lordships made it clear that:

1. a banker/customer relationship was not presumed to be fiduciary; that any relationship "of trust and confidence" or "ascendancy and dependency", in that context, has to be proved; and,
2. the person alleging undue influence must prove, not only that such a relationship existed but that it was abused as between the parties to give an unfair advantage to the ascendant party.

In my view Mrs. Flowers has not succeeded on either of these bases. What the evidence demonstrates is that the Flowers' secured a loan to help them to construct their "dream house" and when that loan did not prove sufficient to complete the work, they took other loans. There is clear indication of a failure to properly service those loans. There is no evidence as to the reason for the failure to service the loans, but the evidence is that

the bank officers, in an attempt to assist the Flowers, and apparently, also to comply with bank regulations, had some of the loans rescheduled. That process entailed using new loans to pay off non-performing loans. The newer loans carried a lower rate of interest and smaller monthly repayment instalments. Mrs. Flowers has not shown how that exercise was to her detriment, that it was improperly undertaken, or that it gave an unfair advantage to the bank.

Were all the claimed debts incurred?

Mrs. Flowers has launched a three pronged attack in respect of the loans which the bank alleges that it made to her. Firstly, she asserts that she did not take all of those alleged loans. Secondly, she says that although her signature and that of her late husband appear on some of the loan documents, they could not have been signed by them on the dates borne by the documents. Thirdly, Mrs. Flowers asserts that the couple did not mortgage a property which the bank alleges that they did.

An assessment of Mrs. Flowers' attacks requires a detailed analysis of the various documents. For the benefit of the parties, I have compiled a table setting out the essential information revealed by the documentation provided by the bank. This evidence is unchallenged for the most part, though there are some issues of fact, which I shall address.

Scotia Plan Loans

Date	Loan #	Amount $	Interest Rate	Disbursed to A/C	Date Repaid	Security
21/9/95	605999 (SPL 784389)	555,000.00	Information Not provided	Information Not provided	July 97	
30/7/96	604321 (SPL 784397)	3,000,000.00	43.903%	721128 ($2,920,865.78)	July 97	
26/2/97	781843 (SPL 784400)	1,600,000.00	38.082%	721128 ($1,270,000.00)	July 97	
31/7/97	784389	452,872.10	25.958%	Loan # 605999		Mortgage
31/7/97	784397	2,982,372.19	25.958%	Loan # 604321		Mortgage
31/7/97	784400	1,596,209.86	25.958%	Loan # 781843		Mortgage

Demand Loans

Date	Loan #	Amount $	Interest Rate	Disbursed to A/C	Date Repaid	Security
9/12/96	037/97	350,000.00	45%	721128	26/2/97	Mortgage
16/12/96	No number	80,000.00	45%	721128	26/2/97	
13/1/97	No number	450,000.00	45%	721128	26/2/97	
24/1/97	077/97	190,000.00	45%	721128	26/2/97	
7/2/97	094/97	200,000.00	41.75%	721128	Not clear if repaid	Mortgage
11/3/97	133/97 (800096)	400,000.00	38.75%	721128		Mortgage
27/3/97	159/97	300,000.00	38.75%	721128		Mortgage
7/7/97	270/97 (800097)	800,000.00	30%	721128		Mortgage
19/8/97	327/97 (800052)	150,000.00	30%	721128 ($46,385)		
25/8/97	330/97 (800066)	150,000.00	30%	721128 ($145,275)		
8/10/97	800202	200,000.00	5%	721128		

The evidence shows that there were two types of loans made to the Flowers'. One type was a personal or 'retail' loan which the bank called a "Scotia Plan Loan" (SPL). There were six of these SPL's; the first three in

time, were replaced by the second three. Two of the first three were each secured by a legal mortgage of the couple's real property at Coral Gardens, Saint James. This was where their house was being constructed. The latter three were all issued on 31st July, 1997. Each of the mortgages continued to be the security for its respective successor SPL. A third mortgage was registered, ostensibly, as security for the last of the latter three SPL's.

The second type of loan was a commercial loan, which was also called a "demand loan". There were eleven of these loans and each was evidenced by a promissory note. The notes signed, up to and including July 1997, were signed by both Mr. and Mrs. Flowers. Their liability is joint and several. Thereafter, Mrs. Flowers alone, signed. The security was by way of two legal mortgages of the couple's real property at Catherine Hall, Saint James. Several of the earlier demand loans were settled by a portion of the proceeds of an SPL in the sum of $1,600,000.00. It is not clear whether one such loan, which was granted on 7th February 1997 was so settled, but I shall deal with this aspect when considering the counterclaim.

What the analysis of the documentation shows is that the proceeds of every demand loan made to the Flowers' was lodged (at least in part) to their joint savings account. The second and third SPL's were also lodged (less some administrative expenses) to that account. It is not clear if the proceeds

of the first SPL was so deployed, but there is no dispute concerning that amount, which was used toward the purchase price of the Coral Gardens property. The fourth, fifth and sixth SPL's, being used to pay out the first three, are not revealed in the record of the savings account

An examination of the savings account, (pages 92 – 94 of the bundle with the witness statements) shows that there were withdrawals of the various sums representing the loans. What the account also shows is that the bank would often pay itself the monthly repayment instalments, from the said savings account. As it turned out, these payments were from the very proceeds of the loans which it had made, to the extent that those loan proceeds remained in the savings account. The SPL accounts each describe the process as an "autopayment". As strange as this arrangement may seem, it had been contemplated by the parties and pre-authorized by the Flowers' on the "one step application forms" used for the SPL's.

Just as importantly, the savings account shows that for the period, 30th January, to 31st October, 1997 only three deposits were made by the Flowers'. They totalled just over $100,000.00. Two of the original SPL accounts, upon examination (pages 98 - 99 of the bundle with the witness statements), also show dismal payment performances by the Flowers. The record of the other original SPL account was not exhibited.

I accept the documentation as accurate and credible. It shows consistency and is grounded in documents signed by the Flowers'. The above analysis shows, not only that the Flowers' account was credited with the various amounts loaned to them, but that they had the benefit of all those loans, be they demand loans or SPL's. Mrs. Flowers' testimony to the contrary cannot be accepted.

In respect of the second prong of Mrs. Flowers' attack of the bank's documentation, the evidence raises the issue of the credibility of the witnesses concerning the execution of the documents dated 31st July and 12th August 1997. The affected documents are three SPL Disclosure Statements (784389, 784397 and 784400 each dated 31st July 1997), and two Instruments of Mortgage (both dated 12th August 1997). On those dates, Mrs. Flowers testifies, her husband was either indisposed due to illness, or on his death bed, suffering from the last effects of that illness. She testified at paragraph 6 of her first witness statement that Mr. Flowers was allowed to go home from hospital, "on medication and (he) was fully bedridden. In her latter witness statement (at paragraph 40), she said that Mr. Flowers "was released from the hospital on that same day (31st July) and he was blind". In cross examination she said that she couldn't say that the documents bearing that date were signed by her husband, because on the 31st July he "was on

his way to dialysis". She further said in cross examination, concerning signings by Mr. Flowers, that "when my husband was in the hospital Mr. Wright gave me a document for me to sign and he sign (sic) it, but when he came out of hospital he ask (sic) me to destroy it because it could not be valid". It is not clear to which document those exchanges referred or on which dates they occurred.

On the contrary, Mr. Quarrie testified that the documents dated 31st July, 1997 were all signed before him on that date. They were, he said, signed by both Mr. and Mrs. Flowers (paragraph 7 of his witness statement). He resisted suggestions made to him to the contrary effect. He testified, in cross examination that he was aware that Mr. Flowers died on 12th August, 1997, and that there were two documents, bearing Mr. Flowers' signature which bore that date. Mr. Quarrie said that they were, however, not executed on that date. He drew a distinction between the granting, as opposed to the registration, of the loan.

Mr. Egerton Anderson, who succeeded Mr. Wright as the manager of the branch, sought in cross examination, to explain the distinction. His explanation for the mortgage documents bearing the date 12th August 1997 even though the loan was disbursed 30th July, 1997, was that "in order to

avoid penalty we don't put in the date until it is time to register the mortgage".

I have, in this context, looked particularly at the signatures of Mr. Flowers as they appear on the documents dated 31st July and 12th August 1997 respectively. The signatures are markedly less legible than those in the previously executed documents. I have also considered the unchallenged evidence of Mr. Carl Major, a handwriting expert. He testified that he examined several documents (eventually produced in evidence before the court) for the purposes of determining the authenticity and authorship of those documents with regard to the signatures of Carlton Flowers and Lorna Flowers. Having examined the documents and made his comparisons, Mr. Major opined that the documents dated 31st July 1997, were all signed by Mr. Flowers and by Mrs. Flowers. His significant findings were as follows:

> "2. I am satisfied and it is my conclusive opinion from my examination and comparison of all the signatures – Lorna Flowers as one set on questioned documents listed at "a", "b", "c", "d" and "e" …- each signature (Lorna Flowers to Lorna Flowers) exhibits significant and or outstanding similarities to each other and fits comfortably within the parameters of individual variation of each other, one with the other and severally and displays identical characteristics to each other and were all (Lorna Flowers) written by one and the same person together with those signatures Lorna Flowers/Lorna C. Flowers on the six (6) Promissory Notes dated 13.01.97; 24.01.97; 07.02.97; 11.03.97; 27.03.97 and 7th July 1997 listed at "f" …and on Mortgage Instruments dated October 12, 1995 and August 16, 1996 listed at "g" and "h" …respectively were all written by one and the same person."
>
> "3. Likewise, in the case of Carlton Flowers as another set of questioned signatures on documents listed at "a", "b", "c", "d" and "e" … - each signature exhibits significant and or outstanding features similar to each other and fits

> comfortably within the parameters of individual variation of each signature, one with the other and severally and displays identical characteristics to each other and were all written by one (Carlton Flowers) and the same persons;
>
> "3a. **In respect to (sic) signature "Carlton Flowers" on Promissory Notes Nos. 784389; 784397 and 784400 each dated July 31, 1997 listed at "c", "d" and "e"… - each signature exhibits cragginess or instability in its execution which seems, in my opinion some sort of nervousness or sickness** – yet those three (3) signatures exhibit consistency in that form of cragginess or instability in those signatures – up and down the baseline and appear not legibly written but with that cragginess consistency etc. These signatures are reportedly questioned and disputed by its author.
> And worthy of note is the signature Carlton Flowers or what appears there for on Promissory Note dated 7th July 1997 listed among others at "f"… which is a known or acknowledged signature – in other words the signature is not in dispute – but same exhibits identical identifying features as those six (6) signatures "Carlton Flowers" described earlier in this "3a" subparagraph.
>
> "3b. In the circumstances I am of the opinion conclusively that all those signatures Carlton Flowers on Mortgage Instruments Nos. 989691 and 989692 listed at "a" and "b" respectively as also the signature Carlton Flowers on the three (3) Promissory Notes all dated July 31, 1997 with respective Nos. 784389, 784397 and 784400 listed at "c", "d" and "e" …together with the signatures "Carlton Flowers" on the six (6) Promissory Notes dated 13.01.97; 24.01.97; 07.02.97; 11.03.97; 27.03.97 and 7th July 1997 listed at "f" …and on Mortgage Instruments dated October 12, 1995 and August 16, 1996 listed at "g" and "h" … were all written by one and the same person." (Emphasis supplied)

Although, as the tribunal of fact, I am entitled to reject Mr. Major's evidence and his opinion, I find that it is consistent with the evidence concerning Mr. Flowers' physical and medical condition on or about 31st July, 1997. I therefore find, that Mr. Flowers did in fact sign the Promissory Notes dated 31st July, 1997 and the two mortgages dated 12th August, 1997. I prefer, as being more credible, the testimony of Mr. Quarrie on the point. I find Mrs. Flowers' statements concerning Mr. Flowers' location on that day, inconsistent. Mrs. Flowers' second limb therefore also fails.

I now turn to Mrs. Flowers' third prong of attack. She testified that the couple's real property at Lot 314 Catherine Hall was never the subject of a mortgage. As a result, she denies taking any loan which used that property as security. She stated in cross examination, "I cannot acknowledge that $350,000.00 (loan) because we did not take any loan on Catherine Hall property." In respect of other demand loans brought to her attention, Mrs. Flowers said, "I have no knowledge of the $80,000.00. I can acknowledge that $450,000.00. That was the first advance. The $190,000.00, I think this was coming from the payment to Delapenha (Funeral Parlour) and the rest to service my account". When confronted with the fact that in paragraph 26 of her Statement of Claim, she had acknowledged that she did accept an advance of $80,000.00, Mrs. Flowers said that the Statement of Claim was incorrect in that regard. Apart from the fact that Mrs. Flowers' demeanour in this area of the cross examination was far from impressive, again the documentation belies her assertions.

The registered title for the Catherine Hall property (at pages 39 - 41 of the bundle with the witness statements) shows two mortgages in favour of the bank. The details are:

Instrument Number	Date of Instrument	Date of Registration	Amount secured
964990	13th December 1996	6th February 1997	$350,000.00 with interest

989691	12th August 1997	24th September 1997	$1,700,000.00 with interest

A document entitled "Statement of Affairs", signed by the Flowers' and dated 9th December, 1996 refers to a loan of $350,000.00 requested by the Flowers. In the document the security referred to for that loan is, "Form 98C over R/E Lot 314 Catherine Hall, St. James. STPD. $350m. E/V. $4000m.". (It should be noted here that the bank uses the Roman format for the letter "m"; hence it signifies thousands rather than millions.) The date and amount involved belies Mrs. Flowers' assertion that the couple took no such loan and granted no such mortgage.

Similarly, the other "Statement of Affairs" documents, used to initiate the process for the demand loans, all refer to the Catherine Hall property as the security for the loan. It is true that the SPL granted by the bank on 26th February, 1997 ($1,600,000.00), and secured by a mortgage on the Coral Gardens property, was used, in part ($1,270,000.00), to pay off at least four of these demand loans, including the loan for $350,000.00 which was already secured by a mortgage on the Catherine Hall property. It seems therefore that there is no basis for the bank maintaining mortgage numbered 964990 against this title. When asked by the court, about its continued existence, Mr. Quarrie said "because the security was a mortgage, it is not customary that when the (relevant) debts are paid out that we instantly

discharge the mortgage. It reduces the burden on the customer". I understood him to mean that the mortgage could have been used as security for another loan if the customer so desired. In this case it was not so used. It should be discharged.

The mortgage instrument in the sum of $1,700,000.00 is less straightforward. There was no supporting document as in the case of the other loans. In fact, the bank, in a letter dated April 23, 1998, and addressed to Mrs. Flowers' accountants stated that it had, "no record of a loan of $1,700,000.00 d/d 12/8/97" (page 143 of the bundle of witness statements). There was no direct enlightenment coming from any of the witnesses. The court was left to deduce, from Mr. Quarrie's evidence on cross examination, that the $1,700,000.00 mortgage was taken by the bank to secure four separate demand loans, which were unsecured (except that the bank held the duplicate certificate of title) up to 30th July, 1997. Mr. Quarrie said:

> "We had granted SPL for $1,600,000.00, part of it was used to pay out a number of these demand loans. We then proceeded to register a mortgage for the balance remaining after that process."

Later the following exchange occurred in cross examination:

> Q. As at 31/7/97 the only monies owed to the bank were the ones rescheduled?
>
> A. No sir.
>
> A. Other than the rescheduled loans, we had other demand loans outstanding at that time.

> Q. What were the demand loans outstanding as at 31/7/97.
>
> A. I have to search. (After consulting bundle with the witness statements) From my records it seems to be $1,700,000.00.
>
> In answer to court: I looked at the promissory notes on pages 58, 59, 60 and 61 to assist me (in arriving at the last answer).

The loans in question were in the sums of $200,000.00, $400,000.00, $300,000.00 and $800,000.00. I therefore again find that Mrs. Flowers and her late husband did in fact mortgage the Catherine Hall property to secure the sum of $1,700,000.00, and had received loans totalling that amount. At paragraph 20 of her latter witness statement Mrs. Flowers stated that she was told to bring in the title for Catherine Hall at the time that they received the loan of $1,600,000.00. It is clear that she is either mistaken or untruthful on this assertion. The title for Catherine Hall had been encumbered in December 1996, she could not have had the duplicate certificate of title in February, 1997 when the loan of $1,600,000.00 was requested and disbursed. Despite the inaccuracy, there is, implicit in the statement, contemplation that the Catherine Hall property would have been used as security for a facility provided by the bank. Mrs. Flowers therefore fails on this third limb of her attack on the bank's position.

Discharge of the loans by the proceeds of a life insurance policy

Another major complaint made by Mrs. Flowers is that the bank has failed to apply the proceeds of a creditor life insurance policy which had

been put in place to cover the various loans. In a very credible testimony, Mr. Anderson explained why Mrs. Flowers is mistaken in this regard. Contrary to Mrs. Flowers' claimed understanding and belief, says Mr. Anderson, the policy of the bank was to put insurance in place only on the life of the principal borrower. He asserts that Mrs. Flowers was the principal borrower for all the loans and SPL's. Mr. Flowers, says Mr. Anderson, was the co-borrower. When asked, in light of the joint tenancy, how the bank made the decision as to which person was to be designated the principal borrower, he said that it depended on which person initiated the loan request.

The documents support Mr. Anderson's testimony. Each of the Statement of Affairs forms used to initiate the demand loans, set out Mrs. Flowers' particulars, though both of the Flowers' signed the documents. The same applies to all the One Step Application Forms in respect of the SPL's. Again, each of the Disclosure Statements signed on 31st July 1997, listed Mrs. Flowers as the borrower and Mr. Flowers as the co-borrower.

In addition to the above, the documents exhibited by Mr. Anderson (at pages 84 to 86 of the bundle of witness statements) show that Mrs. Flowers signed an acknowledgement concerning her health, to the insurer First Life Insurance Company Limited. The document indicated that Mrs. Flowers

was the insured borrower. Mrs. Flowers, when confronted with one such document at page 86 of the bundle of statements, said:

> "I do not acknowledge that this is in respect of insurance. It could never be on my life alone. It was pointed out by Mr. Quarrie that I could service the loan by myself and he said it would be both our lives. **I do not acknowledge signing this document**."(Emphasis supplied)

Mrs. Flowers made similar denials in respect of the documents at pages 84 and 85. These answers inflicted serious damage to her credibility.

There was an issue raised by Mrs. Flowers concerning an amount paid as premium for the increased life insurance policy. The bank's officers countered that the premium mentioned by Mrs. Flowers, was for peril insurance. I need not resolve that issue as I am satisfied, and I so find, that Mr. Flowers was never insured by the creditor life insurance policy. I also accept the testimony of Mr. Anderson (at paragraph 31 of his witness statement) that the policy was only effective when the relevant loan was current. It is clear that these loans were not current at the time of Mr. Flowers' death and so there would have been no payment, even if his life had been insured.

Finally in this regard, Mrs. Flowers asserts that the bank did in fact receive a payment from the life insurance company. No evidence was produced to support that assertion except that Mrs. Flowers says, at paragraph 36 of her latter witness statement, that she received a statement in

respect of her current account with the bank, showing that she had a balance of $12,130,804.00. This statement was exhibited at page 154 of the bundle with the witness statements.

Mr. Frankson, acting on behalf of Mrs. Flowers, confidently cross-examined Mr. Anderson in respect of this sum. It rapidly became very clear, that not only was there no such sum in Mrs. Flowers' account, but that the account was in fact in debit. The sum of $12,130,804.00 was very credibly explained to be the aggregate debit balance on the account for the period 15th December, 1997 to 11th January, 1998. The process of arriving at this massive figure was clearly explained, but I need not repeat it here.

I find that the bank did not receive a payment representing proceeds of a life insurance policy on the life of Mr. Carlton Flowers.

Was there any rescheduling of loans?

As part of her complaint against the bank, Mrs. Flowers asserted in cross examination that she had no knowledge of any rescheduling of her loans. This was specifically in respect of the transactions conducted on the 30th and 31st July, 1997. I reject this testimony as untrue. I have already indicated that I accept the evidence of Mr. Quarrie that the Disclosure Statements, One Step Application Forms and Mortgage Instruments are

documents emanating from those transactions. An examination of those documents makes it clear that they were for the purpose of loan re-scheduling. Even if it is said that the page of each of those forms which bears that indication, was not signed by the borrowers, it is clear from the amounts involved, that that was the intention of the exercise. The original SPL of $555,000.00 was being replaced by an SPL in the sum of $452,872.10. This was after it was in existence for 22 months. The scheduled monthly payment for the original loan was $19,304.38, but for the first 12 months that payment covered only the interest accruing. The original SPL of $3,000,000.00 was being replaced by an SPL of $2,982,372.19 after 12 months with a similar arrangement regarding the scheduled payments. The original interest rate of 43.903% *per annum* on the SPL was reduced to 25.958% (22% add on) *per annum* on the replacement SPL. The third original SPL of $1,600,000.00 at 38.082% *per annum* was replaced by a loan of $1,596,209.86 after five months. The new rate of interest was 25.958% (22% add on) *per annum*. The two SPL accounts exhibited show the respective debts as being settled by “EBC payout”. Mr. Anderson testified in cross examination that, “‘EBC’ means early balance payout and it suggests that it was from a loan that was used”. Although when preparing these reasons for judgment, it was not clear to me

why it was that the EBC payouts ($526,205.31 and $4,004,511.03, respectively for the two accounts exhibited), were greater than the principals of the respective replacement SPL's, I am satisfied that Mr. Anderson is accurate and credible when he says at paragraph 20 of his witness statement, that in "relation to the mortgage loans for $555,000, $3M and $1.6M Mrs. Flowers executed three loan application forms dated July 30, 1997 for Scotia Plan Loans ("SPL") to rewrite these loans so as to provide lower monthly instalments…". He went on to say at paragraph 21, that no additional proceeds were disbursed in respect of these rewritten loans.

As a final blow to Mrs. Flowers on this limb, the bank has exhibited her letter of December 2, 1997 in which she acknowledged the amounts debited as the monthly repayments for October, (presumably of that year). These sums were the exact figures set out as being the amount payable as the first monthly payment on the rear of the respective "One Step Application Forms" dated July 30, 1997, used as the basis for the rescheduling.

Mrs. Flowers therefore has also failed in this context.

Expert Evidence

Mr. Carl Major was called as an expert witness. He gave his expert opinion in respect of the authorship of the various documents executed by Mr. and Mrs. Flowers. Mr Major was not cross examined. I accept his

testimony, the import of which has already been outlined, as credible and reliable.

The Counterclaim

The bank has counterclaimed that Mrs. Flowers was indebted to it in the sum of $10,292,768.04 as at 31st December 1998. It breaks down this figure between SPL's of $6,710,308.37 and demand loans of $3,582,459.67, with the principal figures being $5,031,454.15 and $2,498,023.10 respectively. No evidence was given of the breakdown of these figures. Mr. Anderson merely stated that "as at 21/09/98 Mrs. Flowers is legitimately indebted to the bank in the amount of $9,601,708.04". In light of the challenge to the counterclaim, one would have expected more from the bank's witnesses in proving the bank's counterclaim. They were however content to concentrate on repelling Mrs. Flowers' claim. I shall therefore seek to ascertain what the evidence discloses.

The principal amounts of the three SPL's granted on 31st July 1997, total $5,031,454.15. There is therefore no discrepancy in respect of this figure. The bank has also claimed interest and charges in respect of that figure. These total $1,678,854.22. There has been no specific challenge to the calculation of this figure. For the demand loans however, my calculation

shows that the figure for the principal should be $2,200,000.00 and not $2,498,023.10. The $2,200,000.00 is calculated up as follows:

Loan granted 7/2/97	$ 200,000.00
Loan granted 11/3/97	$ 400,000.00
Loan granted 27/3/97	$ 300,000.00
Loan granted 7/7/97	$ 800,000.00
Loan granted 19/8/97	$ 150,000.00
Loan granted 25/8/97	$ 150,000.00
Loan granted 8/10/97	$ 200,000.00
Total	$2,200,000.00

The promissory notes which have not been cancelled, and have been exhibited, support this total. In preparing these reasons it was not clear to me however, if the evidence revealed support for the additional $298,023.10 to make the total of $2,498,023.10 which has been counterclaimed. I was also unclear about two entries on the record of the savings account in the amount of $100,000.00 each and made on 27th February and 4th March 1997, respectively (page 93 of the bundle of witness statements).

I therefore recalled the parties, not with a view to assisting the bank to prove its counterclaim but in order to determine whether the evidence did in fact exist within the formidable amount of documentation. Mr. Quarrie gave further evidence on these matters. He testified that the sum of $298,023.10 was the amount outstanding as overdraft on Mrs. Flowers' current account. He was not able to identify any document which supported that particular figure, but pointed to Mrs. Flowers' letter of December 2, 1997, (page 108

of the bundle of witness statements) in which she acknowledged debits being made to her current account to facilitate the monthly repayments on the various loans. Though Mrs. Flowers confessed in the letter, "This is due to the fact that I was unable to meet these payments from nny (sic) personal resources", there is no acknowledgement that the account was in overdraft.

Mr. Quarrie also pointed to page 95 of the bundle of witness statements. He said that the document provided there revealed that Mrs. Flowers' current account numbered 4698-15 was in overdraft as at March 1998 to the amount of $458,783.00. He was however not able to explain what connection, if any, existed between this latter figure and the amount of $298,023.10, which was the subject of the court's enquiry. Although his testimony concerning the contents of page 95 supports paragraph 40 of Mr. Egerton Anderson's statement, as to an overdraft, Mr. Anderson's testimony does not take the matter any further. There is no documentary evidence which supports Mr. Quarrie's testimony that the unaccounted for sum of $298,023.10 arises from Mrs. Flowers' overdraft on her current account. I therefore find that the bank cannot succeed in claiming that amount.

The court also questioned Mr. Quarrie concerning the two entries on the record of the savings account in the amount of $100,000.00 each, which I mentioned earlier. Mr. Quarrie's testimony was that the "DML"

designation for those entries indicated that the sums were to be used to discharge existing demand loans. He testified that the source of the payment of those figures was the Scotia Plan Loan of $1,600,000.00 mentioned earlier. He could not point to any loans in the sums, of $100,000.00 each. Neither could he say which loan or loans these sums were used to settle.

Though there is no evidence of two loans in the sum of $100,000.00 each, one did exist for $200,000.00. This was the demand loan granted on 7th February 1997. I am of the view that the probabilities lead to a conclusion that it was that loan which was settled in two instalments. The bank has shown too much care in having documentation for each loan, to allow for the probability that, not one but two separate demand loans were created, without the documentation being available. My finding results in the principal sum being found to have been proved, as owing on the demand loans, as being $2,000,000.00.

My calculation of the interest accruing to December 31, 1998, which is the date used in the statement of claim, is as follows:

On $400,000.00 at 38.75% p.a. from 11/3/97 to 31/12/98 = $279,849.32
On $300,000.00 at 38.75% p.a. from 27/3/97 to 31/12/98 = $203,198.63
On $800,000.00 at 30.00% p.a. from 7/7/97 to 31/12/98 = $355,068.49
On $150,000.00 at 30.00% p.a. from 19/8/97 to 31/12/98 = $ 61,397.26
On $150,000.00 at 30.00% p.a. from 25/8/97 to 31/12/98 = $ 60,534.25
On $200,000.00 at 5.00% p.a. from 8/10/97 to 31/12/98 = $ 12,301.37
Total = $972,349.32

Stamp Duty on the Registered Mortgages

The bank's witnesses spoke to an established practice of placing dates on certain documents, which dates were subsequent to the date of the signing of those documents. The evidence of Mr. Anderson in cross examination was that, "In order to avoid penalty we don't put in the date until it is time to register the mortgage". Leading counsel for the bank, Miss Wong, did not apparently view the practice as wrong. Counsel said at paragraph 80, "As it costs to stamp mortgages it would not be uncommon for banks to stamp or up-stamp mortgages when the need arises, as it expects that the loans would be repaid over time".

The practice is apparently a widespread one but, in my view, it runs afoul of the Stamp Duty Act. Section 32 (1) of the Stamp Duty Act requires that a penalty be paid if a document, which attracts Stamp Duty, is stamped more than fourteen days after it is first "executed". Section 32 (5) defines "executed", for the average document such as mortgage instruments under the Registration of Titles Act, as meaning "signed". Based on this section it appears that the mortgage instruments signed by Mr. and Mrs. Flowers on 31st July 1997 would have attracted Stamp Duty as of that date, regardless of whether or not the document bore that date. The mortgage instruments reveal that they were not submitted to the Department of Stamp Duty and

Transfer Tax until 22nd August 1997. It is only by improperly placing the date of 12th August, 1997, on the documents, that the bank could perhaps have avoided the liability to pay the penalty which would normally be payable, since fourteen days had already passed since the time of execution. I must say however, that it is not clear from the documents produced to the court, if bank succeeded in its attempt to avoid the penalty in this case.

The Stamp Duty Act speaks to a number of sanctions to be imposed where the correct amount of stamp duty has not been paid. This includes a restriction on the admission of the relevant document into evidence in court proceedings (section 36). The Act is silent as to whether that restriction apples to any penalty payable. I have not however found any similar restriction, as to registration of unstamped documents, included in the Registration of Titles Act.

How then does the court deal with this particular situation with regard to the mortgage document? It is clear that the debt by the Flowers already existed independently of the mortgage instrument. There is no illegality which taints the execution of the instrument which would make it void. What the bank's action sought to secure was the stamping of the document at a time when, perhaps, it ought not to have been stamped. Had the document been dated 31st July 1997, what could have occurred, at the time

the document was sent for stamping, was that the Stamp Commissioner would have returned it to the bank, saying “this document cannot be stamped until you also pay the penalty which is due”. The Stamp Commissioner does have a discretion to waive the penalty, in the event that he receives an appropriate explanation for the late-stamping of a document. He may have been deprived of this option, in this case, as the fact of late-stamping was not brought to his attention, at least, not by the date on the document.

In light of the uncertainty concerning the payment of the penalty, I am not prepared to definitively state that the document was therefore improperly registered. I trust however, that the matter having been raised, the bank will review and revise its approach to the dating of mortgage instruments.

Conclusion

The documentary evidence all points to the fact that:

a. Mrs. Flowers and her husband took several loans from the bank;

b. Every loan was evidenced by:

    i. an application form;

    ii. a promissory note; and,

    iii. a mortgage document;

c. all documents were signed by both Mrs. Flowers as the borrower and Mr. Flowers as the co-borrower, their liability being joint and several;

d. the loans were not serviced adequately and the loan accounts were in arrears.

I am satisfied that all the loans were disbursed according to the agreements between the parties, that there was no undue influence exercised by the banks officers over the Flowers' and that there was no life insurance policy in place in respect of Mr. Flowers' life. Mrs. Flowers' testimony to the contrary is rejected, not only because the documentary evidence does not support her, but also because she failed to impress, as a witness. Based on my findings in respect of the issues considered above, Mrs. Flowers' claim must fail and there must be judgment for the bank in respect of the claim.

The evidence supports the bank's claim that there was no repayment of the various loans mentioned above. The bank must therefore have judgment on its counterclaim. The amounts proved as the respective principal sums are $5,031,454.15 for the SPL's and $2,000,000.00 for the demand loans.

Mortgage numbered 964990 on the Certificate of Title registered at Volume 1174 Folio 582 should be discharged as having been redeemed by the repayment of the loan for which it was used as security.

It is therefore ordered that:

1. Judgment be entered for the Defendant on the claim.

2. Judgment be entered for the Defendant on the counterclaim in the sum of:

	$ 6,710,308.37
	$ 2,972,349.32
Total	$ 9,682,657.69

3. Interest shall accrue from 1st January 1999 until payment on the sum of $5,031,454.15 at the rate of $3,578.26 *per diem*.

4. Interest shall accrue from 1st January 1999 until payment, on the sum of $2,000,000.00 at the rate of $1,674.65 *per diem*.

5. Costs to the Defendant on the Claim and Counterclaim to be taxed if not agreed.