

IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 26 of 2011

WILLIAM ARTHUR LINDO

CLAIMANT

AND

ATLANTIC BANK LIMITED

DEFENDANT

Before: Hon. Madam Justice Minnet Hafiz-Bertram

Appearances: Mr. Said Musa S.C. for the Claimant

Mrs. Liesje Barrow-Chung for the Defendant

**J U D G M E N T**

1. This is a claim for several Declarations and for an order for accounts to be taken as to what is due to the Defendant by the Claimant. The Claimant, William Lindo is a businessman and a director/shareholder in W & S Engineering Company Limited, a private company duly registered in Belize (hereinafter called "the Company"). The Defendant, Atlantic Bank Limited is a company formed in Belize with its registered office at Freetown Road and Cleghorn Street, Belize City (hereinafter called "Atlantic Bank").
2. Mr. Lindo and the Company have on various occasions taken loans from Atlantic Bank. Mr. Lindo in his first affidavit deposed that Atlantic Bank has grossly misrepresented the balance owing to account of the company claiming in excess of \$6,000,000.00 when the amount actually outstanding for principal and interest as at 31<sup>st</sup> December, 2010

is \$3,847,592.97. As such he seeks the following declarations and orders:

1. A Declaration that a Variation of Charge dated the 2<sup>nd</sup> September, 2008 purportedly made by the Defendant in respect of his property – Block 16, Parcels 2890, 2891 and 2893 in the Caribbean Shores/Belize Registration Section is void, illegal and not binding on his property.
2. A Declaration that the Guarantee dated 4<sup>th</sup> July, 2007 signed by Mr. Lindo in favour of Atlantic Bank to secure banking facilities and accommodation for W & S Engineering Company Limited be rescinded/set aside as having been procured by actual undue influence of Atlantic Bank over him and that Atlantic Bank had actual notice of the undue influence.
3. An Order that Atlantic Bank deliver up the Guarantee to be cancelled forthwith.
4. An injunction to restrain Atlantic Bank, its servants or agents from selling, negotiating for the sale of, disposing, leasing, taking possession of or otherwise dealing with any interest or right in or over the freehold property of Mr. Lindo being Block 16, Parcels 2890, 2891 and 2893 in the Caribbean Shores/Belize Registration Section.
5. An Order that accounts be taken of what is due to Atlantic Bank by the Company and/or Mr. Lindo.
6. Damages and costs.

7. Further or such other relief as the Court may deem just.

3. The Claim is supported by two affidavits of Mr. Lindo sworn to on 18<sup>th</sup> January, 2011 and 14<sup>th</sup> December, 2011. Atlantic Bank in its defence filed one affidavit by Mr. Celso Rodriguez sworn to on 31<sup>st</sup> day of October, 2011.

**Issue 1:**

*Whether the Variation of Charge dated the 2<sup>nd</sup> September, 2008 is void, illegal and not binding on Mr. Lindo's property.*

4. Mr. Lindo at paragraph 17 of his affidavit deposed that on 2<sup>nd</sup> September, 2008 Atlantic Bank without his consent and against the expressed objection by him purported to register a charge over his property, Block 16, Parcels 2890, 2891 and 2893 Caribbean Shores/Belize to secure a total indebtedness of the company to Atlantic Bank of one million dollars. He exhibited at "W.L. 5" a copy of a letter of objection dated 29<sup>th</sup> August, 2008 which was sent to Atlantic Bank. He also exhibited at "W.L. 6" a letter of objection sent to the Registrar of Lands dated 2<sup>nd</sup> September, 2008.
5. Mr. Rodriguez for Atlantic Bank in his affidavit evidence gave a history of the loans taken by Mr. Lindo and the Company and explained the power given to the Bank to vary the charge. It is necessary to go through the evidence in some detail so as to get an understanding as to why the variation was necessary as there were several variations before the one that is being challenged. He deposed that in 1987, Mr. Lindo received a loan from Atlantic Bank for \$25,000.00 and as security for the loan he

executed a charge on the 4<sup>th</sup> August, 1987 over the entirety of his leasehold interest in Parcel 888/1 Block 16 in the Caribbean Shores/Belize Registration section. This Charge is exhibited at “**CR 1**”. Additionally, Mr. Lindo provided Atlantic Bank with a general Power of Attorney dated the 11<sup>th</sup> day of December, 1991 which was duly registered on 1<sup>st</sup> January, 1992 and recorded as instrument No. 11/92. This is exhibited as **C. R. 2**”.

6. At paragraph 7 of his affidavit, Mr. Rodriguez deposed that the Power of Attorney is expressed to be irrevocable during the continuance of the security created by the charge and specifically confers power on Atlantic Bank to vary the charge without the licence or consent of Mr. Lindo to secure the indebtedness of Mr. Lindo to Atlantic Bank.
7. Mr. Rodriguez evidence is that the charge was successively varied to secure additional indebtedness over the years. On 18<sup>th</sup> September, 1987 it was varied to \$30,000.00 and this was duly executed by Mr. Lindo. Then on 14<sup>th</sup> December, 1987 it was further varied to \$40,000.00 and this was also duly executed by Mr. Lindo.

**Variations after freehold title was obtained of the charged leasehold interest**

8. Mr. Rodriguez deposed that Mr. Lindo applied to purchase the freehold interest of the charged property and this was approved on 26<sup>th</sup> February, 1990. Thereafter, on 10<sup>th</sup> April, 1994, Mr. Lindo caused the subdivision of Parcel 888/1 Block 16 into eight parcels of lots described as parcels 2886, 2887, 2888, 2889, 2890, 2891, 2892, and 2893. On 8<sup>th</sup> July, 1991, Mr. Lindo was registered as the freehold owner by instrument number 3562/91.

9. Mr. Rodriguez's evidence is that when the new registers were created for the newly subdivided properties, the charge and interest of Atlantic Bank in the Charged property Block 16, Parcels 2890, 2891 and 2893 was duly noted on the register for these three parcels. He exhibited at "**C.R. 4**" a copy of the registers for the said parcels of land.
10. The first variation after freehold title was obtained was on 15<sup>th</sup> January, 1992. Mr. Rodriguez deposed that the charge was varied to secure additional indebtedness of \$135,000.00 to secure a total indebtedness of \$175,000.00. This variation was also duly executed by Mr. Lindo.

**Land Reclamation project by the Government of Belize**

11. Mr. Rodriguez's evidence is that Mr. Lindo approached Atlantic Bank and had some discussions in relation to a Land Reclamation Project that the Government was about to embark on and for which Mr. Lindo's Company would be engaged to do certain dredging works. Further, he indicated that he would need financing for the project. Mr. Rodriguez deposed that he attended to the preparation of a credit proposal and presented it for approval which was subsequently obtained.
12. Mr. Rodriguez further deposed that on 29<sup>th</sup> July, 2004, the Company entered into an agreement with the Government to do the dredging works and it was a condition of the agreement that the Company should secure financing for the said works. Atlantic Bank by way of a letter dated 6<sup>th</sup> October, 2004 offered to the Company a loan facility in the amount of **\$2,112,194.50** which was equal to the value of the contract for the dredging works between the Government and the Company. The interest rate on this loan was **10% per annum**.

**Additional financing to construct larger dredge**

13. Mr. Rodriguez at paragraph 25 of his affidavit deposed that before the works commenced, Mr. Lindo informed Atlantic Bank that he would need to construct a larger dredge in order to perform the works and as such would need additional financing. It was then agreed between Mr. Lindo and Atlantic Bank to make an overdraft facility available to the Company to enable it to do the work and to facilitate with the construction of a larger dredge. The interest on this overdraft facility was **16% per annum**.

**Separate accounts for construction of larger dredge and on dredging works**

14. At paragraph 27 of his affidavit, Mr. Rodriguez deposed that Atlantic Bank kept a full account of how much money the Company received for the contract works and how much was utilized for the construction of the larger dredge. He deposed that Mr. Lindo was informed and agreed that the monies advanced to the Company for the dredging works under the contract would attract interest at the rate of 10% per annum and the Company would pay interest at the rate of 16% on other monies it received under the overdraft facility that was used for the contract.

**Personal Guarantee for \$2,115,000.00 dated 5<sup>th</sup> January, 2005**

15. Mr. Rodriguez deposed that on 5<sup>th</sup> January, 2005 Mr. Lindo signed a personal guarantee for \$2,115,000.00 as security for the credit facilities extended to the Company for the works for the construction of the dredge. This guarantee dated 5<sup>th</sup> January, 2005 is exhibited at **“C.R. 5.”** Atlantic Bank also received a promissory note from the Company. On the said 5<sup>th</sup> January, 2005, the Bank provided the Company, by way of an overdraft facility the mobilization sum of \$472,316.49 which was used to mobilize works on the reclamation project as well as construction of the dredge.

**Loan of \$237,640.79 for purchase of pipes**

16. Mr. Rodriguez at paragraph 33 of his affidavit deposed that by a separate agreement a loan for \$237,640.79 was granted to the Company for the purchase of pipes.

**Loan for educational purpose, importation of vehicles and purchase of properties**

17. Mr. Rodriguez further deposed that after the construction of the dredge was completed the Company continued dredging works and it was whilst doing this work that Mr. Lindo applied for another facility to assist with a student loan for his daughter. As security for this loan, Mr. Lindo charged his personal property, Parcel 2892 Block 16.
18. On 26<sup>th</sup> January, 2006, Mr. Lindo received a further line of credit for the importation of vehicles from China as well as the purchase of 30 acres of land on Rider's Caye and property on Long Caye.

**Consolidation of facilities**

19. Mr. Rodriguez deposed that in 2007 the Company had at least three facilities with Atlantic Bank which included lines of credit for Mr. Lindo's daughter's education, the importation of vehicles and the purchase of properties as well as the loan for the pipes. These facilities according to his evidence were not being serviced timely by the Company and as such Mr. Lindo proposed to the Bank that the various facilities be consolidated into one loan for \$4,380,000.00. On or about 27<sup>th</sup> June, 2007 by way of a letter, Atlantic Bank offered a new loan facility to consolidate all the facilities for a total sum of \$4,380,000.00 in accordance with the request of Mr. Lindo.

**Personal Guarantee for consolidated loan facilities**

20. Mr. Rodriguez at paragraph 41 of his affidavit deposed that the letter of offer was accepted by Mr. Lindo on 4<sup>th</sup> July, 2007 and in accordance with the agreed terms and conditions for the loan, Mr. Lindo provided the Bank with a personal guarantee for the amount of the loan being \$4,380,000.00. This is exhibited at “C.R. 6”. This is the second guarantee and it is the one that is being challenged by Mr. Lindo.

**Extension of dredging works**

21. Mr. Rodriguez deposed that after the Company’s facilities were consolidated it continued to do dredging works for the Government as on 5<sup>th</sup> December, 2007 the works were extended from 25.4 acres to 38 acres with an increase in contract value to approximately \$4,533,977.80.

**Completion of dredging works and payment by Government of balances owing for dredging works including interest at 10%**

22. At paragraph 43 of his affidavit, Mr. Rodriguez deposed that after the dredging was completed, the Government in accordance with the terms of the contract with the Company paid off the balances owed by the Company for the dredging works done including interest chargeable at a rate of 10% per annum.

**Non-payment by Company of facilities resulting in variation of charge**

23. Mr. Rodriguez further deposed at paragraph 44 of his affidavit that notwithstanding the consolidation of the Company’s facilities, it was not making its payments in accordance with its agreement and as a result Atlantic Bank varied the charge it had in effect from 1987 by the sum of \$825,000.00 to secure a total of indebtedness of \$1,000,000.00 and advertised its intention to exercise its power to sell properties belonging to



Mr. Lindo so as to recover the debt. The variation of charge for \$1,000,000.00 is exhibited at “C.R. 7”. Mr. Rodriguez deposed that Atlantic Bank executed the variation of the charge for and on behalf of Mr. Lindo pursuant to the power of attorney dated the 11<sup>th</sup> December, 1991 and recorded as instrument 11/92.

24. In cross-examination, Mr. Rodriguez said that Mr. Lindo did not ever pay off the loans because he continuously owed the Bank. Further, he has never paid off any obligation that cleared him to a zero balance.

**Mr. Lindo’s response to Mr. Rodriguez’s evidence**

25. Mr. Lindo in his second affidavit at paragraphs 4 and 5 deposed that the Power of Attorney dated 11<sup>th</sup> December, 1991 was given for a loan of \$175,000.00 to purchase land from the Government, reclaim the land by filling, subdividing and to sell four parcels of the land being Parcel 888/Block 16. The land was purchased, filled and subdivided and Parcels Nos. 2886, 2887, 2888 and 2889 were sold and the proceeds paid to Atlantic Bank. He deposed that the charges and power of attorney that the bank had over 2890, 2891 and 2893 of Block 16 should have been cancelled by the Bank.
26. Mr. Lindo has accepted that he took other loans to purchase pipes, pay for Sharon Lindo’s education and to pay someone in China for establishment of an auto assembly plant in Belize. He said the loan of \$665,000. which was granted on 5<sup>th</sup> January, 2005 was to repay old loans from Western Development Ltd. and Belize Paper & Plastic Company. He deposed that he did not take any loan to purchase property at Rider’s Caye as claimed in paragraph 37 of Mr. Rodriguez’s affidavit.

Submissions by Mr. Musa

27. Learned Senior Counsel, Mr. Musa submitted that the variation of the charge dated 2<sup>nd</sup> September, 2008 in respect of Mr. Lindo's property, Block 16, Parcels 2890, 2891 and 2893 is void, illegal and of no effect having been obtained without the consent of Mr. Lindo. Learned Senior Counsel relied **section 72 of the Registered Land Act, Chapter 194** which provides:

*The amount secured, the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation executed by the parties to the charge but no such variation shall affect the rights of the proprietor of any subsequent charge unless he has consented to the variation in writing on the instrument of variation.*

28. Learned Senior Counsel further submitted that the original charge over Block 16 held by Mr. Lindo was over the leasehold. That after Mr. Lindo purchased the freehold and sold parcels 2886, 2887, 2888 and 2889 the proceeds were used to pay the full satisfaction of the debt of \$175,000.00. Therefore, it is not open to Atlantic Bank to rely on the Power of Attorney to effect a further variation of the charge without the consent of Mr. Lindo. That the up-stamping of the charge to secure one million dollars was therefore illegal and the purported variation was invalid and did not affect the rights of the claimant over the property. Further, the attempt by the Bank to sell Mr. Lindo's property as Chargee exercising a power of sale should be restrained by injunction.

### **Submissions by Mrs. Barrow- Chung for the Bank**

29. Learned Counsel, Mrs. Chung submitted that the Bank had the power and authority to vary the charge as it did under and by virtue of the general Power of Attorney granted to it in relation to all that property comprising the charged property on the 1<sup>st</sup> January, 1992 and duly recorded as instrument 11/92 and of which Parcels 2890, 2891 and 2893 are but a part.
  
30. Learned Counsel further submitted that Atlantic Bank did not require any further consent from Mr. Lindo to vary the charge given the express terms of the charge as well as the power of attorney both of which were duly executed by Mr. Lindo and registered in relation to Parcels 2890, 2891 and 2893. Mrs. Chung referred the court to the relevant sections of the charge, the memorandum accompanying the charge and the power of attorney which shows that it is a continuing security.

### Determination

31. The evidence before this court as shown by Mr. Rodriguez for Atlantic Bank is that the charge was successively varied to secure additional indebtedness over the years. It is not disputed that Mr. Lindo took additional loans as on three occasions Mr. Lindo duly executed the variations of charge. The problems arose when the facilities were not being serviced timely by the Company and as such Mr. Lindo proposed to the Bank that the various facilities be consolidated into one loan and on 27<sup>th</sup> June, 2007 the Bank offered a new loan facility to consolidate all the facilities for a total sum of \$4,380,000.00. Mr. Lindo as shown by Exhibit "C.R. 6" provided the Bank with a personal guarantee for the amount of the loan of \$4,380,000.00.

32. Mr. Rodriguez's evidence shows that after the dredging was completed the Government paid off the balances owed by the Company for the dredging works done including interest chargeable at a rate of 10% per annum. Notwithstanding the consolidation of the Company's facilities, it was not making its payments and as a result Atlantic Bank varied the charge it had in effect from 1987 by the sum of \$825,000.00 to secure a total indebtedness of \$1,000,000.00. It is not disputed by Atlantic Bank that Mr. Lindo did not agree to the variation of the charge. The Bank's position is that by virtue of the charge and the power of attorney they did not need Mr. Lindo's consent. The question that arises therefore, is whether Mr. Lindo's consent was required to vary the charge pursuant to **section 72** of the **Registered Land Act**. To answer this question, the court has to look at the 1987 charge to see whether by its terms it is a continuing security and also at the terms of the power of attorney given by Mr. Lindo to Atlantic Bank.

Is the 1987 charge a continuing security?

33. Mr. Lindo's evidence is that the Power of Attorney dated 11<sup>th</sup> December, 1991 was given to Atlantic Bank in relation to a loan for \$175,000.00 to purchase land from the Government. The said land was purchased and subdivided and several parcels were sold and the proceeds paid to Atlantic Bank. Mr. Lindo's position is that the charges and power of attorney that the bank had over 2890, 2891 and 2893 of Block 16, should have been cancelled by the Bank.
34. The charge in question is dated 4<sup>th</sup> August, 1987. On the said date it was for \$25,000.00. The Memorandum accompanying the charge is also dated the 4<sup>th</sup> August, 1987. The fourth recital in the memorandum states:

*(4) The Bank has agreed at the request of the Chargor to make from time to time hereafter in its absolute discretion advances to the Chargor or give to the Chargor accommodation or grant accommodation in any account in which the Chargor is a guarantor or surety and the Chargor has agreed to create a charge as security for **repayment of all moneys now owing or which shall hereafter become on general balance** of account of the Chargor or otherwise from the Chargor to the Bank or on any account for which the Chargor is surety in manner hereinafter appearing.*  
(emphasis added)

35. Further, Clause 4 of the Memorandum states:

*The Charge shall be impressed in the first instance with stamp duty to secure a total indebtedness by the Chargor not exceeding \$25,000.00 but that **the Bank may and is hereby empowered by the Chargor from time to time hereafter whenever the indebtedness of the Chargor exceeds the sum of \$25,000.00 without further licence or consent by the Chargor to impress additional stamp duty on the charge** to secure such excess it being the intent hereof that the Charge shall be security for the payment of all sums for which the Chargor may be liable hereunder at any time whether as principal or surety.*  
(emphasis added).

36. The recital and the clause in my view, show that the charge was meant to be a continuing security. There is also evidence that in

fact the charge was varied several times. When the charge was first created it was \$25,000.

37. In cross-examination Mr. Lindo gave several reasons as to why he left the title with the Bank although he said that he paid off the loan since 1994 and there was no cancellation of the charge and the Guarantee. Mr. Lindo's several answers as to why he left the title with the Bank for 18 years are: *"I did nothing. The bank is the best place to put it. It was for free then. I never had to pay nothing. The bank kept it for free. Why I have to spend money I don't have to spend."* He did not agree that the titles were used as continuing security for the facilities for the Company.
38. In further cross-examination, Mr. Lindo said that he had to pay to remove the charge and he could not do so because he had no money as he was in trouble from 1994 to 1998. He was then asked the reason for not removing the charge when he had money in 1999, when there was a political shift. Mr. Lindo replied that, *"Because I decide maybe I could do business again. I could go and borrow again."*
39. I find that Mr. Lindo was not credible when he said that the titles were left at the Bank for almost 18 years for safekeeping or so that he could do business again in the future.
40. The court agrees with Learned Counsel, Mrs. Barrow-Chung that the Charge by its terms was created as a continuing security to the Bank to secure any and all indebtedness of Mr. Lindo to Atlantic Bank. It was for this reason that the titles were left with the Bank for almost 18 years. The charge continued to be of full effect although Mr. Lindo paid \$175,000.00. It was a continuing security

for other facilities granted to Mr. Lindo and this was not in relation to the loan taken by the Company under the dredging contract with the Government. That loan was paid off by the Government of Belize.

Effect of the Power of Attorney dated 11<sup>th</sup> December, 1991.

41. Mr. Lindo by the Power of Attorney dated 11<sup>th</sup> December, 1991 appointed Atlantic Bank to be his attorney and generally in relation to his interest in Block 16 Parcel 888/1 and to do anything that he, Mr. Lindo could do, including the execution of instruments. The Power of Attorney states:

*Without prejudice to the generality of the foregoing and for the avoidance of doubt the Bank and its duly appointed agent or agents are hereby authorized and empowered to do the following acts matters and things namely:*

1. *At any time or times (**without any further licence or consent on my part**) to have impressed with stamp duty such Variation or Variations of Charge as are hereinafter mentioned and/or the Charge dated the 4<sup>th</sup> day of August, 1987 (hereinafter called "the Charge") so that the same shall cover all sums to any aggregate for which I may be liable to the Bank whether as principal guarantor or surety at any time.*
2. *To execute such variation or Variations of the Charge as the Bank may consider necessary in order that the same and/or the Charge may at any time or times hereafter be impressed with additional stamp duty and that the Charge may be so varied that it shall be a security covering all sums to any aggregate for which I may be liable to the Bank whether as principal guarantor or surety at any time.*

3. *And I hereby declare that the Bank and its duly appointed agent or agents shall in exercising the powers hereby conferred be my agent or agents as the case may be and that neither the Bank nor its said agent or agents shall in any way be liable for any act or omission arising out of the exercise of or the failure to exercise the said powers or any of them.*
4. *This Power of Attorney shall be irrevocable during the continuance of the security created by the Charge.*

42. I agree with the submissions of Learned Counsel, Mrs. Chung that the Power of Attorney confirms and gives effect to the arrangement and intent of the Charge which provides at Clause 4 that it is a continuing security and the Power of Attorney remained in effect during the continuance of the security created by the charge.

Effect of objections made by Mr. Lindo

43. Although the Bank had the Charge which was a continuing security and the Power of Attorney in hand, the Bank sought to seek Mr. Lindo's permission to up-stamp the mortgage and this can be seen by Mr. Lindo's letter dated 29<sup>th</sup> August, 2008 to Mrs. Sandra Bedran, General Manager of Atlantic Bank. Mr. Lindo in that letter refused to up-stamp the mortgage until his dispute is settled with the Bank in relation to the balance on the loan. The letter is exhibited at "**WL 5**". Further, in a letter dated 2<sup>nd</sup> September, 2008, Mr. Lindo wrote to the Registrar of Lands stating that he did not give permission and is opposed to Atlantic Bank increasing the charges on Parcels 2890, 2891, 2892, and 2893. This letter is exhibited at "**WL 6**".
44. Mr. Lindo's opposition to the up-stamping at the time as can be seen by the evidence is based on the disputed loan balance. He was not



challenging the Charge which is a continuing security nor the General Power of Attorney. Mr. Lindo has consented to the variation of the charge on his property pursuant to the terms of the Power of Attorney. Atlantic Bank acted as Mr. Lindo's agent in executing the instrument of variation of the charge pursuant to the powers given to them by the Power of Attorney. As such, there was compliance with **Section 72** of the **Registered Land Act** in so far, as Mr. Lindo's consent was obtained to vary the charge. However, **section 72** is inapplicable in this case, in so far, as it required Mr. Lindo to give his consent to the variation on the instrument of variation itself. Mr. Lindo's consent was given to the Bank by the terms of the Power of Attorney. As such, the court does not see any reason for interfering with the decision of Atlantic Bank to up-stamp the mortgage based on the Charge which is a continuing security and the Power of Attorney given to them by Mr. Lindo. The court finds that the variation of the charge dated 2<sup>nd</sup> September, 2008 is not void and illegal and that it is binding on Mr. Lindo's property. Accordingly, the declaration sought against the validity of the variation of the Charge is refused.

***Issue 2: Whether the Guarantee dated 4<sup>th</sup> July, 2007 has been procured by actual undue influence of Atlantic Bank.***

45. Mr. Lindo at paragraph 14 of his first affidavit deposed that in June of 2007, the Manager of Atlantic Bank demanded a personal guarantee from him as further security on the company's account. He deposed that he refused to do so and the Manager told him that unless he signed the Guarantee she would *pull the plug on the entire contract and shut down all works*. Further, that the Manager told him that after the Government had paid the interest outstanding on the account she would make the necessary adjustments to relieve him of the obligation. He deposed that

with such threats and inducements he signed the guarantee for the company's account in the sum of \$4,380,000.00

46. In cross-examination Mr. Lindo said that Mrs. Bedran called him one day and told him to take back his letter because it is going to cause trouble. That if he wants to finish the contract they will straighten everything so he does not get a bad name. He said that he went to her and took back the letter. Further, Mr. Lindo said that he was forced to sign as he was told that the plug would be pulled and later the Bank started to bounce cheques and they refused to sign cheques. Mr. Lindo in further cross-examination admitted that the crux of the matter between himself and the Bank is the interest and the amount owing.
47. Mr. Rodriguez's evidence for the Bank is that Mr. Lindo has at all times acted of his own free will and was not coerced in any way by Atlantic Bank. At paragraph 41 of his affidavit, Mr. Rodriguez deposed that after the consolidation of the facilities, Mr. Lindo, on 4<sup>th</sup> July, 2007 provided the Bank with the personal guarantee for the amount of the loan being \$4,380,000.00. as per the agreed terms of the loan. This is exhibited at "C.R. 6". Mr. Rodriguez further or in the alternative deposed that Mr. Lindo is barred by laches from maintaining any claim that the Guarantee dated 4<sup>th</sup> July, 2007 be set aside or rescinded.

Submissions by Mr. Musa SC

48. Learned Senior Counsel, Mr. Musa submitted that Mr. Lindo has demonstrated by the evidence that actual undue influence was exercised by the Bank Manager in getting him to sign the personal guarantee. Learned Senior Counsel relied on the case of **CIBC Mortgages PLC v Pitt (1993) 4 AER** at page 439 which states:

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

49. Learned Senior Counsel further submitted that if actual undue influence is not proven, there is sufficient evidence of the relationship of trust and confidence between Mr. Lindo and Atlantic Bank that it is fair to presume that the Bank abused the relationship in procuring Mr. Lindo to enter into the guarantee. He relied on **Halsbury's Laws of England 4<sup>th</sup> Edition Reissue Volume 9(1) paragraph 714.**
50. Learned Senior Counsel, in relation to the defence of laches by the Bank submitted that it is spurious as there was no undue delay amounting to an unconscionable delay as would constitute a waiver of rights. Further, that a defence of laches is allowed only where there is no statutory bar. He relied on **Halsbury's Laws of England 4<sup>th</sup> Edition Reissue Volume 16(2) paragraph 910.**

Submissions by Mrs. Barrow-Chung

51. Learned Counsel, Mrs. Chung submitted that Mr. Lindo acted of his own free will and was not wrongly influenced. Further, even if the evidence of "undue influence" is accepted by the court, this does not prove the exercise of undue influence but demonstrates the financial predicament in which Mr. Lindo found himself. Learned Counsel further submitted that the terms of the consolidated facility were not onerous or unconscionable.

52. Mrs. Chung further submitted that it is well established that the relation of banker and customer will not normally constitute a relationship of sufficient trust and confidence to found a claim of undue influence except in exceptional circumstances. Learned Counsel relied on the case of **National Westminster Bank PLC v Morgan (1985) AC 686**.
53. In further submissions, Mrs. Chung contended that it is also well established that a transaction entered into as a result of undue influence is voidable and not void and that the right to rescind may be lost by affirmation or delay amounting to acquiescence. Learned Counsel submitted that Mr. Lindo affirmed the contract of guarantee and his obligations thereunder when between the 28<sup>th</sup> December, 2007 and the 16<sup>th</sup> October, 2009 he paid a total of \$10,000.00 towards the principal and \$384,375.84 towards the interest owing under the consolidated facilities thereby acknowledging and affirming his personal obligation.
54. Learned Counsel relying on **Chitty on Contracts, paragraph 7037** further submitted that by virtue of the delay in challenging the guarantee after the undue influence ceased, acquiesced in the validity of the Guarantee dated 4<sup>th</sup> July, 2007.

#### Determination

55. The question for determination is whether there was actual undue influence by Atlantic Bank on Mr. Lindo. At page 439 of the **Pitts case**, it is stated that actual undue influence is a species of fraud and it is where someone is induced by undue influence to carry out a transaction which he did not freely and knowingly enter into. As such, the court has to see whether Mr. Lindo freely and knowingly signed the guarantee. I have no reason to doubt Mr. Lindo that he was told that the plug would be pulled if

he did not sign the guarantee. The question is whether this amounts to undue influence.

56. The learned authors of **Halsbury's Laws of England 4<sup>th</sup> Edition Reissue Volume 49 at paragraph 1045** states that:

*A guarantee procured by undue influence on the part of the creditor is liable to be set aside. Such undue influence is either actual or presumed.*

*In cases of actual undue influence, it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the transaction. He must show that (1) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (2) the influence was exercised; (3) its exercise was undue; and (4) its exercise brought about the transaction. .... Relief will not be granted where all that is shown is impecuniosity or inequality of bargaining power. There must be something in the nature of the conduct complained of which is unfair and improper, whether it takes the form of coercion, overreaching or cheating, before equity will intervene.*

57. In the case at hand, Mr. Lindo is claiming actual undue influence. In **Langton v Langton (1995) 3 FCR 521** it was held that whether there was actual undue influence was a question of fact rather than of legal definition. ( **Alcard v Skinner (1887) 36 Ch D 145** was relied on by the court).

58. An examination of the evidence in this case shows that Atlantic Bank and Mr. Lindo were involved in ordinary banking transactions whereby he took several loans from Atlantic Bank, consolidated the loans and had refused to sign the Guarantee because he disputed the loan balances. Mr. Lindo wanted financing to continue his dredging contract which he had with the Government and the Bank wanted security for the consolidated loan which included not only monies for the dredging works but other personal loans taken by Mr. Lindo which were not being serviced on a timely basis. It has also been shown by the evidence that Mr. Lindo was in a state of impecuniosity.
59. The evidence that Mrs. Bedran threatened to pull the plug if the Guarantee is not signed is not in my view unfair or improper. Mrs. Bedran has not gone beyond normal business relationship between Banker and Customer. Mr. Lindo as shown by the evidence had signed a Guarantee before the one that is being challenged. There is no complaint by him that he did not understand what he was signing or that he did not know the amount stated in the guarantee. He freely and knowingly signed the guarantee because he wanted financing for the dredging contract. Mr. Lindo has admitted that he did not have a problem with the guarantee. He told the court that the crux of the matter is the accounting and this is evidenced by his letter to the Bank. In my view, this complaint has to be addressed elsewhere. The accounting cannot be a reason to claim undue influence. Accordingly, I find that actual undue influence has not been proven by Mr. Lindo. As such, the Declaration to set aside the Guarantee is refused. It follows that the Order to deliver up the Guarantee to be cancelled is also refused.
60. Further, the court respectfully disagrees with Learned Senior Counsel, Mr. Musa that the Bank abused the relationship in procuring Mr. Lindo to

enter into the guarantee. There is no evidence of abuse by Atlantic Bank in this case.

61. The issue of laches were also discussed by both sides. I do not find it necessary to address same as there was no actual undue influence.

### **Injunction**

62. Since the finding of the court is that the variation of the charge dated 2<sup>nd</sup> September, 2008 is not void and illegal and that it is binding on Mr. Lindo's property, the injunction sought is refused.

### **Order seeking Accounting**

63. Mr. Lindo seeks an order that the accounts be taken of what is due to Atlantic Bank by the Company and/or Mr. Lindo. Before the trial of this matter, Atlantic Bank had provided the accounts and as stated at trial and in their written submissions, they are prepared to review and verify those accounts in such manner as may be reasonably required by Mr. Lindo. Learned Senior Counsel, Mr. Musa in further written submissions dated 22<sup>nd</sup> October, 2012, gave some details as to what is required in the accounting. The Bank in response, again submitted that it has no difficulty providing whatever accounts are necessary to verify the amounts due and owing in accordance with the relevant loan agreements. As such, the court will make an order giving directions in relation to the accounting.

64. **Order**

The declarations sought and the Order to deliver up the Guarantee to be cancelled are refused.

The injunction sought is refused.

Directions for accounting

Atlantic Bank is to verify the accounts in details as to how it arrived at the consolidated figure on the overdraft facility. This should be done by showing the balance on each loan before the consolidation and the principal should be separated from the interest. There must be a separate accounting for:

- (a) monies advanced to the Company for the dredging works under the contract with the Government which attracted interest at the rate of 10% per annum and
- (b) monies advanced under the overdraft facility which attracted interest at the rate of 16%.

65. **Cost**

Atlantic Bank has never refused to provide the accounting to Mr. Lindo. As such, Mr. Lindo will pay the cost of Atlantic Bank in the sum of \$3,000.00.

Dated this 17<sup>th</sup> day of January, 2013.

Minnet Hafiz-Bertram  
Supreme Court Judge