JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 52/00

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**SHEILA ROSE-GREEN**	**PLAINTIFF/APPELLANT**
A N D	**PATRICK ROSE-GREEN**	**1ST DEFENDANT/ RESPONDENT**
A N D	**BANK OF NOVA SCOTIA JAMAICA LIMITED**	**2ND DEFENDANT/ RESPONDENT**

Donald Scharschmidt, Q.C. and Ms. Georgette Scott,
instructed by John G. Graham & Company, for the appellant

The 1st Respondent did not appear and was not represented.

Mrs. Sandra Minott-Phillips and David Noel,
instructed by Myers, Fletcher and Gordon for the 2nd respondent

December 13, 14, 2000, May 14 15, June 22, 2001 and July 31, 2002

DOWNER, J.A.:

The issue to be determined in this interlocutory appeal is whether Reckord, J. came to the correct determination in acceding to the Bank of Nova Scotia's prayer to strike out the Amended Statement of Claim of Sheila Rose-Green which relates to the Bank. There was a prayer in the Amended Statement of Claim at page 119 of the Record for:

....

> "3. An injunction to restrain the second Defendant whether by itself, its servants and/or agents or howsoever from transferring or in any way dealing with the said property."

The Bank of Nova Scotia (the "Bank") wishes to exercise a power of sale in respect of the matrimonial home so this prayer plays an important role in the case.

It is important to set out the specific averments in the Amended Statement of Claim to appreciate how the prayer affects the Bank. They read as follows:

> "5A. The Second Defendant had actual or constructive notice of the fact that the First Defendant was exercising undue influence over her.
>
> **PARTICULARS**
>
> i) That the second Defendant knew that the Plaintiff had received no legal advice.
>
> ii) That the second Defendant failed to ensure that the Plaintiff took Independent legal advice.
>
> iii) Alternatively, that the second Defendant failed to emphasize and communicate with the Plaintiff the need to seek independent legal advice.
>
> iv) That the second Defendant failed to inform the Plaintiff of the full extent of the first Defendant's liability to the second Defendant."

Then the Amended Statement of Claim continued thus:

"In the premises, the said Instrument of Guarantee and the Mortgages over the property known as Lot 45 Unity Hall, Montego Bay in the parish of Saint James registered at Volume 1183 Folio 480 were or have become null and void and are unenforceable."

"AND THE PLAINTIFF CLAIMS:-

1. A declaration that the Plaintiff was wrongfully induced to sign and execute an Instrument of Guarantee dated the 14th day of October, 1994 and Instruments of Mortgage numbered 656976, 739002, 796508, 836428 and 910231 over property known as Lot 45 Unity Hall, Montego Bay in the parish of Saint James registered at Volume 1183 Folio 480 of the Register Book of Titles in favour of the Second Defendant by the undue influence of the First Defendant and that the said Instrument of Guarantee and Instruments of Mortgage are null and void.

2. An Order that the Defendants do execute all such documents and do all and such other as may be necessary to discharge the said mortgages and revoke the Instrument of Guarantee.

3. ..."

The Bank's summons at page 91 of the Record was worded, thus:

" TAKE NOTICE THAT at the hearing of the Plaintiff's summons dated the 29th day of October, 1998, and filed herein, the 2nd Defendant will apply FOR AN ORDER THAT:

1. This action be struck out and writ of summons and all subsequent proceedings filed herein set aside as against the 2nd Defendant on the ground that:

(a) it discloses no cause of action against the 2nd Defendant; and or

(b) it is frivolous and vexatious and/or an abuse of the process of the Court.

2. The costs of this application and of the action to date hereof be the 2nd Defendant's and be taxable immediately."

The gist of the Plaintiff/Appellant's case was that her husband induced her by way of undue influence to sign a number of important instruments which resulted in loans by the Bank which were secured by their matrimonial home.

The basis of the learned judge's decision is to be found in the following passage in his judgment at pages 135-136 of the Record:

> " On the other hand, where the loan is made to the husband and the wife jointly, it cannot be said that the transaction was manifestly disadvantageous to her.
>
> 'A claim to set aside a transaction on the ground of undue influence whether presumed or actual cannot succeed unless the claimant proves that the impugned transaction was manifestly disadvantageous to him.' (See Pitt (supra) at page 438).
>
> In clear and unchallenged affidavit evidence the plaintiff personally benefitted from several of the transactions entered with the Bank along with her husband. They were all made for the improvement of their matrimonial home.
>
> Save for Scotia Plan loans totalling just under $5 million made to the husband personally I find that the bank was under no duty to ensure that the wife had independent legal advice.

> There will therefore be an order in terms of the second defendant's summons dated 9th December, 1998, paragraph 1 (a) and paragraph 2 as amended."

There are two features to note. Firstly, the learned judge purported to decide matters pertaining to substantive property rights in interlocutory proceedings on affidavit evidence and secondly he made no mention of the guarantee which she gave for the husband's loans. These were important issues in the case. Additionally, the formal order of the Court below reinforces the view that the learned judge concentrated on paragraph 1 (a) of the Bank's summons to strike out the Amended Statement of Claim. The order reads:

> "1. This action be struck out and the Writ of Summons and all subsequent proceedings filed herein set aside as against the 2nd Defendant on the ground that it discloses no cause of action as against the 2nd Defendant;
>
> 2. The costs of this application and of the action to date hereof be the 2nd Defendant's;
>
> 4. Leave to appeal granted;
>
> 5. Stay of execution for six (6) weeks."

Did the Plaintiff/Appellant's Amended Statement of Claim disclose 'no cause of action' with respect to the Bank as the learned judge below found?

The initial point to make is that once the Statement of Claim was amended it had a retrospective effect so that the amendments are to be read as if they were made from the date of the original Statement of Claim. The

second point is that the learned judge decided in favour of the Bank on the basis of paragraph 1(a) of the summons. Mrs. Minott-Phillips for the Bank recognized that such a finding was untenable in view of the amendments to the Statement of Claim.

She therefore filed a Respondent's Notice on the basis that the learned judge's judgment in favour of the Bank could not be justified by paragraph 1 (a) but rather by paragraph 1 (b) of the Bank's summons. As previously stated paragraph 1 (b) sought to dismiss the Statement of Claim on the ground that it was frivolous and vexatious and an abuse of the process of the Court. Such a finding could, she submitted, also be supported on affidavit evidence. There is an extract from the judgment on which Mrs. Minott-Phillips relied at page 131 of the Record which reads:

> "Mr. Graham submitted that though a Court will not on affidavit evidence, order a pleading to be struck out on the ground that the statements are false, the circumstances in the present case showed the defence to be frivolous, and vexatious, and one which ought to be struck out as being an abuse of the process of the Court.
>
> Counsel further submitted that in all interlocutory applications the tribunal should be wary of attempting to come to findings of fact based on competing affidavits since choosing between them was the function of the trial judge, not the judge in the interlocutory application – See **Day vs. RAC Motoring Services Ltd. –** (1999) 1 All E.R. Page 1007.
>
> **Linotype Hall v. Baker** (1992) 4 All E.R. p. 887.

> Counsel submitted the circumstances of the plaintiff: She deponed to the fact that she reposed great trust and confidence in her husband – She was a mere child when she got married. Her husband was a man of some prominence and substance – she was an accounting clerk and then became an insurance agent. Undue influence was exercised over her by him and this affected her will. It was not her will. The bank had an obligation to write her to procure independent advice. There is no dispute that they did no such thing. In the context of all those circumstances the Court should dismiss the second defendant's claim and strike out the summons."

It is against that background that the Respondent's Notice defined the issues raised on appeal. It reads at pages 3-4 of the Record:

> "1. The action was frivolous and vexatious and an abuse of the process of the Court under paragraph 1(b) of the summons dated December 9, 1998 filed by the Respondent for the following reasons:
>
> a) The Appellant did not contend in her pleadings that the transactions she sought to impugn were to her manifest disadvantage; and
>
> b) The documentary evidence before the Court clearly showed that the Appellant had benefited directly from the loans disbursed by the Respondent in circumstances where the Appellant indicated to the Court that she was not relying on the doctrine of non est factum.
>
> 2. The Scotia Plan Loan made to the Appellant's husband personally, being for the purpose of settling debts already incurred for home improvement, was not a debt incurred for a purpose which was beneficial to the Appellant's husband solely. To the extent that the Appellant benefitted from the loans advanced

> for the purpose of improving her home, she benefitted directly from those loans and indirectly from such loans as were extended for the purpose of settling the indebtedness arising from those loans."

These reasons ignored the following passages in Mrs. Rose-Green's affidavit:

> "3. That at the time when we purchased the house my husband was a businessman who operated a restaurant and night club at Union Street in Montego Bay. The premises was owned by him solely. That at the time I was an accounts clerk with the Ministry of Health.
>
> 4. During the period June 1986 to February 1989 my husband was a Councillor for the Spring Gardens Division of the St. James Parish Council and that during the period February 1989 to 1993 my husband was a Member of Parliament for West Central St. James.
>
> 5. That during the course of our marriage I reposed great trust and confidence in my husband and during the course of our marriage before our estrangement I allowed him to deal with and take all the business transactions and decisions which affected us. In fact in all the transactions which were entered into with the bank my husband would carry out the negotiations and I would be called on to sign the document. On two or three occasions my husband was present when I signed the documents.
>
> 6. That I have since discovered that large advances were made to my husband in respect of a speculative "Off Track Betting business" in which substantial sums of money have been lost.
>
> 7. That my husband has traditionally done all his banking arrangements with the West Gate and

> Sam Sharpe Square branches of the 2nd Defendant. I have never been a part of my husband's business, I have received very little information as to his business affairs."
>
> 8. That over the years a number of loans have been made to my husband which loans have been used in the main to shore up his business.

It is relevant to cite the grounds of appeal if only to demonstrate that once the respondent conceded that the Amended Statement of Claim showed a cause of action, then the appellant's grounds of appeal were superfluous and the substance of the appeal was contained in the respondent's notice. Here are the appellant's grounds of appeal at page 1 of the Record.

> "**AND FURTHER TAKE NOTICE** that the grounds of this appeal are:
>
> 1. The learned trial judge applied the wrong principles of law in assessing whether to grant the application to dismiss the plaintiff's claim.
>
> 2. The learned trial judge enquired into questions of fact and sought to make findings on disputed questions of fact from the Affidavit evidence.
>
> 3. The learned trial judge proceeded on the basis of a misapprehension of his functions in deciding whether the plaintiff's claim disclosed a cause of action."

It is now appropriate to turn to the Respondent's Notice to determine the issues on appeal.

The Respondent's Notice

The initial claim was that the Statement of Claim was frivolous and vexatious having regard to the affidavit evidence and that it contained no averment that the loan transactions were to the appellant's disadvantage. There was also a claim that the evidence relied on by the appellant showed that she benefited from the loans granted to the husband.

Since the Respondent's Notice is relying on the inherent jurisdiction of the court it is permissible to resort to the affidavit of the appellant and if the averments in the Respondent's Notice are made good, then it would be open to this Court to amend the Statement of Claim if that was necessary. Mr. Scharschmidt, Q.C. contended that the essential pleading was stated by Lord Hoffman in **Barclays Bank Plc v. Boulter** (1999) 1 W L R 1919 at page 1925 thus:

> "In the case of undue influence exercised by a husband over a wife, the burden is prima facie very easily discharged. The wife needs to show only that the bank knew that she was a wife living with her husband and that the transaction was not on its face to her financial advantage. The burden is then upon the bank to show that it took reasonable steps to satisfy itself that her consent was properly obtained."

In stating this principle Lord Hoffman stated earlier on the same page:

> "It seems to me that Fry J., who was a most exact and learned equity judge, clearly contemplated by the words "person who is not shown to have taken with such notice" that the burden of proving notice is upon the person who claims that the vitiating circumstances affect a person who was not party to

> the undue influence or misrepresentation. Likewise in ***C.I.B.C. Mortgages Plc. v. Pitt*** [1994] 1 A.C. 2000, 210 Lord Browne-Wilkinson said:
>
> > 'Even though, in my view, Mrs. Pitt is entitled to set aside the transaction as against Mr. Pitt, she has to establish that in some way the plaintiff is affected by the wrongdoing of Mr. Pitt so as to be entitled to set aside the legal charge as against the plaintiff.':
> >
> > I respectfully think that these statements of the law are in accordance with principle."

There can be no doubt that the averment with respect to Notice in the Amended Statement of Claim adverted to earlier is in compliance with the test Lord Hoffman laid down in **Boulter** supra.

The other relevant case is **Barclays Bank plc v. O'Brien** [1993] 4 All ER417. The following passage at page 429 from Lord Browne-Wilkinson's speech governs the instant case. It runs thus:

> "It is at this stage that, in my view, the 'invalidating tendency' or the law's 'tender treatment' of married women, becomes relevant. As I have said above in dealing with undue influence, this tenderness of the law towards married women is due to the fact that, even today, many wives repose confidence and trust in their husbands in relation to their financial affairs. This tenderness of the law is reflected by the fact that voluntary dispositions by the wife in favour of her husband are more likely to be set aside than other dispositions by her: a wife is more likely to establish presumed undue influence of class 2B by her husband than by others because, in practice, many wives do repose in their husbands trust and confidence in relation to their financial affairs. Moreover the

> informality of business dealings between spouses raises a substantial risk that the husband has not accurately stated to the wife the nature of the liability she is undertaking, i.e he has misrepresented the position, albeit negligently."

Then His Lordship continued thus:

> "Therefore, in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.
>
> It follows that, unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights."

It is instructive to note that these declarations of law were made after contested trials where oral evidence was adduced and extensive cross-examination took place.

Turning to the Guarantee which the appellant signed, the opening words at page 51 of the Record are as follows:

> "GUARANTEE
> **TO: THE BANK OF NOVA SCOTIA JAMAICA LIMITED**
> **IN CONSIDERATION of THE BANK OF NOVA SCOTIA JAMAICA LIMITED** (herein called the "Bank") agreeing at the request of the undersigned and each of them if more than one to deal with or to continue to deal with PATRICK ROSE GREEN (herein called the

> "Customer") in the way of its business as a bank that undersigned and each of them, if more than one, hereby jointly and severally guarantee(s) payment to the Bank of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Customer to the Bank or remaining unpaid to the Bank, whether arising from dealings between the Bank and the Customer or from other dealings or proceedings by which the Bank may be or become in any manner whatever the creditor of the Customer, and wherever incurred, and whether incurred by the Customer alone or with another or others and whether as principal or surety, including all interest, commissions, legal and other costs charges and expenses (such debts and liabilities be herein called the "guaranteed liabilities"), the liabilities of the undersigned hereunder being limited to the sum of UNLIMITED Dollars with interest from the date of demand for payment at the rate or rates mentioned in paragraph 5 hereof."

The relevant evidence adduced by the Appellant is as follows at page 10 of the Record:

> "9. That on a number of occasions I have been requested to execute a number of security documents to collateralize the loan advances. These loans have included:-
>
> a) Mortgages No. 739002, 780241, 796508, 836248 and 910321 over the matrimonial home referred to in paragraph 2 hereof
>
> b) A Guarantee

c) Promissory Notes in respect of Scotia Plan Loans numbered 606111, 14109 and 15709.

That I exhibit hereto marked "SR-G2" a copy of the instruments of Mortgage referred to at (a)

10.

10. That on every occasion that I have been requested to execute documents in respect of the loans I have been summoned to the bank by one of the loans officers.

11. Except on two or three occasions in 1993 they have always demanded that I come to the bank as a matter of urgency because monies have already been disbursed to my husband and it should not have been done that way as I should have signed first and hence the loan was not properly collateralized.

12. That on no occasion did the bank manager or the loan officers who witnessed my signature give me an opportunity:-

i) to properly read the documents;

ii) to take away the documents which I was required to execute;

iii) no suggestion or recommendation was ever made to me to seek independent legal advice;

iv) on almost every occasion the documents were signed by me in blank and the relevant officer advised that he would complete the document;

iv) on no occasion did the relevant bank officer give me a copy of the document which I had signed

vi) on all the occasions the persons who have witnessed my signature on the various

documents have been officers of the bank namely:

a) Mr. Milton Elliott
b) Mr. D.W. Quarrie
c) Mr. C. Williams

13. At the time when I signed the guarantee the space reserved for the insertion of the consideration and the name of the principal debtor were in blank and in fact when I signed the Guarantee I was told by Mr. D.W. Quarrie that all I would be responsible for were the sums due on the Promissory Notes I had previously executed."

These aspects of Mrs. Rose-Green's evidence convince me that there are serious issues to be tried, and refute the submissions of the respondent Bank that the allegations in the Amended Statement of Claim are frivolous and vexatious and an abuse of the process of the Court.

Accordingly, therefore, the appeal must be allowed, the order of the learned judge below must be set aside, the Respondent's Notice is dismissed and costs both here and below must go to the appellant, Sheila Rose-Green.

BINGHAM, J.A.

In this matter the plaintiff/appellant by way of appeal sought to challenge an order made by Reckord, J on April 7, 2000, whereby it was ordered that:

> "(1) This action be struck out and the Writ of Summons and all subsequent proceedings filed herein be set aside as against the second defendant on the ground that;
>
> (a) It discloses no cause of action against the second defendant and
>
> (2) The costs of the application and the costs of the action to date hereof be the second defendant's.

In striking out the Statement of Claim in so far as it related to the 2nd defendant and awarding costs, the learned judge refused the relief sought in the summons in so far as it asked for the costs to be taxed immediately.

Before us on appeal learned counsel for the second defendant/respondent sought to press in argument additional grounds in contending that the order made by the learned trial judge below should also be affirmed on the following grounds:

> "(1) The action was frivolous and vexatious and an abuse of the process of the Court under paragraph 1(b) of the summons dated December 9, 1998, filed by the respondent for the following reasons:
>
> (a) The appellant did not contend in her pleadings that the transactions she sought to impugn were to her manifest disadvantage; and

> (b) The documentary evidence before the Court clearly showed that the appellant had benefited directly from the loans disbursed by the respondent in circumstances where the appellant indicated to the Court that she was not relying on the doctrine of non est factum.
>
> (2) The Scotia Plan Loan made to the appellant's husband personally, being for the purpose of settling debts already incurred for home improvement, was not a debt incurred for a purpose which was beneficial to the appellant's husband solely. To the extent that the appellant benefitted from the loans advanced for the purpose of improving her home, she benefitted directly from those loans and indirectly from such loans as were extended for the purpose of settling the indebtedness arising from those loans."

The learned judge below found in favour of the respondent and ordered that the Statement of Claim be struck out as disclosing no cause of action against the second defendant/respondent.

In arriving at this decision, he purported to act in accordance with paragraph 1(a) of the respondent's summons. Where a Court so acts, its decision, to be sustainable, has to be one grounded on an examination only of the pleadings which in this case, given the learned judge's order, was the Statement of Claim. Here, the Rules make it quite clear, that no resort may be had to any affidavit evidence.

The amended Statement of Claim raises important issues which when fully examined, the matter could only be properly determined by a trial on the merits. In the absence of evidence of a clear and compelling nature, the proper course

the learned judge ought to have taken was to dismiss the respondents' summons and allow the matter to proceed to a trial of the issues raised on the pleadings.

On an examination of the written judgment, it is clear that the learned trial judge in coming to his determination resorted to an examination of the affidavit evidence before him. While the Rules do afford a prompt and summary method of disposing of groundless claims and excluding immaterial issues in which case resort may be had to an examination of the affidavit evidence, such a course ought not to be resorted to at the interlocutory stage. The material before the learned judge given his ruling, supports a conclusion that the matter was one which on its face, amounts to what may be regarded as a plain and obvious case. What is also not permitted is for the learned judge to resort to examine the affidavit evidence and to make findings of fact from complex issues of fact raised on the pleadings. Such a determination is one for the trial Court and not a matter for the learned judge to determine at the interlocutory stage.

Having regard to the observation in respect to the ruling of the learned judge founded as it was on 1(a) of the summons, and given the circumstances with which he was confronted, it was clearly wrong.

I shall now proceed to examine the material available to the learned judge to determine if in coming to the conclusion he arrived at, it can be supported on alternative ground (viz 1(b) of the summons).

In his determination of the matter the learned judge was fully cognizant of the fact that the Statement of Claim as amended (paragraph 5(a)), sought to allege against the bank that it had actual or constructive notice of the fact that the first defendant was exercising undue influence over her.

This pleading did not stop there but went on to state in the Particulars:

> "(i) That the second defendant knew that the plaintiff had received no legal advice.
>
> (ii) That the second defendant failed to ensure that the plaintiff took independent legal advice.
>
> (iii) Alternatively, that the second defendant failed to emphasize and communicate with the plaintiff the need to seek independent legal advice.
>
> (iv) That the second defendant failed to inform the plaintiff of the full extent of the first defendant's liability to the second defendant when she was requested to execute the mortgages, guarantee, and security documents."

It is patent from a reading of the above extract from the Amended Statement of Claim that at the very core of the plaintiff's claim was the crucial question as to whether she was advised by the bank to obtain independent legal advice before executing the aforementioned documents. That question was one for a trial judge to examine and determine on viva voce evidence at a hearing of the matter. Here, learned counsel for the respondent placed great reliance on a trilogy of cases decided by the House of Lords viz:

(1) **National Westminster Bank** v **Morgan** [1985] 1 All E.R. 821

(2) **Barclays Bank** v **O'Brien** [1993] 4 All E.R. 417

(3) **C.I.B.C. Mortgages** v **Pitt and Another** [1993] 4 All E.R. 433.

Without going into the facts of these cases it is sufficient to state that while the principles to be extracted from the judgments are of high persuasive authority, the cases are of little if any assistance being appeals from trials in the High Court following a hearing on the merits where all the relevant issues raised on the pleadings would have been gone into by the judge, unlike the instant case on appeal from an order made in a summary manner at the interlocutory stage. In this regard, it bears repeating that one recognises that in plain and obvious cases, for example, where a claim when examined establishes that it has no reasonable chance of success, and here this is clearly not such a case. One would therefore have to acknowledge that such situations would be extremely rare, vide **Lawrance** v **Lord Norreys et al** Vol. 15 App. Cases 210. In such a case there is the power in a judge at the interlocutory stage, on application before him or on his own motion, exercising the inherent jurisdiction of the Court to strike out a claim on the ground that it is frivolous or vexatious, and is an abuse of the process of the Court.

In light of the above, in proceeding to determine the summons in the manner he did in striking out the claim under 1(a) of the summons, the learned judge fell into error.

The remaining question therefore, is whether the learned judge's order can be supported on the alternative ground, viz; that the Statement of Claim is frivolous or vexatious and is an abuse of the process of the Court.

Here, the evidence contained in the competing affidavits can be looked at in determining whether the matter satisfied the test of amounting to a claim which discloses that it stood not the remotest chance of succeeding.

In proceeding to strike out the Statement of Claim as can be seen from an examination of the judgment of the learned judge rather than proceeding to examine the pleadings in order to determine whether they raised triable issues, he embarked on an examination of the merits of the claim and the defence in coming to a determination that the bank was not under a duty to:

(a) advise the plaintiff to seek independent legal advice with respect to the loans made to her husband;

(b) that the transactions with the bank were not to her manifest disadvantage.

With the utmost respect to the learned judge, such a determination was not for him to make at the interlocutory stage.

Conclusion

The Statement of Claim as originally drafted raised the important issue of undue influence against the 1st defendant/respondent (the husband). There was up to that point in time, no such allegation against the respondent bank. This defect was, however, subsequently cured by the later amendment of the

claim which application was granted with the leave of Reckord, J. Once the pleadings disclosed a cause of action against the respondent bank, the proper course to be taken by the learned judge below was to dismiss the summons and allow the action to take its natural course to the next stage of a hearing on the summons for directions. There was absolutely no merit in the alternative grounds of relief prayed for in the summons. Such a course which in practice is rare, is only resorted to in plain and obvious cases where a claim stands not the remotest chance of success.

Moreover, the rules, governing striking out of applications at the interlocutory stage also lay down as a cardinal principle that it is not for the learned judge at that stage to attempt to try an action on the merits by proceeding on a minute examination of competing affidavits, that being properly a matter for a trial Court as the tribunal of fact.

An examination of the written submissions relied on by counsel below gives a clear indication as to what may have led the learned judge down the path that he took in the matter. In doing so, however, he was regrettably led into error and the order made cannot stand.

For the above reasons I would allow the appeal and set aside the order made by Reckord, J with costs to the plaintiff/appellant both here and below. Such costs to be agreed or taxed.

PANTON, J.A.

The respondent applied by way of a summons before Reckord, J. for the striking out of an action filed by the appellant against her husband (first defendant) and the respondent (second defendant). The summons reads thus:

> "Take notice that at the hearing of the plaintiff's summons dated the 29th day of October, 1998, and filed herein, the 2nd defendant will apply for an order that:
>
> This action be struck out and the writ of summons and all subsequent proceedings filed herein set aside as against the 2nd defendant on the ground that:
>
> (a) it discloses no cause of action against the 2nd defendant; and/or
>
> (b) it is frivolous and vexatious and/or an abuse of the process of the Court".

On April 7, 2000, the learned judge ordered that the "action be struck out and the writ of summons and all subsequent proceedings filed herein set aside as against the 2nd defendant on the ground that it discloses no cause of action as against the 2nd defendant". He awarded the costs of the application and of the action to date in favour of the respondent herein, granted leave to appeal and stayed execution for six weeks.

The appellant has challenged the decision on three grounds:

> (1) "The learned trial judge applied the wrong principles of law in assessing whether to grant the application to dismiss the plaintiff's claim.
>
> (2) The learned trial judge enquired into questions of fact and sought to make findings on

disputed questions of fact from the affidavit evidence.

(3) The learned trial judge proceeded on the basis of a misapprehension of his functions in deciding whether the plaintiff's claim disclosed a cause of action.

The learned judge, in arriving at his decision, had, indeed, taken into consideration the several affidavits filed in relation to the facts and merits of the case of the contending parties. Having considered the documents filed as well as the submissions of the attorneys-at-law, he concluded thus:

> "The central issue arising from this summons is whether there was any duty on either the first or second defendant to ensure that the plaintiff obtained independent legal advice when she signed and executed the following..."

There followed a list of documents relative to the guaranteeing of loans.

It is quite clear that the learned judge, in focussing his attention in that manner on the details of the contending issues of fact, was in error. He ought not to have looked beyond the pleadings. In **Wenlock v. Moloney and Others** [1965] 2 All E.R. 871, there was an application to strike out the writ, statement of claim and replies, and to stay or dismiss the action on the grounds that the pleadings disclosed no reasonable cause of action, and were vexatious and an abuse of process. After a hearing which lasted more than two full days, and at which there was no oral evidence or cross-examination, the master delivered a twenty-two page judgment and struck out the plaintiff's pleadings. The Court of Appeal of England allowed the appeal because the course taken by the master

amounted to a trial of the case in chambers, without discovery, oral evidence or cross-examination, and so was neither authorised by the rules nor was it a proper exercise of the inherent jurisdiction of the court. Danckwerts, L.J.disposed of the matter in these terms:

> ".....this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not a proper exercise of that power." [page 874 G-H]

The Court of Appeal, in allowing the appeal, was merely emphasizing a long established judicial position that the jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases. See **Hubbuck & Sons Ltd. v. Wilkinson, Heywood and Clark Ltd** [1899] 1 QB 86.

When Mrs.Minott –Phillips commenced her reply to Mr. Scharschmidt, Q.C. on the second day of the hearing, she conceded that the learned judge was in error in finding that there was no cause of action. That being the position, the appellant has submitted that the appeal ought to be allowed. However, Mrs. Minott-Phillips submitted that the affidavits that were relied on by the learned judge support an order under paragraph 1 (b) of the summons, that is, that the action is frivolous and vexatious and an abuse of the process of the court. The

facts, she said, were undisputed. The learned judge, she said, had all the relevant information to determine whether the appellant was a joint beneficiary of the loans granted by the respondent to her and her husband. As a joint beneficiary, there is no presumption of manifest disadvantage arising in favour of the appellant. That being so, she submitted, the claim was devoid of all merit and cannot possibly be sustained. Reliance was placed on **National Westminster Bank plc v. Morgan** [1985] 1 All ER 821, a decision of the House of Lords. In that case it was held that a transaction could not be set aside on the grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. According to Mrs. Minott-Phillips, the allegation against the respondent in the instant case is that it had notice of undue influence by the appellant's husband over her. There is need, she said, for the appellant to show that she was at a manifest disadvantage. As a joint beneficiary, she had no presumption of manifest disadvantage working in her favour. It was therefore, Mrs. Minott-Phillips said, a waste of time to have a full-scale trial.

I cannot see any good reason for denying the appellant the opportunity to put forward her case at a full-scale trial in open court where cross-examination will be possible. I do not see a waste of time, nor an abuse of the process of the courts in allowing the appellant to have her day in court. It is significant, I think, that the principles on which the respondent relies were developed after there had been full-scale trials and exhaustive use of the appellate processes. It cannot

seriously be advanced as a fact that the appellant has nothing more beyond the contents of the affidavits to put forward in her case. Nor can it be advanced as a matter of law that she has no right to present her allegations that:

> a) the respondent had actual or constructive notice of the undue influence exercised by her husband over her; and
>
> b) the respondent caused her to sign many documents in blank, after her husband had been disbursed loans, in an attempt to reduce her capacity to understand the nature of the documents she was signing.

These are matters which require the giving of evidence. In the circumstances, I cannot see how it would be just to prevent the appellant from presenting her case. I therefore have no hesitation in agreeing that the appeal should be allowed, with costs to the appellant to be agreed or taxed.

DOWNER, J.A.

Appeal allowed. Cross-appeal dismissed. Order of Reckord, J set aside. Costs both here and in the court below to the appellant to be taxed if not agreed.