Date: 7 February 2002
Docket: S.H. - 98-151898

1998

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Credit Union Atlantic Ltd. v. Roy, 2002 NSSC 36]

Between:

CREDIT UNION ATLANTIC LIMITED

Plaintiff

- and -

WENDY ROY

Defendant

DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Justice Gerald R. P. Moir on October 17 and 18, 2001

DECISION: 7 February 2002

COUNSEL: David G. Coles, Charles J. Ford and Nicole Godbout, Articled Clerk, for the plaintiff

Stanley W. MacDonald and Susan McKinney, Articled Clerk, for the defendant

MOIR, J.:

[1] *Facts*. After some years with chartered banks, Mr. Ronald Mumford took a position as a loans officer with Credit Union Atlantic and from September 1995 until September 1997 he was in charge of commercial lending. He understood the credit union had little commercial experience and wanted to expand its portfolio of loans to small businesses. By late 1996, Mr. Mumford was very busy and he was flying by the seat of his pants. He was never one for paperwork or for diligently following policy and procedure. His authorization limit was $25,000, but he set up loans at the credit union well above his limit without getting approval of those with higher limits. It is evident that he failed to follow credit union policy for suggesting independent legal advice and that he was a very poor drafter of security documents. These deficiencies were at play in a loan made by Mr. Mumford on behalf of the credit union to Mr. David Roy.

[2] Mr. Mumford was the only witness for the credit union. The defendant testified, as did her husband, David Roy. Mr. Mumford readily acknowledged his failures and he was careful to make it clear when he could not rely on specific recollection. He was a co-operative witness in cross-examination, as well as on direct. I also found Mr. Roy and Ms. Wendy Roy to be credible

witnesses. To the limited extent that there are differences of any importance between the testimony of these witnesses, I resolve the differences by taking account of differing perceptions and differing powers of recollection and by having reference to the documentary evidence.

[3] David Roy is an optician with over twenty-five years experience. In 1996 he was trading as a sole proprietor under the name “Half Price Optical” at an establishment on Kempt Road. Business was good, and Mr. Roy was determined to expand. He decided to open a second store in Dartmouth. He needed $50,000. He approached his bank but was turned down. One of Mr. Roy’s employees suggested he try Credit Union Atlantic. There, Mr. Roy was introduced to Mr. Mumford because Mumford was in charge of commercial loans. Mr. Mumford said there would be no problem making the loan. Information was provided, and a line of credit agreement for up to $20,000 was signed in October 1996. Mr. Roy and Mr. Mumford have differing explanations for why the initial agreement was for $20,000 rather than $50,000. According to Mr. Roy, he had a commitment for the full $50,000 from the beginning, but Mr. Mumford advised that Mr. Roy might save money on fees and interest rates if he had an agreement for the maximum he presently needed and increased it later when more money was required. Thus, a new agreement

was executed early in January 1997 for $50,000. According to Mr. Mumford, Mr. Roy only applied for $20,000 in October, and the new agreement resulted from a fresh request made in December 1996. In cross-examination, he allowed that Mr. Roy may have said in October that he required a $20,000 line of credit now and would eventually require $50,000. The difference does not matter. Mr. Roy agrees that he made a commitment to $50,000 in December 1996. Whether the commitment was made in October or in December does not affect the outcome of this case. As will be seen, the important point is that the commitment was made before January 1997.

[4] The new loan agreement for $50,000 was signed by Mr. Roy on January 6, 1997. It was authorized by Mr. Mumford although it was well over his $25,000 limit. Mr. Mumford testified that about this time the credit union instructed him to "pull back" on lines of credit over $25,000. In the case of Mr. Roy, the credit union required either that the line of credit revert to the former $20,000 or that Mr. Roy put up security. Mr. Mumford testified that he made a call to Mr. Roy in trepidation because the $50,000 had so recently been committed and because Mr. Mumford wanted to continue doing business with Mr. Roy. He said the call was made sometime after January 6, when the new line of credit agreement was signed, and before January 16, when a mortgage was signed.

He said much of the line had been drawn by then. He said he told Mr. Roy the credit union required security or a reduction and Mr. Roy was not happy with this. Mr. Roy says the conversation occurred a couple of weeks after he signed the new agreement, which is consistent with Mr. Mumford's evidence. He says there was no specific discussion of a mortgage and he took it that his wife's co-signature on the agreement would meet the requirement for security. I believe the memories of both gentlemen have faded. In 1992, when he was involved in a business venture with other partners, Mr. Roy was advised to convey to Ms. Roy his interest in their residence . He did so. The deed was executed at Coady Filliter, where Ms. Roy works. On the morning of January 6, 1997, the same day as the new agreement was signed, a metes and bounds description of the residence was faxed by Coady Filliter and this was appended to the mortgage that was prepared by Mr. Mumford and signed on January 16. It is the more probable that the discussion concerning security occurred on or shortly before the day the new agreement was signed and that the discussion included specific reference to mortgaging the house, which had been disclosed as an asset as early as October 1996. I find: Mr. Mumford verbally committed the credit union to the $50,000 line of credit before January 1997 without any condition for security; Mr. Mumford told Mr. Roy of the new requirement at

about the time the $50,000 line of credit agreement was signed; and, Mr. Roy assisted in getting a copy of the description to the credit union about the same time as the agreement was signed.

[5] Mr. Roy said, and I accept, that the new demand put him under pressure. Although the old $20,000 limit was not quite drawn at that time, the expansion was nearing completion and Mr. Roy had bills to pay and, perhaps, outstanding cheques. He had a need for close to $50,000 to cover his obligations. Immediately reducing the debt was problematic. Mr. Roy did not want to take on an investing partner. He had been turned down by the bank and did not want to go to another lender. So, he went to his wife.

[6] According to Mr. Roy, Ms. Roy was not pleased. Mr. Roy denied there was any discussion between him and his wife of a mortgage of their house, although he said on direct the discussion included a "pledge" involving their joint assets or her sole assets, primarily the house. Mr. Roy recalls his wife's response to have been "If it has to be, it has to be." Mr. Roy laughed when he was asked in cross-examination whether he makes his wife do things. He did not pressure her or threaten her, the pressure upon the couple came from the situation.

[7] Ms. Roy had no involvement in her husband's business, and, while they discussed his plans for the expansion and his attempts to raise financing, she

was not made aware of the details of the expenses. She says that one evening her husband told her the credit union was pressuring him. Either he would provide a co-signer "or something like that", or the credit union would stop advancing money or demand payment of the outstanding balance. She thought the credit union required a guarantee of some sort, so that not only Mr. Roy would be liable.

[8] Apparently, the credit union does not involve lawyers in the preparation and execution of mortgages for this kind of transaction. The form of mortgage used by Mr. Mumford was designed for completion by staff. This is clear from the absence of a form of affidavit of marital status as called for by s. 8(3) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Rather, the form contains a "statement of status", which is merely witnessed and does not require the presence of a lawyer or commissioner of oaths when the mortgage is executed. The form Mr. Mumford selected was not designed for the circumstance where a third party, such as Ms. Roy, puts up security. The form used is for the circumstance where a person secures his or her line of credit against his or her own property. As a result, there are some provisions in the mortgage that do not make sense in the context of this transaction. Also, Mr. Mumford made mistakes in both the preparation and the execution of the document. Counsel

for the defendant argues that defects in the documentation are fatal to its effect. I shall discuss these defects and the details of the terms later. Whatever the effect of the documentation, it is clear that Mr. Mumford, Mr. Roy and Ms. Roy paid little attention to the documentation when the Roys went to the credit union on January 16, 1997. According to Mr. Mumford, his practice is to sit down with both spouses, make sure they understand they are mortgaging their residence, go through the document with them and have them sign the mortgage. In cross-examination, he agreed that he may not have followed this practice in the case of the Roys. The meeting was brief and Mr. Mumford recalls no expressions of stress by Ms. Roy. In direct, he said that if a spouse expressed distress in a situation like this he would tell the individual to be sure they knew what they were doing and he would encourage independent legal advice, but in cross he allowed that it was possible Ms. Roy said she was not happy with the transaction and Mr. Mumford did not respond because he was too busy. The credit union had a written policy requiring independent legal advice where a guarantor supplies security or guarantees any debt over $20,000. Mr. Mumford did not follow the policy. Ms. Roy did not sign a form of guarantee and Mr. Mumford did not appreciate that what she was doing amounted to a guarantee. According to Mr. Roy, there was no discussion

concerning the effect of the document he and his wife would sign. At some point, Ms. Roy said, "I'm signing this under duress.", but she was probably very quiet throughout the meeting because that is how she shows stress. Ms. Roy's statement was directed to Mr. Roy but he did not respond to it. He hoped she would sign the documentation. According to Ms. Roy, she went to the meeting not knowing exactly what she would be signing. Documents were on a table in a meeting room. She was asked to sign, but she does not recall any explanation being given. When signing, she said she was doing so under duress. She was otherwise quiet and the remark was not necessarily directed to Mr. Mumford. Rather, she trusted her husband that things would be in order. Ms. Roy signed the mortgage and the statement of status. Some communication of some sort made during the meeting caused her to realize she was signing a mortgage. In cross-examination, she agreed that she was quiet during the meeting and may have conveyed the impression that she was not very serious. In particular, the remark about duress may not have been taken as meant to be serious.

[9] I find Mr. Mumford did not follow any practice of explaining a mortgage and did not mention independent legal advice. I find that Ms. Roy was aware that she was mortgaging her home as security for her husband's line of credit. I am

satisfied that Ms. Roy said something to the effect that she was signing under duress, but I am not satisfied that Mr. Mumford heard her. I find she did not communicate to Mr. Mumford information to the effect that she was signing the mortgage against her will. In fact, she did not sign against her will.

[10] Ms. Roy says she signed the document because she felt the pressure and stress her husband was under from the credit union. She knew that if she did not satisfy the credit union's demands her husband's business would be in trouble. Her husband contributed more to household income than Ms. Roy did from her job, and the income from his business was needed to meet household expenses. Ms. Roy agrees that the credit union did not pressure her directly. I find that her husband did not pressure her either. Rather, the couple felt the pressure of the credit union's demand for security or reduction of the debt. Ms. Roy is an articulate woman of obvious intelligence. She is not subservient to her husband. In cross-examination, he found a question, about his telling her what to do, to be laughable. She is educated and she is experienced in business as well as purchasing and mortgaging her homes. She has worked for law firms for many years and she has been the office manager at Coady Filliter for nine years. While she articulated the pressure she and her husband felt, she did not attempt to suggest that her husband's wishes dominated over her own.

[11] The Line of Credit Loan agreement dated January 6, 1997 included this: "The credit limit requested in this agreement will expire on Nov 1st 1997, but it may be cancelled at any time by the Credit Union or the Borrower." And, clause eight of the agreement went on to provide "the agreement may be renewed on or before date of expiration". It appears that November 1, 1997 came and went without anything being done. Rather, a new agreement was sought by the credit union from Mr. Roy in 1998. Mr. Roy signed the new agreement on March 4, 1998. It provided the same limit of $50,000, the provision for interest changed and instead of an expiry date the document provided "until terminated" for the expiry date. This document was not signed by Ms. Roy, and she knew nothing of it. The line of credit was almost fully drawn on November 1, 1997. The debt revolved substantially, by $30,883.10 according to my calculation, between November 1, 1997 and March 4, 1998. It fully revolved, $52,082.39 by my calculation, between November 1997 and November 1998.

[12] Mr. Roy's business became insolvent. He attributes the failure to competition from mass merchandisers who got into the eyeglasses business in the late 1990s. Nothing suggests the failure could have been foreseen when the line of credit was originally established. The credit union started this action for foreclosure and sale naming both Roys as defendants. However, Mr. Roy made

an assignment in bankruptcy and the action against him was recently dismissed. As I said, Ms. Roy is the sole owner of the equity in their home.

[13] *Issues*. Counsel for Ms. Roy sets up four lines of defence. It is said that the mortgage was executed under undue influence and independent legal advice was required. It is also said that defects in the mortgage, particularly the absence of a copy of the Line of Credit Loan Agreement as called for in the mortgage itself, made the mortgage ineffective. Thirdly, the defendant raises the suretyship defence concerning material alteration of risk and counsel refers to the change made in the provision for interest in the March 1998 agreement. Finally, the defendant relies on the November 1997 expiry.

[14] *Undue Influence*. *Bertolo* v. *Bank of Montreal* (1986), 57 O.R. (2d) 577 (O.C.A.) involved a suit for a declaration that a note and a mortgage securing it were unenforceable. The bank had required that Mrs. Bertolo, "a widow of meagre means who had little schooling and is not fluent in the English language" (p. 578), see a lawyer before she made herself the principal debtor and provided her home as security on a loan for her son's restaurant. The advice was given by a partner of the lawyer who was acting for the son and the bank on the transaction. The advice was not independent. At that, the evidence did not establish what advice was given or that the son was not present when

it was given. The trial judge found for Mrs. Bertolo on the basis that the bank was her fiduciary. The Ontario Court of Appeal did not agree that a fiduciary relationship had been created. "This, however, does not end the matter.", the court said at p. 584. This was a case in which equity should intervene to relieve Mrs. Bertolo from the effects of the note and the mortgage. The conclusion was stated this way at p. 587:

> This bank was aware, or ought to have been aware, that this woman had not had the benefit of independent legal advice with respect to a transaction which, from a business viewpoint, was manifestly disadvantageous to her. On the approach taken in the authorities to which I have referred, the bank ought not to be entitled to recover against her. In my opinion, the factors present in this case are such that it would be unconscionable to permit the bank to take advantage of the security it obtained from Mrs. Bertolo in the absence of proper independent legal advice.

This is not to say that the mere fact of a failure to provide independent legal advice is a sufficient ground to preclude recovery under a note or a mortgage. That was made clear by the court at p. 584:

> It was, of course, open to the trier of fact to conclude, as the bank urged, that Mrs. Bertolo sufficiently understood the nature of the transaction and her financial exposure. If this were so there would be no basis for impeaching the transaction regardless of whether or not she was independently advised. The unhappy consequences would then be the product of her own erroneous judgment. However, that is not this case. Here, the trial judge has not found, and in the absence of proper independent advice it cannot reasonably be concluded, that the transaction was adequately explained to her or that she fully comprehended its terms or that she made an informed decision to enter into it.

In *Bank of Montreal* v. *Featherstone* (1989), 68 O.R. (2d) 541 (O.C.A.), the trial judge had found that spouses were not liable on guarantees they executed in support of a bank loan to their husbands' corporation. He reached this finding "solely on the basis that they did not receive independent legal advice" (p. 548). The trial judge had found that there was no undue influence and he had made no finding that could support a defence of *non est factum*. The Court of Appeal reversed. It said, at p. 546:

> The failure of a wife to obtain independent legal advice before executing a guarantee will not in every case entitle her to escape liability under the guarantee. The obvious purpose of the bank in requesting a certificate of independent legal advice is to avoid, if possible, the spouse's later raising defences such as *non est factum*, unconscionability, fraud, misrepresentation or undue influence. The burden of proving each of these defences rests upon the person seeking to set aside the guarantee.

The finding of unconscionability in *Bertolo* was founded upon facts similar to those which must be established for a defence of *non est factum.* Both *Bertolo* and *Featherstone* make it clear that a mere absence of independent legal advice is not enough to discharge the onus of proving unconscionability or *non est factum*. The role of independent legal advice in those kinds of cases is to respond to the situation where the guarantor or accommodation party fails to understand. The role of independent legal advice may be somewhat different in cases of suspected influence.

[15] Counsel for the defendant referred me to *MacKay* v. *Bank of Nova Scotia* (1994), 20 O.R. (3d) 698 (O.S.C.), where there was a finding of undue

influence. The court found the circumstances of the borrower in that case to be similar to those of Mrs. Bertolo. The court stated "Unequal bargaining power, together with an unfair contract, create a presumption of undue influence." (p. 709). The bank had failed to discharge the onus put upon the bank by the presumption. The court expressed the belief that "Independent legal advice may not be conclusive but it certainly is the best means of rebutting the presumption." (p. 709). The bank had suggested independent legal advice, but it had been refused. In the circumstances of that case, the suggestion was not enough to rebut the presumption. The defendant also relies upon *Royal Bank of Canada* v. *Druham*, [1996] N.S.J. 563 (S.C.) affirmed [1997] N.S.J. 442 (C.A.). Mr. Druham owed money to the Royal Bank on account of a business in which Mrs. Druham was not involved. The bank requested security. Mrs. Druham saw a lawyer but he was acting for her husband and the bank. Not knowing much of what she was doing, she signed a mortgage of a vacant lot owned by her and her husband. Apparently, the bank had wanted a mortgage of her home. When his error was discovered, the lawyer replaced the description and re-recorded the mortgage without advising the Druhams or seeking their consent or preparing an amending agreement. The debt increased beyond what the mortgage secured, and the bank insisted upon new security.

Mrs. Druham refused. Then the bank said it would foreclose her home under the documentation she had previously signed. She was never told she had only mortgaged the vacant lot. Under pressure of this threat and because her husband “told her that she had to sign papers at the bank” (N.S.J. 563 at para. 18), Mrs. Druham signed a new note at the bank and then saw the same lawyer, who witnessed her execution of a mortgage securing the note. Justice Michael MacDonald, now Associate Chief Justice, found misrepresentation. The earlier mortgage was not likely an equitable mortgage of the home (para. 32) and the representation that the bank made concerning foreclosure was a misrepresentation supporting recision of the later contract (para. 36). Alternatively, the court found that the relation between the bank and the Druhams and the one-sided advantage of the transaction gave rise to a presumption of undue influence and a need for independent legal advice. As regarded the bank’s claim against Mrs. Druham, the Court of Appeal upheld the decision on the first ground, misrepresentation. The appeal court refused to determine the alternate ground, but it did comment “ ... the need for Mrs. Druham to have had independent legal advice in these circumstances is obvious” (para. 62). At para. 40 of *Druham*, Justice MacDonald accepted the approach to presumed undue influence adopted by Wilson J., Cory concurring,

in *Geffen* v. *Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 and 43. This involves an inquiry first into whether "potential for domination inheres in the nature of the relationship itself": para. 42. Some such relationships have been identified by equity but others "defy easy categorization": para. 42. In the case of gifts, the presence of a dominant relationship is enough to raise the presumption: para. 44. In the case of commercial transactions, a second step is required. The party asserting undue influence must show "that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the [opposite party] was unduly benefited by it": para. 43. When the person asserting undue influence has established a potential for domination inherent in the nature of the relationship itself and, in the case of a commercial transaction, undue disadvantage or undue benefit, the opposite party must show that the transaction resulted from the other's "full, free and informed thought": para. 45. Justice Wilson's approach was also followed in *Muttart Estate* v. *Jones*, [1995] N.S.J. No. 2 (S.C.). However, Justice Davison emphasized in *Re. Murphy Estate*, [1998] N.S.J. No. 324 (S.C.) that this approach did not attract support of the majority in *Geffen*. Writing for himself and McLachlin J., later the Chief Justice, LaForest J. said it was unnecessary on the facts of *Geffen* to determine whether undue disadvantage or undue benefit must be shown in order

to raise a presumption of undue influence and he refused to endorse "the proposition that the law will never interfere with a contract that does not necessarily lead to a material disadvantage, even where it is clear that the process leading up to the contract has been tainted": para. 85. *Geffen* was decided by a court of five. The fifth was Justice Sopinka, who reviewed conflicting authorities on the effect of any presumption of law, and was of the opinion that the presumption of undue influence played no role in *Geffen*: para. 96. As with the others, Justice Sopinka concluded that the Alberta Court of Appeal had been wrong in reversing the trial judge's finding that there had been no undue influence. The presumption was unnecessary to that finding: para. 100. For Justice Sopinka, the presumption is insignificant in a case where a finding of fact does not depend on the onus of proof. For Justice Wilson, the presumption gives rise to a need to establish a further fact: the transaction resulted from full, free and informed thought. For Justice Wilson, the absence of undue disadvantage or undue benefit in a commercial transaction appears to be preclusive not only of the presumption but also of the assertion of undue influence. For Justice LaForest, undue influence may be established in such transactions even without undue disadvantage or benefit.

[16] Counsel for the plaintiff referred me to *Gold* v. *Rosenberg*, [1997] S.C.J. No. 93, a case concerning liability for breach of trust on the part of a stranger to the trust. The stranger was the Toronto Dominion Bank, a respondent in the appeal. Mr. Rosenberg and his nephew, Mr. Gold, were the beneficiaries of a trust of interests in various companies. They were also the trustees, but the nephew had signed a power of attorney in favour of the uncle. One of the companies guaranteed a loan the Toronto Dominion was making to another company owned solely by Mr. Rosenberg, and the guarantee was supported by a collateral mortgage. Mr. Rosenberg used the power of attorney to accomplish most of this, but after the loan was advanced, Mr. Gold signed a directors' resolution ratifying the guarantee and the collateral mortgage. He did not receive independent legal advice. The minority opinion concluded that the guarantee was unenforceable. The bank could not be liable under the doctrine of knowing assistance because the bank did not have actual knowledge of a fraudulent and dishonest breach of trust. However, it should be liable under the doctrine of knowing receipt because it was aware of sufficient facts to be put upon inquiry and that inquiry ought to have included independent legal advice for Mr. Gold. The majority did not accept that a case had been made out for knowing receipt. Firstly, no trust property had passed into the bank's

possession. Secondly, the bank acted reasonably. The majority referred to Mr. Gold's education and experience, and his awareness of pertinent facts at the time he signed the resolution. Counsel for the plaintiff refers me to this decision because of the contrast drawn by the majority between Mr. Gold and Mrs. Bertolo of *Bertolo* v. *Bank of Montreal*: "the contrast serves to illustrate the type of case in which independent legal advice is not a prerequisite" (para. 86). It is said that the situation of Ms. Roy is closer to that of Mr. Gold than Mrs. Bertolo. Mr. MacDonald, for the defendant, emphasizes another aspect of this decision. Although *Gold* involved an allegation of breach of trust rather than undue influence, both the majority and the minority referred approvingly to a House of Lords decision on undue influence. Justice Iacobucci wrote for himself and Justices LaForest and Cory and said at para. 60:

> In my view, the circumstances were sufficiently suspicious to give rise to an obligation on the part of the Bank to make reasonable inquiries to ensure Rosenberg was not acting in breach of trust. In *Barclays Bank plc* v. *O'Brien*, [1993] 1 All E.R. 417, the House of Lords considered the circumstances in which a bank will have a duty to inquire when receiving a guarantee from the debtor's spouse. The House of Lords held that, where a woman enters into a manifestly disadvantageous transaction, and where there is a substantial risk that the husband has committed some equitable or legal wrong (i.e., undue influence or misrepresentation) in order to secure the woman's consent to the guarantee, the Bank is placed on its inquiry. It then must take reasonable steps to ensure that the wife's agreement to stand as surety has been properly obtained.

Justice Sopinka wrote for himself and Justices McLachlin and Major with Gonthier J. concurring in Justice Sopinka's conclusion that the bank had acted reasonably and his reasons for that conclusion: para. 88. At para. 78, Justice Sopinka wrote:

> In certain circumstances, a third party in the position of the bank will not have discharged its duty to inquire unless the guarantor has been advised to obtain independent legal advice. In certain cases, the law imposes on a creditor a duty to inquire when the transaction is clearly detrimental to the person offering security and the relationship between that person and the principal debtor is particularly close. In such circumstances, the law presumes undue influence on the part of the principal debtor. The clearest type of relationship giving rise to this presumption is that of husband and wife. Iacobucci J. cites *Barclays Bank plc* v. *O'Brien*, [1993] 4 All E.R. 417, in which the House of Lords extended this presumption to include cohabitees. Lord Browne-Wilkinson held that when a creditor is approached by cohabitees, one the principal debtor and the other the surety, and the proposed transaction is clearly to the disadvantage of the surety, it will be under a duty to inquire. A creditor can discharge this duty by explaining to the surety in a meeting not attended by the principal debtor the amount of her potential liability and the risks involved and advising her to take independent advice: *Barclays*, supra, at pp. 431-32.

Barclays Bank v. *O'Brien* settled for the United Kingdom circumstances in which a guarantee or security will be set aside for undue influence where a wife guarantees or secures a debt owed by her husband to a bank. The reasons given by the House of Lords and the summary of them given by both the majority and the minority in *Gold* advance a rule of much greater effect than suggested by the reasons of Justice Sopinka in *Geffen*. It is not merely a presumption of law, but entails a "duty to inquire", breach of which will invalidate bank security. This is much closer to the position of

Wilson J. in *Geffen*. Further, the prerequisite of "manifest disadvantage" or for "clearly detrimental" referred to in both summaries takes us to the position of Justice Wilson in *Geffen* rather than that of Justice LaForest in that same case. The English requirement for manifest disadvantage had been criticized before *Geffen* and Justice Wilson's solution was to retain it in a slightly modified form for commercial transactions and reject it for gifts. Justice LaForest, on the other hand, proposed retaining flexibility for cases where the process was tainted even though the result might not have been unjust in the sense of manifest disadvantage. Although *Gold* was not an undue influence case, the integral use in *Gold* of the reasons of the House of Lords in *O'Brien* generally supports Justice Wilson's approach to undue influence.

[17] I will follow Justice Wilson's approach in *Geffen*, although hers was not a majority opinion. I do so based upon the integral references to *Barclays Bank* v. *O'Brien* in *Gold* and upon this court's previous acceptance of the Wilson approach in *Druham* and in *Muttart Estate*. In light of *Barclays Bank* v. *O'Brien*, Justice Wilson's threshold of a potential for domination inherent in the nature of the relationship is not established on proof of a spousal relationship. However, it is established where a spouse being asked to put up security for the other has been shown to have put trust and confidence in the other as to financial affairs. The Roys are not the sort where one spouse

surrenders financial decisions to the other. However, their household depended upon her husband's income and Ms. Roy was not involved in the source of that income. On matters concerning what was necessary to her husband's business and the business income, she had to defer to his judgment. I accept the evidence that the demand of the credit union was met with no more analysis on the part of Ms. Roy than "what must be, must be", and the evidence that she trusted her husband to see that the transaction was in order. It is a relationship in which one spouse depends entirely upon the other for judgments in reference to one important aspect of their financial affairs. So, I am satisfied that this threshold is met.

[18] This was a commercial transaction, so the case attracts the second level of inquiry suggested by Justice Wilson. Examination of the transaction does not disclose undue disadvantage or undue benefit. Since the want of authority was not known to the borrower, it may have been unbusinesslike for the credit union to have decided to make demand so soon after the unauthorized commitment. Some might say that this action was inconsistent with co-operative principles upon which credit unions are supposed to be founded. However, the commitment, ostensibly authorized, was never for more than a demand loan. This is plain in both the October loan agreement and the January loan

agreement. The credit union had the right to make demand, and the freedom to suggest the alternatives of reducing the limit to a figure within Mr. Mumford's authority or securing the $50,000 limit. Given the legitimacy of the demand, the appropriate comparison is with Ms. Roy's position had she not given security. The disadvantages are obvious: she took on a contingent liability for a debt of her husband and she put her home directly at risk to the extent of that debt. The risk was not comparable to the new restaurant financed for Mrs. Bertolo's son or the troubled business of Mrs. Druham's husband. On the contrary, the evidence is that Mr. Roy's business was healthy and the cause of its failure was unforeseen at the time the security was requested. Against this risk, Ms. Roy received some advantages. Her husband was able to complete the expansion of his business without sharing profits with an investing partner, and the risk that his business would fail without a quick cash investment was extinguished. This was of direct benefit to Ms. Roy because her household required the business income.

[19] Even if I were to follow Justice Sopinka's observations in *Geffen*, this would not be a case in which I would find undue influence. Unlike Mrs. Bertolo, Ms. Roy advances no defence along the lines of *non est factum*. Ms. Roy had the intelligence, the experience and the ability to take her own counsel as to

whether she required advice. To the extent that she was unaware of the details contained in the documentation she signed, that resulted from her own choice not to read what she was signing as much as it resulted from Mr. Mumford's failure to go through the documentation. Unlike Ms. O'Brien, the pressure was not coming from the husband. It came from the situation created by the business expansion and the credit union's demand. Unlike Mrs. Druham, the lender's demand was based upon a legitimate right, not a threat founded on misrepresentation. What would legal advice have done for Ms. Roy? She would have learned the details of the instrument she was signing, but those details were not then her interest. She would have learned that the credit union had a legal right to demand payment, which would not have influenced her against signing and would only have confirmed that the pressure the couple felt was real. She would have received confirmation of that which she already knew, that she was putting herself and her home at risk to the extent of the line of credit.

[20] In conclusion, the mortgage has not been rendered unenforceable on the ground of undue influence.

[21] *Defects in the Mortgage*. The mortgage was poorly drafted by Mr. Morash. As I said, he used a form that assumes the mortgagor is the debtor on the line of

credit. Thus, Ms. Roy signed a mortgage which recites that "the Mortgagor has ... entered into a Line of Credit Loan Agreement with the Mortgagee" and the mortgage was a "collateral security for payment of all present and future indebtedness ... of the Mortgagor ... incurred under the Line of Credit". Of course, Ms. Roy entered into no agreement and she had no liability under the line of credit agreement itself. Further, the agreement is said to be "of even date herewith" when there was no line of credit agreement of January 16, 1997. And, the mortgage provides that a copy of the line of credit agreement "is annexed hereto as Schedule 'A' ". No copy of any agreement was attached. Schedule 'A' is a land description, although the instrument mortgages "land ... described in Schedule 'B' hereto annexed". There is no Schedule 'B'. The mortgage secures "payment of all indebtedness under the said Line of Credit" and "Line of Credit" appears throughout the instrument. The phrase is defined in a recital to mean a Line of Credit Loan Agreement signed by the mortgagor of even date with copy annexed.

[22] Counsel for the defendant submitted, in the words of his pre-trial brief "the absence of Wendy Roy's signature on any Line of Credit Loan Agreement, the failure to attach the Line of Credit Loan Agreement to the Collateral Mortgage, and the additional lack of existence of any Line of Credit Loan Agreement

dated January 16, 1997, invalidates the Collateral Mortgage ...". Counsel submits that *contra proferentem*, as applied for sureties in *Manulife Bank of Canada* v. *Conlin*, [1996] S.C.J. 101, assists this position. I disagree. An error in a document is not necessarily an ambiguity. It is clear from the document that the mortgage was to secure payment of something rather than nothing. The mortgage contains sufficient references to incorporate the only liability that could be applicable. David Roy also signed the mortgage and is within the word "mortgagor" although he was not an owner. The mortgage references "a Line of Credit Loan Agreement", of which there were none signed by Ms. Roy and two signed by Mr. Roy, one current and the other superceded. The mortgage references the limit, $50,000. The only document answering the description was executed in the same month, though not on the same day. When the surrounding circumstances are known, there is no ambiguity as to what liabilities were being secured.

[23] Counsel for the defendant submits that *Royal Bank* v. *Druham* also assists this defence. That case involved the deliberate alteration of a mortgage after execution and the misrepresentative quality of the bank's threat to foreclose the defendant's home when the mortgage, in its unaltered state, did not mortgage the home. The decisions of Justice MacDonald and the Court of Appeal do not

suggest that the kinds of error we see in the body of the present mortgage render it ineffective. Because of the failure to attach a copy of the agreement and the inadequate references to parties and dates, resort has to be had to the surrounding circumstances in order to ascertain exactly the liability being secured, but the document does not mislead or misrepresent and its effect is obvious when one sees that there is only one $50,000 Letter of Credit Loan Agreement executed about the time of the mortgage by one of the so-called mortgagors.

[24] *Material Alteration*. The mortgage provides for interest "at the rate which the Mortgagee from time to time charges on its 'Line of Credit Loans' ". Whether this rate is sufficiently ascertainable is not in issue. The mortgage goes on to inform that the rate is 7% per year as of the date of the mortgage and it refers to the loan agreement for calculation methods. The January 1997 loan agreement similarly provides "the amount outstanding shall bear interest at the rate which the Credit Union from time to time charges on its 'Line-of-Credit Loans' generally which is Credit Union prime plus 2%" and the agreement then provides this information: "As at the date of this agreement the 'Line of Credit Loans' rate is 7% per annum." The agreement provides for monthly calculation. This expression of the rate of interest increased by .75% with the

May 1998 agreement: "the amount outstanding shall bear interest at the rate which the Credit Union from time to time charges on its 'Line-of-Credit Loans' generally which is Credit Union prime plus 2.75%". The agreement then informs that the rate is presently 8.75%. Calculation is monthly. Counsel for the plaintiff argues that the applicable rate is the credit union line of credit rate and the agreements are purely informative where they provide "which is Credit Union prime plus 2%" or "2.75%". I have some difficulty with this. The word "which" can indicate information or definition. It is supposed to be punctuated with a comma when the former is intended. The way this term is drawn in the agreements, the parties are either contracting for the line of credit rate and readers are being informed that the rate is prime plus something or the parties are contracting for prime plus 2%, 2.75% in the second case, and readers are being informed that this is what the credit union generally charges on lines of credit. The former tells nothing. The credit union would be free to abandon both the fluctuating rate and the fixed 2% or 2.75%. Textually, the terms could be read either way. The ambiguity should be resolved in favour of the interpretation which gives more substance, prime plus 2% in one case and prime plus 2.75% in the other.

[25] Unless the alteration is to the benefit of the surety, a surety is released from liability where debtor and creditor agree to a material alteration in the guaranteed obligation without the consent of the surety: *Bank of Montreal* v. *Wilder*, [1986] 2 S.C.R. 551, *Manulife Bank of Canada* v. *Conlin*, [1996] 3 S.C.R. 415. An alteration is material unless it is self-evident that the alteration is unsubstanial: *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495 (C.A.), *Manulife Bank of Canada* v. *Conlin*, para. 2 and *Royal Bank of Canada* v. *Bruce Industrial Sales Limited* (1998), 40 O.R. (3d) 307. A surety may contract out of the defence provided by this principle by, for example, inclusion of a term in the instrument of guarantee allowing creditor and debtor to do something without consent of the surety: *Bauer* v. *Bank of Montreal*, [1980] 2 S.C.R. 102. However, such a term must be clear: *First City Capital Ltd.* v. *Hall* (1993), 11 O.R. (3d) 792 (C.A.) and *Manulife Bank of Canada* v. *Conlin*, para. 4.

[26] A 3/4% change in rates would not, in these circumstances, be a self-evidently insubstantial change in risk. Obviously, an increased rate with no countervailing concession is not of benefit to a surety. So, the question is whether Ms. Roy contracted so as to permit her husband and the credit union to vary the rate of interest over credit union prime plus 2%. The credit union relies on article 3(b) of the mortgage. On this point, the third issue, material

alteration, crosses the path of the fourth, the expiry of the January 1997 loan agreement. My reasons may be easier to understand if I take up that issue now and return to material alteration later.

[27] *Expiry of the Loan Agreement*. Ms. Roy did not read the mortgage or the January 1997 loan agreement it secured. In her circumstances, she is bound by the terms. But, she cannot be bound to more than those terms provide. Let us begin by looking closely at clause 3(b), then set it in the context of related provisions. The clause reads:

> This Mortgage is collateral security for the payment of all amounts owing pursuant to the Line of Credit and the Mortgagee may from time to time extend the time for payment of such amounts or any part thereof, may renew the Line of Credit or substitute another Line of Credit in its place without in any way affecting the liability of the Mortgagor hereunder and without in any way affecting or prejudicing the security hereby created and nothing but the actual payment of the Line of Credit in full shall discharge the Mortgagor.

[28] To what was Ms. Roy agreeing by the words in clause 3(b) that "the Mortgagee ... may renew the Line of Credit or substitute another Line of Credit in its place"? Was she agreeing to make herself liable and did she mortgage her home for any obligation under any line of credit the lender might extend by renewing the January 1997 loan agreement or by substituting any new line of credit? The term has a more restricted meaning than that. Indeed, by its own

terms the mortgage does not secure any obligation outside the January 1997 loan agreement.

[29] "Line of Credit" is defined in the mortgage. It does not mean the revolving line of credit itself. It means the loan agreement. The definition is found in these words: "the Mortgagor has of even date herewith entered into a Line of Credit Loan Agreement with the Mortgagee, a copy of which is annexed hereto as Schedule 'A' (the 'Line of Credit')". The errors made in preparation of the Roy mortgage have already been commented upon. There is no loan agreement "of even date". No agreement was attached. Ms. Roy did not sign the loan agreement that was in existence. I accepted the credit union's position that the reference in this definition could only be to the Line of Credit Loan Agreement dated January 6, 1997. So, for the purposes of understanding clause 3(b) and the other provisions in the mortgage that contain the defined term "Line of Credit", the definition can only mean the January 1997 loan agreement. Incorporation of the definition into clause 3(b) leads to an absurdity and the absurdity would have been apparent even if the January 1997 loan agreement had been attached as Schedule "A", as the form of mortgage requires. Incorporating the definition leads to this reading of the crucial term about renewals and substitutions: "the Mortgagor ... may renew the January 1997 loan

agreement or substitute another January 1997 loan agreement in its place". The requirement for clarity in terms purporting to negative the principle of release upon material alteration referred to in the majority opinion of *Manulife* and the emphasis upon strict construction in that opinion may well suggest that the absurdity leads to the conclusion that no substitution is permitted. However, without resort to *contra proferentem*, one still sees that the mortgage did not authorize or extend to the new loan agreement taken by the credit union in March 1998.

[30] By reason of the incorporation of the definition of "Line of Credit" in clause 3(b), the clause refers the reader to the terms of the January 1997 loan agreement and the clause is limited to those terms even in its reference to a substitute loan agreement. This is consistent with the rest of the mortgage. It clearly restricts itself to the January 1997 loan agreement. The grant is so restricted. The property is granted "as security for the payment of all indebtedness under the said 'Line of Credit' ", that is, under the January 1997 loan agreement. And, so with the defeasance. The mortgage is void upon payment of $50,000 "or such lesser sum as may from time to time be outstanding in accordance with the terms of the Line of Credit", that is, in accordance with the terms of the January 1997 loan agreement. And the

covenant for payment is to the same effect. It is in clause 3(d): "The Mortgagor will pay or cause to be paid the Line of Credit ...". So, to see what clause 3(b) means by renewal and substitution and to see what obligations the mortgage secured and to see what liabilities Ms. Roy undertook personally, we have to turn to the January 1997 loan agreement and restrict ourselves to it.

[31] The agreement is between the credit union and Half Penny Optical, Mr. Roy trading under a name. Clause 8 reads:

> The credit limit requested in this agreement will expire on Nov 1st 1997, but it may be cancelled at any time by the Credit Union or Borrower. Notwithstanding the agreement may be renewed on or before date of expiration failure to renew shall not remove the Borrower from repayment obligations incurred either before or after the expiration date.

"Credit limit" is a defined term. The opening words of the agreement read:

> A line of credit is an authorization to increase the amount of money owing to the Credit Union up to a set amount (the 'Credit Limit') at any time without having to complete a new promissory note each time.

So, we see that Mr. Roy's authorization and the credit union's authorization for advances expired on November 1, 1997. And, the agreement could be renewed only "on or before date of expiration". The statement that "failure to renew shall not remove the Borrower from repayment obligations incurred either before or after the expiration date" cannot mean that the agreement somehow continues after its

expiration, which would be contrary both to the phrase "the expiration date" and to the clear language terminating the line of credit on the expiration date and providing for renewal "on or before date of expiration". The interpretation which avoids contradicting this clear language is that "repayment obligations incurred ... after the expiration date" means whatever obligations Mr. Roy would have at law or in equity to repay advances notwithstanding that there was no agreement in effect at the time an advance was made.

[32] The agreement was not renewed. It expired on November 1, 1997. After that date there was no agreement. There was nothing to renew and there was nothing to be substituted. By the terms of the mortgage and of the agreement to which the mortgage was collateral, the mortgage could not secure and Ms. Roy would not be liable for advances made by the credit union to Mr. Roy after November 1, 1997. She was then liable to the credit union for $49,586 and her home stood as surety for it. However, the credit union continued to revolve the line of credit. Indeed, the account revolved totally before demand. There were sufficient deposits after November 1, 1997 to retire Ms. Roy's liability and she had no liability for advances after November 1, 1997. Thus, her liability was extinguished: *Dickson* v. *Royal Bank of Canada* (1974), 8 N.S.R. (2d) 342 (S.C., A.D.) affirmed [1976] 2 S.C.R. 834, see particularly para. 35 of the

decision of the Appeal Division, which was adopted by the Supreme Court of Canada at p. 840 of the S.C.R. report.

[33] Counsel for the plaintiff invited me to find that the loan agreement did not expire. He suggested that the parties might be taken to have "waived" the requirement for renewal before expiration. Respectfully, I do not agree with this reasoning. It is evident that Mr. Roy and the credit union paid no attention to the expiry. Counsel also refers me to *Prospect Mortgage Investment Corp.* v. *Van-5 Development Ltd.*, [1985] B.C.J. No. 2472 (C.A.) for its discussion of when an assumption of a mortgage will operate as a novation and discharge the personal liability of the original mortgagor. Respectfully, I do not agree that this subject assists the determination of the present case. Ms. Roy is not discharged on account of novation. Her personal liability and her mortgage were discharged because the collateral instrument expired. None of this is to suggest Mr. Roy was not liable for advances after October 1997. By his conduct, he may have been estopped from relying on the expiration. Or, he may simply have been liable under the cause for monies had and received. Whatever the source of his liability for advances after expiration, it is not the liability underwritten by Ms. Roy when she provided the mortgage.

[34] *Conclusion*. Ms. Roy did not contract out of the defence available to a surety where, without the consent of the surety, creditor and debtor make a material, adverse alteration referable to the guaranteed obligation. Clause 3(b) cannot operate that way in these circumstances. The March 1998 loan agreement did not "renew" the January 1997 loan agreement or "substitute" for that agreement because the latter expired in November 1997. There was nothing to renew and nothing to be substituted. So, I would find for the defendant on the defence of material alteration if the March 1998 loan agreement had, in fact, been an alteration referable to the guaranteed obligation. In my opinion, it was not such. Rather, the January 1997 loan agreement expired and liability under the mortgage collateral to it became discharged as the line of credit continued to revolve.

[35] I will dismiss the action. I am open to submissions concerning a declaration that the mortgage has been redeemed. And, counsel may address me on costs.

J.

Halifax, Nova Scotia
7 February 2002