

A BANKING DISPUTE (NUMBER 2)

Alan and Sheila were husband and wife, and partners, in a business of renting out properties to provide investment income. Sheila was a full partner but left most of the admin to Alan and got on with her main interest of painting watercolours. In boom times the Bank had lent the partnership a fortune for property purchase, secured on the properties and on the matrimonial home. Then came the recession, values crashed, Alan went bankrupt and the Bank only recovered a modest proportion of its total lending and interest.

The only asset they had left was the matrimonial home and the Bank applied to the Court for a Possession Order. Sheila fought like a tigress to keep the home and counter-claimed on two grounds. The first that the Bank was negligent or fraudulent in lending them this amount of money in the first place, and secondly that she had been under actual undue influence by her strong-minded husband, Alan when she signed the Charge on the matrimonial home.

Alan and Sheila were now in very poor health, with heart problems, were of retirement age with little prospect of finding paid employment, on income support and legally aided up to a certain limit.

The Bank had offered to write off 75% or so of the outstanding debt if it could sell the house and keep all the proceeds. Sheila wanted the Bank to waive the debt entirely, pay her compensation for the negligence or fraud or on account of the undue influence and let them keep the house. The Bank took a pretty terse view of these defences. The parties (the Bank and Sheila: Alan, a bankrupt, was not a party, but was there to help Sheila) moved to mediation and for the purposes of the mediation only, the Bank accepted that Sheila had not been independently advised before she signed the charge and that quite possibly there was actual undue influence on Sheila by Alan at the time of the charge. However the Bank had no actual or constructive notice of the undue influence and for various reasons the Bank regarded the transaction as not manifestly disadvantageous to Sheila. It pointed out that she was a partner in the investment business, co-owner of the matrimonial home and that the advance was to them both jointly for their joint business and for paying off existing borrowing at another Bank. She was not merely a guarantor of her husband's debt.

The law arising out of CIBC Mortgages -v- Pitt (1994) and Barclays Bank -v- O'Brien (1994) etc, was considered. Both sides felt that there were possibly grey areas of law relating to details not recorded here, as they moved into the private sessions.

Since his bankruptcy and heart problems, Alan had now little to do each day but to go to the local library and read up the law. He was convinced beyond any possible doubt, as the result of his own research, that the Bank's national directors would (by the time that he had finished with them) go to prison for authorising a branch manager to make a loan that it turned out that Alan could not pay back, or that the bank manager should have worked out (in the boom time) that Alan would not be able to pay back. Before his bankruptcy, Alan had already issued a civil writ, as a personal litigant. The Bank made short work of all these allegations but the writ was still there and needed more money spent on it to kill it off.

At the opening joint session, the Bank's solicitor made a brilliant presentation. She identified all the Bank's weak points and showed Sheila why, cumulatively, it made no difference to the Bank's case for recovery. She then identified what she thought were Sheila's strong points, and tore them to bits. An excellent preparation. The object was to bring an element of common sense into the discussion. The solicitor for Sheila was visibly shaken by all this, but so was Sheila. She had not appreciated the way the Bank felt about its case and had not recognised the strength of it. The parties moved into the private sessions openly saying to the other that they wanted a settlement on the day, which was a start.

In the private sessions, the solicitor-mediator identified the differing agendas of the parties:-

Bank

1. To clear the indebtedness out of the Bank's books, so far as possible.
2. To recover as much from the house value as possible.
3. To demonstrate their consciousness of how two elderly and infirm people felt in such circumstances.
4. To break future contact on all matters with Alan and Sheila in the future.

Sheila

1. To stay in the matrimonial home.
2. To receive enough compensation to provide for capital for retirement income, because the income support would be withdrawn on receipt of a capital sum.
3. Not to be required to utilise part of the compensation in repaying the Legal Aid Fund her costs.

4. To keep Alan with her as she moved to a settlement, not to have him die of a heart attack as a result of all this, and to let him retain his self-respect.
5. To persuade the Bank to waive all the debt.

Alan

1. To show the Bank it was culpably at fault for lending the money in the first place.
2. Not to receive any cash that might be passed back to his trustee in bankruptcy.
3. To vent his feelings against the Bank.
4. Total victory on all fronts against the Bank.
5. There were many other peripheral issues, such as minute calculations of interest and Bank charges, which in practical terms were irrelevant (though very important to Alan) because they were picked up in the Bank's proposed 75% write-off.
6. To stay in the house provided that his other objectives were met.

The solicitor-mediator pointed out to Alan that the Bank Manager in question retired long ago, and Alan's quarrel was now with people who had never heard of him until they came to pick up the litigation file. The mediator was trying to separate the people from the issues.

The solicitor-mediator then identified with the parties that if the house were sold, then unless the Bank limited its claim to a certain figure, Alan and Sheila would get nothing. Everything would go in repaying the debt and there would still be an outstanding balance which would be hanging over them for the rest of their lives, which they had no possible means of repaying. If they got anything very much, they would lose income support and have the Legal Aid Fund recover Sheila's costs from that compensation. Net result, disaster.

The solicitor-mediator persuaded the parties to think a little bit more inventively about concepts not involving cash sums, to maximise the amount recoverable by the Bank while meeting as many as possible of Sheila's requirements. Strangely enough, the Bank representatives were unable to help very much, because they wanted an end to the difficult relationship with Alan, and took a robust view that they wanted the cash, and it was up to Sheila to work out how to provide it, to pay off the Bank. But they wanted a settlement that day and not to run up further losses in a lengthy court case or cases where there was no prospect of receiving costs on their expected victory.

The Bank conceded that it would limit its claim to a certain figure, leaving some cash to Alan and Sheila and provided the Bank received that certain figure, from whatever source within 2

months, (whether the house was sold or not was immaterial) they would not apply for an order for possession.

Prudently, Sheila was obsessed with the cost of borrowing what the Bank needed, to pay the Bank its settlement figure. It was going to be impossible to service this on income support. The solicitor-mediator suggested that it might be possible to consider not borrowing, but having an investor purchase a stake in the house which would not be cashed in until they sold it. This capital sum would not bear interest and would be paid to the Bank in settlement of the debt.

The solicitor for Sheila believed there were such schemes on the market for elderly people to release cash to live on, and checked back at the office to confirm.

The downside was that on departure from the house, that percentage of the future value would be paid to the investor, but the upside was Alan and Sheila could stay in the house for the rest of their lives or until infirmity compelled them to move, not lose income support and (probably) not be subject to the legal aid statutory charge, and have 100% of debts wiped out for 25% of their repayment. Sheila and her lawyer felt that this was a good way to start to try to resolve the issue, but said that she needed longer than 2 months to find the money. She asked for 6 months and the Bank agreed to this.

At this point Alan clearly felt that he was missing out on his own agenda item of showing the Bank that it was culpably at fault for making the business loan to the partnership in the first place. He wanted to do more to get even against the Bank. By this time however, Sheila was seeing a possible end to the enormous strain that she and Alan were under. A way out was being opened to her and she was going for it. Hard. The mediator encouraged them to have a private word with their lawyer to discuss this. It turned out that Alan conceded that this might be a way out, with which he could live domestically.

The problem now arose as to the level of settlement, because the amount that the Bank required was more than Alan and Sheila felt was justified. This is where Alan (a very forceful character) came back into his own in his capacity as the Bank's victim, burning for revenge. Sheila steadied the ship. It was her case and she was going to handle it her way. She said that there was the possibility of a solution. Alan reluctantly accepted what she said, but was clearly still burning. He now had to leave the mediation for a while because the strain was having a physical effect (heart) on him. Sheila imagined what a court case would do, and was determined to avoid a court action, that could kill Alan through stress.

Alan came back to try to encourage Sheila to make derisory offers of settlement but the solicitor-mediator very firmly declined to take back to the Bank such derisory offers. This would certainly cause the Bank to get up and walk out. Alan and Sheila must be realistic. Sheila had an immense fund of shrewd common sense, but she needed to spend a lot of her time trying to bring Alan with her, to see and agree with her point of view. Reasonably realistic offers eventually went back to the Bank and while initially unacceptable, everybody stayed in the mediation and the parties horse-dealed a figure, which turned out to be very close to the deal-breaking position for both sides. Last chance saloon, lower than the Bank wanted but higher than Sheila had expected. But after hearing the opening presentation by the Bank's lawyer, she had swiftly started to revise her opinions. Previously, she had left it to Alan to report back to her.

At this point the solicitors for the parties met in a private room to formulate the position on an agreed Court Order to resolve all the issues. This took a fair amount of time but was concluded. In broad terms, if the Bank had not received its settlement figure within 6 months, Alan and Sheila would not contest a possession order and the house could be sold. But the Bank would limit its claim in the sale to the agreed sum and write off the balance of principal, interest, charges and costs. All Alan's litigation claims and Sheila's counter-claims and defences were withdrawn. Sheila's lawyer had been in touch during the day with Alan's trustee in bankruptcy to obtain necessary consents from him. If Alan and Sheila could not raise the cash through one of these retirement schemes, or from anywhere else, then they could redecorate the house, and sell it as owner-occupiers for the maximum possible price, with them in control, (rather than the Bank selling as mortgagee) to maximise the slice of the sale proceeds that would accrue to them. And they had 6 months to do it.

The parties were not interested in having a final joint session. There was no relationship to nurture. They were glad to get out with a deal done, one all the parties could live with, just.