(257)

SCZ NO. 19 OF 2007

IN THE SUPREME OF ZAMBIA **APPEAL NO. 101/2004**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

NKONGOLO FARMS LIMITED	**APPELLANT**
AND	
ZAMBIA NATIONAL COMMERCIAL BANK	**1ST RESPONDENT**
KENT CHOICE LIMITED (IN RECEIVERSHIP)	**2ND RESPONDENT**
CHARLES HARUPERI	**3RD RESPONDENT**

Coram: Lewanika, DCJ, Chibesakunda and Mushabati, JJS
On 27th April 2006 and 15th August, 2007

For the Appellant: Mr. A. M. Wood of Messrs Wood and Company, together with Mr. G. K. Chisanga of Messrs Chisanga Advocates.

For the 1st Respondent: Ms. M. K. Chalwe of Theotis and Chalwe Advocates.

For the 2nd & 3rd Respondents: Non-appearance

JUDGMENT

Chibesakunda, JS, delivered the Judgment of the Court

Cases referred to:

1. Barclays Bank Plc v O'Brien [1993] 4 ALL ER 417
2. Bank of Credit Commerce International SA v Aboody [1992] 4 ALL ER P.955
3. Credit Lyonnais Bank Nederlands NV v Burch [1997] 1 All ER 144
4. Chaplin and Company Limited v Brammall [1908] 1 KB 233, CA
5. Lloyds Bank Limited v Bundy [1974] 3 All ER 757

6. Avon Finance Company Limited v Bridger [1985] 2 All ER 281

7. Brusewitz v Brown [1922] 42 NZLR 1106
8. Grindlays International (Z) Limited v Naha Investment Limited [1990/92] ZR 86
9. Royal Bank of Scotland V ETRIDGE 2001 4 All ER 2001 P. 449.
10. Norwich and Peterborough Building Society V Steel 1993 IAER P. 330.
11. Zambia Export and Import Bank Limited vs. Mukuyu Farms Limited and Others [1993/1994] ZR 36.
12. Saunders v Anglia Building Society [1970] 3 All ER 961
13. Joseph Constantine Steamship Line Limited Vs. Imperial Smelting Corporation Limited 1941 Z AER
14. Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and the Attorney General SCZ EP/01/02/2002.
15. Sithole v Zambia State Lotteries Board 1975 ZLR P. 106
17. Nkhata & Four Others v The Attorney General (1966) ZR.P.124

Legislation Referred to:

18. Order 18 Rule 8 (16)
19. Order 18 Rule 12 (1)
20. Halsbury Laws of England 4th Edition Vol.16 Para 1219.
21. Halsbury Laws of England 4th Edition Vol. 36 Para 36.

The delay in delivering this Judgment is deeply regretted. This is due to circumstances beyond our control.

This is an appeal against the High Court Judgment in a claim by the Appellants against the Respondents for:

1) A declaration to set aside the third party mortgage dated 15th November 1996 and the guarantee dated 28th August 1996.
2) Alternatively damages for negligence by the 1st Respondent as bankers involving the execution of the guarantee dated 28th August 1996 in respect of the credit facility offered and advanced to the 2nd Respondent dated 13th August 1996 under and by virtue of the 3rd Respondent's misrepresentation and undue influence on the Appellants' directors.

3) An order of injunction

4) C osts.

5) Further and other relief.

In support of this claim the Appellants' testimony in a nutshell was that PW1, an old lady of 72 years, **Olga Georgitsis,** and her late husband **(hereinafter referred to as the deceased)** were the directors of the Appellant Company. She, sometime in 1996, together with her deceased husband, **Andreas Georgitsis** offered Farm No. 3342 in Chisamba for sale to the 3rd Respondent at a purchase price of US$300,000.00 to be paid in instalments. This transaction fell through, as the 3rd Respondent's three cheques made to the Appellant's Company, were dishonoured by the Bank. She testified that she had known the 3rd Respondent personally and that they had developed a close personal and business relationship, although she had not met with him since the end of 1996. She testified further that she and the deceased signed the directors' guarantee and the mortgage deed believing that the said documents related to a maize transaction, which her company and the 3rd Respondent were dealing in. She said that she did not remember the day she executed the documents in question. Her testimony is that at no time did the 3rd Respondent explain to her and the deceased, as directors of the Appellant Company, that the documents in question were security documents for a loan to be granted by the 1st Respondent in favour of the 2nd Respondents. She further testified that at no time did she go to the 1st Respondent to give instruction for a third party mortgage in favour of the 2nd Respondents.

(260)

She also testified that at no time did the board of directors of the Appellant Company meet to pass a resolution to clothe the 3rd Respondent with authority to use the title deed of its farm as security for the loan to be given by the 1st Respondent to the 2nd Respondent. Her testimony is also that a Mr. Jeffrey G. Mulenga who purported to have signed the purported minutes authorizing such, was never, at any time, an employee of the Appellant Company. He was an employee of the 2nd Respondent. She testified that the documents purporting to be minutes in question were a forgery. She testified that she released the certificate of title for Farm No. 3342 Chisamba to the 3rd Respondent believing that the 3rd Respondent wanted to obtain a bank loan to pay for the purchase of the same farm and not as security for a loan to be granted to the 2nd Respondent in form of a third party mortgage. According to her, she learned about the intended foreclosure of the mortgage by the 1st Respondent following an advertisement in the press.

In cross-examination, she accepted that the signature on both the third party mortgage deed and the guarantee form were hers and that of the deceased. She explained that as directors of this farm, Nkongolo Farms Limited, they signed as directors the guarantee form and the mortgage deed believing that the said documents were in connection with the maize transaction between them and a company in Kabwe known as Central Marketing Company. She went on to state that she never received any letter nor did she ever receive any documents from the 1st Respondent explaining the ramification of signing the third party mortgage deed and guarantee forms. When asked how she released the certificate of title to the

3rd Respondent, she testified that the 3rd Respondent deceived them by informing them that his application for a loan from the 1st Respondent to purchase farm No. 3342 Kabwe from the Appellant Company, had been approved by the 1st Respondent. She told the court that she did not remember the actual date when she did that. She further testified that on a number of occasions thereafter she asked the 3rd Respondent for the return of the certificate of title but to no avail. She accepted that she never made any follow up with the 1st Respondent on retrieving this certificate of title. In the same cross-examination, she testified that she never trusted the 3rd Respondent although she handed over the said documents to him.

She went on to testify that although she and the deceased executed the documents, this was done because of what the 3rd Respondent said to them. She conceded that she never read the documents in question, as she did not question the integrity of the 3rd Respondent. However, she realized later on that there was something wrong somewhere. She further testified that although the 1st Respondent did not deceive them directly, the 1st Respondent deceived her and the deceased when it made misrepresentations that the loan facilities were meant to help him (the 3rd Respondent) to purchase the farm No. 3342 from the Appellant Company.

In further cross-examination, and being shown pages 16 and 19 (Bank bundle of record) she testified that their farm's purchase price due was US $300,000.00 and that this was not equivalent to K750, 000,000.00 which was advanced to the 2nd Respondent by the 1st Respondent. She further stated that the 3rd Respondent never disclosed to her that he was

getting the certificate of title in order to secure monies from the 1st Respondent for the 2nd Respondent in form of a third party mortgage.

The evidence for the Respondents on the other hand is that the 1st Respondent obtained all the documents required as security before granting a loan to the 2nd Respondent. Their evidence is that the 3rd Respondent acted on behalf of the 2nd Respondent and obtained all the documents required before a loan could be granted to the 2nd Respondent and that all those documents required, were duly registered. The Respondents' only witness testified before the court outlining the procedure required for obtaining a loan from the 1st Respondent. He testified that although he was not the manager of the bank's branch which processed this transaction, and as such his evidence was based on documentary evidence which he found on the file of the 2nd Respondent, nonetheless he was satisfied that all the procedures required to give a loan to the 2nd Respondent had been complied with. He informed the court that, in this case, he found a guarantee form, memorandum of a deposit of a certificate of title, a 3rd party mortgage and a debenture against the 2nd Respondent. All these documents were duly registered. He went on to testify that after granting this loan to the 2nd Respondent, the 2nd Respondent defaulted in repaying the loan. So the 1st Respondent had to call on the guarantors to make good the loan/debt in default for which the 1st Respondent had as security Farm No. 3342 Chisamba.

The Respondent's witness went into details of the requirement expected from a borrower by the 1st Respondent. He testified that the

borrower had to apply through his branch and after the loan application was approved the borrower had to be given an offer letter. According to these procedures, the borrower had to sign the letter of offer as a sign of acceptance. The bank then would call for security documents, which must meet the bank's criteria. He testified that the Appellant Company was a guarantor in the transaction and not a customer of the 1st Respondent. The Respondent's witness testified that the 1st Respondent was satisfied that the Appellant Company had consented to Farm No. 3342 Chisamba being used as security because of the memorandum and the deposit of the certificate of title and the directors' guarantee. According to him the 1st Respondent was not in any way negligent in this transaction. His testimony furthermore is that there was no indication on the documents that security was fraudulently obtained. Neither was there any evidence that the security documents were forged.

In cross-examination the Respondent's witness was asked for the resolution of the Appellant Company for a third party mortgage in favour of the 2nd Respondent. He conceded that the only resolution before the court was the one purportedly signed by Mr. Jeoffry Mulenga. When asked in whose favour the guarantee document was as it did not show the beneficiary although the directors of the Appellant Company had signed it, he conceded that the guarantee document did not show the beneficiary. When cross-examined again on the Appellant Company's absence of a request or its consent, his response was that according to the 1st Respondent the consent of the Appellant Company was deduced from the execution of the security documents. When asked why the Appellant Company did not sign a document to indicate its acceptance, his response was that the

withdrawal of the money by the 2nd Respondents was evidence of acceptance by the Appellants in itself. He conceded to the suggestion that according to the procedure in the Bank, acceptance could only be indicated by the surety or borrower endorsing on the copy of the letter of offer, which in this particular case was returned to the bank blank. He was cross-examined on why the signatures of the directors were in wrong places. He conceded that that was wrong. He accepted that one endorsement was for the Farm Number 3342 Chisamba while the other one was blank.

In submissions before the court, the Appellant Company urged the court to find that the first Respondent facilitated the misrepresentation by the 3rd Respondent to the Directors' of the Appellant Company. The

Appellant Company submitted that there was an element of collusion between the 3rd Respondent and some employees of the 1st Respondent, which they argued, could be deduced from the totality of the evidence and the events obtaining in the transaction.

Furthermore, the Appellant pointed out the discrepancies in the evidence before the court, which supported the drawing of the conclusions that, there was misrepresentation and thus establishing undue influence as the only reasonable inference. These discrepancies were:

1) The 1st Respondent bank without any formal acceptance from the 2nd and 3rd Respondents proceeded to release a colossal sum of K750, 000,000.00 to the 2nd Respondents.

2) The 1st Respondent accepted and acted on the purported resolution of the Appellant Company's directors (page 13 – Plaintiff's bundle of documents) which resolution was not signed by the Chairman or Secretary of the board of directors of the Appellant Company to establish its authenticity but by one Jeffrey G. Mulenga who was not an employee of the Appellant. Counsel pointed out that it is trite law that extracts of board minutes can only be produced as authentic if such extracts of the minutes have been signed by the authorized officers such as Directors. The extracts of the minutes produced in this case were not signed by the authorized officers.

3) The 1st Respondent bank accepted and acted upon a guarantee document (page 7 – 12 Plaintiff's bundle of documents), which did not show the name of the customer or beneficiary. This therefore proved that the said documents were

4) misrepresented to the appellant Company's Directors. The two signatures were also in a wrong place.

5) The purported memorandum of deposit of title deeds in the Appellant's bundle of documents (page 14) did not show the description of the mortgaged securities whereas the same document in the 1st Respondent's bundle of documents (page 8) showed an endorsement without the full description of the alleged mortgaged securities.

6) The purported guarantee forms were forwarded to the 1st Respondent bank by the 2nd Respondent and not by the

Appellant Company (page 7 – 1st Respondent's bundle of documents).

7) Although one Jeffrey G. Mulenga purported to have signed the alleged extract of the Board minutes for the Appellant Company he was also shown as having signed the mortgage deed as the Secretary of the 2nd Respondent company, (page

8) 23–1st Respondent bundle of documents). This confirmed the evidence by PW1 that Mr. Jeffrey G. Mulenga was never an employee of the Appellant Company.

The Appellant's core argument was therefore that with these facts and discrepancies this court must be persuaded to visit the English cases of **Barclays Bank v O' Brien** (1), **Bank of Credit Commerce International SA v Aboody** (2) and **Credit Lyonnais Bank Nederland NV v Burch** (3). It was argued that the whole transaction being so manifestly disadvantageous to the Appellant Company and being attached to the misrepresentation, the presumption of undue influence, which was not refuted by any evidence before this court, was irresistible. Also there being no evidence to establish that the 1st Respondent took any reasonable steps to explain the nature of this transaction to the Appellant Company this led to the 1st Respondent being fixed with constructive notice of undue influence, which the 3rd Respondent had on the Appellant Company Directors.

It was further argued that, it was common ground that the Appellant Company did not know the extent of the liability and that the liability was far beyond their means, thus risking the total loss of their property leading

to the only reasonable presumption of undue influence. According to two Directors of the Appellant Company, the 1st Respondent never gave any explanation on the implications of the transactions and the need for them to seek independent legal advice before the loan was given. Citing the case of ***Barclays Bank Plc v O'Brien*** (1), the Appellant Company therefore, urged the lower court to set aside this transaction

The Respondents in response before the High Court argued that it was not disputed that the 1st Respondent, on the basis of security documents signed by the Appellant Company's Directors and submitted by the 2nd Respondent to the 1st Appellant availed the 2nd Respondent a credit facility of K750, 000,000.00 and that this loan was secured through a third party mortgage attached to Farm No. 3342 situated in Chisamba and the Guarantee forms signed by the Appellant Company Directors. Their case before the High Court was that the Appellant Company's Directors willingly and voluntarily signed these documents. According to them at the time all this was happening the Appellant Company's Directors had full knowledge that the same were for a loan facility from the 1st Respondent. They submitted that these documents did not misrepresent any facts.

According to them these documents did spell out what was the nature and obligations of the transaction. The documents showed that there was a 3rd party mortgage which was secured by the Appellant's Farm No. 3342 Chisamba for a debt advance from the 1st Respondent to the 2nd Respondent. They referred to page 16 of the 1st Respondent's bundle of documents, which talked about parties and their involvement. This

document also clearly indicated the place for signature to indicate consent before execution of the deed. According to the Respondents, consent had been properly obtained. It was also argued that the memorandum of deposit was equally clear. It stated that the title deed deposits were for the purposes of creating a charge over Farm No. 3342 Chisamba. It was submitted that had the Appellant Company Directors read the documents in question, they would have gotten all the details. It was argued therefore on behalf of the Respondent that the court should dismiss the claim before it. The Respondent also argued that the two Directors of the Appellant Company knew the procedure required in obtaining credit facilities from the Bank as they had on three occasions applied for such facility. The High Court then ruled that the Appellant Company Directors willingly and voluntarily signed the security documents and that there was no evidence of fraud. It also ruled that the 1st Respondent was not negligent.

According to the learned trial Judge the Appellant Company's Directors willingly and voluntarily signed the security documents and passed a resolution authorizing the usage of the farm as security for a loan to be given to the 2nd Respondents. Aggrieved by this decision the Appellants hence appealed to this court.

Before us the Appellant Company raised three grounds of appeal. These are:-

1. That the learned trial Judge misdirected himself in law and fact when he held that the 1st Respondent bank (**the Zambia National Commercial Bank Limited**) was not

professionally negligent as alleged by the Appellant Company contrary to the evidence on record.

2. That the learned trial Judge misdirected himself in law and fact when he held that the Appellant's company directors clothed the 3rd Respondent with authority as their agent to the 1st Respondent bank.
3. That the learned trial Judge misdirected himself in both law and fact when he held that the Appellant's directors consented and voluntarily executed the third party mortgage contrary to the evidence on record.

In arguing these grounds of appeal, before us, Mr. Chisanga, Counsel for the Appellants, on Ground 2, (as Ground 1 was abandoned) argued that the Learned Trial Judge misdirected himself in law and in fact when he held that the Appellants clothed the 3rd Respondent with authority as their agent to the 1st Respondent. He argued and elaborated on this ground by submitting that the evidence, before the court did not suggest in any slightest sense that the Appellant Company and the 3rd Respondent intended to create principal – agent relationship. A borrower whose debt is secured by a third party mortgage cannot in any circumstance be constituted as an agent of the mortgagee. He went on to say that the evidence before the court was to the effect that the documentary evidence, purporting to be the Appellants' resolution authorizing the creation of the contentious third party mortgage, was itself a forgery.

He went on to argue further that although PW1, the only witness for the Appellant Company, accepted that the 1st Respondent did not directly mislead them before signing the documents and handing-over the directors' guarantee, 3rd party mortgage and title deed, nonetheless, the 3rd Respondent deceived them into believing that the directors' guarantee and 3rd party mortgage were in relation to a maize transaction and also into believing that the deposit of the title deed was to enable him obtain a loan to purchase their farm, which they had offered for sale to him. The facts as testified by PW1 were such that the court had to invoke the doctrine of undue influence. He argued that, even if for argument's sake the Appellant deposited these documents to the 3rd Respondent who in return used them to obtain a loan facility for the 2nd Respondent, at law, that per se could not absolve the 1st Respondent from complying with its obligation which it owed to the Appellants of ensuring that the Appellant not only fully understood the implications and ramifications of the transaction before committing themselves to the transaction but also were advised to seek independent legal advice. According to the law, what was crucial was for the court to consider whether the 1st Respondent explained fully to the Appellants the transaction they were getting involved in.

In support of this proposition of law, Mr. Chisanga cited three (3) English cases, tracing the development of this doctrine of undue inference.

1) **Chaplin and Company Limited Vs Brammall** (4), where the court held that, ***"It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice on the matter. But the result is that the plaintiffs, who through their agents, were undoubtedly aware that the***

execution of this guarantee was to be procured through the guarantor's husband, who was living with his wife at the time, and would presumably have the influence of her husband over her, fail to show that the document was properly explained to her....her plaintiffs left everything to the husband and must abide by the consequences.... " As Per Vaughan Williams LJ;

2) <u>Lloyd Bank Limited Vs Bundy</u> (5) where the court held that, ***"... the (English) law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair.... Or transfers property for a consideration which is grossly inadequate....when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue inferences or pressure brought to bear on him by or for the benefit of the other"***.

4) <u>Avon Finance Company Limited Vs Bridger</u> (6), in which Lord Denning MR had this to say, ***"Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases, which are caught by this rule ..... take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and a friend guarantees it. The guarantor gives his bond and gets nothing in return. The common law will not interfere ..... yet there are exceptions to this general rule. There***

(272)

are cases in our books in which the court will set aside a contract, or a transfer of property, when the <u>parties have not met on equal terms</u> when the one is so strong in bargaining power and the other is so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak against the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unify them... " (Own emphasis).

Seeking support from these authorities, he argued that the 1st Respondent never discharged their duty of explaining the nature of this transaction to the Appellant. He went on arguing that considering that in this case the, 1st Respondent was in a much stronger position than the Appellants and that the relationship between the 3rd Respondent and the Appellant Company Directors was close, the first Respondent in all fairness had a duty to ensure that the Appellant Company sought independent legal advice before committing themselves to this transaction. It was not right for the court to allow the first Respondent to push the Appellants, who were weak and disadvantaged, into a tight corner. The question in such cases, he argued, is always whether or not the bargain in question was as results of ordinary interplay of forces. The Appellants cited in addition the cases of **<u>Brusewitz v Brown</u>**(7)and **<u>Credit Lyonnais Bank Nederlands v Burch</u>**(3) as enunciating this legal principle that the 1st Respondent by not having taken reasonable steps to explain the nature of the transaction to the Appellant Company Directors must be fixed with constructive notice of undue influence which the 3rd Respondent exercised

over the Appellant Company Directors. Counsel cited the case of **Barclays** (1), where the Court of Appeal expressed the view that the law imposed on the creditor a duty to take steps to ensure that not only did the borrower/debtor not exercise undue influence and or make false representation to the surety, but also that the creditor had to ensure that the surety had adequate understanding of the nature and effect of the transaction in question. On this same point, he further argued that, the current development of the law on the doctrine of undue influence is such that this branch of the law is meant not only to prevent undue influence in relationships where one party has reposed sufficient trust and confidence in the other, but also where the vulnerable person has been exploited by somebody who dominates and controls others. He further submitted that the current development of the law on undue influence is such that it underscores the need of protecting unsuspecting vulnerable people from institutions and individuals with power. It sets limits over influence. Illustrating this point, he cited the case of ***Bank of Credit and Commerce International SA v Aboody*** (2) where the Court of Appeal explained that there are two classes of undue inference - **Actual** and **Presumed** undue influence. He explained that there was **Actual** undue influence where the claimant has to prove affirmatively that the wrong doer actually exerted undue influence on him/her. The **Presumed** undue influence has two types: the first type is where there is a relationship of trust and confidence between two people, which is found in husband and wife relationship. This is presumed undue influence because the law recognizes the relationship where it is fair to presume undue influence. The second type is where, even if there is no such relationship, the relationship would be presumed to be of trust and confidence if the complainant established **de facto** that the

relationship between him/her and the wrong doer imposed trust and confidence. This is rebuttable by adducing evidence.

In pursuant of this reasoning, the Appellant argued that the Appellants' Company Directors fell in the later category because there was evidence of a close relationship between the Directors of the Appellant's Company and the 3rd Respondent. There also was evidence that the Directors reposed trust in the 3rd Respondent and that the 3rd Respondent abused this trust by falsely presenting to them that the credit was to their benefit when in actual fact they did not benefit. He further submitted that it was common cause that even though the documents which were presented by the 3rd Respondent to the 1st Respondent may have been signed by the Appellant Company Directors since the signing of these documents and handing over of these documents was of as a result of misrepresentation of fact by the 3rd Respondent, therefore the doctrine **non est factum** was applicable in line with the cited authorities.

According to Mr. Chisanga the case of **Brusewitz v Brown** (7) was on all fours with the case before the court. The facts of that case were briefly that, the defendant was employed in a junior capacity at a modest wage by a tour operating company, which wished to increase its bank overdraft limit from £250,000 to £270,000. P, the main shareholder and alter ego of the company, asked the defendant to provide the security required by the bank for the increased overdraft by giving a second charge over her flat and an unlimited money guarantee. The flat was valued at £100,000 and the defendant's equity was £70,000. The defendant signed the mortgage document in P's presence at the offices of the bank's

(275)

solicitors. At no time was the defendant informed either by P or the bank of the company's indebtedness to the bank or the extent of the overdraft facility being granted. The bank's solicitors wrote to the defendant to point out that the guarantee was unlimited both in time and amount and advising her to seek independent legal advice before entering into the transaction but she did not do so. The company later went into liquidation and when the bank was unable to recoup from P the full amount owing on the overdraft, it demanded payment of the amount outstanding, some £60,000, from the defendant and when the defendant failed to pay it, issued proceedings in the county court for possession of the defendant's flat. The county court judge found that there was a relationship of trust and confidence between PW1 and the defendant, which gave rise to a presumption of undue influence which had not been rebutted and dismissed the action and set aside the bank's charge over her property. The bank appealed to the Court of Appeal, contending that it had discharged its duty to the defendant by urging her to seek independent legal advice and that it was not responsible for the consequences of her choosing not to do so.

The court of Appeal Held that: – "***The transaction was so manifestly disadvantageous to the defendant, in that without knowing the extent of the liability involved she had committed herself to a liability far beyond her means and risked the loss of her home and personal bankruptcy to help a company in which she had no financial interest and of which she was only a junior employee, that the presumption of undue influence on the part of P was irresistible. The bank had not taken reasonable steps to avoid being fixed with constructive notice of that undue inference, since neither the potential extent of her liability had been explained to her nor***

had she received independent advice. It was not sufficient for the bank' solicitors to tell her that the guarantee was unlimited both in time and amount since without being informed of the amount of the company's indebtedness to the bank or the extent of the overdraft facility being granted she was in no position to assess the significance of the guarantee being unlimited. "The thrust of all their submission is that the Appellant did not by this conduct clothe the 3rd Respondent with authority to act the way he did.

On the last Ground, the Appellants argued that the learned trial Judge misdirected himself in law and in fact when he held that the Appellants' Directors consented and voluntarily executed the mortgage deed. In support of the argument, the Appellants, once again, pointed to the argument in Ground 2, that the documentary evidence purporting to be the Appellants' resolution, authorizing the creation of the contentious third party mortgage, was itself a forgery. Augmenting this point the Appellants submitted that the circumstances, in which this guarantee and the third party mortgage were obtained by the 1st Respondent were such that the existence of undue influence of the 3rd Respondent on the Appellants had to be presumed and that the 1st Respondent had to rebut that presumption. In this case the 1st Respondent failed to do so.

They referred again to the case of **Brusewitz v Brown** (7), where Sir John Salmond had this to say, ***"The mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable, or unjust is not in itself a ground on which this court can***

set it aside as invalid. Nor is such a circumstance in itself even a sufficient ground for a presumption that the transaction was as a result of fraud, misrepresentation, mistake or undue inference, so as to place the burden of supporting the transaction upon the person who profits by it. The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances, such as fraud or undue influence....." Mr. Chisanga argued that the Respondent and 1st Appellants did not meet on equal terms. He argued that the Appellant had proved affirmatively that there was misrepresentation so he urged this court to uphold the appeal.

The Respondents in response also relied on their written heads of argument. In her oral submission, Ms Chalwe, Counsel for the Respondents, argued that the Appellant Company knew what they were entering into. According to her, this was so because this was the third time for the Appellant to have applied for a loan facility. The first application was to Barclays Bank for a loan. They had also applied to Meriden Bank, the third experience was this application to the 1st Respondent for a similar facility. She argued that in all these three occasions the Appellant Company had to comply with the similar requirements. She argued that it was not necessary for the 1st Respondent to explain to the Appellant Company the procedures. She argued that in all these applications the Appellant Company was made to go through the same procedure of surrendering title

documents before the loan was authorized. Also in her view there was no need to explain the nature of the transaction and obligations of this transaction as the documents fully explained the nature of the transaction and obligations. Had the Appellant Company Directors read the documents they would have not been deceived.

On the question of clothing the 3rd Respondent with authority, the upshot of the Respondent's argument was that the learned trial Judge concluded in the way he did because the Appellant Company conducted itself in such a way that it obviously authorized the 3rd Respondent to use its property to secure the loan. According to her the evidence on record clearly showed that the Appellant Company Directors signed security documents and the 3rd party mortgage and gave them to the 3rd Respondent, together with the title deed, which were then surrendered to the 1st Respondent. That indeed clothed the 3rd Respondent with authority to act on behalf of the Appellant Company to deal with the 1st Respondent. She argued that all the signatures on the documents were genuine. The Appellant Company's Directors were not deceived by the 1st Respondent. They were deceived by the 3rd Respondent. She pointed out that this was possible because the Appellant Company's Directors chose not to read the documents before they signed. Had they read these documents they would have realized that the transactions were to enable the 1st Respondent to give loan facilities to the 2nd Respondent. In refuting the claim by the Respondent of **non est factum.** she cited the case of **Zambia Export and Import Bank Limited v Mukuyu Farms Limited and Others** (11) where the court held that: "..... ***an agreement is signed freely if it is signed in the course of business practice and the Respondents had a choice not to***

sign". She also cited **Grindlays Bank International (Z) Limited v Nahar Investments Limited**, (8) where Ngulube, DCJ, as he was then, in an effort to establish who have to be held liable in a case where innocent parties are deceived held that, "*.... I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that loss occasioned by the fault of a third person in such circumstance ought to fall upon one of the two parties who clothed that third person as agent with authority by which he was enabled to commit the fraud.*" She urged this court to apply this sound reasoning.

In support of this proposition she further cited other English cases of ***Norwich and Peterborough Building Society v. Steed 1993***(9) and ***Lloyd v. Etrige and Others 2001***(10). She referred us to the evidence of PW1 where PW1 categorically denied that the 1st Respondent deceived them, although PW1 accepted that the 3rd Respondent deceived her and the deceased. She argued that the 1st Respondent had a bank/customer relationship with the 2nd Respondent and that the 2nd Respondent applied for a credit facility of K750, 000,000.

That facility was approved subject to the 2nd Respondent providing:

1) Valuation of and the creation of a legal mortgage over landed property to secure debt;
2) The provision of Directors personal guarantees;
3) Authorization by the registered proprietor to secure property for debt;
4) Memorandum of deposit for title deeds.

(280)

She argued that the 2nd Respondent met all these requirements. She referred to the correspondence between the 1st and the 2nd Respondents. She argued that the Appellants' Directors signed all these documents voluntarily. She argued that, the fact that they chose not to read what they were signing, because of the story or explanation given to them by the 3rd Respondent, was not evidence or ground enough for them to claim undue inference, neither can they base on that a claim of misrepresentation. She then argued that there was no misrepresentation as the documents presented to the Appellant Company's Directors were clear. The 3rd party mortgage was to secure a loan advance to the 2nd Respondent by the 1st Respondent. She referred to the documents at page 16 of the defence bundle of documents and the fact that the relevant consent for the execution of the title deed had not been obtained. She contended that the Respondent inferred relevant consent from the fact that the second Respondent who was the 1st Respondent's client used the loan facilities. She further illustrated this point by saying that there was no misrepresentation according to the document on records. She argued that had the Appellant's Company Directors read these documents, they would have known what these transactions were about because all the details were spelt out in the documents on record. On the argument that the 1st Respondent had an obligation to spell out and explain the nature of the transaction and the extent of the liability, she referred to the page that describes the loan and the property secured. She also referred to the memorandum of deposit, which explained that the title deeds deposited were for the purpose of creating a charge over the property. She then argued that there was no misrepresentation in these documents. She referred to the guarantors' undertaking that they undertook to make payment if there was any default

in repayment of the loan. According to her the omission of the 2nd Respondent's name though unfortunate, did not nullify the two obligations under the guarantee as the evidence on page 7 was that she and PW1 signed the same and the letter above referred to, clearly refereed to the same credit facility to be availed to the 2nd Respondent. On the argument that the Appellant Company did not benefit from the transaction, she argued that in fact the Appellant Company did as they were paid U$100,000.000 as down payment for the purchase of the farm.

In her written submission she argued that since all the signatures on the forms were genuine and the title deed having been released and these transaction having been understood by the Appellant Company's Directors, the 1st Respondent had no reason to believe or suspect that the Appellant Company was neither aware nor falsely induced to sign the security documents. She argued that the court also found as a fact that in the pleadings filed by the Plaintiff (Appellant Company) there was no pleading of fraud as provided under ***Order 18 Rule 8***(19) of the ***Rules of the Supreme Court*** (19). In conclusion she submitted that as the Learned trial Judge also made the following findings:-

(i) That it was an undisputed fact that the 1st Defendant did, on the basis of security documents signed by the Appellant's Directors and submitted to them by the 2nd Respondent, avail the 2nd Respondent, its customer a credit facility of K750,000,000.00.

(ii) That it is also not in dispute that the above credit facility was secured through a 3rd party mortgage-attaching Farm.

(iii) No. 3342 situated in Chisamba and personal guaratee of the Appellants Company's Directors.

(iv) That it was also not in dispute that the 3rd party mortgage and guarantee were voluntarily signed by the Appellant Company's directors and authorized agents, namely **Olga Georgitsis** and **A B Georgitsis**.

(v) That it is further not in dispute that at the time of executing the above stated agreements, the Appellant Company's directors had full knowledge that the same were for a credit facility or loan advance from the 1st Respondent to the 2nd Respondent, (see paragraph 6 of the Appellants' statement of claim filed into court on 17th November, 1998).

(vi) It is not in dispute that the Appellant Company's directors voluntarily released a certificate of title for the property used as collateral for the 2nd Respondent's borrowing, (see paragraph 7 of the Appellants' statement of claim).

She reminded this court that as a general rule this court rarely interferes with the findings of facts by the lower court, unless such findings are not supported by evidence on record or that the lower court erred in assessing and evaluating the evidence by taking into account matters which ought not to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence before it. See the case of ***Nkhata and Others Vs. the Attorney General*** (17). Mr.

(283)

Chisanga in reply drew a distinction between a plea of fraud and a plea of misrepresentation in claims for damages and these pleas as vitiating factors of consent. He pointed out to us that a plea of fraud and a plea of misrepresentation can be interchangeably pleaded in claims for damages. However, according to him there is a distinction between these two pleas depending on the context. In support of this preposition he cited ***Order 18 rule 8 (16)*** (18) which says: "***In an action for damages for Misrepresentation under Misrepresentation Act 1967s.2, it is enough to plead misrepresentation and not to plead fraud in the statement (or points) of claim, but where the plaintiffs seeks to allege fraud, then fraud must be specifically pleaded and the further and better particulars of the statement (or points) of claim are not the right place for doing so, especially where they had initially no plea of fraud in the statement (or point) of claim, and moreover, if the plea of fraud is being raised by way of answer to the plea to plea of the defendant raised under the Unfair Contract Terms Act 1977, it should be raised by way of answer to the plea of the way of amendment of the reply*** (Garden Neptune Shipping v Accidental Worldwide Investment Corporation [1990] 1 Lloyd's Rep.330.GA).

Mr. Wood augmenting Mr. Chisanga's argument in reply said that there has never been any proof before the High Court of the actual payment of US$100,000.00 to the Appellant Company. He submitted that the submission by the Respondent that the Appellant Company benefited has never at all been substantiated. He referred to pages 53 –55 and 107 in support of this argument.

(284)

We have looked at the record and the issues raised before us. We agree with the learned trial Judge that there was common ground on the following: (1) that the 1st Respondent did, on the basis of security documents signed by the Appellant Company's Directors and submitted to them by the 2nd Respondent, avail the 2nd Respondent advance credit facility of K750, 000,000.00 and (2) that the above credit facility was secured through a third party mortgage attaching Farm No. 3342 situated in Chisamba and the personal guarantee of the Appellant Company's Directors.

In addition we hold that there was common ground that the Appellant had two Directors, PW1 and the deceased and that the Appellant Company Director, PW1and the deceased had personal and business relationships with the 3rd Respondent. Also it was equally common ground that there was an agreement between the Appellant Company and the 3rd Respondent to sell property No. 3342 Chisamba and that the 3rd Respondent issued three cheques carrying different dates to pay for this farm to the Appellant Company. All these three cheques were dishounered by the bank.

However, we do not accept the findings of the Learned trial Judge in (iii), (iv) and (v) that there was common ground on these facts as stated at page 24 of our Judgment. We hold that on the contrary these same findings bring out the core contentions of the Appellant Company. We quote these findings by the Learned trial Judge which we hold that there was no common ground. These findings are:

(iii) It is also not in dispute that the 3rd party mortgage guarantee were voluntarily signed by the plaintiff's

(285)

Directors and authorized agents, namely Olga Georgitsis and AB Georgitsis.

(iv) It is further not in dispute that at the time of executing the above stated agreements, the Plaintiffs' Directors had full knowledge that the same were for a credit facility or loan advance from the 1st Respondent to the 2nd Respondent. (see paragraph 6 of the plaintiff's statement of claim filed into court on 17th November 1998)

(v) It is not in dispute that the Appellants Directors voluntarily released a Certificate of Title for the property used as collateral for the 2nd Respondent's borrowing. (See paragraph 7 of the Plaintiff's statement of claim).

Mrs. Chalwe in her submission reminded this court that as in the case of ***Nkhata & Four Others vs. the Attorney General***(17) that as a general rule that this court rarely interferes with the findings of facts by the lower court, unless such findings are not supported by evidence on record or the lower court erred in assessing and evaluating the evidence by taking into account the matters which ought to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, which appear from the evidence the lower court failed to take advantage of having seen and heard the established evidence demonstrates that the lower court erred in assessing the evidence.

Looking at the evidence on record in our view all these findings were disputed. Our view is that all these three findings were not supported by evidence on record, for instance, the findings in (iii), the Learned trial Judge held that there was no dispute that the third party mortgage was voluntarily signed by the Appellant Company Directors and authorized agent namely, Olga Georgitsis and Andrea Georgitsis. This was disputed. It was one thing to make findings on credibility and another to say there was no dispute. According to the record there was a lot of dispute on this point. Again on findings (iv) the Learned trial Judge held that there was no dispute that at the time of executing the above agreement, the Appellant Directors had full knowledge that the same were for a credit facility or loan advance from the 1st Respondent to the 2nd Respondent. He then based that conclusion on paragraph six (6) on the Appellant Company statement of claim filed on 17th November 1998. But that paragraph six (6) does not support this holding of the Learned trial Judge. That paragraphs says..

"Some time in November 1996, the Defendant approached the Plaintiffs' directors Olga Georgitsis and Andrea Georgitsis with documents from the 1st Defendant Bank and advised the Plaintiffs' director that the documents were for a loan advance granted to him by the 1st Defendants to enable him to complete the sale of farm No. 3342 in Chisamba." This paragraph six (6) of the statement of claim contrary to the findings of the Learned Trial Judge states categorically the misrepresentation of the 3rd Respondent about the transactions. This paragraph spells out the misrepresentation of the 3rd Respondent of the purpose of obtaining the certificate of title, and the signing of the guarantee forms by the Appellant Company Directors. Our view therefore is that the

evidence on record does not support these findings. This court therefore must interfere with these findings.

Coming to the other contention as represented in the two grounds of appeal, we intend to deal with them together as there are interrelated. The upshot of these two grounds of appeal is that the Learned trial Judge misdirected himself when he did not invoke the doctrine of **undue influence** or in the alternative the doctrine of **non est factum**. Mrs. Chalwe's argument in support of the High Court findings is that the Appellant Company knew the nature of the transaction, and that there was evidence that they had benefited. She argued therefore that there was no undue influence. According to her, echoing the High Court findings, the Appellant Company Directors by their conduct clothed the 3rd Respondent with authority that he used to secure a loan facility from the 1st Respondent. Also according to her, there was no evidence of fraud neither was fraud properly pleaded.

We have anxiously considered these arguments. We are satisfied firstly that there was evidence from the Respondent on which it was common ground that the 3rd Respondent was the agent of the 2nd Respondent. The Learned trial Judge also found as a fact that the 3rd Respondent was the agent of the second Respondent. The question, which begs an answer, is whether or not the 3rd Respondent, besides being an agent for the 2nd Respondent can at the same time be an agent of the Appellant Company. We agree with the Appellant that there is no evidence

on record, which suggests even in the slightest sense that there was any such intention by the Appellant Company to create agent/principal relationship between them and the 3rd Respondent. Secondly at law, the mortgagor whose debt is secured by the 3rd party mortgagor can never be an agent of a mortgagee. That is not tenable. The Learned trial Judge therefore misdirected himself on this point.

Coming to the main question as to whether or not the Appellant clothed the 3rd Respondent as their agent. In our view this leads to another question as to whether or not the Appellant Company can invorke the doctrine of **non est factum** or indeed **undue influence**. We note that Mr. Chisanga argued the application of these two doctrines in the alternative. The Learned trial Judge in tackling these arguments firstly held that the Appellant had not properly pleaded fraud in their statement of claim as provided under ***Order 18 rule 8 (16) of the rules of the RSC*** (18), secondly relying on the case of ***Joseph Constantine Steamship Line Limited Vs. Imperial Smelting Corporation Limited*** (13), he ruled that the evidence adduced by the Appellant Company was not sufficient proof as required in such allegations. See ***Sithole v Zambia State Lotteries Board 1975 ZLR P. 106 (15)***. We have looked at this argument that fraud was not properly pleaded. In paragraphs 4–11 in the statement of claim the Appellant Company claimed that:

"4) By an agreement to sell the Plaintiffs offered to the 3rd Defendant farm no. 3342 in Chisamba at the purchase price of US $300,000 which the purchaser undertook to pay in instalments.

5) Following the agreement to sell the 3rd Defendant made part payments to the Plaintiffs against three cheques, which were all subsequently referred to drawer.

6) Sometime in November, 1996, the 3rd Defendant approached the Plaintiffs' directors Olga Georgitsis and Andrea Georgitsis with documents from the 1st Defendant bank and advised the Plaintiffs' director that the documents were for a loan advance granted to him by the 1st Defendants to enable him to complete the sale of farm no. 3342 in Chisamba.

7) In complete good faith and unknowingly to the Plaintiffs and their directors they executed the said documents and surrendered the certificate of title for farm no. 3342, Chisamba to the 3rd Defendant.

8) It later occurred to the Plaintiffs' directors that in fact the documents presented to them for execution and which they had so executed were a third party first point the Appellants' position was that they acted on a misrepresentation by believing the 3rd Respondent in signing a third party mortgage and handing over the title deeds of their farm No. 3342 Chisamba, to him; and that they were deceived firstly when they signed the third party mortgage, handed the title deed and guarantee form because they believed that this was an agreement with the Central Marketing Company, a Kabwe company involved in maize deals. Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and merit values."

(290)

The Learned trial Judge relying on the ***Halsbury Laws of England 4th Edition Vol. 36 para 36***(20), where it is stated that: "...***where a party relies on any misrepresentation, fraud, breach of trust, willful default or undue influence by another party, he must supply the necessary particulars of the allegation in his pleading*** "held that it was vital for the Appellant Company to specifically set out the particulars of fraud alleged.

We agree that the Appellant did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under ***Order 18 rule 8 (16) of the rules of the RSC***(18), which states that "**misrepresentation should always be pleaded with proper particularity**". However looking at the five (5) paragraphs of the statement of claim quoted above we hold the view that these paragraphs brought out sufficient details of fraud and misrepresentation in line with the ***Halsbury laws of England 4th Edition***(20) which says: "***the court had never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is special duty to disclose it.***" We agree with Mr. Chisanga that although the pleadings were deficient for the purposes of using the plea of fraud and misrepresentation to claim damages, the details brought out in the five (5) paragraphs quoted above on the statement of claim are sufficient details for applying fraud and or misrepresentation as a vitiating factor of consent by the Appellant Company Directors in the transactions between the 3rd Respondent and the Appellant Company.

(291)

In the alternative even if we had to agree with the Learned trial Judge that the pleadings were defective, we hold that there was evidence adduced before the High Court by the Appellant on the misrepresentation by the 3rd Respondent, which evidence was not objected to by the Respondents. The court has an obligation to weigh that evidence. In the case of ***Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa***(14) **the election petition of 2001),** this court considered this point and held that such evidence had to be considered. On the allegation of misrepresentation by the 3rd Respondents to the Appellant Company, there was evidence by the only witness for the Appellant Company that the 3rd Respondent deceived them. She testified that although they signed documents and handed over the title deeds to the 3rd Respondent, they did that only because of the misrepresentations by the 3rd Respondent. They pleaded **non est factum**. This was evidence that was not refuted. In fact the Respondents' position was that even if there was this misrepresentation, the first Respondent had nothing to do with this deception. Thus the Respondent accepted that the 3rd Respondent made certain misrepresentations to the Appellant Company. According to them they had nothing to do with the deception. In the English case of ***Saunders vs. Anglia Building Society*** (12) Lord Wilberforce in explaining this doctrine of **non est factum** said ***'...the document should be held to be invalid only when the element of consent is totally lacking'.*** So the next question is, was the consent totally lacking? Mrs. Chalwe relying on the case of ***Zambia Export and Import Bank Ltd v. Mukuyu Farm Limited*** (11) argued that this court should uphold the High Court conclusions that the signatures were appended voluntarily since they were signed during the course of business practice. She argued that these documents, which they

signed, spoke for themselves. She further argued that the loss, which was occasioned by the signature of the Appellant Company Directors, had to borne by the Appellant Company. See the case of ***Grindlays international (z) Limited v Naha Investment Limited*** (8). In the case of ***Sounders Vs Anglia Building Society*** (12) Lord Reid explained the doctrine of **non est factum** in the following statement: " ***the doctrine of non est factum must be kept within narrow limits if it is not to shake confidence of those who rely on signature when there is no obvious reason to doubt their validity***". We are inclined to be persuaded by this sound reasoning. However, although we accept this sound reasoning, we are mindful of the fact that this doctrine of **non est factum** does not apply only to cases where fraud is pleaded and where fraud exists. The doctrine applies also to the validity of signatures where it is established that the mind of the signer never intended to sign that document in question. In this case, there was evidence led by PW1 which was not objected to that consent was totally lacking when the Directors of the Appellant Company facilitated a loan facilities to the 2nd Respondent from the 1st Respondent. So in this case, our view is that even if pleadings were deficient, since detailed evidence of misrepresentation was adduced in court, which the Respondents accepted, the court was obliged to consider that evidence. The Learned trial Judge in this case made general statements indicating that he did not accept that evidence without stating reasons why. Even though we accept that he was in the best position to assess the demeanor of the witness, nevertheless, in our view the fact that there was acceptance by the Respondents that there was such a deception, his dismissal of the application of the doctrine **non**

est factum was therefore not supported by evidence. Using the case of ***Nkhata and others vs. the Attorney General(17)*** this court must interfere with these findings.

The Respondent argued that the deception was self-induced by the Appellant Company as they did not read the documents which were self-explanatory.

It was common ground that there was close relationship between the two Directors of the Appellant Company and the 3rd Respondent. In fact there was evidence in cross-examination that there was intimate relationship between one of the Directors with the 3rd Respondent. The transactions in question were manifestly disadvantageous to them. Also there was evidence, which was not disputed of the anomalies with regard to the procedure in obtaining the security documents were obtained. The Appellant relying on the English authorities, in particular, ***Bank of Credit Commerce International SA v Aboody***(2), ***Credit Lyonnais Bank Nederland's NV v Burch*** (3) sought to rely on the doctrine of **undue influence**. The Learned trial Judge dismissed that plea. The current trend of the law on the application of the doctrine of **undue influence** is to ensure influence of one person over another person is not abused. The law supplemented by Equity has set limits of one person's influence over the other. In the early stages of development of this doctrine, its application was only confined to husband and wife relationships. Now the question, whether the transaction was brought about by exercise of undue influence, is a question of fact. According to Sir Trille on the **Law of Contract 1999 3rd Edition page 380,** the question is not whether the relationship between

the parties belongs to a certain category or type but rather whether one party reposed sufficient trust and confidence in the other. According to **Sir Trille** even that approach does not exhaust the list because this principle has not been confined to cases of abuse of trust and confidence only but also to cases where vulnerable persons have been exploited. There is no single touchstone to determine whether the doctrine is applicable or not. In this case, facts narrated by PW1 reveal that deceit was the nature and character of the transactions in question. Following the reasoning in the case of ***Royal Bank of Scotland v. Etridge and other Appeal*** (9), our view therefore is that as there were a number of anomalies that were catalogued, plus the evidence by PW1 that there was deceit before this agreement was entered into, as such this is a proper case for applying this doctrine of **undue influence**.

We are of the view that on the evidence on record the Learned trial Judge glossed over and overlooked the evidence of these irregularities and PW1's evidence thus wrongly concluding that the Appellant's Company Directors voluntarily and willingly signed the documents. For example, there is evidence that the signatures were on the wrong pages, that there was no acceptance letter, a procedure that the 1st Respondent's witness testified that that was one of the mandatory requirements before a loan facility could be given. All these pieces of evidence put together were totally unsupportive of the Learned trial Judge's findings that the Appellant Company Directors willingly and voluntarily signed the documents. In our view, these anomalies taken together with the evidence of PW1, should have supported the irresistible findings that there was undue influence.

(295)

Now the question is whether or not the 1st Respondent shared in the wrong doings of the 3rd Respondent.

In the case of ***Credit Lyonnais Bank NV v Burch*** (3), the facts already quoted and the ruling by the court which we already quoted, the court placed the responsibility on the Bank lending money to take reasonable steps to explain to the surety, the extent, and the implications of the transaction and to make sure that the surety independently sought independent legal advice before committing itself to the transaction. In that same case, the court held that it was not sufficient for the bank lending money just to have a causal contact with the guarantor. According to these English authorities, the bank had a duty to make sure that the surety sought to seek independent legal advice. The ratio of this English case is that, the creditor has the obligation to inform itself to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that, relationship. The bank has an obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.

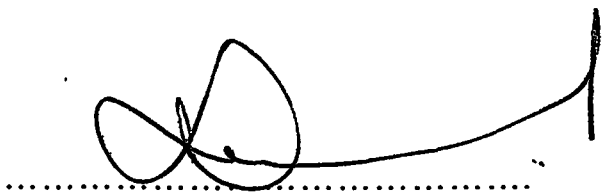
We are persuaded to follow that sound reasoning in the case before us. We hold that there was a relationship of trust and confidence between the Appellant Company Directors as stated by PW1 and the 3rd Respondent. There was evidence that at no time did the 1st Respondent try to get in touch with the Appellant company Directors. The 1st Respondent ignored the anomalies that we have referred to which would have put them on alert as to whether or not the Appellant Company Directors voluntarily signed these documents and handed them over to facilitate a loan facility

for the benefit of the 3rd Respondent. The first Respondent failed to discharge its duty to ensure that the Appellant Company Directors sought the required legal advise before committing themselves to the transaction which ended to their disadvantage as we accept Mr. Wood's submission that the Appellant Company was never paid US$1,000.000.00. Therefore, at law the 1st Respondent must be fixed with constructive notice of undue influence, which was obviously exercised by the 3rd Respondent on this elderly couple. This presumed undue influence was never rebutted. In this case before us there was no evidence to establish that this elderly couple were free from undue influence before they committed themselves. There were no evidence to show that they were told to seek legal advise.

It is insufficient to argue, as argued by the Respondents that, the Appellant had themselves to blame because they confessed not to have read the documents as there was this evidence by the Respondent themselves that they had no contact whatsoever with the Appellant's Directors as they processed the credit facility to the 3rd Respondent up to the time that the Appellant Company was called upon to honour the debt that, the debt was far beyond the Appellant company's means and which they did not benefit from. We are satisfied on the evidence on record that this is a proper case to invoke the doctrine of undue influence and set aside the transaction.

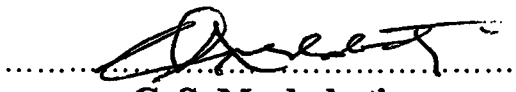
For the reasons stated in our judgment, we hold that the appeal has merit. We agree that there was no negligence on the part of the first Respondent. We therefore set aside the third party mortgage dated 15th November 1996

and the guarantee dated 28th August 1996. Judgment is entered in favour of the Appellant We award costs for the Appellant.



D. M. Lewanika
DEPUTY CHIEF JUSTICE

L. P. Chibesakunda
SUPREME COURT JUDGE



C. S. Mushabati
SUPREME COURT JUDGE