Hilary Term
[2022] UKPC 10
Privy Council Appeal No 0011 of 2020

JUDGMENT

Nature Resorts Ltd (Appellant/Cross-Respondent) *v* First Citizens Bank Ltd (Respondent/Cross-Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lady Arden
Lord Kitchin
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
4 April 2022

Heard on 30 November 2021

Appellant/Cross-Respondent
Martin Westgate QC
Anand Singh
(Instructed by Banks Kelly Solicitors)

Respondent/Cross-Appellant
Frederick Gilkes
(Instructed by Simons Muirhead Burton LLP)

LORD BRIGGS AND LORD BURROWS: (with whom Lord Kitchin and Lady Rose agree)

1. Introduction and an outline of the facts

1. This case is primarily about the doctrine of undue influence. It is accepted that the law on undue influence in Trinidad and Tobago is the same as that in English law. This case therefore requires the Board to examine and apply the law on undue influence that was so rigorously and helpfully analysed by the House of Lords in the leading modern case of *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 ("*Etridge*").

2. The central facts are not in dispute. The Culloden Estate ("the Estate") is an idyllic area of some 148 acres in Tobago. The Estate is owned by Nature Resorts Ltd ("NRL"), which is the claimant and appellant. The sole shareholder of NRL was Patrick Dankou who had incorporated NRL in 2000 for the purpose of buying the Estate and developing it as an eco-resort. It is common ground that, except where Mr Dankou was clearly acting in his personal capacity, Mr Dankou and NRL can be treated as one and the same for the purposes of this case: that is, at all material times, Mr Dankou was the directing mind and will of his company. The Estate was purchased by NRL for US$2,200,000 in 2001 and outline approval for the building of a resort was obtained in 2003. At that time the Estate was valued at US$6m to US$6.5m. However, Mr Dankou struggled to find the investment needed for the development and those who had invested (who were referred to as the "silent investors") became restive. In 2005 and 2007, agreements to sell the Estate fell through.

3. In or around 2007, Mr Dankou entered into discussions with Simon Paler and Christopher James. On 8 January 2008, they signed a share purchase agreement under which they agreed to purchase 75% (150) of the 200 NRL shares held by Mr Dankou for a sum of US$2,750,000. A payment of US$275,000 was made on the signing of the agreement and the balance of US$2,475,000 was to be paid on or before 14 March 2008.

4. Messrs Paler and James applied to the First Citizens Bank Ltd ("the Bank"), which is the defendant and respondent, for a loan to facilitate their purchase of the shares. They applied for a loan of US$2,340,000. But the Bank was only willing to lend them US$1,925,000 and only on the security of a mortgage over the Estate and a charge over the 150 shares to be acquired by them. Messrs Paler and James agreed to those terms with the Bank.

5. Richard Wheeler, a lawyer and partner in the firm Lex Caribbean, was instructed by the Bank to prepare the security documents (ie the mortgage and the charge over the shares). He also received instructions from Messrs Dankou, Paler and James to draw up two share transfers each transferring 75 shares in NRL from Mr Dankou to Mr Paler and Mr James respectively. Mr Wheeler also prepared a promissory note by which Messrs Paler and James promised to pay Mr Dankou US$975,000. This was because, from the money being lent to them by the Bank, it was agreed with Mr Dankou that only US$1,500,000 should be paid immediately for the purchase of the shares.

6. Arrangements were made for Messrs Dankou, Paler and James to attend at the offices of Lex Caribbean on 28 March 2008 to execute and sign the documents. Mr Dankou was informed that the secretary of NRL, Tanya Mohammed, was also required to be present and that the seal of NRL was needed. All parties attended Mr Wheeler's office on 28 March 2008. The deed of mortgage was duly executed, being signed by Mr Dankou in his capacity as director of NRL, and the other documents prepared by Mr Wheeler (the two share transfers, the charge over the shares, and the promissory note) were also signed by Mr Dankou (in his personal capacity) and by Messrs Paler and James.

7. Messrs Paler and James did not repay any of the US$1,925,000 loaned to them by the Bank. The Bank therefore decided to exercise its power of sale under the mortgage and on 8 July 2011 it entered into an agreement with the highest bidder for the sale of the Estate. That sale has not been completed because of the proceedings in this case.

8. NRL submits that the deed of mortgage with the Bank was voidable (and has been avoided by NRL) because of undue influence exercised over Mr Dankou (and therefore NRL) by Mr Wheeler. That submission failed in the High Court of Justice of Trinidad and Tobago and NRL's appeal to the Court of Appeal of Trinidad and Tobago was dismissed. An additional allegation that the deed of mortgage was voidable for misrepresentation by Mr Wheeler to Mr Dankou was also dismissed at first instance and there was no appeal against that decision. NRL now appeals to the Board on the issue of undue influence; and there is a cross-appeal by the Bank as to whether the Court of Appeal was correct to decide that there was here a presumption of undue influence that the Bank needed to rebut.

9. The Board also indicated, at the permission to appeal stage, that it would like to hear argument as to whether the deed of mortgage contravened sections 56-57 of the Trinidad and Tobago Companies Act which limit the circumstances in which a company may give financial assistance in connection with the purchase of its own shares.

2. The law on undue influence

10. Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress: see *Times Travel (UK) Ltd v Pakistan International Airline Corpn* [2021] UKSC 40; [2021] 3 WLR 727, paras 8-9 and 89-90) undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C).

11. Ever since *Allcard v Skinner* (1887) 36 Ch D 145, it has been commonplace to divide undue influence into two categories: actual and presumed. But in *Etridge* the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different ways of *proving* undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct, within a relationship with B, which led to B not exercising a free and independent judgment).

12. As *Etridge* also made clear, there are two requirements for establishing the (rebuttable) presumption of undue influence. First, there must be a relationship of influence. This may be established on the facts. But in respect of some relationships there is what is commonly referred to as an irrebuttable legal presumption (but is more appropriately referred to as a legal rule) that the relationship is one of influence (but note not *undue* influence). Examples of such relationships are doctor and patient (*Mitchell v Homfray* (1881) 8 QBD 587), spiritual adviser and follower *(Allcard v Skinner*), parent and young child (*Lancashire Loans Ltd v Black* [1934] 1 KB 380) and, of direct relevance to the facts of this case, solicitor and client (*Wright v Carter* [1903] 1 Ch 27). The second requirement is that the transaction must not be readily explicable on ordinary motives. The House of Lords preferred this test, which uses the words of Lindley LJ in *Allcard v Skinner*, to a test of whether the transaction was manifestly disadvantageous which had been put forward by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 703-707. The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. A contract between A and B which is substantively very unfair to A stands on one side of the line: a Christmas present by A to B stands on the other side of the line.

13. If those two requirements are satisfied, so that there is a presumption of undue influence, the burden of proof shifts and it is for the party seeking to uphold the transaction to rebut the presumption by showing that A was not acting under undue influence (ie that A exercised free and independent judgment) when entering into the transaction. Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: see *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*.

14. In a three-party situation, where there is undue influence by B over A such that A enters into a transaction with C, the transaction will be voidable by A provided that C had notice of the undue influence or that B was acting as C's agent in procuring the transaction. The concept of notice, and how it applies in this context, was explained in detail in *Etridge*. That the law of agency has a role to play in the context of undue influence was accepted in cases such as *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 972 and *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 191, 195; see also *Chitty on Contracts,* 34th ed (2021), para 10-139.

15. Finally, it should be pointed out that there is no need to classify undue influence as a civil wrong (as opposed to a factor vitiating a transaction) in order to explain why transactions are set aside for undue influence: see Birks and Chin, "On the Nature of Undue Influence" in *Good Faith and Fault in Contract* (eds Beatson and Friedmann, 1995), pp 57-97. This was clearly explained by Mummery LJ (with whom Pill and Jacob LJJ agreed) in *Pesticcio v Huet* [2004] EWCA Civ 372 at para 20:

> "Although undue influence is sometimes described as an 'equitable wrong' or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives … A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful."

3. The reasoning on undue influence of the courts below

16. We are here dealing with a three-party situation. As regards undue influence, the allegation of NRL before the lower courts has been, and remains, that Mr Wheeler exercised undue influence over Mr Dankou (and therefore NRL) in relation to the mortgage deed entered into by NRL with the Bank. And it is alleged by NRL that the Bank is affected by that undue influence, so that the deed is voidable against it, because Mr Wheeler was acting as the agent of the Bank in relation to the procuring of that mortgage deed or, in any event, the Bank had relevant notice of the undue influence.

17. In the High Court, Madam Justice Pemberton's central reasoning in dismissing the allegation of undue influence was as follows:

(i) There was no serious reliance by NRL on actual undue influence (ie there was no attempt directly to prove that Mr Wheeler actually unduly influenced the decision of Mr Dankou, and hence NRL, to enter into the mortgage), so that the case was concerned with presumed undue influence (para 95).

(ii) There was no relationship of attorney and client (as between Mr Wheeler and NRL/Mr Dankou) as regards the deed of mortgage. Mr Wheeler was acting on the instructions of the Bank in drawing up the deed of mortgage. While Mr Wheeler had previously acted as attorney-at-law for NRL and Mr Dankou by preparing documents (for example, Mr Dankou's will and, on Mr Dankou's instructions, the share purchase agreement between Messrs Dankou, Paler and James entered into in January 2008) - and Mr Wheeler was also a director of NRL - he was not acting as NRL/Mr Dankou's lawyer in respect of the deed of mortgage: see paras 100-103.

(iii) Furthermore, there was no evidence to support a finding of fact that NRL/Mr Dankou reposed trust and confidence in Mr Wheeler as regards any of the transactions entered into between the parties. As Pemberton J put it, at para 119, "It is clear that [Mr Wheeler] had no significant part to play in discussing, negotiating or dispensing advice for the important transactions which are the bases for the case at bar."

(iv) Mr Wheeler had not gained any benefit from the mortgage deed (para 128).

(v) The deed of mortgage was not to NRL's or Mr Dankou's manifest disadvantage and was readily explicable. This was because the sale of the shares - which the loan and mortgage facilitated - enabled Mr Dankou to pay money to his silent investors and also enabled various debts of the company to be paid off: see paras 132-135.

(vi) For the reasons set out at (ii) to (v), there was no presumption of undue influence in this case. There was therefore no need to go on to consider whether the Bank was affected by the undue influence of Mr Wheeler. There was also no need to consider whether, had there been a presumption of undue influence, it would have been rebutted.

18. It can be seen from this summary of Pemberton J's judgment that her reasoning was that neither of the two necessary elements for establishing the presumption of undue influence had been made out by NRL. This was because first, there was no relationship of influence as between Mr Wheeler and NRL/Mr Dankou: there was neither a fixed relationship of influence (because the relationship of attorney and client did not extend through to the mortgage deed) and nor was there a factually established relationship of influence (because the evidence did not establish that factually Mr Dankou reposed trust and confidence in Mr Wheeler). And, secondly, the deed of mortgage was readily explicable.

19. While upholding the decision of Pemberton J, the Court of Appeal (Mendonça, Mohammed and des Vignes JJA) adopted different reasoning. It decided that there was a presumption of undue influence but that the presumption was rebutted by the Bank. The central aspects of the Court of Appeal's reasoning (the single judgment was given by Mendonça JA) were as follows:

(i) Although this was a three-party situation, there would be no difficulty in the Bank being affected by Mr Wheeler's undue influence, if established, because Mr Wheeler was the agent of the Bank in relation to the procuring of the deed of mortgage (para 40).

(ii) The *Etridge* case established that there are two requirements for there to be a presumption of undue influence (paras 44-45). The first requirement was satisfied because the relationship of attorney and client is irrebuttably presumed to be a relationship of influence. In this case, NRL/Mr Dankou were clients of Lex Caribbean and Mr Wheeler (paras 48-49). The second requirement was satisfied because the mortgage deed was a transaction that called for an explanation. This was because NRL derived no benefit from the mortgage deed

and it was NRL that was exposed to the risk that its only asset could be sold by the Bank if Messrs Paler and James failed to repay the loan to the Bank (see para 53). There was therefore a presumption of undue influence.

(iii) However, the presumption of undue influence was rebutted on the facts because Mr Dankou was an educated businessman who would have fully understood the risks involved in entering into the mortgage as security for the loan to Messrs Paler and James. It was more probable than not that Mr Dankou would have appreciated that a sale of the Culloden Estate could affect the value of the shares which he retained (see para 60). In Mendonça JA's words, at para 65:

> "Mr Dankou entered into the mortgage transaction on his own free will knowing what he was doing and fully appreciating the risks involved."

4. The Board's reasons for dismissing the appeal on presumed undue influence

(1) The Court of Appeal was entitled to decide that the presumption of undue influence was rebutted

20. It is sufficient in order for the Board to dismiss this appeal that we consider that the Court of Appeal was perfectly entitled to take the view it did that the presumption of undue influence (assuming it was established) was rebutted on the facts. In other words, the Board accepts that, on the evidence, the Court of Appeal was entitled to reach the view that it had been shown by the Bank that, in relation to the deed of mortgage, Mr Dankou was not acting under the undue influence of Mr Wheeler ie that he was exercising a free and independent judgment.

21. Although Pemberton J did not directly address the issue of rebuttal, it is significant that, having heard evidence from Mr Dankou, she set out her assessment of him as follows at para 85:

> "My assessment of [Mr Dankou] as a witness is one who is articulate when he has to be so. He is capable of understanding his way around the world and is quite *au*

> *courant* with commercial reality. Suffice it to say that [Mr Dankou's] evidence in chief and cross examination would make any finding of business naivety on his part to be at odds with his qualifications and life experience which he has admitted to in this case."

22. Although Martin Westgate QC, counsel for NRL, drew to the Board's attention that there was no evidence that Mr Dankou had ever previously entered into a mortgage, the Board finds it very hard to believe that a businessman of his experience would not understand that the deed of mortgage which NRL was entering into with the Bank could lead to a sale of the Culloden Estate and that this would affect the value of the shares in NRL which Mr Dankou retained. It is worth citing in full para 60 of Mendonça JA's judgment where he dealt with this point:

> "Counsel for [NRL] has argued that Mr Wheeler did not explain to Mr Dankou that a sale of Culloden Estate by the [Bank] under the mortgage could affect the value of Mr Dankou's shares. It is accepted by the parties that Mr Wheeler did not say that he did so. But it is more probable than not that Mr Dankou would have appreciated that a sale of Culloden Estate could affect the value of the shares which he retained. He was an educated businessman. He had formed the company, Yes Tourism Ltd, and was its Chief Executive Officer. That company had operated in Tobago since 1998 in the tourism industry. He was the main mover behind the formation of [NRL] and the acquisition of Culloden Estate. It is highly unlikely that Mr Dankou would not have appreciated that a sale of Culloden Estate could negatively impact the value of his shares. As Lord Nicholls observed in *Etridge* … (at para 88) those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of security. That we consider to be true in this case. In our judgment Mr Dankou would have fully understood the risks involved in entering into the mortgage as security for the loan to Messrs Paler and James."

23. It is true that proof that a person understands the nature of a transaction will not necessarily mean that he entered into it free from undue influence. It is also true that the normal method of rebutting the presumption of undue influence is for the alleged influenced party to obtain independent advice from a lawyer and Mr Dankou

did not have the benefit of such advice. Mr Wheeler could not perform that role because the alleged presumed undue influence was being exercised by him. In any event, there is no suggestion that Mr Wheeler was asked to, or did, offer any advice to Mr Dankou in relation to the deed of mortgage. But advice from a lawyer is not the only way in which it can be established that free and independent judgment was being exercised; and we are satisfied that, on the facts, the Court of Appeal was entitled to decide that the presumption of undue influence was rebutted.

24. It is convenient to deal here with a point that has not so far been adverted to, namely that the deed of mortgage was, it would seem, an "all moneys" security. By clause 4 of the deed, the money owing to the Bank by Messrs Paler and James, and secured by the mortgage over the Culloden Estate, was "moneys now or from time to time hereafter owing by the Borrower [to the Lender]". It would therefore appear that the mortgage would potentially secure the Bank against any future lending by Messrs Paler and James. Mr Westgate drew this to our attention and submitted that it was an additional factor to be taken into account in deciding whether the mortgage deed needed explanation and therefore in determining whether there was a presumption of undue influence. However, it was not submitted that it had any relevance to whether any such presumption was rebutted. Certainly, we do not think we should take this factor into account at least in deciding whether the Court of Appeal was entitled to conclude that the presumption of undue influence was rebutted. This is for the following three reasons:

(i) There is some uncertainty on the facts as to whether the "all moneys" clause was subject to the upper limit stamped on the front of the deed of mortgage. The sum "stamped to cover" on the front was US$2,340,000 which was the loan that Messrs Paler and James had requested from the Bank albeit that the Bank had only been willing to lend US$1,900,000.

(ii) There is nothing to indicate that the parties had in mind further borrowing that would go above the loan requested of US$2,340,000.

(iii) That this was not a significant evidential factor is borne out by the fact that neither court below made any mention of the "all moneys" clause in the deed of mortgage let alone that they regarded it as having any importance. The courts below appeared to treat it as common ground that the mortgage was securing a fixed sum and there is no firm basis for departing from that on this appeal.

(2) The presumption of undue influence

25. Although not necessary for our decision, the Board considers it important to say something more about the presumption of undue influence in this case. We have seen that the Court of Appeal, in contrast to Pemberton J, decided that there was here a presumption of undue influence.

26. The Board has concerns that the reasoning of the Court of Appeal may lead to the view that, in many situations where a solicitor (or attorney) is providing professional advice to a client, and the client then enters into a disadvantageous commercial transaction with a third party, the client would be able to invoke the law on undue influence (including the law of agency) to set aside the transaction. There are many instances where, for example, the solicitor is acting for both a purchaser of land and a lender of the money for the purchase where that relationship should not operate to give rise to a presumption of undue influence for either client to be used against the other. This is so where the solicitor does not obtain any personal benefit (beyond his normal fees) from the transaction.

27. In the Board's view, where the other party to the transaction is not the solicitor obtaining some benefit from the client but is rather a third party, an ordinary commercial transaction such as a mortgage, entered into by a person engaged in business, should rarely be regarded as one that is not readily explicable on ordinary motives, merely because it is, or turns out to be, disadvantageous. It is readily explicable that the client will enter into such a transaction without being under the undue influence of the solicitor.

28. This is even more obviously true where, as here, the person engaged in business derived a substantial benefit from the transaction. The deed of mortgage opened the money-box from which Mr Dankou received payment for his shares. Without it, the sale would have fallen through. Although the Court of Appeal was careful to say, at para 53, that it was NRL that derived no benefit from the mortgage, the Board considers it unrealistic to ignore the benefit to Mr Dankou when considering whether the mortgage was readily explicable. It was the benefit to Mr Dankou, as the sole shareholder in NRL at the time when the transaction was entered into, that rendered the transaction readily explicable. In the Board's view the Court of Appeal was wrong to ignore this bigger picture and therefore wrong to take the view that the deed of mortgage was not readily explicable. Although unnecessary for our decision, it follows that, in the Board's view, there was no presumption of undue influence that needed to be rebutted in this case. In this respect (ie that the transaction was readily explicable), the Court of Appeal was incorrect and the first instance judge was correct.

29. As we have seen, Pemberton J also thought, in contrast to the Court of Appeal, that there was no presumption of undue influence because there was no relationship of influence between Mr Wheeler and Mr Dankou/NRL in relation to the deed of mortgage. This potentially raises difficult questions as to the operation of the so-called irrebuttable legal presumption that the relationship is one of influence on which we were not addressed (but see, for example, the criticism by Sir Kim Lewison, "Under the Influence" [2011] Restitution Law Review 1, 9-10); and, given what the Board has already decided, the Board prefers to say nothing further on that first requirement for the presumption of undue influence.

30. The Board adds for completeness that, if (which is not alleged) the deed of mortgage had jeopardised NRL's solvency, then both Mr Dankou and Mr Wheeler may have acted in breach of their fiduciary duty to NRL as its directors in committing NRL to it. But that is a very different conclusion from undue influence and breach of fiduciary duty formed no part of NRL's case.

(3) Conclusion on presumed undue influence

31. NRL's appeal on undue influence therefore fails. The Court of Appeal was entitled to decide that the presumption of undue influence (*if* established) was rebutted on the facts. Although it has been unnecessary for us to decide this, the Board is also of the view that the Bank's cross-appeal should succeed because, as the deed of mortgage was readily explicable, there was no presumed undue influence of Mr Wheeler over NRL/Mr Dankou in respect of the deed of mortgage.

5. Sections 56-57 of the Companies Act

32. Section 56 of the Companies Act of Trinidad and Tobago imposes a qualified restriction upon the provision of financial assistance by a company in connection with the purchase of its shares. The qualification, which one may regard as a very significant qualification, is that there exist circumstances prejudicial to the company. Moreover, section 57 provides for the enforcement of a contract made contrary to section 56, by the company itself and by a lender for value in good faith without notice of the contravention. Sections 56 and 57 provide as follows:

> "**Illicit loans by company**

56(1) When circumstances prejudicial to the company exist, the company or any company with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise -

(a) to a shareholder, director, officer or employee of the company or affiliated company, or to an associate of any such person for any purpose; or

(b) to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company or a company with which it is affiliated.

(2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that -

(a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due; or

(b) the realisable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes.

Enforcement of illicit loans

57 A contract made by a company contrary to section 56 may be enforced by the company or by a lender for value in good faith without notice of the contravention."

33. It was not alleged by NRL at any stage in these proceedings, or in its Notice of Appeal to the Board, that the transaction in issue contravened section 56, although it plainly constituted financial assistance by NRL in connection with the purchase of its

shares. The Court of Appeal observed that no such question arose. Mindful that if a plain illegality was disclosed by the agreed facts it might be a matter which the Board should consider of its own motion, the parties were asked for, and provided, submissions on the question, for which the Board is grateful.

34. For the reasons which follow, the Board does not consider that it is appropriate for this point to be adjudicated upon in this appeal. In short, it does not appear with sufficient clarity that there is disclosed a contravention of section 56 which ought to lead the Board, for the first time in these proceedings, to declare the deed of mortgage unenforceable by the Bank on the grounds of illegality. There are, first, questions about the true interpretation of sections 56 and 57 upon which it would have been preferable to have had the opinion of the Court of Appeal. The Board is also conscious that it appears that the correct interpretation of sections 56 and 57 of the Companies Act has not previously been before the Board or before an appellate court in Trinidad and Tobago and that the provisions are not straightforward and are not precisely mirrored by legislation in England and Wales (with which the Board is familiar). Secondly (but depending to some extent upon the issues as to interpretation), there are factual questions which it would not be just to resolve without the Bank having been given the opportunity to address them in the appropriate tribunal of fact in Trinidad and Tobago. Thirdly, although the interpretation of section 57 is not straightforward, what is clear is that, despite the company acting in contravention of section 56, the company is entitled to enforce a contract contravening section 56. In other words, in the context of contractual enforcement by the company, the issue of illegality is one that the company can choose to raise, or not raise, at its option. While that does not mean that a court is precluded from raising illegality where the company has not done so, not least where the claim is one against the company, it may be thought to indicate that, to avoid procedural unfairness to the other party, caution should be exercised before a court does so.

35. There are two relevant issues of interpretation. The first arises under section 56(2)(b). Proof that there exist “circumstances prejudicial to the company” depends upon demonstrating commercial insolvency (ie inability to pay debts as they fall due under subsection (2)(a) or balance sheet insolvency under subsection (2)(b)). That balance sheet requires there to be excluded from the realisable value of the company’s assets the “amount of any financial assistance … in the form of assets … encumbered to secure a guarantee”. The question is whether the “amount” falling to be excluded is the realisable value of the whole of the asset being encumbered, or only the amount of the financial assistance provided by the encumbrance, here the mortgage.

36. An example may illustrate the problem. Suppose that a bank lends the purchaser of the company’s shares $100,000 secured by a charge in that amount upon

assets worth $1m. Is the relevant amount $100,000 or $1m? The present case is complicated because, although a fixed amount was lent, the mortgage was also said to be an "all-moneys charge". We have drawn attention at para 24 above to the factual uncertainties regarding the apparent "all moneys charge". But on the assumption that the mortgage secured a fixed sum, the resolution of the question of interpretation that we are here discussing might be decisive of the question whether there were circumstances prejudicial to the company, sufficient to render the assistance unlawful, since the amount lent was much less than the value of the Culloden Estate.

37. One reading of section 56(2)(b) in its context might suggest that it is the whole of the value of the asset charged which represents the relevant amount to be excluded. But the draconian consequences of that interpretation are well illustrated by the example given above, because by no stretch of the imagination could a charge for a small fraction of the value of the property charged in substance wipe out the contribution made by the value of the charged asset in the company's balance sheet.

38. The second issue of interpretation concerns the meaning of "lender for value" in section 57. Does it include a lender such as the Bank to the buyer of the shares, secured by a contract of guarantee backed by a charge undertaken by the company? Or does the phrase only contemplate a lender of money to the company itself, under a contract of loan with the company, in circumstances where the company then uses the borrowed money to assist in the purchase of its shares? The former interpretation would confer a wide degree of protection, all the more so if (as the Board considers), "notice of the contravention" means notice not merely of the use of the money lent to assist the purchase of the shares, but also notice of the facts that render the assistance unlawful, including the necessary element of circumstances prejudicial to the company. By contrast the latter interpretation would exclude any protection to the typical lender secured by a charge over the company's assets, such as the Bank in the present case, even if value was given, and without notice of the contravention.

39. It will readily be apparent that factual issues will arise, both in relation to the amount and value of the company's assets and liabilities under section 56(2)(b) - including the issues relating to the "all moneys charge" set out in para 24 above - and the question whether the Bank as lender (if that is the correct construction of section 57) had the requisite notice of the contravention. While it may be tempting to try to resolve those questions on the factual framework already determined by the courts below, or agreed by the parties for the purpose of this appeal, that process of determination and agreement was not undertaken for the purpose of resolving any factual issue arising under sections 56 or 57. Disclosure is unlikely to have been directed to it, nor forensic research. It would in short be unfair to the Bank, to deprive it of that opportunity, and wrong to treat the emergence of the issue for the first time

on appeal to be a reason to require the facts now to be re-determined by a further hearing at first instance.

40. In addition to the problems of legal interpretation and the factual uncertainties, there is the need for caution to avoid procedural unfairness to the Bank, where the company has chosen not to raise the illegality point. For a court at first instance to have taken the point, when the company had chosen not to, is one matter. But it is quite another for the Privy Council to take this point when the company chose not to do so both at first instance and in the Court of Appeal. In the Board's view, it would be procedurally unfair to the Bank for this point to be taken at this late stage in the proceedings.

41. The Board would also draw attention to a further legal difficulty. The law on the effects on a transaction of illegality at common law has been reformulated by the UK Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467. The Board has received no submissions on how that decision might affect the enforcement of the deed of mortgage in this case and, in particular, we have had no submissions on the relationship between sections 56 and 57 and the law laid down in *Patel v Mirza* (that decision was applied by the Court of Appeal in Trinidad and Tobago in *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corpn*, 25 January 2017). We have also had no submissions on the effect of section 517 of the Companies Act which reads:

> "**Civil remedies unaffected**
>
> 517 No civil remedy for any act or omission is affected by reason that the act or omission is an offence under this Act."

42. We accept that, where there are proceedings before a court relating to a contract involving conduct that appears to be illegal, the court must consider whether the contract or term is unenforceable or void even if not raised by the parties. But the authorities indicate that the court must be satisfied that it has sufficient legal and factual material to deal with the illegality question: see, eg, *Edler v Auerbach* [1950] 1 KB 359, 371; *Chitty on Contracts,* 34th ed (2021), para 18-264. The Board considers that it does not have sufficient factual material before it to resolve the dispute between the parties as to the operation of sections 56 and 57; and that the issues of legal interpretation are far from straightforward and are legal issues which the Board is reluctant to resolve without the benefit of the views of the Trinidad and Tobago Court of Appeal. The impact of *Patel v Mirza* may also need to be considered and has not been the subject of any submissions (and the same may also be said in respect of

section 517 of the Companies Act). Moreover, in the Board's view, it would be procedurally unfair to the Bank now to rest the decision in this case on sections 56-57.

6. Overall conclusion

43. For these reasons, the appeal is dismissed.

LADY ARDEN: (dissenting)

A. INTRODUCTION

44. In my judgment, for the reasons set out below, the grant of the mortgage dated 28 March 2008 which Nature Resorts Ltd ("NRL") executed over its undeveloped Culloden Estate constituted a contravention of section 56 of the Companies Act of Trinidad and Tobago and that in the events which have happened the Board should declare that the respondent, First Citizens Bank Ltd ("FCB"), cannot enforce the mortgage.

45. For convenience I will set out sections 56 and 57 again:

> "**Illicit loans by company**
>
> 56(1) When circumstances prejudicial to the company exist, the company or any company with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise -
>
> (a) to a shareholder, director, officer or employee of the company or affiliated company, or to an associate of any such person for any purpose; or
>
> (b) to any person for the purpose of, or in connection with, a purchase of a share issued or to be issued by the company or a company with which it is affiliated.

(2) Circumstances prejudicial to the company exist in respect of financial assistance mentioned in subsection (1) when there are reasonable grounds for believing that -

(a) the company is unable or would, after giving the financial assistance, be unable to pay its liabilities as they become due; or

(b) the realisable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes.

Enforcement of illicit loans

57. A contract made by a company contrary to section 56 may be enforced by the company or by a lender for value in good faith without notice of the contravention."

B. OUTLINE FACTS

46. NRL was incorporated on 30 October 2000 under the laws of Trinidad and Tobago. Mr Patrick Dankou was the principal registered holder of shares, and a director. Mr Richard Wheeler, referred to below, was also a director. Mr Dankou wished to sell some of his shares and the second and third defendants ("the Borrowers") agreed to purchase them. They represented some 75% of his total shareholding. The share purchase agreement dated January 2008 provided that the price would be paid in two instalments, US$275,000 on signing and a further US$2,475,000 before 14 March 2008 (a date which the parties could agree to vary). They required a bank loan to complete the purchase and FCB agreed to lend the Borrowers money to acquire the shares.

47. One of FCB's requirements was that NRL would execute a mortgage over the Culloden Estate to secure all moneys which might become due from the Borrowers to FCB. FCB accepts that the moneys to be advanced to the Borrowers were to be used to enable them to purchase shares in NRL (see, for example, para 6 of the witness

statement of Mr Derek Ramlal, a senior manager of FCB who was involved in the processing of the Borrowers' credit application). At the date of the deed of mortgage NRL had no or no significant assets other than the Culloden Estate. Mr Wheeler acted for FCB and he prepared the draft deed of mortgage. There was no covenant for payment in this document but the securing of the amounts due to FCB from the Borrowers on Culloden Estate amounts in law to the grant of a guarantee: See *In re Conley, Ex p Trustee v Barclays Bank Ltd; In re Conley, Ex p Trustee v Lloyd's Bank Ltd* [1938] 2 All ER 127; Halsbury's Laws of England vol 48, 5th ed (2008), para 1152.

48. The mortgage secured only the liabilities, present and future, of the Borrowers to FCB. FCB made no promise or payment to NRL. The judge made no finding that the "all moneys" charge in the mortgage was in the best interests of NRL as a separate legal entity. She merely found that the transaction enabled Mr Dankou to make payments out of the proceeds of sale to beneficial owners of shares who wished to dispose of their shares and in the payment of certain liabilities of NRL of an aggregate amount which rendered the mortgage over the whole of the Culloden Estate wholly disproportionate. Moreover, the general principle is that a company has no interest in the identity of its shareholders. In addition, the prohibition against giving financial assistance support the rules of company law regarding capital maintenance, which are cardinal in protecting the rights and expectations of creditors in relation to limited liability companies.

49. As is usual, the facility which FCB extended to the Borrowers was subject to certain conditions. The facility letter from the Bank stated that the following were conditions of the lending:

> "Conditions of lending:
>
> - First Citizens Bank Ltd reserves the right of first refusal on the villa construction. [H]owever this is not to be construed as a commitment by the bank to finance the project.
>
> - The rate of interest on the facility is subject to change without prior notice by the bank based on prevailing market conditions.
>
> - The borrowers shall maintain site to a level acceptable to the lender.

- Equity of US$825,000 to be injected into acquisition of the property prior to drawing on the banks debt facility."

50. These conditions were set out in the facility letter, and when Mr Wheeler was instructed on behalf of FCB to draft the deed of mortgage, he was given a copy of the facility letter.

51. These conditions show that FCB saw the development of the Culloden Estate as an opportunity for further lending. That lending would be for the development of the Estate. In those circumstances, it is apparent from the conditions that FCB was looking to provide project funding for the Culloden Estate. That may explain why an "all moneys" form of charge was taken. In addition, it would strengthen FCB's position as potential project lender to NRL if FCB took security over the whole of the Culloden Estate and not simply a part of it. Furthermore, the fact that FCB imposed a condition about the further subscription of shares shows that FCB expected the project to be carried out by NRL and not the Borrowers personally. This condition also shows that FCB had investigated, or had been given information about, the financial position of NRL. Indeed, as Mr Ramlal explained in his witness statement, that was standard practice:

> "Commercial due diligence is carried out to determine the defendant's level of interest and appetite for the particular project having regard to the risk profile of the project. In other words the defendant determines the client's ability to repay whatever credit facility is granted in respect of the project."

52. On the execution of the mortgage, FCB advanced the sum of US$1,925,000 to the Borrowers and they used US$1.5m of the moneys so lent to pay the first instalment of the sale price for the shares that Mr Dankou was then selling to them.

53. On receipt of those moneys Mr Dankou gave instructions to Mr Wheeler to use part of them to pay liabilities amounting to US$184,279.90. All but some US$34,000 were for amounts due to Mr Dankou. Most of the liabilities were liabilities for taxes, services and directors' fees for prior years. It is to be inferred that NRL had liabilities of this amount immediately before the mortgage was executed. There is no realistic possibility of showing that the liabilities were materially less than this amount. The balance of US$1,315,720 was paid to three persons, known as the "silent investors", who had provided 80% of the funds for the acquisition of the Culloden estate and

received equitable charges over it from NRL. However, terms of this funding have not been established, and I therefore proceed on the basis that the discharge of this funding did not constitute financial assistance.

C. WHY THE BOARD MUST CONSIDER THE ISSUE WHETHER UNLAWFUL FINANCIAL ASSISTANCE WAS GIVEN

54. On 18 May 2021 the Board invited submissions on the effect of section 56 of the Companies Act which limits the circumstances in which a company may give financial assistance for the purchase of its own shares. The point had been mentioned in the judgment of the Court of Appeal but not pleaded.

55. There is no suggestion that the law of Trinidad and Tobago in this situation differs from that of England and Wales in any material respect. On this issue, there is a rich seam of case law in England and Wales, and the law is well established.

56. The court will not act on a contract which is unlawful even if neither party has relied on this point. The court may act on evidence as to illegality even if the point is not pleaded and it simply emerges from the evidence at trial to which no objection is taken.

57. As regards the evidential basis for a conclusion of illegality, a court in the position of the Board can only conclude that the mortgage was unlawful where the facts, viewed realistically, admit of no other conclusion. *Edler v Auerbach* [1950] 1 KB 359, (whose complex facts are not material) addresses the law as to the correct approach of the court to questions of fact where there is an unpleaded question as to the unlawfulness of a contract. Devlin J distilled the principles established in earlier cases into four propositions as follows, at pp 371-372:

> "I turn now to the objection that I ought not to be considering any illegality except that which is pleaded. I accept the submission of counsel for the defendant that the illegality which I have found depends on the knowledge or intention of the defendant, that this is not pleaded, and that it ought to have been pleaded if it was to be relied on. Counsel then cited *North-Western Salt Company Ltd v Electrolytic Alkali Company Ltd* [1914] AC 461. That case, I think, authorizes four propositions: first, that, where a contract is ex facie illegal, the court will not enforce it,

whether the illegality is pleaded or not; secondly, that, where, as here, the contract is not ex facie illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

The last proposition is the most important for the purpose of this case, and I think that it fairly synthesizes the relevant dicta. The court must pronounce on the transaction if, in the words of Viscount Haldane L-C, the 'case has been completely presented', or, in Lord Moulton's words 'the contract and its setting be fully before the court'. What I have expressed as the third proposition is not so much an exception to the principle as an exemplification of it: the court must be satisfied of the illegality of the transaction; that means that it must be satisfied that it knows all the relevant facts. On any issue which is raised on the pleadings the court may safely assume that the relevant facts will be brought before it by one side or the other; where notice or the issue is not given on the pleadings, there is a danger that that assumption may break down, and the decision in *North-Western Salt Company Ltd v Electrolytic Alkali Company Ltd* is a warning against overlooking that danger. In *Rawlings v General Trading Company* [1921] 1 KB 635, 645, Scrutton LJ treated the decision as making it clear 'that where all the facts are before the court, and it can see clearly that it is contrary to public policy to enforce the agreement, the court should act, though the pleadings do not raise the point'. This dictum is in a dissenting judgment; but the point of dissent was whether the agreement in that case was in restraint of trade or not."

58. By “all the facts”, Scrutton LJ clearly meant all the relevant facts. The Board is not prevented from reaching a conclusion as to unlawfulness by the fact that that issue is not pleaded. The Board can examine all the evidence that emerged at trial. But, under Devlin J’s third proposition, the Board must ask itself, before reaching any conclusion as to whether the transaction (here the mortgage) was unlawful, whether there is any realistic possibility of showing that the facts were not as they seem to the Board to be. I would treat this as a matter going to the fairness of the procedure.

59. This appeal requires the Board to consider both points of evidence and points of law. Nothing in the authorities holds that the court is prevented from deciding points of law in the usual way. The Board does not have to ask whether there is any possibility that another court could have decided the point of law in some other way.

D. IN THE COURT OF APPEAL

60. In this case, Mendonça JA gave the judgment of the Court of Appeal (Mendonça, Mohammed and des Vignes JJA). In his judgment, he dealt with the financial point very briefly as follows:

> “It is perfectly lawful for a company to provide financial assistance for the purchase of shares Issued by it. No one has suggested that the transaction was anything but lawful or usual.” (para 63)

61. Clearly the question of unlawful financial assistance was a cause of concern to the Court of Appeal. I can deal briefly with the Court of Appeal’s reasoning here. Not all financial assistance is lawful. There is a prohibition: see section 56(1). However, the prohibition applies only if section 56(2) applies. So the possibility that section 56(2) applies has to be considered.

62. The Board does not have a transcript of the proceedings in the Court of Appeal. Counsel who appeared in the Court of Appeal and now appear before us have not indicated that there was any discussion of financial assistance in the hearing before the Court of Appeal.

E. CORE SUBMISSIONS BEFORE THE BOARD ON THIS ISSUE

63. NRL contends that on the findings of the courts below the mortgage is unlawful and unenforceable by virtue of section 56 even if the undue influence appeal fails, and that this appeal ought to be allowed on this ground as well. It submits that the deed of mortgage falls within the mischief to which section 56 is directed, that section 56(2) which sets out the circumstances in which the prohibition is satisfied applies and that FCB is not a "lender" within section 57 and, even if it was, it was not a lender for value and without notice of the contravention.

64. FCB contends that the prejudicial circumstances required by section 56 had not arisen, that it was not aware that they had arisen and that in any event it would be unfair for these matters to be raised now when it has not had an opportunity to lead evidence on, or to plead to, them.

F. MISCHIEF BEHIND THE PROHIBTION IN SECTION 56(1) ON THE GRANT OF FINANCIAL ASSISTANCE IN CONNECTION WITH A SHARE ACQUISITION

65. Section 56 was based on section 44 of the Canada Business Corporations Act ("CBCA") which has since been repealed in Canada and which I need not set out. The prohibitions, however, on companies giving financial assistance in connection with the purchase of their shares (to which I will simply refer as "financial assistance") have a common root even if they have evolved differently. The common root is the recommendation of the Company Law Amendment Committee, known as the Greene Committee. Paragraphs 30 to 31 of the Greene Report (Cmd 2657) (1926) said:

> "*Company Providing Money for the Purchase of its own Shares*
>
> 30. A practice has made its appearance in recent years which we consider to be highly improper. A syndicate agrees to purchase from the existing shareholders sufficient shares to control the company, the purchase money is provided by a temporary loan from a bank for a day or two, the syndicate's nominees are appointed directors in place of the old board and immediately proceed to lend to the syndicate out of the company's funds (often without security) the money required to pay off the bank. Thus in effect the company provides money for the purchase of its own shares. This is a typical

example although there are, of course, many variations. Such an arrangement appears to us to offend against the spirit if not the letter of the law which prohibits a company from trafficking in its own shares and the practice is open to the gravest abuses.

RECOMMENDATION

31. We recommend that companies should be prohibited from directly or indirectly providing any financial assistance in connection with a purchase (made or to be made) of their own shares by third persons, whether such assistance takes the form of loan, guarantee, provision of security, or otherwise. This should not apply in the case of companies whose ordinary business includes the lending of money, to money lent in the ordinary course of such business, or to schemes by which a company puts up money in the hands of trustees for purchasing shares of the company to be held for the benefit of employees or to loans direct to employees for the same purpose."

66. In practice the resultant prohibitions against financial assistance, section 45 of the Companies Act 1929 and its successor, section 54 of the Companies Act 1948, were found in metaphorical terms to be a patch much larger than the hole they were intended to cover. So much so that the Report of the Company Law Committee (known as the Jenkins Committee) (Cmnd 1749) (1962) famously remarked:

> "From the evidence we have received, we are satisfied that section 54, as it is now framed, has proved to be an occasional embarrassment to the honest without being a serious inconvenience to the unscrupulous." (para 176)

67. The Jenkins Committee recommended that section 54 be recast. That in due course followed and the current position in the UK is that the prohibition on financial assistance no longer applies to the acquisition of shares in private companies except in the case of private companies which are holding companies of public companies (see further sections 677 to 683 of UK Companies Act 2006, which is the current Companies Act in the UK).

68. Section 56, in line with section 44 of the CBCA, limits the prohibition to situations where there are prejudicial circumstances, which are then defined. Where there are no prejudicial circumstances, shareholders and creditors are protected appropriately by the director's duty to act in the company's best interests. The question whether the directors of NRL fulfilled their fiduciary duty does not arise on the present appeal.

69. It follows from the above that while the company will be the body which contravenes the prohibition, it is generally the victim of the wrong, not the real culprit (see *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 261-262 per Buckley LJ with whom Orr and Goff LJJ agreed).

G. THE MEANING OF FINANCIAL ASSISTANCE

70. The concept of "financial assistance" plays a crucial role in the application of section 56(1). Yet, while the forms of proscribed financial assistance are described in section 56(1), there is no definition of financial assistance itself. Moreover, the forms specified conclude (as did section 44 of the CBCA and section 54 of the UK Companies Act 1948) with the words "or otherwise". Those two words make it clear that there are no limits on what can constitute financial assistance, provided it is assistance which is financial. In this case the financial assistance consisted of the charging of the company's property in favour of the bank to secure the liabilities (as widely defined) of the Borrowers.

71. When section 54 of the UK Companies Act 1948 was enacted, it may be that it was thought that everybody knew what financial assistance was but in practice the term has been hotly contested because for instance, under a complex share acquisition, a company may be involved for any number of reasons. Moreover, while the company may be so involved for commercial reasons, it may also be the case that it would not have been involved at all were it not for the share acquisition. On the face of it, even a transaction on commercial terms or the paying of a dividend can constitute financial assistance. Hence there was an active debate about what the words "financial assistance" occurring "in connection with" the share acquisition meant.

72. In the UK, Parliament has made substantial changes to resolve doubts about what is financial assistance (for example, dividends and de minimis transactions are now excluded). The matter has also been clarified by the seminal decision of Hoffmann J (as he then was) on section 54 of the UK Companies Act 1948 in *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1. The company there had sold

tax losses to put itself into a suitable state for its shares to be sold, and the issue was whether this was unlawful financial assistance. In the decision of the Court of Appeal of England and Wales in *Chaston v SWP Group plc* [2002] EWCA Civ 1999; [2003] 1 BCLC 675, placed before the Board on this appeal, I adopted the approach of Hoffmann J, and placed it in the context of amendments made by the UK Companies Act 1985. The passage (paras 23 to 32) reads:

> "For a company to 'give' financial assistance, the financial assistance must be given to the purchaser … In order that assistance may be 'financial', a net transfer of value is required. In support of this submission, Mr Cunningham relies on a passage from the decision of Hoffmann J in the *Charterhouse* case (at 10–11):
>
> > 'The need to look at the commercial realities means that one cannot consider the surrender letter in isolation. Although it constituted a collateral contract, it was in truth part of a composite transaction under which Tempest both received benefits and assumed burdens. It is necessary to look at this transaction as a whole and decide whether it constituted the giving of financial assistance by Tempest. This must involve the determination of where the net balance of financial advantage lay. …'
>
> In the present case … the assistance was not for the purpose of the acquisition. Assistance which only persuades a purchaser to buy shares is not enough. The authorities draw a distinction between assistance which occurs before a transaction and assistance in the course of a transaction. Mr Cunningham relies in support of this submission on another passage from the *Charterhouse* case (at 14):
>
> > '… I am not satisfied that [even if the transaction had involved a net transfer of value from Tempest to the Charterhouse group] Tempest could be said to have given financial assistance. The object of the transaction was to put the assets and liabilities of Tempest into a state in which it was acceptable to both parties for them to be sold to Mr Allam for £1. If this process involved the prior extraction by the

> shareholders of assets from Tempest by means which were intra vires and not a fraud upon creditors, I doubt whether it could be described in any acceptable commercial sense as a giving of financial assistance by the company. It is no more than a change in the character of the assets being sold.'

… The prohibition [against giving financial assistance in connection with a share purchase] was amended in 1948 and reformulated in 1981. The *Report of the Company Law Committee* (the Jenkins Committee) (Cmnd 1749, 1962) para 180, p 66 expressed the view that it was 'unwise' to attempt a precise definition of financial assistance. It is clear from the way in which section 151 and section 152 [of the Companies Act 1985] are drafted that it covers financial assistance in many forms apart from loans (see for example the wide wording of section 152(3)). The general mischief, however, remains the same, namely that the resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition. This may prejudice the interests of the creditors of the target or its group, and the interests of any shareholders who do not accept the offer to acquire their shares or to whom the offer is not made.

… Thus although section 152 proscribes a number of forms of financial assistance, it does not define the words 'financial assistance'. It is clear from the authorities that what matters is the commercial substance of the transaction: 'The words ["financial assistance"] have no technical meaning and their frame of reference is the language of ordinary commerce' (per Hoffmann J in *Charterhouse v Tempest Diesels* [1986] BCLC 1 at 10, approved by the Court of Appeal in *Barclays Bank plc v British & Commonwealth Holdings plc* [1996] 1 BCLC 1 at 40). This approach was confirmed by Lord Hoffmann (with whom the other members of the House of Lords agreed) in a recent revenue case: *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] STC 237 at 254. In the relevant passage, Lord Hoffmann usefully draws a distinction between the expression 'financial assistance', which conveys a commercial concept, and other words used

in this group of sections which by contrast have a recognised legal meaning …"

73. The UK Parliament has accepted the approach to financial assistance enunciated by Hoffmann J since "financial assistance" remains undefined in the Companies Acts 1985 to 2006.

74. It is therefore clear that the concept of financial assistance has substance and impact, and that the question whether a transaction constituted financial assistance cannot be ignored. The concept, as refined by the case law, directs attention to the commercial realities. So, it is unlikely to have included a guarantee which NRL entered into in the ordinary course of its property development business even if it had done that in preparation for a share acquisition. But that was not the case with the mortgage. The mortgage was primarily if not exclusively executed to secure the acquisition borrowing of the Borrowers. The clear "balance of advantage" lay with FCB and the Borrowers, not NRL. There was a net transfer of value from NRL to FCB at the request of the Borrowers.

H. SECTION 56(2) - ASCERTAINMENT OF PREJUDICIAL CIRCUMSTANCES

(1) Two tests for establishing existence of "circumstances prejudicial to the company" (section 56(1))

75. There are two tests for the prejudicial circumstances which make the prohibition against giving financial assistance in section 56(1) applicable. The first is in section 56(2)(a) and this requires an assessment of commercial insolvency and the second is in section 56(2)(b) and this requires a calculation to ensure that there is no deficiency of "free assets" (which I will call "the free asset deficiency"), ie a deficiency in those assets which did not represent, and were therefore "free" of, the financial assistance for the share acquisition. I will refer to the assets which represented the financial assistance as "the financial assistance-based assets".

76. In my judgment, the Board need only consider section 56(2)(b) of the Companies Act because, if that is satisfied, there is no need to consider further section 56(2)(a). It simply would not matter whether NSL passed the commercial insolvency test.

(2) Section 56(2) requires an objective approach to the satisfaction of the tests

77. For the tests to be satisfied, the Parliament of Trinidad and Tobago has provided that there must be reasonable grounds for believing that the tests in section 56(2) of commercial insolvency and free asset deficiency are satisfied. Unreasonable grounds will not suffice, nor is it sufficient for the calculation to be done by the directors according to their business judgement. So, NRL rightly submits that the calculation is an objective question dependent on whether there are reasonable grounds to believe that the states of affairs in section 56(2) existed (see also *XDG Ltd v 1099606 Ont Ltd* [2002] OTC 1062, Superior Court of Justice of Ontario (Canada)).

(3) Asset values generally for the purposes of section 56(2)(b)

78. The valuation of assets is to be of "realisable value" and by implication the date for valuation is immediately before the financial assistance is given.

79. Section 56(2) directs assets to be taken at their "realisable" value. Company accounts are generally drawn up on a going concern basis so the realisable value is unlikely to be the value appearing in the balance sheet or book value. In any event, even if the accounts are drawn to the date immediately prior to the date on which financial assistance is given, balance sheet values will be historic (unless exceptionally current cost accounting is adopted). There must be a real-world valuation of the sum for which the company could then sell the assets. This figure may be less or more than book value. To ascertain the realisable value, it may be necessary to carry out a special valuation. In this case, the development of the Culloden Estate had scarcely been commenced and so potentially this is a case where realisable value may have been less than the value shown in the balance sheet.

(4) The free asset deficiency calculation involves applying the statutory formula

80. Under section 56(2)(b), if satisfaction of the statutory test is taken as "S", the statutory formula for satisfying that test may be expressed as follows:

> S = [realisable value of assets - financial assistance-based assets] < [liabilities and paid up share capital]

81. S may be nil or a negative figure. If it is, the test will inevitably be satisfied. Prejudicial circumstances within the statutory definition exist and the formula does not produce the necessary positive figure. The company cannot lawfully give financial assistance (but enforcement may be possible under section 57).

82. Taking the components of the formula in turn:

(i) First component: [realisable value of assets - financial assistance-based assets]

(a) **Realisable value of assets**: there is no valuation as at March 2008 but the parties have proceeded on the basis of a valuation dated 19 July 2003 by Deloitte & Touche which values the Culloden Estate, in its then current condition and with planning permission and environmental approval, at US$6m to 6.5m subject to review of the eventual lay out, size and number of the lots/villas to be built. It is obviously possible that this value had increased by March 2008.

(b) **Financial assistance-based assets**: section 56(2)(b) requires that there must be deducted "the amount of any financial assistance … in the form of assets pledged or encumbered to secure a guarantee". As to this element:

(i) What is to be deducted is "the amount of any financial assistance", and in this case, if section 56(2)(b) had stopped there, this would be the amount of the loan which was guaranteed at the date of the mortgage plus accrued interest.

(ii) However, matters do not stop there as there is a statutory direction to take the amount of any financial assistance "in the form of assets pledged or encumbered to secure a guarantee". The phrase "in the form of" means "the particular character, nature, structure, or constitution of a thing; the particular mode in which a thing exists or manifests itself" (see the Oxford English Dictionary). The particular mode in which the financial assistance manifests itself in this case is the assets charged. The particular assets identified with the financial assistance are the totality of the assets charged and the section makes no provision for how this sum should be reduced by reference to the value of the equity of redemption with or without the margin which any lender would require. I have pointed out also that there were commercial reasons why FCB might want a charge over the whole Estate even if the amount secured was at that stage only a fraction of its value. It made a commercial decision to take an unlimited charge over the whole of the property when it could have taken security over part of the property sufficient appropriately to secure the borrowings needed to enable the Borrowers to purchase the shares, coupled if thought fit with negative covenants which would restrict the company from borrowing elsewhere without its consent.

(iii) The words "pledged" and "encumbered" must be given their usual meaning. The word "pledge" clearly applies to security given over chattels whereas the word "encumber" applies to forms of property that may be charged, or encumbered, remembering that the term "encumbrance" extends beyond a charge to any other sort of encumbrance on property. The phrase "pledged or encumbered to secure a guarantee" must be read as a whole. It is not possible to read the phrase as if the word "pledged" was followed by a comma.

(iv) I have already expressed the view that the word "guarantee" would include the provision of collateral without a covenant for payment. This was not the view taken when section 54 of the UK Companies Act 1948 was enacted because it uses the words "loan, guarantee, the provision of security or otherwise" This in my judgment was because, in line with the Greene Committee's recommendation (see above), those words appeared in section 45 of the Companies Act 1929, that is, prior to the decision in *In re Conley* (above), and the Companies Act 1948 was

(so far as material) a consolidation Act (see its long title). I do not therefore consider that the wording of section 54 of the UK Companies Act can affect the interpretation on this point of section 56 of the Companies Act of Trinidad and Tobago.

(v) One of the objects of the particular wording under consideration may well have been to prevent a company in the position of NRL saying that the amount due under the guarantee immediately after the deed of mortgage had been executed was nil so that the amount to be deducted from realisable assets under the free asset deficiency test was nil. The calculation required to be carried out is not of the liability due under the deed of mortgage but of the assets pledged or encumbered. This inference as to the likely aim of the free asset deficiency formula is supported by the statutory history. The Companies Act of Trinidad and Tobago was first enacted in 1995. It followed the model provided by section 44 of the CBCA. Prior, however, to 1995, Farley J in the Canadian case of *Clarke v Technical Marketing Associates Ltd Estate* (1992) 8 OR (3d) 734 (Gen Div) had held that "the amount of any financial assistance … in the form of a guarantee" under section 20(1)(d) of the Ontario Business Corporations Act would be the amount which at the relevant date there were reasonable grounds to suppose the beneficiary of the guarantee would then call on it. The Companies Act of Trinidad and Tobago was first passed after this decision, and that decision forms part of the background to the Act which is admissible at least as showing the mischief to which section 56(2)(b) was directed: see the recent decision of the UK Supreme Court in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343. The Parliament of Trinidad and Tobago adopted the wording of section 44. Thus the Companies Act of Trinidad and Tobago, unlike the CBCA, stipulated that, where the company had given a guarantee, the amount of the financial assistance had to be "in the form of <u>assets pledged or encumbered to secure a guarantee</u>." In my judgment the use of these words in preference for the words construed by Farley J from section 20(1)(d) of the Ontario Business Corporations Act was likely to have been for the purpose of ensuring that the full amount of the assets charged was deducted from realisable assets when a guarantee was given. In my judgment, in the vernacular the form of words which I have quoted from section 56(2)(b) would be said to do "what it says on the tin".

(vi) The whole of NRL's assets is charged by the mortgage so in my judgment there is no basis for taking some part only of the Culloden Estate into the section 56(2)(b) calculation. Indeed, as I have suggested above (and must often be the case) a bank might have a commercial reason with the expectation of project funding to take an all moneys charge. Such a charge would in this case automatically provide security for advances to NRL which the Borrowers guaranteed.

(vii) Section 56(2)(b) does not prevent NRL from executing any further charge over the same assets (ie a second charge).

(viii) The basis of valuation for the assets pledged or encumbered is not specified but, for reasonable grounds to exist, the valuation must be taken on a basis consistent with the first element of realisable value. That does not raise any separate issue on this appeal.

(ii) Second component: [liabilities and paid-up share capital]

(a) **Liabilities**: should be taken as US$184,279.90 (para 53 above);

(b) "**stated share capital**": this is paid up share capital (section 35 of the Companies Act). According to the shareholders' agreement this was US$200. Under FCB's conditions the Borrowers had to provide "equity" of US$825,000 into the acquisition prior to drawing on the facility provided by FCB. It may therefore be that the share capital of NRL to be taken into account was greater than the amount of US$200, but this has not been proved. So it should be taken as that sum for present purposes.

83. In conclusion on this issue, it was common ground that NRL's only asset was the Culloden Estate (see para 6 of the witness statement of Mr Ramlal). On the facts of this case, the first component of the formula is thus necessarily nil whatever the value of the Estate. The second component is US$184,479.90. There were bound to be some liabilities and their precise amount, if not that figure, is not material. Therefore, there existed a free asset deficiency and the prohibition in section 56(1) applied. Therefore, the mortgage is unlawful. Under the Companies Act of Trinidad and Tobago, the mortgage can only be enforced in accordance with section 57.

84. Under the general law, if an agreement to give financial assistance may be performed without breaking the law, it may be enforced unless the object was to break the law: see, in the context of financial assistance, *Brady v Brady* [1989] AC 755. But in this case, there was no way in which the mortgage could be lawfully given unless the guarantee was limited to specific assets leaving a margin equal to the second element of the formula. But there was no suggestion of this and the court cannot rewrite the parties' agreement.

I. FCB CANNOT ENFORCE THE MORTGAGE IN RELIANCE ON SECTION 57

85. The issues here are (1) whether FCB is a "lender" for the purpose of section 57, and, if it is, (2) whether it was a lender for value, and (3) whether it had notice of the contravention.

86. In my judgment, FCB is plainly not a lender for the purposes of section 57. The ordinary meaning of "lend" is to provide something to someone on the basis or expectation that it will be returned. So, to be a lender for this purpose, it must have lent money to the company or an affiliated company (see the opening words of section 56(1)). There is no company which could fall within the definition in section 5 of the Companies Act of Trinidad and Tobago of affiliate relationship.

87. The argument that "lender" includes FCB because it lends money to the Borrowers leads to absurdity. Section 57 would serve no purpose if the lender is to some other company since in the case of such a loan, there would be no question of that loan being rendered unenforceable because of section 56 in any event. Further, if "lender" incudes lender to a third party, and the company which has breached section 56(1) has given financial assistance involving a transfer of value, the mischief to which section 56 is directed could be evaded as there would be no test applicable to ensure the propriety of the transaction carried out by the company. Indeed, that result would render the law incoherent.

88. Furthermore, the word “lender” cannot be interpreted to include the obligee of a guarantee because section 56 plainly makes a distinction between loans and guarantees.

89. If the word “lender” means in a particular case the lender to a third party, the steps to enforcement must on the ordinary meaning of the statute be taken in the same capacity, ie qua lender to the third party not in some other capacity. So, it does not help FCB to hold that the expression “lender” includes “lender to a third party” in any event. It would still not be able to rely on section 57. It needs to be able to enforce the provisions of the charge given by NRL. We are concerned with a guarantee which takes the form of provision of security only but the same would be true if there was a personal covenant of guarantee. In many cases there will be a personal covenant to guarantee, and the guarantor will also often agree to be liable as a principal and not as surety only. Where that happens, the company is a principal obligor and it would not in that case be an ordinary use of the word “lender” as including the beneficiary of the guarantee (see para 88 above).

90. I conclude that for these reasons FCB is not in any event a “lender” within the meaning of section 57. In those circumstances it is unnecessary to consider issues (2) or (3) above.

91. There is no room for permitting enforcement of a transaction which contravenes section 56(1) in any circumstances other than those specifically permitted by section 57. To hold that other parties could take steps would usurp the decision of the Parliament of Trinidad and Tobago, which was to deny enforcement save in the limited circumstances expressly set out. In other words, it is not open to the court, as the Board suggests, to enforce transactions in breach of section 56 under the common law doctrine of *Patel v Mirza* in ways that go beyond what is permitted by section 57. For the same reason, section 517 could not confer any right on the beneficiary of a guarantee to enforce a transaction which went beyond section 57. The specific provisions of section 57 must override the general provisions of section 517, if they go that far: *generalia specialibus non derogant*.

J. FAIRNESS

92. FCB contends that it is not fair at this stage of these proceedings for it to be called on to address the question of whether section 56 is contravened and if so whether it had notice of any contravention, since it had no opportunity to plead to these issues or to lead evidence specific to them at trial. But in my judgment, it is protected from any unfairness by the principles that have been developed in the

authorities: see *Edler v Auerbach*, above. Applying those principles, I consider that there is no material factual issue raised by this judgment which depends on an issue on which there was no evidence at trial which was agreed or admitted without challenge. Moreover, fairness only goes to the evidence, and not to questions of law as to which FCB has had sufficient opportunity to prepare submissions.

93. If I am right on statutory interpretation, it might be said with some force that not to decide on the grounds put forward by the Board the issues that have been raised on sections 56 and 57 does not deal fairly with NRL's case, it having adopted the position before the Board that section 56 is breached.

94. I note that before the Board FCB has failed both in writing and orally (even in response to enquiries from the Board) to deal with the question whether it was on notice of the contravention by answering that it was not aware of the contravention. All section 57 requires is lack of notice and notice is different from knowledge. FCB has had a full opportunity to identify evidence which could have been called and has failed to identify any such evidence on any of the issues discussed in this judgment. This supports my conclusion that FCB cannot complain that the process before the Board was unfair because it had not been able to plead to any relevant issue or call any relevant evidence at trial.

K. THE JUDGMENT OF THE BOARD ON SECTIONS 56 AND 57 OF THE COMPANIES ACT OF TRINIDAD AND TOBAGO

95. The essence of the difference in view between the Board and myself is that the Board concludes that it can dispose of the sections 56 and 57 points in issue on this appeal without deciding them because "it does not appear with sufficient clarity that there is disclosed a contravention of section 56" (para 34 above). I do not agree that the Board can avoid deciding points of law in this case: as explained above and will be amplified below, there is no relevant question of fact which has not been determined or on which unchallenged evidence has not been led without deciding the points of interpretation in a manner contrary to my interpretation. To put it another way, the point cannot be sustained that there are issues of fact to be decided in the courts of Trinidad and Tobago unless the Board also reaches a positive decision that I am wrong on the interpretation I have placed on sections 56 and 57.

96. The points of statutory interpretation which the Board identifies are principally set out in paras 35 to 38 above, which, as explained, the Board does not decide. The first concerns the "amount" to be deducted under section 56(2)(b). I will not repeat my interpretation of this requirement in the present case (paras 78-81 above). I have

explained why I consider that section 56(2)(b) is drafted as it is in relation to guarantees and that what must be deducted is the amount of all the assets which have been subjected to the mortgage, not the amount secured (which may not be ascertainable). The relevant deduction applies only to guarantees. The Board's interpretation suggested as an alternative is that the "amount" is the amount secured, but neither the legislature nor the Board provides any guidance how or when that amount will be ascertained before the principal debtor defaults and a demand is made under the guarantee.

97. On my interpretation, contrary to para 36 above, no factual issue is raised by para 24 of the Board's judgment. I have also explained that, contrary to the Board's approach, the "amount" of assets is not under section 56(2)(b) limited to the aggregate of balance sheet values.

98. The Board's second point relates to the interpretation of the following words in section 57, namely "lender for value in good faith without notice of the contravention". The Board sets out two possible interpretations and makes no assessment of their merits and it does not decide between them. The Board does not address the points which I have made, including the point that the word "lender" cannot in this context include a lender to a third party (paras 85-91 above and paras 99-101 below).

99. If "lender" includes a lender to a third party, it would leave the guarantor's position fundamentally unprotected contrary to the evident intention of the legislature. The court would have to enforce a charge given to secure a guarantee by the company whose shares were being acquired where the guarantee was given by the company whose shares are purchased even though there was no semblance of benefit to the company. The Board hypothesizes that the words "for value in good faith" provide protection to the company whose shares are being purchased because the lenders' enquiries would have to extend to the financial position of the company. That seems unlikely because it is trite law that "good faith" means only honesty so there is no requirement for the lender to display diligence in making enquiries into the position of the company. It may also be more difficult for the company to be compensated for the consequences of the unlawful transactions if it has to rely on breach for breach of duty and constructive trust. There would therefore under this interpretation be less protection for the company. That raises a real doubt as to whether section 57 could have been intended to have that effect.

100. Moreover, there is no good reason why the legislature should concern itself here with "value" if the lender is a lender to a third party. If it provided no value to the

third party, nothing will be due under any guarantee from the company whose shares are being purchased.

101. As indicated in para 95 above, the Board makes the point (expressed as its second point in para 34) that "there are factual questions which it would not be just to resolve without the Bank having been given the opportunity to address them in the appropriate tribunal of fact in Trinidad and Tobago". This is in my respectful judgment not the case unless the Board has first decided the issues of interpretation to ascertain whether any factual issue arises. To take the "amount" point, the issue of law comes first. The question of fact simply does not arise unless my interpretation of the relevant words "the amount of any financial assistance … in the form of assets pledged or encumbered to secure a guarantee" is held to be wrong. If the point were decided in agreement with me, no factual question could arise as to the amount. The same is true with necessary modification in relation to the interpretation of the words "lender for value in good faith without notice of the contravention".

102. Likewise, if the Board were to hold in agreement with me that "lender" means "lender to the company" it would be obvious without any further evidence that FCB could not take advantage of section 57 in any event.

103. Logically, therefore, the points of statutory interpretation must be considered first before it can be said that any factual issue arises.

104. Of course, the Board would be in a better position if the matter had been raised below and the Court of Appeal of Trinidad and Tobago had given more reasons for its conclusions. But the point has been fully argued with the assistance of local attorneys and no reference has been made to cases decided in Trinidad and Tobago. It is correct as the Board states, that the two expressions - "amount" (in connection with guarantees) and "lender for value in good faith without notice of the contravention" - do not appear in the UK financial assistance provisions. However, sections 56 and 57 share the same roots as current UK law. The primary concept is "financial assistance", which the UK courts have considered in some detail. In addition, in this judgment, I have made points by reference to the UK provisions. There are other parallels. For instance, under the UK provisions some forms of financial assistance are lawful where there is no material net asset reduction. In addition, there are some parallel aims in the legislative policy between both jurisdictions.

105. The Board's further point in para 34 is that to decide the illegality issue would be unfair to FCB because it is raised so late. But it can hardly be unfair to FCB to decide the issue if there is no additional factual issue. Even if there were, FCB has not

identified any point on which it would wish to adduce relevant evidence. If it had done so, then different considerations would be likely to apply.

106. The Board expresses the view that "the issue of illegality is one that the company can choose to raise, or not raise, at its option." (para 34 above, passage beginning "Thirdly"). That is not in my judgment a correct reading of section 57. It is a narrow provision which cannot be generalised into a proposition that a company can always take steps to enforce a transaction which is unlawful financial assistance. All that section 57 does is to allow the company to enforce contracts made in breach of section 56(1). As a small example, the company could not seek an order of the court compelling a person to accept a gift of tax losses or other assets which it had gratuitously made, and which constituted financial assistance, or take proceedings in tort against the other party to the transaction in respect of unlawful financial assistance.

107. I agree with the Board (para 34 above) that it does not follow that, just because under section 57 the company is permitted to enforce contractual rights in consequence of a breach of section 56(1), there is no illegality if the company fails to take the point that the transaction is unlawful when financial assistance is sought to be enforced against it. The reason for that is that the enforcement of a right of the company by the company is completely different from allowing the beneficiary of a guarantee to enforce its rights against the company. Enforcing a right conveys some element of benefit to the company whereas succumbing to the enforcement by someone else does not.

108. In any event the illegality is not cured when section 57 is used: the transaction remains contrary to section 56 and the court's powers are limited to those in section 57. The attitude of the company is therefore nothing to the point under these provisions. The reason for this is obvious: the company may by then be under the control of those in whose personal interests it is that the guarantee or other financial assistance should be enforced against it. To hold otherwise on the company's failure to act would fundamentally undermine the protection given to companies and their creditors through section 56.

109. Therefore, I respectfully do not find persuasive the point made by the Board that, as NRL did not take the illegality point in the courts below and has only taken this point before the Board, that "not least where the claim is one against the company, it may be thought to indicate that, to avoid procedural unfairness to the other party, caution should be exercised before a court does so [ie raises a point of illegality]". But the point has now been raised, and when the point is raised that a transaction is illegal, courts must ensure that they are not aiding the enforcement of an illegal transaction.

It must also be remembered that in breaches of section 56 the victim is the company and not the lender to a third party. The order which I would make does not involve procedural unfairness for the reasons that I have already given.

110. The fact that the points of law are not "straightforward" (above, para 42) also does not mean that the Board cannot or should not decide them.

L. CONCLUSION

111. I would allow this appeal. It clearly appears from the evidence that the transaction constituted by the deed of mortgage amounted to unlawful financial assistance within the meaning of section 56. The prohibition against giving such financial assistance was triggered by the deficiency of assets which resulted from applying the statutory formula in section 56(2)(b). FCB cannot rely on section 57 because so far as NRL was concerned it was not a lender at all for the purposes of that provision. It is unnecessary to consider any further question as to whether FCB could have brought itself within the category of a lender for value and without notice.

112. The Board should not lend its assistance to FCB to enforce the mortgage. It is important that the Court should see that the law is observed. It follows that it is not necessary to decide any other issue arising on this appeal. The appeal should be allowed.