THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012 - 03240

BETWEEN

UNIT TRUST CORPORATION

Claimant

AND

RICHARD WOODRUFFE

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Ravi Nanga for the Claimant

Mr Anil Maraj for the Defendant

Dated: **24 May 2016**

REASONS (Edited Oral Judgment)

1. By notice of application filed on 9 July 2013, the claimant applied for summary judgment. Oral submissions were made by the claimant. The defendant's attorney requested the opportunity to file written submissions. This was done on 10 October 2013. A brief reply was made by attorney for the claimant.

2. The test for summary judgment is whether the defendant has a realistic prospect of success on its defence to the claim. The claimant must satisfy the court that the defendant has no real prospect of succeeding.

3. Under a syndicated transferable loan agreement between the claimant as arranger/lender and the defendant as borrower the claimant agreed to two separate loan facilities to the defendant each in the sum of $5,000.000.00, called Facility 1 and Facility 2. Facility 1 was reduced to $2,457,000.00 because the claimant was unable to provide sufficient security (the adjusted loan).

4. In accordance with the agreement, RNW Investment Limited by a Collateral Mortgage Deed dated 11 April 2008 granted a mortgage of two properties described in the Deed. In addition, by a Collateral Deed of Acknowledgment of Indebtedness, Agreement to Pay and Undertaking, the defendant agreed to a mortgage over a particular apartment at a place called La Rive Development, in which he was involved. The Defendant did not grant this mortgage. The loans then became payable on demand.

5. Initial disbursement of Facility 1 in the sum of $2,457,000.00 was made on 27 May 2008 and the first payment was due on 27 June 2009. Disbursement of Facility 2 was done by the claimant on the defendant's behalf to a First Caribbean Scotia Bank account in the sum of $5,000,000.00. The defendant pledged a substitute unencumbered property to secure the Facility 1 loan. The property offered as security was encumbered. The adjusted loan facility was, therefore, not restructured. Facility 2 matured on 26 May 2010.

6. The defendant also defaulted on payment which made the whole sum due and owing being payable on demand.

7. On 17 October the claimant wrote to the defendant advising of the default and that payment of the whole was due. The defendant was therefore indebted. A pre-action letter was sent to him on 15 May 2012. On 15 May 2012 the claimant and the defendant met to liquidate his debt. By letter of 11 June 2012 the defendant wrote a letter to the claimant acknowledging the debt and confirmed his proposal to liquidate the debt. It remains due and owing.

The Defence

8. The Defendant admitted paragraphs 1, 2, 3 and 4 of the statement of case. This was that there was the loan agreement with two Facilities, 1 and 2. Certain preliminary points were taken which were dealt with in a previous ruling by this court. Paragraph 4 of the defence says the claimant knew that the money in Facility 1 was a loan to consolidate his debt and Facility 2 was to provide financing for a construction project called "Renaissance at Shorelands". The defendant averred that repayment was to be had from the return paid to the defendant after completion and sale of all units constructed in this project.

9. At paragraph 5 he says it was the understanding of the parties that the sale of the defendant's interest was to be the primary source of repayment of the loan facilities and any other security was subordinate to this source of payment.

10. At paragraph 6 he said he did not have the benefit of independent legal advice before executing the syndicated loan agreement or any of the contemporaneous documents. Further, that he had not been given the opportunity to obtain such advice before. At paragraph 7 the defendant admitted paragraph 5 of the statement of case subject to the understanding mentioned above. Paragraph 5 of the statement of case was to the effect that the defendant was to provide security for the loan agreement. That security was for

the benefit of the lenders and the claimants were no longer the lenders by their transfer or assigning of its rights under the syndicated loan agreement. At paragraph 9 he admitted certain securities were given. Paragraph 10 pleaded a variation that that the defendant would grant the claimant a mortgage over another property, Lot 13 Townhouse Site Road Reserve, instead of the Carenage property. Paragraph 9 of the statement of case was admitted; that is that the claimant disbursed Facility 1. Paragraph 10 and 11 of the statement of case was admitted. This was that Facility 2 was paid and that the defendant agreed to substitute another property by a pledge. Paragraph 12 of the statement of case was admitted. This was that the claimant agreed to a restructuring of the loan facilities. At paragraph 15 of the defence he denies the property pledged was encumbered.

11. Paragraph 14 of the statement of case stated that Facility 2 matured and the defendant failed or refused to pay. At paragraph 16 of the defence the defendant said:

> "Paragraph 14 is admitted except that the Defendant avers that he has not refused to pay the sums set out therein but engaged with the Claimant initially and then its assignee or transferee in negotiating a method of settling the said debt and immediately prior to the filing of this action was involved in negotiations for settling the debts related to the syndicated loan agreement."

12. Paragraph 15 of the statement of case was admitted by the defendant. That said that the claimant gave the defendant the option to sell three properties with the net proceeds of sale being applied to the liquidation of Facility 2 and the defendant did not accept that

offer. He said the claimant's representatives told him they would give him further time to complete the sale of the properties and the development of Lot 13 townhouse site. He denied the property was encumbered.

13. At paragraphs 18 to 21 he set out the transfer/assignment of the loan agreement.

14. Paragraphs 18 and 19 were "neither admitted or denied". These were the sums the claimant said was payable to them by the defendant. Paragraph 20 of the statement of case was admitted to the extent that it said he received a letter dated 15 May 2012. That was the pre-action protocol letter. At paragraph 23 he said:

> "...The servants and/or agents of the lender orally communicated to the defendant that the Lender would take no enforcement action until the proposal had been considered by the Lender's board of directors and a decision communicated to the defendant. The defendant provided a proposal to the said officers and / or servants of the lender on or about 11 June, 2012 by letter of even date and to Mr Kevin Dolly."

15. He said Mr Dolly (the Relationship Manager of the claimant) said it would be reviewed by his superiors. He said he was awaiting confirmation from the claimant or PMCL (assignee/transferee) as to their acceptance or denial of the proposal. It was therefore inequitable for the claimant to initiate the claim.

16. At paragraphs 27 and 28 he avers the interest rate is penal and exceptionally high in the circumstances.

17. The defendant's letter of 11 June 2012 is important. He confirms the meeting. He acknowledges the loan, Facility 1 and 2. He sets out a plan to liquidate the debt. This is by way of mortgage on certain properties. He accepts Facility 1 debt to be "the approximate balance outstanding $230,000.00" and Facility 2 to be "the approximate balance outstanding $7,700,000.00".

18. The defendant's attorney addresses several points in his submissions. The first is that the court should be slow to grant summary judgment because of what may emerge from the disclosure process. There is no suggestion of what that may be except to say what may have passed between the claimant and the current lender Portfolio Credit Management Limited. There really is no basis for the court speculating on what may emerge. The defendant was required to plead his case fully and refer to any documents which supported his claim.

19. The court had previously ruled that the claimant is a proper party to seek to enforce the loan agreement. The court had to look at the defence to see if there was a realistic prospect of success of the defence. Nothing raised in the defence about the issue of the loan being assigned or transferred affected the defendant's obligation in respect of it.

20. A second issue raised in the submissions was promissory estoppel. The argument was that an oral promise was made that no enforcement action would be taken until his proposal for settling the debt was received and considered. For this to succeed there must be a promise, reliance on it by the defendant and some act by the defendant to his own detriment. Nothing has been suggested in the defence that the defendant acted to his detriment. The particulars in the defence are also vague. He would as a result have been handicapped in advancing evidence on the issue. The defendant relied on the case of **Royal Bank of Scotland PLC v Luwum [2008] EWCA Civ 648**. In that case Luwum was told that if he brought his account with the bank below its overdraft limit within a three month period, the Bank would not bring any proceedings against him within that period and would review his account during that period. To that end, Luwum raised money and borrowed from friends and made a number of payments to the account and yet the Bank brought proceedings within the period.

21. That case was clearly distinguishable from the present case. Luwum had acted in reliance of the promise to his detriment. That was also a definite promise. The Board simply considering the matter does not equate with the definite promise to Luwum. At best here any promise raised in the defence, assuming it to have been made, was simply to consider the proposal being advanced. In any event, the defendant has not showed where he has acted on the matter. In my view, therefore, there is also no realistic prospect of success on this issue.

22. The final matter was whether the interest clause was a penal. The defendant has submitted in line with **Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Car Co Ltd [1915] AC 79** at 86-88 that a contractual stipulation for a payment in the event of a breach will be enforceable if it is a genuine pre-estimate of damage, but not enforceable if it is a penalty. He submitted that whether the rate of interest charged was exorbitant or within the normal range of interest was a matter for trial. He also submitted that if the court finds that that issue is triable, the court may as well put the matter as a whole for trial.

23. That approach would go against the whole purpose of the CPR to deal with cases efficiently and justly. Why should the court send a case for trial several issues when there is only one that arises? I respectfully disagreed with the defendant's submission. Assuming that the interest rate point is one with some force, in any event, the defendant has asked for such alternative interest that the court may consider appropriate. That may be preferable an option rather than to direct a trial on an issue as narrow as that. However, the defence itself simply says the rate is exceptionally high and penal in nature. It has not set out facts to show what the normal rate should have been. A party must plead its case fully if it is to advance. Merely saying it was penal is not enough. What was it and what should it have been and why was not stated. On this basis also the defence is not realistically likely to succeed.

24. The defence accordingly accepted the loan, it accepted the defendant's failure to pay it and accepted he was indebted. At its highest his case was that they agreed to hold off on bringing a claim. He also said he got no independent legal advice. I do not think this would likely succeed either. He has given no particulars of what he did. Was he prevented from doing so? It would have been in his interest to do so. There is not likely to have been any legal requirement for him to be advised of that. As a man of business engaged in a multi-million dollar transaction he ought by any reasonable standard to have known that it would be prudent to engage in obtaining legal advice before entering any such transaction.

25. There was therefore no defence that has been raised that has a realistic prospect of success. Accordingly, the claimant was entitled to summary judgment on their claim in terms of paragraphs 1, 2 and 3 of the claim form. Interest was ordered in terms of the court's order of 4 February 2014.

26. After hearing submissions I concluded that prescribed costs applied and the defendant was ordered to pay prescribed costs in the sum of $242,156.36.

Ronnie Boodoosingh
Judge