

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-03378

BETWEEN

HERMITAGE PROPERTIES LIMITED

CLAIMANT

AND

COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED

DEFENDANT

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Mervyn Campbell and Mr Marc Campbell for the Claimant
Mr Ravi Nanga and Ms Elena Araujo for the Defendant

Date: 2 May 2018

JUDGMENT

1. The Claimant mortgaged certain lands to the Defendant. By its claim form the Claimant sought:
 - a. An order that the Defendant re-convey and/or release from their mortgage 40 lots of land in Arima described in a particular Certificate of Title;
 - b. An account of moneys collected from the proceed of the sale of lots under the mortgage.

2. The Claimant says it has proved the mortgage has been repaid. The Defendant says no.

3. Affidavits were filed by Mr. Michael Amar, Allan Hewitt and Carlos John on behalf of the Claimant. The Defendant filed an affidavit of Usha Jawahir, its financial manager.

4. The parties accept a loan of \$4.2 million was made secured by a mortgage.

5. The Defendant accepts that \$7,424,200.00 has been paid. However, the Defendant says there were two further loan facilities in the sums of \$2,700,000.00 comprising a second mortgage for \$1.7 million over the subject lands and a further \$1 million facility.

6. The main issues for the court to decide were:
 1. Whether the Claimant was granted further facilities in the sum of \$2.7 million secured by the mortgage lands;
 2. Did the Defendant apply the moneys paid to the various facilities;
 3. Were the payments sufficient to satisfy the loans?

7. The Claimant filed affidavits of Michael Amar on 7 October, and 13 December, 2016; Carlos John on 9 March, 2017 and Allan Hewitt on 9 March, 2017. The Defendant filed an affidavit of Usha Jawahir on 29 May, 2017.
8. The Claimant has advanced it has paid the moneys due in full. The Defendant says no.
9. The Claimant asks for an order releasing the mortgagee on the 40 lots of land.
10. There is agreement that there was a \$4.2 million dollar mortgage. The Claimant did not mention another mortgage. Based on the documents advanced by the Defendant it is clear that there was a second mortgage. The Claimant has not cross-examined the Defendant's deponent to dispute this \$1.7 million mortgage.
11. The Defendant referred to a further loan facility of \$1 million. However, no mortgage has been produced in support of this assertion. Ms Jawahir deposed her affidavit based on the company records. She did not have first-hand knowledge of a third mortgage. She has been unable to locate documentation to support a third mortgage.
12. The Claimants deny a third mortgage. Based on the available evidence the existence of a third mortgage has not been established. At its highest, I can conclude, and do, that there was a further loan facility, but it has not been secured by a mortgage over the subject properties.
13. Mr Amar in his affidavits established the location of the lands and how they were divided up. He gave an account of the distribution of the lots and of payments made. He gave evidence that the Claimant re-paid the \$4.2 million due on the first mortgage together with interest in the sum of \$1,120,000.00. He further asserted that there was an excess of payments. He said in paragraph 9 of the 13 December affidavit that the Claimant is entitled to the sum of \$1,970,000.00. He said the mortgage debt was \$5,320.00 and that there was an undervalued loss on the sale of two lots, Nos. 41 and 77 in the sum of \$638,680.00. He said the payments made totalled \$7,290,000.00.

14. The problem with these assertions of Mr Amar is two-fold. He has not produced any documents to support how he arrived at these calculations of interest and the undervalued lots. These unfortunately are merely assertions. Second, these figures are based on a \$4.2 million mortgage. They do not take account of the further \$1.7 million mortgage on the property.
15. Thus, while the sum of \$7,424,200.00 has been accepted as paid by the Defendant, the principal on the two mortgages amount to \$5.9 million. However, there was an additional loan facility of \$1 million. I am unable to conclude that the mortgaged properties were used as security for this. In all, \$6.9 million was borrowed and \$7,424,200.00 was paid to date.
16. Usha Jawahir is the Finance Manager of the Defendant. She has reviewed the Defendant's file in this matter.
17. She said the Claimant is still indebted to the Defendant. She said the Claimant had two accounts. One was in respect of the \$4.2 million mortgage and the other was for the \$1.7 million mortgage and \$1 million facility.
18. She detailed in an account statement the payments made to those two accounts. In total, she says \$5,351,200.00 was paid to Account No. 1. In respect of Account No. 2 \$2,073,000.00 was paid.
19. She does mention that there were interest and other charges. What her statement lacked were statements of what was the applicable interest rate to each account, how much did this translate to, what were the other charges incurred, and how and why these payments were applied to one or the other account.
20. There was no cross-examination of her. However, lack of cross examination does not fill the omissions in the provision of information. One would have expected that the Defendant had the capacity to produce detailed records of what the payments were, how they were applied and how the resulting debt she cited was found still to be due.

21. There are two bits of evidence from Mr John's and Mr Hewitt's affidavits that are also relevant.
22. Mr John indicated that as the manager of the Defendant's mortgage department in 1998 he was aware of an agreement in place for the repayment of the mortgage to the effect that upon the sale of an individual lot of the mortgaged property, a payment would be made directly to the Defendant to obtain a partial release of that specific lot. He was aware that payment were routinely made to the Defendant and the Defendant would execute a partial release of that specific lot. He also confirms that the arrangements for the repayment of the mortgage set out in the affidavits of Mr Amar and Mr Hewitt were correct. Mr John as the manager of the Defendant's mortgage department can be considered to be a person who would be in the know in relation to the transactions made.
23. Mr Hewitt said in his affidavit that the Claimant's liability would be liquidated by remitting a minimum of \$100,000.00 to the Defendant from the sale proceeds of each of the 49 houses. In turn, the Defendant would execute partial releases of the specific lots on which the houses were built and transfer ownership to the purchasers.
24. Where loans were taken from the Trinidad and Tobago Mortgage Finance Company Limited (TTMF) for the purchase of houses, moneys would be remitted by TTMF directly to the Defendants. He has referred to a specific example where an agreement made by a purchaser with TTMF included a specific clause authorising TTMF to pay the sum of \$135,000.00 to the Defendant.
25. Further, it is to be noted that in a letter in reply to a pre-action letter sent by the Claimant on 9 June, 2016 the then attorney for the Defendant, Mr Russell Huggins, wrote on 29 June, 2016:

“Our client is not prepared at this time to dispute your arithmetic. However, with respect to your claim for 40 lots, we would have to confirm this since there are some lots for which payments have been made and transfers executed but have not to date been endorsed.”

26. A further letter of 15 August, 2016 detailed that certain lots had been sold but the transfers were not yet done and another lot was sold for \$200,000.00.
27. Mr Amar claims lots were sold at an under-value. However, there is no basis on which the court can conclude this has occurred.
28. What this story tells is that, considering the evidence as a whole from both sides, there is certainly lack of details and information upon which any proper assessment can be made of the state of the accounts between the parties. The Claimant has made assertions that the debt has been paid but has not given evidence about the second mortgage and the additional loan facility. The Defendant has omitted to provide the details of why they say the debt is not paid up in full. There is also no evidence to dispute what Mr John and Mr Hewitt have said about how payments made in respect of specific lots were treated with and whether this went to a partial release.
29. It is for the Claimant to prove they have satisfied the burden of proving that the lots should be re-conveyed. However, that does not absolve the Defendant, as the party lending the money, from being able to give a detailed record of how the payments have been applied in accordance with the mortgages and showing how the figures have been arrived at.
30. Moreover, there has been no contest to the evidence of Mr John and Mr Hewitt about the arrangement for the partial releases of the various lots. This information should be forthcoming as to how this process occurred.
31. Additionally, I have taken note of the contents of an affidavit filed on 8 November, 2016 by Mr Russell Huggins especially at paragraphs 8 to 11. This in effect stated:
 1. The Defendant's records were removed from the Defendant's premises;
 2. The need for a search of the land registry;
 3. The need for an accounting exercise.

32. Taking a less adversarial approach to the matter, the bottom line is that significant sums of money have been paid which amount to more than the principal amounts on the mortgages. I do not think the Defendant has done any definitive analysis of the state of the accounts and how the moneys paid were applied. Ultimately, if the payments are made, the claimant is entitled to the remedy of having the lots released under the mortgages. A duty is placed on the defendant to provide full information to the claimant on the state of their payments and mortgages. The claimant should have the benefit of a proper breakdown of their payments.
33. At the same time, there is uncontested evidence as to the process to be applied when lots were sold regarding partial releases. The approach articulated by Mr Huggins in his affidavit would accordingly have been a sensible approach to adopt.
34. Further, the statement provided in Ms Jawahir's affidavit set out that there were "charges", "other charges" and "incurred charges." What these charges were and why they were applied is not dealt with. The Claimant at least has a right to know this so that it can be determined if these were legitimate charges under the mortgages and loan facility.
35. While it was open to the Claimant to probe these matters in cross examination it was also entitled to advance that the Defendant had not discharged its evidential duty to assist the court fully, given that the Defendant ought to have supporting records, to clearly set out how the end figures were arrived at.
36. Since I am unable to make definitive conclusions on the evidence before me as to how and why the payments made by the Claimant were applied and how these related to partial releases of individual lots of land, I would order:
 - a. The Defendant to provide a detailed account verified by affidavit to the Claimant and the Court on the payments made, when made, how the interest and charges were computed and why payments were applied to each account and whether releases or partial releases were made for individual lots, such as their records allow;

b. This information to be provided within three months of this order;

37. Once this is done, I will be in a position to consider whether an order should be made under paragraph 1 of the Fixed Date Claim and the terms of the order.

38. I will further make an order in terms of Part 2 of the fixed date claim to be provided within three months of the order. It is the right of any borrower to obtain a statement of their account.

39. This matter is accordingly adjourned to for a further hearing once this information has been provided.

Ronnie Boodoosingh
Judge