

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-00686

BETWEEN

ROMATI MARAJ

CLAIMANT

AND

ASHAN ALI

TIMMY ASHMIR ALI

DEFENDANTS

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. V. Paul, Instructed by Ms. J. Pertab

For the Defendant: Mr. N. Ramnanan

Date of Delivery: 26th September, 2012

DECISION

BACKGROUND

- [1] The Claimant purchased from the Defendants a parcel of land (“the said land”) in Carapichaima by Deed of Conveyance dated the 16th September 2005.
- [2] By letter dated 9th March, 2009, the Claimant was advised by Mr. Ramdath Dave Rampersad, liquidator of the Hindu Credit Union Cooperative Society Limited (“HCU”), that the said land was subject to three (3) Instruments of Charge in favour of the HCU to secure loans granted to the Defendants. The said instruments were issued under the **CO-OPERATIVE SOCIETIES ACT, CHAP. 81:03**.
- [3] By letter dated 31st March, 2009 the liquidator further advised the Claimant that the sums due under the said Instruments of Charge totalled \$121,389.55 plus interest at the rate of \$23.74 per day. He also stated therein that should the sum not be paid the said land would be sold pursuant to the terms of the said Instruments of Charge.
- [4] By another letter dated 6th August, 2009, the liquidator confirmed to the Claimant that the sum now due and owing under the said Instruments of Charge amounted to \$127,397.55. Accordingly, the Claimant paid this sum to the HCU and duly received receipts in respect of these payments.

THE PLEADINGS

○ CLAIM

[5] On the 21st February, 2011 the Claimant commenced this action to recover the sum of \$127,397.55 paid by her to the HCU aforesaid. The Claimant contended that this claim arises out of a breach of the implied covenant for title as contained in **SECTION 27(1)(A)** of the **CONVEYANCING AND LAW OF PROPERTY ACT ("CLPA")**, **CHAP. 56:01**.

[6] The Claimant averred that the Defendants gave an implied covenant that the said land would be 'freed and discharged from all estates, encumbrances, claims and demands whatever other than those subject to which the conveyance was expressly made' as stated in **SECTION 27(1)(A)** of the **CLPA**. The Defendants breached this covenant since at the time of the conveyance of the said land they failed to disclose the existence of the Instruments of Charge in favour of the HCU over the said land.

○ DEFENCE

[7] By their Defence filed on the 14th June, 2011, the Defendants admitted that they conveyed the said land as beneficial owners to the Claimant; however they were not actually the beneficial owners of the said land at the time of the said conveyance; therefore, **SECTION 27(1)(A)** of the **CLPA** did not apply.

[8] They also pleaded that the applicability of this Section was conditional upon a vendor actually being the beneficial owner at the time of conveyance. They went on to state that they were not the beneficial owners of the said land at

the time of conveyance since it was subject to a charge in favour of the HCU. The existence of this charge meant that the HCU was the beneficial owner of the said land at the time of conveyance.

PRELIMINARY ISSUE

[9] At the Case Management Conference on the 20th March, 2011, the Defendants were granted Leave to raise the preliminary issue:

- i. Whether **SECTION 27(1)(A)** of the **CLPA** is applicable to these proceedings; and,
- ii. If so, whether the Defendants did convey the said land as the beneficial owners.

The Court ordered the parties to file written submissions on this issue and it was agreed that a decision on this preliminary issue would be determinative of the entire matter.

[10] I would like to note at this juncture that the following points raised in the Defence are not relevant to the issue before the Court, namely that:

- i. The sum demanded by the HCU to clear the three charges is incorrect; and,
- ii. Sums were paid to the Claimant's then Attorney-at-Law towards discharging the debt which were not deducted from the amount paid to the HCU.

These are matters to be dealt with between the Defendants and the HCU and/or Mr. Rick Ramparas, the Claimant's then Attorney-at-Law whom the Defendant alleged had actual and ostensible authority to act on her behalf and who did so act, collecting sums of money from the Defendant towards the discharge of the charges. The Claimant has denied this.

SUBMISSIONS

○ DEFENDANTS

[11] The Defendants filed their submissions on the preliminary issue on the 16th April, 2012.

[12] Counsel for the Defendant submitted that it is trite law in Statutory Interpretation that the word "and" is to be construed conjunctively. Therefore, the words "*the following covenant by person who conveys and is expressed to convey as beneficial owner*" in **SECTION 27(1)(A)** of the **CLPA** suggests that there can only be an implied covenant of title where the vendor is both expressed to convey as beneficial owner and is actually conveying in his capacity as beneficial owner. The Defendants vehemently deny that they were the actual beneficial owners at the time of the conveyance.

[13] In support of this contention, Counsel referred to **SECTION 76(1)** of the **PROPERTY ACT 1925** of the United Kingdom whose wording is identical to that of **SECTION 27(1)(A)**. He then argued that in interpreting **SECTION 76(1)**, the English Courts have held that in order for a covenant for title to be implied in a conveyance by sale the vendor must not only express to convey as beneficial owner but in fact he must be the beneficial owner at the time of

such conveyance. In support of this contention, he relied upon the cases of Pilkington v Woods¹ and Fay v Miller, Wilkins & Co.²

[14] Counsel went on to submit that upon a proper construction of **SECTION 27(1)(A)** of the **CLPA**, unless the vendor conveys property in his capacity as beneficial owner and he is also expressed to be such beneficial owner, there can be no implied covenant for title under **SECTION 27(1)(A)**.

[15] It was submitted by Counsel for the Defendants that the creation of the charges in favour of the HCU resulted in the latter acquiring the beneficial ownership in the charged property. Therefore, the beneficial title to the property was held by the HCU and **SECTION 27(1)(A)** is inapplicable in such circumstances as both criteria were not satisfied.

[16] In support of this contention, Counsel cited the case of Buchler v Talbot³ where Lord Miller opined:

“Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the charge and falls within the scope of the chargor’s bankruptcy or winding up.”

○ CLAIMANT

[17] The Claimant filed her submissions on the 16th May, 2012, wherein she contended that the Defendants’ mere denial that they are not the beneficial

¹ [1953] CH 770

² [1941] CH 360

³ [2004] UKHL 9, 51

owners of the said land is in breach of **PART 10.5(3)**⁴ of the **CIVIL PROCEEDINGS RULES 1998** (“CPR”). Counsel for the Claimant argued that the Defendants proffered no reason(s) in their Defence as to why they were not the beneficial owners at the time of the conveyance. In the circumstances, he urged the Court to find that Paragraph 2⁵ of the Statement of Case is admitted, or undisputed.

[18] With regard to the argument raised by the Defendants as to whether they conveyed the said land in their capacity as beneficial owners, Counsel contended that this argument is an improper attempt to introduce, through submissions, that which was not specifically pleaded. This argument, Counsel suggested, ought to have been properly formulated and set out as reason(s) in the Defence pursuant to **PART 10.5** of the **CPR**.

[19] It was submitted by Counsel that the concept of a beneficial ownership is separate and distinct from legal ownership. The issue, as to who the beneficial owner is, is a question to be determined by the Court on the merits of each case. That issue can only be decided by determining who retains use and possession of the property – who has control over the fruits of the item and may dispose of or otherwise use it for his benefit. In support of this, Counsel relied upon the cases of **Ayerst (Inspector of Taxes) v C & K (Construction)**

⁴ In his defence the defendant must say –

- a) which (if any) allegations in the claim form or statement of case he admits;
- b) which (if any) he denies; and
- c) which (if any) he neither admits or denies, because he does not know whether they are true, but which he wishes the claimant to prove.

⁵ By paragraph 4 of the said Deed of Conveyance, the Defendants as the Vendors conveyed and were expressed to convey as beneficial owners the parcel of land unto the Claimant as Purchaser.

Ltd.⁶ and *Medway Drydock & Engineering Co. Ltd. v The Beneficial Owners of Ship Andrea Ursula*⁷.

- [20] Counsel further submitted that there is nothing to suggest that prior to the conveyance, the Defendants had not been in possession of the said land or had been deprived its use and/or benefit.
- [21] Counsel noted that the authorities relied upon by the Defendants do not support their proposition that the creation of a charge grants beneficial ownership of the charged property to the chargor. In *Buchler v Talbot*⁸ Lord Hoffman affirmed the learning in *Ayerst v C&K (Construction) Ltd.*⁹ that it is the winding up resolution or order that divests a company of the beneficial ownership in its assets, not the creation of the charge itself. Prior to such an order, a company has all rights to use and benefit from the fruits of the assets charged.
- [22] On this point, it was argued by Counsel that the operation of a charge is dependent upon the statute that creates it and there are conditions which need to be satisfied before the transferral of beneficial ownership - *i.e.* from the owner of the property to the holder of the charge - can occur. Counsel went on to state that at the time of conveyance, in 2005, the Defendants were the beneficial owners of the said land as the HCU only sought to exercise its rights under **SECTION 29** of the **COOPERATIVE SOCIETIES ACT** in 2009.

⁶ [1976] AC 167

⁷ [1971] 1 All ER 82

⁸ *Op. cit.*, para 28

⁹ *Op. cit.*

ANALYSIS

- EFFECT OF SECTION 27(1)A OF THE CLPA

[23] SECTION 27 of the CLPA provides:

“(1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall be in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject matter or share of subject matter expressed to be conveyed by him, with the person if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say –

(A.) In a conveyance for valuable consideration other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner, namely:

... that the subject matter shall remain to and be quietly entered upon, received and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made ... without any lawful interruption or disturbance by the person who so conveys ... and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, encumbrances, claims and demands whatever other than those subject to which the conveyance is expressly made ... ”

[24] In order to properly determine this issue, one must first understand the meaning of “owner” and “beneficial owner”. The CLPA does not provide definitions to these terms. However, Black’s Law Dictionary, 18th Edition, defines “owner” as:

“One who has the right to possess, use and convey something; a person in whom one or more interests are vested. An owner may have complete property in the thing or may have parted with some interests in it.”

In addition, it defines “beneficial owner” as:

“One recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else...”

[25] The scope of ‘beneficial ownership’ was discussed by Brandon J. in Medway Drydock & Engineering Co. Ltd v The Beneficial Owners of Ship Andrea Ursula¹⁰, where he opined that “beneficially owned” could mean owned by someone who, whether the legal owner or not, was in any case the equitable owner. He then went on to say:

“[these] words seem to me to be capable also of a different and more practical meaning related not to title, legal or equitable, but to lawful possession and control with the use and benefit which are derived from them. If that meaning were right, a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully has full possession and control of her, and by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have.”

¹⁰ *Op. cit.*, p. 269

[26] Based on the foregoing and the pleadings, it is clear that the Defendants were the actual beneficial owners of the said land. Despite the charges held by the HCU over the land, the Defendants remained in possession and control of the land and utilised same for their benefit. There is nothing before me which suggests that at any time they were deprived of possession, control, use and/or benefit of the said land to displace their beneficial ownership of same.

[27] Further, **SECTION 29(2)(a)** of the **COOPERATIVE SOCIETIES ACT** provides:

“A charge shall so long as it continues in force confer on the society the following rights and impose on the society the following obligations, that is to say:

(a) The right upon the happening of any event specified in the charge as being an event authorising the charge to seize the property subject to the charge to take possession of any property so subject...”

This Section makes clear that it is only upon an act done by the chargee (*i.e.* the Defendants), which is specified in the charge instrument, that triggers the transferral of beneficial ownership unto the chargor (*i.e.* the HCU). There is no evidence of such an act having transpired so as to give beneficial ownership to the Defendants. In the absence of such an event, the Charge Instruments recognise that the borrower/chargee *“is entitled to retain possession and use of the property”*¹¹.

¹¹ Clause 3 of the Charge Instrument

[28] In addition to the foregoing authorities, I also had regard to the cases of David v Sabin¹², Re Ray¹³, Wise v Whitburn¹⁴ and Parker v Judkin¹⁵ which all support the position that the actual capacity held by a vendor is irrelevant.¹⁶

[29] Having decided that the Defendants were the actual beneficial owners of the said land, the remaining question to be answered is whether they were in breach of **SECTION 27(1)(A)** of the CLPA.

- COVENANT FOR GOOD TITLE

[30] The essence of the Claimant's claim for title is that the Defendants are in breach of the implied covenant in **SECTION 27(1)(A)** of the CLPA that the said land be free from any encumbrances.

[31] The covenant that land must be free encumbrances forms part of the covenant for good title. In covenants for title implied by statute, on a conveyance for valuable consideration as beneficial owner, the covenant against encumbrances is a future covenant to the effect that the purchaser is to enjoy the land free from any encumbrances to his good title.¹⁷

[32] An encumbrance has been said to be every right to or interest in the land which may subsist in third persons to the diminution in the value of the land. It includes a mortgages, charge or lien capable of being enforced against the

¹² [1893] 1 Ch 523

¹³ [1896] 1 Ch 468

¹⁴ [1924] 1 Ch 460

¹⁵ [1931] 1 Ch 475

¹⁶ Emmet on Title, 18th Edition, p. 464

¹⁷ Vane v Lord Barnard (1708) Glib Ch 6, p. 7

purchaser, an easement and a subsisting term and a restrictive covenant enforceable against the purchaser.¹⁸ In the instant case, the encumbrances on the land purchased by the Claimant were in the form of three (3) charges in favour of the HCU.

[33] It is incumbent upon a vendor to furnish the purchaser with abstracts and/or evidence in respect of any rights and/or interests affecting the land, especially where the register is not conclusive.¹⁹ Further, any documents which affect equitable interests should be abstracted and presented to the purchaser although such abstracts may sometimes omit documents which create equitable charges, which have been paid off for, or if still subsisting, are intended to be paid off on completion.²⁰

[34] In the present case, the charges on the said land by the HCU were not made known to the Claimant at the time of the conveyance. While a search of the local land charges register does not protect a purchaser against unregistered charges²¹, the charges in this case were registered in accordance with **SECTION 30** of the **COOPERATIVE SOCIETIES ACT. SECTION 30** provides:

“(1) A charge created under section 29 shall be duly executed if signed by the member in duplicate in the presence of the Chairman or the President and the Secretary of the Society ...

¹⁸ Halsbury's Laws of England, 4th Reissue, p. 229, para. 347

¹⁹ *Ibid.*, p. 115, para. 138

²⁰ *Ibid.*, p. 122, para. 147

²¹ *Ibid.*, p. 130, para. 167

(3) The Registrar general shall keep a book to be called “the Register Book of Co-operative Societies’ Charges” in which he shall register every charge transmitted to him by the Secretary of a society, and issue to the society a certified copy of the registration.

(4) The registration of a charge under subsection (3) shall constitute a first charge and security in favour of the society and shall be deemed to affect with notice any person dealing with the property comprised in the charge.”

[35] Based on the foregoing, the Defendants should have given notice to the Claimant of the charges on the said land but this was not done. Therefore, they were in clear breach of the covenant in **SECTION 27(1)(A)** of the CLPA which provides that the said land should be:

“... freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, encumbrances, claims and demands whatever other than those subject to which the conveyance is expressly made... “

CONCLUSION

[36] In the circumstances, I hold that the Defendants were the actual beneficial owners of the said land at the time of the conveyance. I also hold that they were in breach of the implied covenant for title contained in **SECTION 27(1)(A)** of the CLPA in that there was an encumbrance on the said land *to wit* three charges in favour of HCU in the amount of \$127,397.55 which had not been disclosed to the Claimant by the Defendants at the time of the conveyance of the said land or at all. The Claimant having had to pay these

sums which were owed by the Defendant to the HCU, I also hold she are entitled to recover the said sum from the Defendant.

Accordingly, I make the following orders:

- i. The Defendants' preliminary objection is dismissed;
- ii. The Defendants to pay to the Claimant the sum of \$127,397.55 which represents the amount paid to the Hindu Credit Union to discharge the three encumbrances on the said land;
- iii. The Defendants to pay to the Claimant interest on the sum of \$127,397.55 at the rate of 3% from the 21st February, 2011 to the 26th September, 2012; and
- iv. The Defendants to pay the Claimant's costs on the prescribed basis in the sum of \$15,460.29.

JOAN CHARLES

JUDGE