REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011-01984

BETWEEN

JOSEPH LUTCHMANSINGH

Claimant

AND

THE AGRICULTURAL DEVELOPMENT BANK OF TRINIDAD AND TOBAGO

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Ms. N. Sharma instructed by Ms. A. Goddard for the Claimant
Mr. G. Hannays for the Defendant

JUDGMENT

Ruling

1. On the 2nd August 2012 I heard two applications together, one of which was an oral application to strike out the claim on the ground the statement of case disclosed no reasonable ground for bringing the case. This application had actually been invited by the Court very early in the management of the case. The second application is the claimant's and is made by way of notice dated 16th July 2012 for leave to amend the statement of case which was filed on the 26th May 2011 and for specific disclosure of two agreements for sale, which documents were eventually voluntarily disclosed before the hearing.

2. In the course of hearing submissions on these applications and particularly in relation to the striking out, with a view to confirming my understanding of the facts and the issues as they stood at that point, counsel for both parties were asked several questions as to their cases. Rather than confirm the impression I had formed of the weakness of the claimant's case, what emerged from the answers of counsel for the defendant caused me to realize that I had misunderstood the defence because what was then indicated from the bar table was somewhat at variance with what had actually been set out in the defence. Certain facts had not been set out as fully as they ought to have been. Indeed, Counsel's clarification raised certain questions which give rise to the need for further disclosure in respect of which on the authority of **Civ Appeal 238 of 2001 Real Time Systems Ltd v Renraw Investments Ltd**. I will order further and better particulars of the defence and counterclaim.

3. The application for striking out is dismissed. As to the application for leave to amend I am prepared to grant leave to amend the statement of case to include the claims indicated at paragraph 17 of the claimant's affidavit of 16th July 2012 but will suspend the date of the filing of that amended statement of case until 21 days after the filing of the particulars which I now order the defendant to file. I will identify these later on. My reasons for these rulings are better understood against the factual and procedural background.

The claimant's case

4. In 1995 the claimant, mortgagor Mr. Lutchmansingh, mortgaged several parcels of land including lands at Platanal and Cunupia to secure a loan from the defendant. He was delinquent with the payments of his monthly installments for many years. This caused the defendant to write him several times threatening to sell his lands.

5. Mr. Lutchmansingh explained his inability to pay through correspondence and in meetings and begged the defendant's indulgence while he made attempts to sort out his finances to reduce the arrears and his liability. He co-operated with the bank to sell the Cunupia lands in or about 2003. Prior to that sale the Bank already entered into agreements for sale of the Platanal lands (two parcels) on the 18th July 2001.

6. Mr. Lutchmansingh claimed that following their negotiations, by an agreement (which he called a renegotiated loan or refinancing) dated 10th March 2004, the bank agreed to a new payment schedule for the balance then outstanding. This, he understood to have superceded all previous terms in respect of repayment. He ought to have specifically pleaded that he understood the new arrangement to mean that the agreements for sale of the Platanal lands would have been terminated or not proceeded with, but that can easily be inferred from what is actually set out. In any case the counsel

for the defendant has only now submitted that they were "suspended", which at least accepts that the pending sales were affected by the new terms.

7. The claimant says he made all payments under the renegotiated schedule of payment until he received a letter dated 19th January 2010 which notified him of the sale of the Platanal lands under the defendant's statutory power of sale. The caption indicated the sale prices, but no other details, even as to the date of the sale were provided. He made enquiries and attempted to have a statement of his account, unsuccessfully.

8. Subsequently, Mr. Lutchmansingh received a letter dated 24th March 2010 which indicated that the lands had been sold since the year 2003 pursuant to the agreements for sale dated July 2001. It explained that completion had been delayed because of a defect in title which needed to be rectified. The claimant had not previously been aware of any defect in his title. More relevantly, the letter indicated that that agreement of 10th March 2004 pertained to the **residual debt** at the time. (emphasis added)

9. Against the background as I understood it, his case was simply that the defendant having represented it was renegotiating the terms of the original loan to allow a new payment schedule, and he having paid in accordance with it since 2004 and continuing until January 2010, the defendant could not lawfully exercise the power of sale at the time that it did. The claim was that the new arrangement effectively superceded all steps taken by the defendant

to recover prior to the date of it, including the steps then taken in pursuance of the exercise of the power of sale prior thereto.

The Defence

10. The thrust of the defence even after an amendment and a re-amendment was at all times consistent with what had been set out in the defendant's letter of 24th March 2010. The agreement for repayment related only to the "**residual debt**". I understood this to mean that, as was accepted by the claimant, the defendant's right to exercise the power of sale of the Platanal lands had arisen since 2000 or thereabouts. The defendant said further that the agreements for sale had been entered since 2001, that there had been a long period of delay in completion because of a title defect, but that did not affect the defendant's right to sell or the process which had been properly put in motion since July 18th 2001. So specifically, and in response to the claimant's claim, its position was that the agreement did not supercede all of these steps, it affected only the claimant's residual debt. The defendant's letter of 27th November 2003 and which had been attached to the statement of case and which predated the agreement had clearly indicated as much.

The issue or what it appeared to be

11. On my understanding that this was the defendant's case, and that the issue was whether the agreement of March 2004 referred to the residual debt and nothing else, I suggested to the claimant's previous attorney that he ought to consider the strength of his client's case, especially in the light of the letter

of 27th November 2003 which was clear in its terms. In the course of managing the case I suggested a striking out application because it seemed to me that based on the facts stated and on the issue which I had identified there were no reasonable grounds for bringing the action especially in the face of that document. If the renegotiated agreement dealt with the residual debt only, then the claimant could hardly sustain a complaint that the defendant could not lawfully complete the agreements for sale.

New issues

12. At the hearing of these applications it emerged that what I had identified as the thrust of the defence, was not in fact what was intended. I asked for the defendant's response to the claimant's submission that the effect of the new payment agreements was to "wipe out or supercede all previous recovery steps" (my words) taken by the bank. Counsel for the defendant said the bank agreed to suspend the action or to hold its hand on condition that the new payment schedule was kept.

13. This explanation from the bar table confirmed that the defendant was conceding that the agreement did have an effect on the previous sales agreement, albeit not the same as what Mr. Lutchmansingh understood. This was new to me. The defendant's response therefore raised new issues as to the intention of the parties in relation to and the effect of the new payment agreement on the previous recovery steps.

14. I accept too that my earlier approach to the matter has to be reviewed. I am now able to more clearly recognise that yet another issue is raised on the bank's letter dated 29th March 2010. If the lands had already been sold in 2003, then on what basis did the bank enter the rescheduled payment agreement? What was there to be suspended? These are matters which require further investigation.

15. The acceptance by Counsel for the defendant that the outstanding debt contemplated on the 10th March 2004 did not include the purchase prices reflected under the agreements for sale of July 2001, too, raised more questions about the defence as well as doubts about the calculation of the quantum on the counterclaim.

16. What has emerged in the defendant's submissions from the bar table is that my understanding of the defence and as a consequence my identification of the issues in this case, was flawed. The clarification of the defendant's position throws a new complexion on this matter. It presents a new circumstance which easily rules out striking out at this stage. Further it raises new issues which the claimant must be allowed to address.

17. Most obviously, if the defendant agrees that the agreement of 10th March 2004 was for the conditional suspension of the steps it had undertaken in the recovery process, a serious issue which would require consideration would be whether even on terms which provided for the "resumption" of the defendant's recovery efforts, would any subsequent breach on the

mortgagors's part simply allow the completion of the sale agreements previously entered into however many years ago on the same terms, or would it require new steps to be taken given the mortgagee's duties to obtain a proper price when exercising the power of sale. This raises the very question that the claimant wishes to raise as in indicated at paragraph 7 of the claimant's affidavit in support if an amendment to the original statement of case is to be allowed.

18. Further, if, as the claimant claimed, he continued to pay under the new payment schedule, and if the bank continued, his alleged default notwithstanding, to receive his payments in accordance therewith until January 2010 for some six years, does the issue of a waiver of some sort arise.

19. In the very peculiar circumstances of this case I do not think it is necessary to decide whether this is an adjourned first case management conference or otherwise. Suffice it to say, this turn of events has given rise to the need for an amendment to the statement of case. Given the contents of the defendant's letter dated 24th January 2010, which are consistent with the defence as filed, I do not think that this was an issue which the claimant could necessarily have anticipated. Indeed my decision to grant leave to amend arises more as a consequence of what has transpired at the hearing and relies less on the grounds of the claimant's application.

20. This is not the only result of the defendant's clarification its position. The recent decision of the Court of Appeal in **Real Time Systems Ltd Civ. App. 238 of 2011 v Renrow Investments Ltd & Ors** encourages a more proactive approach in case management, one which the circumstances require me to apply here, since I have found that the Defendant's pleading up to the stage of the re-amended defence did not properly disclose all the facts that would allow for the proper determination of the issues in this case.

21. In the circumstances under my general case management powers, I direct the defendant to provide further and better particulars of the following:

(1) The alleged title defect referred to the defence. Did it have any effect on the relationship between the claimant and the defendant?

(2) When did such title defect come to the attention of the defendant?

(3) Was such title defect and the nature of it brought to the attention of the claimant, if so, when?

(4) As to the alleged agreements for sale dated 17th July 2001, what became of them at the date of the agreement entered into between the claimant and the defendant on 10th March 2004? Are there any documents within the defendant's possession which identify the status of the agreements as at 10th March 2004? Are there any documents which indicate the status of these agreements between 10th March 2004 and December 2010?

(5) As to the residual balance referred to in letter of 27th November 2003, did it include purchase prices agreed to under agreement for sale?

(6) Defendant to provide full particulars of the claimant's account as at 10th March 2004.

(7) What was the amount of interest calculated over the 9 year period pending the completion of the agreements for sale from July 2001 to January 2010?

(8) As to the "sale" since November 2003 referred to in the defendant's letter of 24th March 2010 please provide particulars.

22. The above particulars are to be filed and served on or before 30th September 2012. Leave is granted to the claimant to amend the statement of case on the 26th October 2012 to include claim indicated at paragraph 17 of the claimant's affidavit of 16th July 2012 and to file an amended reply if necessary in response to any issues arising from the filing of the particulars provided by the defendant pursuant to this ruling. I reserve on the issue of costs until the determination of the matter

Note:

A ruling on this matter was first delivered on the 16th August 2012. Immediately thereafter, Counsel for the defendant indicated that I had erroneously ascribed certain submissions to him. On a review, I accepted that that was in fact so and I have now corrected the errors and I have taken the opportunity to make some other amendments to my ruling which do not affect the substance of it. I regret any embarassment or anxiety caused to Counsel for the defendant.

Dated this 16th day of August 2012

CAROL GOBIN

JUDGE