REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 563 of 1992

BETWEEN

NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO **Plaintiff**

AND

BARL NARAYNSINGH

ROBIN NARAYNSINGH

Defendants

Before: Master Margaret Y Mohammed

Appearances:

Ms Joan Furlonge for the Plaintiff

Mr Dharmendra Punwasee

instructed by Mr Anil V Maraj for the Defendants.

DECISION

INTRODUCTION

1. The plaintiff's 3 applications which are before me concern the enforcement of a judgment obtained by the plaintiff against the defendants on January 17, 1996. ("the judgment"). They are in order of filing:

(a) Judgment summons filed on January 9, 2008.

(b) Application filed on July 22, 2008 pursuant to Order 46 Rule 2(1) 9(a) of the Rules of the Supreme Court ("the RSC") (erroneously stated as Order 46 rule 4 (2)) requesting the court to grant permission to issue a writ of execution to enforce the judgment.

(c) Application filed on May 14, 2010 pursuant to Order 15 Rule 7 of the RSC to substitute the second defendant to represent the estate of the first defendant.

All applications were supported by affidavits. The second defendant filed an affidavit in opposition to application (b) and a consent to application (c).

BACKGROUND

2. To place the applications in context I will set out at this juncture the material events. On February 19, 1992 the plaintiff instituted a mortgagee action under Order 85 of the RSC against the defendants in respect of a deed of mortgage between the parties whereby the defendants had agreed to pay to the plaintiff the sum loaned of $817,000.00 together with interest. The security for the repayment of the loan was the defendants premises situate at Sankar St, St Augustine ("the premises").

3. On January 17, 1996 the plaintiff obtained judgment against the defendants for the sum of $1,471,385.09 and interest at the daily rate of $261.78 until payment, possession of the premises and costs. In February, 1996 the defendants appealed the judgment and while the appeal was pending on March 28, 1996 the attorney for the defendants requested the plaintiff not to proceed with execution. Despite this request, sometime in June 1996 the plaintiff took possession of the premises and on January 20, 1999 the defendants' appeal was dismissed with costs. Subsequently, the plaintiff entered into an agreement for sale of the premises on January 25, 2000 which was only completed some 6 years after, on April 28, 2006 when the plaintiff received the sum of $900,000.00

from the proceeds of the sale. During all these events, on May 10, 2008 the first defendant Barl Naryansingh died.

THE ISSUES

4. The 3 issues which the parties addressed in their submissions were:
   (a) Whether the plaintiff can enforce a judgment which it obtained more than 12 years ago.
   (b) Whether the payment received by the plaintiff on the sale of the property is a "part payment" within the meaning of the relevant statute of limitation.
   (c) If the plaintiff can enforce the judgment, whether it has satisfied the court that procedurally, leave ought to be given.

Whether the plaintiff can enforce the judgment

5. There was common ground between the parties on this issue. Both parties submitted the following:

   (a) that the law governing the accrual of the plaintiff's rights to enforce the judgment in the instant case is the Limitation of Personal Actions Ordinance Ch 5 No 6 ("the Ordinance");
   (b) the interpretation of section 3 of the Ordinance must be taken literally;
   (c) the plaintiff must take further proceedings to realize the fruits of its judgment;
   (d) the time for the plaintiff to enforce the judgment started to run from the date of the judgment when the plaintiff's rights accrued.

ANALYSIS

6. There are 2 pieces of legislation in this jurisdiction which govern the limitation of actions. The Ordinance and the Limitation of Certain Actions Act, Chap 7:09 ("the Act").

Mendonca JA in **Chadee and Ors v Rampersad and Ors**[1] clarified any ambiguity in the application of the Act and the Ordinance when he pronounced that the Act is not applicable to any action which is based on a right of action accrued before its commencement (November 17, 1997). In the instant case both parties agreed that the plaintiff's right of action accrued on January 17, 1996 when the decision of Bharath J was given and as such the Ordinance is the relevant legislation.

7. To determine the plaintiff's entitlement to enforce the judgment both parties also agreed that the interpretation of section 3 of the Ordinance is critical. The section provides:

> " All actions, suits or proceedings brought to recover any sum of money secured by any mortgage, judgment or specialty, or charge upon or payable out of and being a lien on any land or rent or for the recovery of any dotal claims or any legacy or share of any inheritance and all actions of account between partners in land or commerce or between co-heirs, or against any executor, guardian, trustee, curator, administrator or agent shall and may be brought at any time within twelve years next after a present right to receive or have the same shall have accrued to some person capable of giving a discharge for a release of the same, and not after twelve years unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgement of the right thereto, or to maintain such action, shall have been given in writing, signed by the person liable or by whom the money shall be payable or his agent, to that person entitled thereto or his agent; and in such case no such action, suit, or proceedings shall be brought but within twelve years after such payment or acknowledgement, or the last of such payments and acknowledgements, if more than one was given"

[1] Civ App No 145 of 2005 at page 6 where he states *"the 1997 Act, although repealing the Ordinance, expressly disapplied the 1997 Act to any action brought upon a right of action which accrued before the commencement of the 1997 Act and it also continued the application of the Ordinance to actions brought upon such a right whether commenced before or after the 1997 Act"*

8. In determining when time begins to run to enforce a judgment Mendonca JA in **Chadee and Ors v Rampersad and Ors** [2] (which was referred to on several occasions by both parties in their written submissions) is of assistance in interpreting this section. In that case it was held that time began to run when the right to receive the judgment debt accrued which was immediately on the making of the order in the High Court since there was no stay of execution granted. In the instant case there was no stay of execution granted and the proceedings in the Court of Appeal did not operate as a stay of execution.

9. In the circumstances, if I apply a literal interpretation to this section, the 12 year period of limitation started to run from the date of the judgment i.e. January 17, 1996 for the plaintiff to take enforcement steps to recover the fruits of its judgment. That date expired on January 16, 2008.

10. Finally, both parties agreed with the settled position by the Court of Appeal in this jurisdiction in **Chadee and Ors v Rampersad and ors**[3] where it agreed with Lord Lloyd in **Lowsley v Forbes (trading as L.E. Design Services)**[4] that to enforce a judgment a party must take further court proceedings to do so and therefore a right to take execution on a judgment is to be treated as a proceeding in a judgment.

Whether the moneys received from the sale of the premises is a "part payment" within the meaning of section 3 of the Ordinance?

11. The parties could not find any common ground on this issue. The crux of the plaintiff's submissions on this issue were:

[2] supra
[3] supra
[4] (1998) 2 Lloyds rep 577

(a) The sale of the premises which took place on April 28, 2006 was within the 12 year period as set out in section 3 of the Ordinance.

(b) This sale resulted in a payment of a sum of money to the plaintiff which was "some part of the principal money, or some of the interest thereon" owing to the plaintiff in respect of its judgment debt. As a result of this part payment the caveat in section 3 of the Ordinance has been triggered and another 12 year period must again begin to run from the date of the payment i.e. April 28, 2006.

(c) This situation is similar to where a payment is made by a sheriff out of the property of a debtor, from the proceeds of an execution (i.e. by compulsion of law or under an order of court, or out of a fund belonging to the debtor which is in court). Such payment is sufficient to prevent the statute of limitation from running.

(d) Further, where the creditor pays himself (constructive payment) this also prevents the statute of limitation from running.

(e) The words "was given" in the section apply to the condition which immediately precedes it that is "acknowledgments".

(f) The plaintiff is entitled to exercise its rights set out in the mortgage to recover any shortfall after the sale on April 28, 2006.

12. In response, the defendants disagreed with the plaintiff's interpretation of "part payment" and instead submitted:

(a) For the caveat in section 3 of the Ordinance to be invoked to stop the limitation period from running upon the receipt of the "part payment", such payment can only be received from the defendant (i.e. the judgment debtor) or an agent of the defendant.

(b) If the part payment is received from any other third party then the caveat cannot be invoked to the benefit of the plaintiff.

(c) Payments received from a third party can be distinguished from that received by a receiver or sheriff. In the case of a receiver he is the agent of the judgment debtor

and a sheriff acts under compulsion of law and cannot make payments on behalf of the judgment debtor.

(d) If the court is to accept the payment received on April 28, 2006 as a part payment it would allow a judgment creditor to delay in enforcing its judgments and simply extend time for enforcement.

ANALYSIS

13. Both parties share the view that a part payment of the judgment debt has the effect of stopping the statute of limitation from running. The issue is from whom the payment must be received by the judgment creditor to take the case out of the statute. In **Chinnery v Evans**[5] the House of Lords held that the payment by a receiver was a payment which in law must be considered as made by the mortgagor in respect of the mortgage debt, and therefore prevented the Statute of Limitations operating as a bar to the demand on several mortgaged estates. In interpreting a provision similar to section 3 of the Ordinance[6] Westbury LC was of the view that the payment by the receiver satisfied the caveat in the section " by the person by whom the same shall be payable, or his agent" .

14. In **Harlock v Ashberry** [7] following the decision in **Chinnery v Evans** [8] all three judges were of the view that for a payment to take the case out of the limitation statute it must be made by the person liable, as an acknowledgment or admission of his liability to pay. Brett LJ was of the view that while the payment of rent by a tenant to the mortgagee

[5] 11 E.R.1274

[6] The statutory provision under consideration was section 40 of the 3 and 4 Will. 4,c 27 which states *"no action or suit or other proceedings, shall be brought to recover any sum secured by any mortgage but within 21 years next after the present right to recover the same shall have accrued to some person capable of giving a discharge or release of same, unless in the meantime some part of the principal money, or some interest upon the mortgage, shall have been paid, or some acknowledgment of the right, given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent".*

[7] (1881-82) L.R. 19 Ch. D.539

[8] 11 E.R.1274

will go into the account to set off the principal and interest this payment cannot for the purposes of the Statute of Limitation amount to a "part payment".

15. Apart from **Chinnery** and **Harlock,** the third parties from whom a part payment was received for it to be considered as an acknowledgement of the debt by the mortgagor was considered in **Fisher and Lightwood's Law of Mortgage**[9]. In this regard, a right of action will be preserved by payment by a person interested to pay[10]; payment by a person entitled to pay, such as a surety[11] and payment by a person such as a trustee[12], who is bound to pay as between himself and the mortgagor[13]. Consistent with this approach the courts have recognized payments by an agent of the mortgagor such as a solicitor with authority to make an acknowledgment[14] once it is established that the agency was continuing at the time of payment[15].

16. In statutory interpretation one of the underlying principles is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just or expedient[16].

17. There must be finality to litigation. A judgment creditor is not entitled to pursue his judgment debtor to the end of time in order to obtain the fruits of his judgment. The Ordinance is clear that this is not a life sentence on the judgment debtor. The onus is on the judgment creditor to actively pursue the enforcement of its judgment but his right to do so is equally balanced with the right of the judgment debtor to know that this judgment does not remain hanging over his head until the end of his days. The exception must only be if the judgment debtor who is liable to pay acts to his detriment

[9] 11th ed. at para. 16.45
[10] Roddam v Morley (1857)1 De G & J 1
[11] Lewin v Wilson (1886)11 App Cas 639
[12] Alston v Mineard (1906) 51 Sol Jo 132
[13] Bradshaw v Widdrington (1906) 2 Ch 430
[14] Wright v Pepin (1954) 2 All ER 52
[15] Newbold v Smith (1889) 14 App Cas 423
[16] Gwyne v Burnell (1840) 7 Cl &f 572,606 per Coleridge J

by acknowledging the debt. The plaintiff attempted to cloud the main issue of its own delay by raising the doctrine of compulsion of payment which I am of the view is irrelevant to the issue and as such I attached little weight if any to this submission.

18. In the circumstances, following the learning in **Chinnery** and **Harlock** I am inclined to apply a similar interpretation to the caveat in section 3 of the Ordinance since it could not have been the intention of the legislature to do otherwise. To agree with a more liberal interpretation of section 3 would defeat the intent of the section and condone a lax attitude by a judgment creditor in not actively pursuing the fruits of his judgment.

19. For the plaintiff to successfully invoke the caveat in section 3 of the Ordinance it must demonstrate that the payment of the sum of $900,000.00 on April 28, 2006 was from the defendants or agents of the defendants. It has failed to do so. In this regard I agree with the submissions by the defendants that the payment of $900,000.00 received by the judgment creditor on April 28, 2006 from the sale of the premises does not amount to a "part payment" under section 3 of the Ordinance and as such the period within which the judgment creditor had to enforce the judgment expired on January 16, 2008. A judgment creditor who has inordinately delayed in enforcing its judgment cannot now rely on his delay as a reason to extend the time for the limitation period to run.

Whether permission should be given to enforce the order.

20. In light of my previous finding on the limitation point this issue is now moot. However I will still address it since both parties made submissions. The plaintiff's submissions in support of this application are:

    (a) The rules of court cannot create or alter the substantive rights granted the relevant statute in this case by section 3 of the Ordinance[17].

[17] British South Africa Co v Companhia de Mocambique (1893) A.C. 602 at 628

(b) The general purpose of Order 46 of the RSC must be construed to be concerned with the procedural machinery for enforcing the judgment obtained[18].

(c) The plaintiff has good and sufficient reason to account for the delay in enforcing the judgment namely:

- An appeal was filed in February 1996 after the judgment was obtained.
- There was a request by the attorney for the defendants to wait until the outcome of the appeal.
- After the appeal was dismissed on January 20, 1999 due to the size of the debt the plaintiff took a decision to sell the premises.
- The plaintiff entered an agreement for sale on January 25, 2000 with a prospective purchaser.
- Due to discrepancies in title the sale was only completed on April 28, 2006.
- Only after the sale, the plaintiff could determine if any further action can be taken if there was a shortfall. In June/July 2006 an internal opinion was requested advising that action be taken for recovery of the shortfall.
- The means and assets report was only received by the plaintiff's legal department in December, 2006.

21. In response the defendants submitted that:

(a) The plaintiff must demonstrate that it is just to allow the issue of execution after 6 years have passed and each case turns of its own facts.

(b) To determine if it is just to do so the court must have regard to factors such as the judgment creditor's explanation for not issuing execution during the initial 6 year period, the explanation for any delay beyond that period and the prejudice if any suffered by the judgment debtor by reason of such delay.

[18] W.T. Lamb and sons v Rider (1948) 2 All ER 402

(c) The reasons offered by the defendants for the delay namely an appeal filed in February, 1996 is not acceptable since despite this the plaintiff took possession sometime in June 1996. Further, the delay explained by the "certain discrepancies in title are unacceptable since there is no evidence on the nature of the discrepancies and no steps were taken between January 25, 2000 to April 20, 2006 to remedy the defects.

(d) After the completion of the sale the plaintiff took 2 years to file the instant application.

(e) The lengthy delay by the plaintiff is prejudicial to the defendants for the following reasons:

- The first defendant has died.
- Although the plaintiffs knew how to contact the defendants it made no attempt to recover the remaining money or remedy the alleged discrepancy in title.
- The defendants not having heard from the plaintiff for more than 12 years were under the impression that the plaintiff had sold and recovered the judgment debt.
- During the period April 2, 2001 to April 20, 2006 the plaintiff collected a minimum of $5,500.00 per month from a prospective purchaser as a licence fee which is a collective total of at least $330,000.00 in respect of which the plaintiff has not accounted to the defendants and the court.
- The original judgment was for the sum of $1,471, 385.09 and the plaintiff has collected the sum of $330,000.00 as licence fee and $900,000.00 from the sale of the premises. The plaintiff now seeks to recover an additional sum of more than $1,570,552.47 and as such by its delay will profit by more than $1,300,000.00.

ANALYSIS

22. Order 46 rule 2(1)(a) of the RSC provides that a judgment creditor must first obtain permission of the court once 6 years has elapsed from the date of the judgment if he wishes to take steps to enforce the judgment. In determining whether this permission ought to be granted the court's discretion is fettered by the particular facts of the instant case, the explanation given by the judgment creditor for not issuing execution during the initial 6 year period and any prejudice which the judgment debtor might have been subject to as a result of such delay including, in particular, any change of position by the judgment debtor[19]. The courts have also found that the longer the period that had been allowed to have elapsed since the judgment the more likely the court will find prejudice to the judgment debtor[20]. Therefore, the onus is on the party seeking this permission to convince the court that it has satisfied the criteria which the court must consider.

23. The evidence before me, on the steps which the plaintiff have taken to enforce the judgment and the explanation for the undue delay were set out in 2 affidavits of Kendra Thomas-Long sworn to and filed on July 22, 2008 and December 11, 2008 respectively. In these affidavits the reasons advanced by the plaintiff for the delay in enforcing the judgment are :
    (a) In February 26, 1996 the defendants appealed the decision by Civil Appeal 34 of 1996.
    (b) By letter dated March 28, 1996 Mr Andrew Boyce, then attorney at law for the defendants requested the plaintiff not to proceed with execution[21].
    (c) On January 20, 1999 the Court of Appeal dismissed the appeal with costs.
    (d) On January 25, 2000 the plaintiff entered into an agreement for sale with a prospective purchaser.

[19] Duer v Frazer (2001)1 All E. R. 249

[20] Duer v Frazer supra

[21] Exhibit KT2 to Affidavit of Kendra Thomas- Long filed on July 22, 2008

(e) On April 2, 2001 the plaintiff entered into a license arrangement with the prospective purchaser allowing the purchaser to occupy the premises until the completion of the sale.

(f) Due to discrepancies in title the sale was only completed on April 20, 2006.

(g) After the application of the proceeds of the sale and rental income a shortfall was noticed and a decision was taken to consider further enforcement options.

(h) From an examination of the financial records there is no change of parties.

24. The evidence is opposition was contained in the second defendant's affidavit sworn to and filed on February 13, 2009 which stated the following:

(a) The first defendant died on May 10, 2008.

(b) Despite the letter of Mr Boyce the plaintiff's took possession of the premises in the middle of 1996.

(c) The tenants on the premises subsequently paid rent to the plaintiff.

(d) He was unaware that the plaintiff made arrangements to dispose of the premises since after he was evicted from the premises in 1996 the plaintiff did not contact him except by letter dated 31st July, 2008[22].

(e) He was unaware of any defect in title since when the loan was sought from the plaintiff a search on title was conducted and there was no defect.

25. The reasons accounting for the delay by the plaintiff in enforcing its judgment are unacceptable to me for the following reasons:

(a) The filing of an appeal against the judgment does not act as a stay of execution and in any event was not so treated since it took possession of the premises in mid 1996.

(b) The reason of "discrepancies in title" accounting for the inordinate delay of 6 years in completing the sale are vague since the plaintiff did not set out the specific defects in title and the steps which it had to take to have them remedied.

[22] Exhibit KT 2 to affidavit of Kendra Thomas-Long filed on December 11, 2008

(c) In any event, the plaintiff was the mortgagee and ought to have conducted a thorough search on title when the loan was secured.

(d) Even after the sale there appeared to me neither diligence nor haste by the plaintiff to pursue further enforcement. It took approximately 2 years from 2006 to the date the application was filed in July 2008 for the plaintiff to get its act together.

(e) There has been a change in circumstances, since if the plaintiff had done a proper due diligence test it would have realised that the first defendant passed away 2 months before the application was filed.

(f) The plaintiff has not fully accounted for all the moneys it has received since it took possession of the premises.

CONCLUSION

26. The plaintiff is barred by the operation of section 3 of the Ordinance from taking any further steps to enforce the judgment which it obtained on January 17, 1996 the limitation period having expired on January 16, 2008.

27. The payment which the plaintiff received from the proceeds of the sale of the premises on April 20, 2006 does not amount to a "part payment" referred to in section 3 of the Ordinance and therefore does not have the effect of stopping time from running as prescribed by the Ordinance.

28. The reasons advance by the plaintiff accounting for the delay in taking steps to enforce the judgment are unacceptable.

ORDER :

(a) The judgment summons filed on January 9, 2008 is dismissed with costs.

(b) The summons filed on July 22, 2008 pursuant to Order 46 Rule 2(1) 9(a) (erroneously stated as Order 46 rule 4 (2)) is dismissed with costs.

(c) The summons filed on May 14, 2010 pursuant to Order 15 Rule 7 of the RSC to substitute the second defendant to represent the estate of the first defendant is dismissed with cost.

(d) In all cases costs are to be taxed in default of agreement.

Dated this 18 April, 2011.

Margaret Y Mohammed
Master of the High Court (Ag.)