IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2016-04060

BETWEEN

SHAZAD ALI

(The Legal Personal Representative of Ameena Ali also called Amenia Ali also called Meena Ali, deceased)

Claimant

AND

TAURUS SERVICES LIMITED

Defendant

Before the Honourable Mr. Justice Robin N Mohammed

Date of Delivery: Wednesday 21 October 2020

Appearances:

Mr. Samuel Saunders for the Claimant

Mr. Prakash Deonarine instructed by Ms. Saajida Narine for the Defendant

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DECISION ON THE DEFENDANT'S APPLICATION FOR JUDGMENT ON ADMISSION/DEFAULT OF DEFENCE TO COUNTERCLAIM

I. Introduction

[1] Before this Court for determination is the Defendant's Notice of Application filed on 23 March 2017 pursuant to **Part 18.12(2) and/or Part 11.11(4) of the Civil Proceedings Rules 1998 ("the CPR")**, seeking an order that -

1. The Deed of Mortgage dated the 28th April 1987 and registered as No 7866 of 1987 is a demand mortgage.
2. Judgment be entered in favour of the Defendant on its Counterclaim filed on 14 February 2017 against the Claimant in the sum of $700,877.58 as at 31 December 2016 with interest continuing to accrue at a daily rate of $51.19 until judgment.
3. As a consequence of making the order in (1) above and the Claimant having failed to file a Defence to the Counterclaim, the Claimant is deemed to have admitted the Counterclaim and/or the Claimant's Claim filed on 10 November 2016 is thereby struck out.

[2] By Claim Form and Statement of Case filed on 10 November 2016, the Claimant commenced these proceedings against the Defendant seeking the following relief:

1. A declaration that Deed of Mortgage dated the 28th day of April, 1987 registered as No. 7866 of 1987 and made between Meena Ali of the First Part, Azim Ali of the Second Part and Industrial Development Corporation of the Third Part (hereinafter called "the said deed") is unenforceable.
2. A declaration that the said deed is null, void and of no effect.
3. A declaration that the said deed is no longer a valid and subsisting security.
4. A declaration that the said deed is extinguished pursuant to **section 32 of the Real Property Limitation Act, Chapter 56:03**.
5. An order striking the said deed from the records of the Registrar General.
6. Further and/or other relief.
7. Costs.

[3] The Defendant entered its appearance on 28 November 2016 and filed its Defence and Counterclaim on 14 February 2017. In its Counterclaim, the Defendant claimed against the Claimant, the following relief:

1. A declaration that the Deed of Mortgage dated the 28th April 1987 and registered as No. 7866 of 1987 is a demand mortgage.
2. The sum of $700,877.58 as at the 31 December 2016 with interest continuing to accrue at the daily rate of $51.19 until payment being the balance of monies due and owing to the Defendant by the Claimant.
3. Interest.
4. Costs.
5. Such further and/or other reliefs as the Court deems fit.

[4] However, on 23 March 2017, the Defendant filed the Application before the Court to have judgment on admission be given in its favour against the Claimant on its Counterclaim. At the first Case Management Conference on 4 April 2017, Counsel for the Claimant made an oral application to file an affidavit in opposition to the Defendant's Notice of Application. Counsel for the Claimant also indicated that he would be filing an application to extend the time for the filing of the Claimant's Defence to the Counterclaim. Accordingly, the Court gave directions for the Claimant to file a response to the Notice of Application for judgment on admission and permission was granted to the Defendant to file a reply if necessary. Nonetheless, the Claimant failed to file any affidavit in opposition to the Defendant's Application nor did he file an application to extend time to file a Defence to Counterclaim.

[5] Nevertheless, at the next Case Management Conference on 7 June 2017, Counsel for the Claimant stated that there was no need for him to file a Defence to the Counterclaim because the issues raised in the Counterclaim were issues of law and therefore, one does not plead law, far less, file a Defence to answer the allegations. In relation to the Notice of Application by the Defendant for judgment on admission and/or judgment in default of Defence to Counterclaim, the Court gave further directions for the filing and serving of

written submissions with authorities. Subsequently, the Claimant filed his submissions on 26 July 2017 and the Defendant filed its submissions on 18 September 2017.

II. Factual Background

[6] Shazad Ali, the Claimant, is the Legal Personal Representative of Ameena Ali also called Meena Ali (hereinafter referred to as "the Deceased"). The Deceased died on 15 December 1991. At the date of her death, the deceased was the owner of and entitled to possession of the premises known as No. 67 St. Croix Road, Bromage, in the Ward of Savana Grande South, in the Island of Trinidad together with the building thereon and the appurtenances thereof belonging. The land comprised of approximately two lots and is registered under Deed No. 3502 of 1968.

[7] A Deed of Mortgage dated 28 April 1987 and registered as No. 7866 of 1987 was made between the Deceased, Azim Ali and the Industrial Development Corporation (hereinafter referred to as "the Corporation"). The deceased conveyed the said land to the Corporation to secure a loan of $364,000.00 at an interest rate of 7.5% per annum. Pursuant to the Deed of Mortgage, the Deceased agreed to repay the above principal sum together with interest thereon by 120 equal monthly instalments of $5,128.90 commencing on 1 July 1987 and thereafter on the first day of each and every succeeding month in each and every year up to and including the last day of June 1997. The last time that the Deceased paid any money on account of the Deed of Mortgage was on 27 July 1995.

[8] By letter dated 24 April 2013, the Defendant caused its attorney-at-law to write to the Deceased informing her that the Corporation transferred the indebtedness due under the Deed of Mortgage to them on 1 October 2007 by virtue of the **Vesting Act No. 4 of 1995**. However, in response, by letter dated 10 June 2013, the Claimant stated that the Deed of Mortgage was statute barred in accordance with the **Real Property Limitation Act Chapter 56:03**.

[9] In its Defence and Counterclaim, the Defendant, in response, alleged *inter alia* that the Deed of Mortgage dated 28 April 1987 is a demand mortgage and the said demand was made on 24 April 2013. As a result, the Defendant is entitled to sue under the personal covenant in the Deed of Mortgage and therefore the matter is not statute barred. The Defendant averred that there is a balance of monies due and owing under the said covenant in the amount of $700,877.58 as at the 31 December 2016 with interest continuing to accrue at the daily rate of $51.19 until payment.

III. Issues

[10] Having considered the pleadings, the Application and submissions, the Court finds that the issues for determination and the order in which they will be determined are as follows:

1. **Is the Deed of Mortgage dated 28 April 1987 a demand mortgage?**
2. **Is the cause of action in the Counterclaim statute barred?**
3. **Is the Claimant deemed to have admitted the Counterclaim pursuant to Part 18.12(2) of the CPR as a result of his failure to file a Defence to the Counterclaim?**
4. **If the answer to issue 3 above is in the affirmative, is the Defendant entitled to the reliefs sought in the Counterclaim?**

IV. Law and Analysis

Issue 1: Is the Deed of Mortgage dated 28 April 1981 a demand mortgage?

[11] Mr. Saunders submitted that the Defendant made a bold assertion that the Deed of Mortgage is a demand mortgage without pleading any facts to support its contention - any specific provision from the Deed of Mortgage on which it can rely or that it was implied term of the Deed of Mortgage that the loan would be repayable on demand. Mr. Saunders contended that the fact that the Claimant did not file a Defence to Counterclaim does not necessarily mean that he is deemed to admit the Deed of Mortgage is a demand mortgage. In his view, in the absence of more particulars, the onus is on the Defendant to establish first that the Deed of Mortgage is a demand mortgage which can only be done by looking

at the provisions and covenants contained in the Deed of Mortgage and construing same as a whole to determine if it is a demand mortgage.

[12] Mr. Saunders contended that the determination of whether the Deed of Mortgage is a demand mortgage or not, involves a construction of the mortgage itself. He is of the opinion that construing the mortgage is a matter of law and not one of fact. Consequently, the fact there is no Defence to Counterclaim does not mean the Defendant is *a fortiori* entitled to a declaration that the Deed of Mortgage is a demand mortgage. Counsel relied on the Antiguan and Barbudan authority of **First Caribbean International Bank (Barbados) Limited (formerly Barclays Bank PLC) v Oriel Walter**[1] wherein the Court had to determine whether a loan was made pursuant to a bill of sale was a demand loan. The Court in **First Caribbean International Bank (supra)** referred to **Halsbury's Laws of England** and **Chitty on Contracts** with reference to the construction of a loan contract to determine the date from time will run at paragraphs [35] and [36] which stated as follows:

> *"[35]* ***Halsbury's Laws of England, Volume 28, page 447 at paragraph 866*** *states:*
>
> *...In an action for money lent, it is a matter of construction of the contract to determine the date from which time will run. If a time is stipulated for repayment, the limitation period will run from that time; if the agreement provides that the occurrence or non-occurrence of a particular event is to trigger the obligation to repay, time will run from the date of that occurrence or non-occurrence. Where the contract, either expressly or by implication, provides that a demand by the creditor is a necessary prerequisite to the right to repayment, time will not start to run until such a demand is made."*

[1] Claim No. ANUHC CV2008/0386

[36]A similar point is made in ***Chitty on Contracts, Volume 1, 30th edition, page 1788 at paragraph 28-037****:*

Where the contract of loan does provide for repayment of the debt on or before a fixed determinable date, or does effectively make the obligation to repay conditional upon a demand for repayment or any other matter, it is a question of construction when the lender's cause of action accrues…"

[13] Mr. Saunders submitted that in the above case, the Bill of Sale contained an amortization clause which stipulated that the loan was to be paid in instalments, the amount of instalments, the date of commencement of payment, the dates on which the instalments fell due as well as a provision that if there is a default in the payment of any monthly instalment, the whole balance due on the loan becomes immediately payable.

[14] It's Mr. Saunders contention that Clause 1 of the Deed of Mortgage is similarly worded. Clause 1 provided: (1) for payment of the principal sum together with interest thereon by 120 equal monthly payments of $5,128.90; (2) the first payment to be made on the first day of July 1987; (3) each subsequent payment to be made on the 1st day of each and every succeeding month; and (4) if default is made in any payment when it becomes due then the whole balance becomes immediately payable. Mr. Saunders therefore contended that it is difficult to see how the Deed of Mortgage could be a demand mortgage when there is not only a time stipulated for payment but there is also a provision that the occurrence of a particular event will trigger the obligation to repay in which case time will begin to run from the last date of payment or the occurrence of the event. Mr. Saunders further submitted that the Deed of Mortgage does not contain any express provision that a demand by the Defendant or its predecessors is a necessary pre-requisite to the rights to repayment as a result of which, time will run from the date of the demand.

[15] Counsel for the Defendant, Mr. Deonarine, in response, submitted that for a Counter-Defendant to advance a positive case in answer to a Counterclaim, he must plead the facts upon which he intends to rely on. Therefore, since the Claimant's argument is that the

Deed of Mortgage is an instalment mortgage, he ought to have filed a Defence to the Counterclaim to equally set out the clauses of the Deed of Mortgage and the facts in support of his contention that the Deed of Mortgage is an instalment mortgage. As a result of no Defence to the Counterclaim, it is undisputed, rather admitted, that the Deed of Mortgage is a demand mortgage. Before the Claimant could *submit* that the Deed of Mortgage is an instalment mortgage, he must first plead the relevant facts to lay the necessary foundation and the only way to do so is by filing a Defence to the Counterclaim. Thus, it is now impermissible for the Claimant to raise these factual allegations disguised in the submissions.

[16] Mr. Deonarine further submitted that pleadings allow a Court at an early stage not only to identify the issues in dispute between the parties but also to decide whether a particular issue ought to be determined as a preliminary point and others require full investigation and trial: per Jamadar JA (as he then was) in **Real Time Systems Limited v Renraw Investment Limited and ors**[2]. Accordingly, a Court would only be able to discharge that duty properly if both a Claimant and a Defendant "*set out fully all relevant facts in support of and in denial of a claim and of the issues that they reasonably know will likely arise"*. Mr. Deonarine also contended that where a point of law is contested between the parties, that legal issue must also be raised in the pleadings.

[17] According to Mr. Deonarine, the submissions made by Mr. Saunders where he referred to Clause 1 of the Deed of Mortgage and the terms thereof to support his contention that the Deed of Mortgage is an instalment mortgage, are facts which are capable of being pleaded. Therefore, as it stands, counsel submitted that it would be egregious to permit the Claimant to plead his Defence to the Counterclaim by way of submissions. In that regard, the Counterclaim is undisputed and so is the issue of whether the Deed of Mortgage is a demand mortgage.

[2] Civil Appeal No. 238 of 2011

[18] Mendonça, JA in the case of **Taurus Services Limited** v **Emelda Thomas & Ors**[3] stated that a demand mortgage is formed when the mortgagor has covenanted to pay to the mortgagee on demand in writing to him any monies secured by the deed of mortgage owing to the mortgagee. As such, a demand mortgage is a mortgage that a mortgagee can require to be repaid in full at any time. This condition is typically understood by the mortgagee and the mortgagor from the outset and is provided for within the clauses of the mortgage itself.

[19] It can be said that the Deed of Mortgage in the case at bar does not expressly or impliedly provide that a demand by the creditor is a prerequisite to the right to repayment. The first covenant states:

> *"The Borrower covenants with the Corporation that she will pay to the Corporation on the First day of July, 1987 the Principal Sum of THREE HUNDRED AND SIXTY FOUR THOUSAND DOLLARS ($364,000.00) TOGETHER WITH INTEREST THEREIN AT THE RATE OF … and that if the said Principal sum be not paid on that day then so long as the same or any part thereof shall remain unpaid that this Borrower will pay to the Corporation … one hundred and twenty (120) equal monthly payments of combined principal and interest in the sum of FIVE THOUSAND ONE HUNDRED AND TWENTY EIGHT DOLLARS AND NINETY CENTS ($5,128.90) the first of such payments to be made on the First day of July, 1987… up to and including the Thirtieth day of June, 1997 and if default be made in any payment when it becomes due the balance of the said principal sum then remaining unpaid together with accrued interest shall at once become due and payable…"*

[3] Civil Appeal No. S117 of 2013

[20] Based on the construction of the above-mentioned clause, at first blush this Court was tempted to conclude that the Deed of Mortgage is an instalment mortgage. The Court was of the view that there is a time stipulated for payment as well as a provision that the occurrence of a particular event will trigger an obligation to repay the principal sum then remaining together with accrued interest, all of which factors go against the true definition of a demand mortgage.

[21] However, closer scrutiny under **Clause 6** of the deed of mortgage which is headed "PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED as follows:" - another interpretation emerges as to whether or not the Deed of Mortgage was a demand mortgage. More particularly, at **Clause 6(a)(ii**) which provides *"in accordance with the covenants herein contained pay on demand by the Corporation the balance of the principal money then outstanding including any charges herein provided for with interest thereon at the rate aforesaid….."*

[22] Several other clauses of the Deed of Mortgage make reference to the term "on demand", for example, **Clause 5(b)**: *"That the Borrower will duly and punctually pay discharge and satisfy all rates, taxes ……payable in respect of the said Property.. … and if the Borrower shall at any time refuse or neglect to make such payments or deliver up the receipts thereof to the Corporation on demand the Corporation may make such payments…."*

Another example is at **Clause 6(c)** which states: *"All money at any time expended or paid by the Corporation whether by itself or through any receiver for any of the purposes referred to in these presents or for costs or expenses incurred by the Corporation ……. shall be deemed to be properly incurred and shall be repayable to the Corporation on demand in writing with interest thereon at the rate ……"*

[23] The Court, however, at this juncture, will not pronounce on whether the Deed of Mortgage in issue is a demand mortgage as pleaded by the Defendant or an instalment mortgage as

submitted by the Claimant. From all submissions, the Court can safely conclude that Deed of Mortgage, whether being an instalment mortgage in response to the Defendant's averment that it is a demand mortgage, is a substantive issue which is subjected to the Court's interpretation and which can only be determined on a proper construction of the whole instrument. In that regard, filing a Defence to the Counterclaim was of vital importance on the Claimant's part. The Claimant was required to plead the relevant facts in response to the Counterclaim as filed since the Statement of Case was silent on whether the Deed of Mortgage was an instalment mortgage.

[24] The Court, therefore, agrees with the Defendant's submissions that the Claimant's contention that the Deed of Mortgage is an instalment mortgage is a relevant fact which ought to have been pleaded in the Claimant's Defence to the Counterclaim and not raised in the Claimant's written submissions in relation to the Notice of Application. This Court, therefore, at this juncture, will not conclude whether the Deed of Mortgage is a demand or instalment mortgage, but shall further traverse this issue under ***Issue 3*** which will analyse the effect of the failure of the Claimant to file a Defence to the Counterclaim.

Issue 2: Is the cause of action in the Counterclaim statute barred?

[25] Mr. Saunders submitted that the last payment of the Deed of Mortgage was made on 27 July 1995. Therefore, in accordance with Clause 1 of the Deed of Mortgage, the next payment was due on 1 August 1995 as a result of which time began to run from the 1 August 1995. Mr. Saunders contended that since the cause of action accrued in 1995, the **Limitation of Certain Actions Act, Chap 7:09** will not apply since it came into force on 17 November 1997. As a result, **section 23 of the Limitation of Personal Actions Ordinance Chapter 5 No. 6** is applicable. Consequently, the limitation period in respect of the loan pursuant to a mortgage is 12 years. Therefore, the limitation period in respect of the Deed of Mortgage expired by 31 July 2009.

[26] Mr. Deonarine, in response, submitted that the Claimant is now raising a limitation defence in his submissions by stating that the Defendant's right or remedy to recover the

mortgage debt is statute barred and has relied on a separate enactment which was wrongly cited. Counsel contended that if a Defendant wishes to rely on a limitation defence, this must be raised in the pleadings and not in submissions.

[27] Nevertheless, Mr. Deonarine submitted that a mortgagee (the Defendant) has two types of remedies available to it under the Deed of Mortgage – the remedy to recover under the personal covenant for monies lent and the remedy to recover the land or against the security, usually for possession or foreclosure. Accordingly, for each of these two types of remedy, the law prescribes a different period of limitation beyond which a Court action is barred: per Smith JA in **Felix Monsegue v First Citizens Bank Limited**[4]. Therefore, for the present purposes, **section 12 of the Real Property Limitation Act, Chap 56:03** is applicable where the limitation period for recovery of possession runs afresh from sixteen years every time payment of principal or interest was made on the mortgage debt and gives the mortgagee a new right of entry.

[28] On the other hand, Mr. Deonarine contended that it has long been established that the defence of limitation is a procedural bar which a Defendant may raise not to challenge the merits of the Claim but to say that he should not meet a stale claim. If the limitation defence is not raised (meaning no Defence is filed and/or it is not pleaded), then the Defendant, being the Counterclaimant is entitled to assume that the Claimant does not wish to rely upon a time bar and the Claimant would not be entitled to rely on the limitation defence: per Mendonça JA in **First Citizens Bank Limited v Shepboys Limited & anor**[5]. Mr. Deonarine contended that it would not be appropriate for the Court to entertain such a 'defence' by way of submissions.

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[4] Civil Appeal No 224 of 2011

[5] Civil Appeal No P231 of 2011

[29] Mendonça JA in **First Citizens Bank Limited v Shepboys Limited & anor (supra)** referenced Lord Griffiths in **Ketteman and Ors v Hansel Properties and Ors**[6] where a question arose before the House of Lords whether an amendment to the Defence of the Third and Fourth Defendants to raise the statute of limitations was correctly disallowed. Lord Griffiths stated as follows:

> *"A defence of limitation permits a defendant to raise the procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid him meeting a stale claim. The choice lies with the defendant and if he wishes to avail of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties."*

[30] Accordingly, Mendonça JA opined that if the limitation issue is not pleaded by a Defendant, it is not appropriate for the Court to determine whether the action is time barred. In the case at bar, the Claimant requested leave of the Court to apply for an extension of time to file his Reply and Defence to Counterclaim and leave was in fact granted. However, the Claimant elected not to file the application. Further, the Claimant, in the Statement of Case claimed *inter alia* for a declaration that the Deed of Mortgage was extinguished pursuant to **section 32 of the Real Property Limitation Act**. As such, given that the Court had to rely on the Statement of Case, it cannot ignore the fact that there is no such provision in the said Act and it is not this Court's responsibility to determine what parties have pleaded or attempted to plead.

[6] [1987] AC 189

[31] The Claimant has not filed any Defence to the Counterclaim. Therefore, by the Claimant's failure to file a Defence to the Counterclaim, it stands to reason that the Claimant did not intend to avail himself of the plea of limitation. In that regard, the Claimant is not entitled to raise the procedural bar preventing the Defendant from pursuing its Counterclaim in his written submissions. Consequently, the Court is not minded to determine that the cause of action in the Counterclaim is time barred.

[32] Moreover, if the Claimant had submitted his Defence to the Counterclaim, such issues could have been pleaded and put before the Court. One of the main functions of submissions is to buttress what has been pleaded and it is for these reasons the Court's hands are tied. This Court cannot allow the Claimant to couch his Defence to the Counterclaim in his submissions, especially when he specifically indicated to the Court that he intended to file said Reply and Defence to Counterclaim and simply did not. Additionally, in the furtherance of the overriding objective of the CPR, allowing the limitation issue can be seen as prejudicial to the Defendant as it would not have had the opportunity to rebut the limitation by way of Reply to the Defence to Counterclaim. As such, the Court holds that the Claimant cannot now rely on the limitation period.

Issue 3: Is the Claimant deemed to have admitted the Counterclaim pursuant to Part 18.12(2)(a) of the CPR as a result of his failure to file a Defence to the Counterclaim?

[33] Mr. Deonarine submitted that since the Claimant elected not to file an Application to extend time to file his Defence to the Counterclaim, he is deemed to have admitted the Counterclaim pursuant to **Part 18.12(2)(a) of the CPR** and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the Counterclaim. Counsel further submitted that when the Defendant's Defence and Counterclaim are examined closely, they are intimately wrapped up in the Statement of Case. Therefore, a deemed admission on the Counterclaim would mean that the allegations in the main Claim cannot exist consistently. Consequently, the deemed admission that the mortgagee is entitled to sue under its personal covenant would not only

lead to a contradictory outcome on the main Claim but can result in the dismissal of the Claim.

[34] This Application is based primarily on the provisions contained in **Part 18 of the CPR** which relates to counterclaims, ancillary claims and other similar claims. It is therefore a useful exercise to discuss the following provisions.

[35] **Part 18.1** defines an Ancillary Claim to include a Counterclaim by a Defendant. It states:

> *"(1) An "ancillary claim" is any claim other than a claim by a claimant against a defendant or a claim by a defendant to be entitled to a set off and includes—*
>
> *(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;*
>
> *(b) a claim by the defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and*
>
> *(c) where an ancillary claim has been made against a person, any claim made by that person against any other person (whether or not already a party).*

Thereafter, the CPR proceed to make provisions for Ancillary Claims and therefore, by definition in **Part 18.1**, to Counterclaims as well. **Part 18.2** provides that an Ancillary Claim is to be treated as if it were a claim for the purposes of the CPR. However, **CPR 8.13 and 8.14** (which deal with time within which a claim may be served) and the provisions of **Part 12** (which enable a claimant to enter default judgment), do not apply.

[36] **Part 18.9** allows a person against whom an Ancillary Claim is made to file a Defence, and further stipulates that the period for filing the Defence is **28 days** after the date of service of the Ancillary Claim. **CPR 18.2** and **18.9(3)** state that the rules relating to a Defence to a Claim apply to a Defence to an Ancillary Claim except for **Part 12** (judgment for failure to respond). Thus, it follows that in relation to Ancillary Claims,

and by extension Counterclaims, the CPR do not provide for the entry of default judgment when a Defence to a Counterclaim is not filed.

[37] **Part 18.12 of the CPR** deals with special provisions relating to judgment on failure to file a defence to an ancillary claim. It states:

(1) This rule applies if a party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

(2) The party against whom the ancillary claim is made—

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and

(b) subject to paragraph (4) if judgment under Part 12 is given against the ancillary claimant, he may enter judgment in respect of the ancillary claim.

[38] In **Satnarine Maharaj v The Great Northern Insurance Company**[7], the Court of Appeal considered the same provision in **CPR Part 18.12**. The panel found that the failure to file a Defence to a Counterclaim meant that the Claimant was deemed to have admitted the averments and reliefs sought therein:

"It is clear from the submissions that there is no issue between the parties that by having failed to defend the counterclaim the appellant is deemed to admit it. The parties were ad idem that this meant that the appellant was deemed to admit not only the relief claimed in the counterclaim but the averments contained in counterclaim as well. We think that the parties were correct to adopt that position as that is so from the plain wording of rule 18.12(2)(a). Where they part company however is on the effect of the admissions

[7] Civil Appeal No. P198 of 2015

in this case. That is of course is the crux of the dispute and lies at the heart of determining this appeal."

Mendonça J.A. continued to comment on the effect of the provision in **Part 18.12(2)(a)** as follows:

"When faced with an application such as the respondents' in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim." [Emphasis mine]

Eventually, Mendonça J.A. concluded that if the effect of admitting the Counterclaim would be a dismissal of the Claim then permitting the Claim to continue would be an abuse of process:

"It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim… We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. The respondents submitted that that was this case." [Emphasis mine]

[39] There can be no dispute that a Counterclaim that merely restates and relies on the averments contained in the paragraphs of the Defence, raises no new issues and indeed such issues are already addressed in the Defence filed. The issues are joined and effectively no new issues remain to be resolved by adding a Counterclaim: **June Henderson and others v Marian Mohammed**[8].

The Counterclaim before the Court is effectively substantiated by paragraphs 1-3 of the Defence. These paragraphs contain the entirety of the Defendant's averments. The allegations contained in the Counterclaim were therefore identical to those contained in the Defence. Therefore, there were no issues raised nor any identification of a new cause of action.

[40] Nonetheless, the Defendant has admitted the majority of the Claimant's Statement of Case, that is paragraphs 3 to 10 of the Claimant's Statement of Case. However, there were a few averments raising a substantial issue in response. Consequently, as a result of the Claimant's failure to defend the Counterclaim, the Claimant is deemed to admit the following:

(i) The Deed of Mortgage dated 28 April 1987 is a demand mortgage and the said demand was made on 24 April 2013.

(ii) The Defendant is entitled to sue under the personal covenant in the Deed of Mortgage and the matter is not statute barred.

(iii) There is a balance of monies due and owing under the said covenant in the amount of $700,877.58 as at the 31 December 2016 with interest continuing to accrue at the daily rate of $51.19 until payment.

[41] The Claimant's acceptance of the above facts in paragraph [40] means that the matter comes to an end and therefore, the provision that the Claimant be "*bound by the judgment or decision in the main proceedings*" is not entirely applicable. Thus, by this provision,

[8] CV2013-05010

the Court will effectively be giving judgment on the entire matter in the absence of a Defence to Counterclaim.

[42] The Court has carefully considered the admissions and is of the view that the allegations in the Statement of Case against the Defendant cannot exist consistently with the deemed admissions. Since the Counterclaim is wrapped up in the Statement of Case and intimately connected to it, the deemed admissions of the Counterclaim significantly impacts the Claim and Statement of Case.

[43] In ***Satnarine Maharaj (supra)***, however, the panel found that there was still a live issue for determination even after the counterclaim had been deemed to be admitted by the claimant pursuant to **Part 18.12(2)(a)**:

> *"…it leaves the question still to be decided whether the damage resulting from the accident was the result partly of the appellant's fault and partly from the second respondent's fault and raises the issue of contributory negligence. Notwithstanding the deemed admissions by the failure to file a defence to the counterclaim, that remains a live issue on the claim as there is no clear admission that the accident was not in any way the fault of the second respondent."*

[44] Such a live issue, however, does not remain after **Part 18.12(2)(a)** is applied to the case at bar and thus, pursuant to Mendonça J.A's dicta, to permit this claim to continue would amount to an abuse of process.

[45] In this regard, the effect of the Claimant's deemed admissions from the failure to defend the Counterclaim results in the dismissal of the Claim and Statement of Case filed on 10 November 2016. If the Claim were allowed to continue, it would lead to a contradictory outcome and to permit the Claimant to proceed with the Claim in those circumstances would be an abuse of process.

Issue 4: Is the Defendant entitled to the reliefs in its Counterclaim?

[46] Mr. Saunders submitted that the power of the Court to grant declaratory relief is discretionary. It is not the practice of the Court to make a declaration in default of a defence or on admissions or by consent of the parties. Counsel relied on the authorities of **Public Services Association v Rickie Cedeno & ors**[9] and **Seereeram Nanan v Bute Beepat & anor**[10].

[47] Mr. Deonarine, in response, submitted that on first principle, the Court must enter judgment on admission against the Claimant for the sum of $700,877.58 as at 31 December 2016 together with interest accruing at a daily rate of $51.19 and costs on the prescribed scale. Counsel further submitted that the Court is not averse to granting a declaratory relief if to deny same would cause injustice to the party entitled, particularly where money is due and owing as opposed to declaratory reliefs that a party is guilty of fraud, misfeasance and breach of trust. Mr. Deonarine relied on the authority of **Wallersteiner v Moir**[11]. Accordingly, in the case at bar, there is no good reason for the Court to refuse any relief sought by the Defendant in its claim for monies due and owing on a mortgage debt.

[48] The orders sought by the Defendant in the Counterclaim were for a declaration that the Deed of Mortgage dated the 28th April 1987 and registered as No. 7866 of 1987 is a demand mortgage and the sum of $700,877.58 as at the 31 December 2016 with interest continuing to accrue at the daily rate of $51.19 until payment being the balance of monies due and owing to the Defendant by the Claimant. The Claimant's failure to file a Defence to the Counterclaim meant that the Claimant would be deemed to have admitted the sum

[9] CV2011-03500

[10] CV2015-04256

[11] [1974] 3 All ER 217

claimed by the Defendant in the Counterclaim and that the Deed of Mortgage is a demand mortgage.

[49] However, the relief in dispute is - A declaration that the Deed of Mortgage dated the 28th April 1987 and registered as No. 7866 of 1987 is a demand mortgage. Declaratory reliefs should generally not be granted on admissions or concession unless to abstain from such a grant would lead to an injustice.

[50] Mohammed JA in **Pan Trinbago Inc. v Keith Simpson & Ors**[12] stated as follows:

> *"54. The Court ought not to make declarations of right either on admission or in default. In the case of Wallersteiner v Moir [1974] 3 All ER 217. Buckley L.J. said at page 251:*
>
> > *"If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation."*
>
> *55. In Wallersteiner, Scarman LJ saw the position as being less rigid and considered that it would be open to the court to grant a declaration by consent where that was necessary to do justice between the parties:*
>
> > *"..... I believe, the duty of the court to exercise caution before committing itself to sweeping declarations; to look specifically at each claim, and to refrain from making declarations, unless justice to the claimant can only*

[12] Civil Appeal No S-027 of 2013

be met by so doing. Generally speaking, the court should leave until after trial the decision whether or not to grant declaratory relief and, if so, in what terms: see Williams v Powell. [Emphasis added]

56. The case of Claude Denbow & Anor. v The AG of T&T was relied on by the appellant. In that case Pemberton J (as she then was) considered the authorities on granting declaratory relief on admissions and at paragraph 19 said:

"DECLARATORY RELIEF

Much has been written on this special jurisdiction of the Court to grant declaratory relief. I do not intend to traverse that ground in this decision. Suffice it to say that in the absence of special or exceptional circumstances, or in appropriate cases, such as where there is no possible defence or where there are no factual disputes and the denial of such relief will cause the claimant an injustice the Court will not readily grant declaratory relief based on admissions."

[51] The grant of declaratory relief upon admissions or concessions is not barred in all instances. Where it is appropriate the court will grant the relief sought. From the above, the Court ought not to grant declaratory reliefs on admissions save in exceptional circumstances. Such exceptions would be where (i) there is no possible Defence to the Counterclaim; (ii) there are no factual disputes between the parties; or (iii) the denial of the declaratory reliefs would cause, in this case, the Defendant injustice.

[52] It therefore follows that, in the absence of a Defence to the Counterclaim, there is, before this Court, pursuant to Pemberton J's dicta in **Claude & Donna Denbow v The Attorney General of T&T**[13]: (i) no possible Defence to the Counterclaim; and (ii) no factual disputes between the Claimant's Statement of Case and the Defendant's Counterclaim.

[13] CV2005-00740 at para 19

Accordingly, the exceptional circumstances that would permit this Court to grant the Defendant's declaratory relief are present.

[53] Furthermore, Counsel for the Claimant indicated his intention to the Court to file an Application for an extension of time to put in a Reply and Defence to Counterclaim. He, however, did not do so. Instead, he sought to rely on submissions filed in relation to the Notice of Application. Consequently, the Court is of the view that the Claimant simply elected not to file these documents and has therefore subjected himself to the detrimental sanctions of **Part 18.12(2)(a) of the CPR**.

[54] In that regard, the Court is minded to grant the Defendant its declaratory relief sought in its Counterclaim filed on 14 February 2017 that the Deed of Mortgage dated the 28th April 1987 and registered as No. 7866 of 1987 is a demand mortgage.

IV. DISPOSITION:

[55] Accordingly, in light of the findings and analyses above, the order of the Court is as follows:

ORDER:

1. **The Claimant not having filed a Defence to the Counterclaim is deemed to admit the Counterclaim pursuant to Part 18.12(2)(a) of the CPR.**

2. **Judgment on admission be and is hereby granted in favour of the Defendant on the Counterclaim filed on 14 February 2017 in the following terms:**
   (a) A declaration that the Deed of Mortgage dated the 28th April 1987 and registered as No. 7866 of 1987 is a demand mortgage.

(b) The sum of $700,877.58 as at the 31 December 2016 with interest continuing to accrue at the daily rate of $51.19 until payment being the balance of monies due and owing to the Defendant by the Claimant.

3. **The Claimant's Claim together with Statement of Case filed on 10 November 2016 be and is hereby dismissed.**

4. **The Defendant is entitled to recover assessed costs of the Notice of Application filed 23 March 2017 as well as prescribed costs on the Claim and Counterclaim.**

5. **In the event that there is no agreement on the quantification of costs, then the Defendant shall file and serve a Statement of Costs for assessment in accordance with Part 67.11 of the CPR on or before 30 November 2020.**

6. **Thereafter, the Claimant to file and serve Objections to the items on the Statement of Costs, if necessary, on or before 15 January 2021.**

7. **Decision on quantification of costs to be given without a hearing on a date to be announced.**

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Robin N. Mohammed
Judge