

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2008 –04636

**IN THE MATTER OF THE PROPERTY COMPRISED IN DEED OF
MORTGAGE DATED THE 9TH DAY OF APRIL 1981 AND REGISTERED AS
#9138 OF 1981 AND MADE BETWEEN GREGORY DA SILVA (MORTGAGOR)
AND THE WORKERS BANK OF TRINIDAD AND TOBAGO (MORTGAGEE)**

AND

**IN THE MATTER OF THE CONVEYANCING AND THE
LAW OF PROPERTY ORDINANCE CHAPTER 27 NUMBER 12**

Between

Taurus Services Limited

Claimant

and

Emelda Thomas

First Defendant

Josanne Thomas

Second Defendant

Ganelle Thomas

Third Defendant

Michael Cumberbatch

Fourth Defendant

Joann Thomas

Fifth Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. P. Deonarine and Ms. S. Moolchan for the Claimant

Mr. S. Saunders for the First, Second, Third and Fifth Defendants.

JUDGMENT

1. On the 25th November 2008, by way of Fixed Date Claim Form supported by an affidavit deposed to by one Oscar McKenzie, the Claimants commenced an action for vacant possession of mortgaged property situate at Stella Street, Curepe and more particularly described in the Fixed Date Claim Form (“the mortgaged property”).

2. The Claimant, a company, claims to have acquired the full benefit of a mortgage from Workers Bank of Trinidad and Tobago of the mortgaged property by Deed of Transfer dated 12th December 1992 and registered as No. 9546 of 1993. The mortgage, according to the Claimant, was created by Deed of Mortgage dated 9th April 1981 and registered as No. 9138 of 1981 between Gregory Da Silva (the mortgagor) and the Workers Bank of Trinidad and Tobago (the former mortgagee) at the principal sum of \$144,000.00 together with interest at a rate of 14.5% per annum.

3. The 1st, 2nd, 3rd and 5th Defendants are in occupation of the mortgaged property. They claim to have rented the mortgaged property from Joseph Ramlochansingh since 1969. According to the First Claimant, who deposed to an affidavit in opposition on behalf of herself, the 2nd, 3rd and 5th Defendants, they last paid rent in or about the year 1981 and have continued in occupation since.

4. The Defendants dispute the claim on the following grounds:
 - i. That the claim is statute barred by the Real Property Limitation Act Chap 56:03;
 - ii. That if the claim is not statute barred, the parcel of land described in the Deed of Mortgage is not the same parcel of land of which the Defendants are in occupation;
 - iii. That, if the claim is not statute barred and the parcel is the same, the Claimant cannot maintain this claim since the Deed of Mortgage

- registered as No 9138 of 1981 and Deed of Partition registered as No. 5017 pf 1980 contain no declarations to uses and as such are void;
- iv. That if the mortgaged property is the same as that occupied by the Defendants and the claim is not statute barred, the effect of the Deed of Lease in favour of Cecil Danclair registered as No. 14637 of 1960 is that the Claimant is not entitled to possession of the mortgaged property.
 - v. That the Claimant is guilty of undue delay (laches) and as a result it would be inequitable to enforce the claim.
5. The parties have agreed to stand on the contents of their affidavits and to rely on their written and oral submissions. A determination on the limitation point must first be made as the other arguments advanced by both sides are all dependant on the outcome of this ground of challenge. While this is not a claim in which the mortgagee has joined the defaulting mortgagor, the court does not agree that this is a claim in possession simpliciter. This is a claim for summary possession based on a mortgage pursuant to Part 69 of the CPR. The court can nevertheless determine the claim in its entirety at this stage. See *FCB v Martina and Felix Monsegue* CV 2010-01934, Jones J.

Ground One

6. Section 12 of the Real Property Limitation Act provides:

“It shall and may be lawful for any person entitled to or claiming under any mortgage whereby the legal estate in the land comprised in the mortgage shall be conveyed, to make an entry or bring an action or suit to recover such land at any time within sixteen years next after the last payment of the principal or interest money secured by such mortgage, although more than sixteen years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued.”

7. The Defendants submitted that the mortgage loan was to be repaid in eight months. The Defendants contended that upon the expiration of eight months from the date of the mortgage the time began for recovery of possession by the mortgagee. Thus, in accordance with section 12 of the **Real Property Limitation Act**, the claim was statute bared since more than 16 years had elapsed after the expiration of the eight months.
8. The Claimant's however submitted that the applicable section is section 3 of the Real Property limitation Act. This section provides:

“No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.”

9. Thus, the Claimant submitted that this issue rests on the point at which time began to run with regard to bringing a claim pursuant to the Deed of Mortgage. It was therefore submitted that the Deed of Mortgage registered as No. 9138 of 1981 was a demand mortgage. This, the Claimant said is evident in the First Part of the Second Schedule which states: *“On **demand in writing** made to the Borrower to pay to the Bank the balance which on account of the Borrower with the Bank shall for the time being be due and owing to the Bank in respect of all moneys now or from the time hereafter owing by the Borrower or for which the Borrower may be liable....”*
10. According to the Claimant therefore, time would begin to run from the date of the demand. In this regard, the Claimant submitted that the demand for repayment of the mortgage debt was made on the 9th June 1994 in a letter to the mortgagor, Mr. Gregory Da Silva.

11. The court is of the view that the legislation is clear. Section 12 of the Real Property Limitation Act is the applicable section as it provides specifically for limitation of actions for recovery of possession by the mortgagee. The legislation makes no distinction between recovery of possession from the mortgagor or from someone in possession other than the mortgagor. This is so as the fulcrum of the claim by the mortgagee lies in the recovery of possession based on their entitlement under the mortgage whether by way of demand mortgage or otherwise. In its claim, the Claimant clearly sets out that the basis for the claim lies in the need to obtain vacant possession for the purpose of exercising its power of sale pursuant to the ordinance. This power is specifically reserved by statute and is set out in the demand mortgage. The jurisdiction of the Claimant to the recover possession is therefore grounded in its entitlement by virtue of the demand mortgage whereby the legal estate in the land comprised in the mortgage was conveyed.
12. Mortgages are specifically provided for by section 12. In those circumstances, to apply the provisions of section 3 would be to give an interpretation which it appears to this court to be wholly inconsistent with the natural, ordinary and clear meaning to be ascribed to section 12.
13. Additionally, in determining from when time begins to run, the wording of section 12 is equally clear. A mortgagee is allowed to make an entry or bring an action to recover the mortgaged property at any time within 16 years **next after the last payment of the principal or interest money secured by such mortgage:** see ***In re the property comprised in a deed of mortgage dated 18 February 1992 made between Stella John [landowner] and Laurence V. Williams [borrower] and Trinidad Co-operative Bank Limited [Mortgagee] Between First Citizens Bank Limited v Fransica Carrera; Patricia Carrera, a/c Patrina Carrera H.C.1742/2007.***
14. The cases of **Brown v Brown [1893] 2 Ch. 300** and **Lloyds Bank Ltd. v. Margolis (1954) 1 W.L.R. 644**, cited by the Claimants, are based on legislation which calls for a determination of the issue as to when time begins to run. Specifically, in **Lloyds Bank Ltd.** (supra) s 4(3) of the Limitation Act 1939 provided:

“No action shall be brought by any ... person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

15. By contrast, the relevant section of our legislation makes provision for the precise time at which the right of action is deemed to have accrued and therefore provides a clearly ascertainable date from which time begins to run. The fact that the mortgage is expressed to be a demand mortgage is of no particular importance when reckoning the period of limitation. The demand contained in the said Deed of Mortgage at the first part of the Second Schedule relates to a covenant entered into by the mortgagor to repay the balance should a demand be made by the mortgagee. This is a separate issue from the fact of default. Default begins once regularly scheduled payments are not made (whether formally demanded or not). It is the date of that default that the legislature recognises as giving rise to an entitlement to recover. In the court’s view therefore the attempt to argue that the date of a demand is the instructive date for the purpose of reckoning the limitation period is misconceived. The cases cited by the Claimant are therefore of little applicability in this regard.

16. The court is fortified in its view when it considers the practical implication of applying section 3 to claims based on a mortgage. If the submissions of the claimant are correct, it would mean that a mortgagor would be in a position to gain an unfair advantage by unilateral action. All a mortgagor need do in such circumstances would be to delay its demand thereby facilitating the unilateral determination of the commencement of the limitation period, in the meantime benefitting from the accrual of interest on arrears until it is ready to begin the limitation period. It could not be the case that the intention of the legislature was to give such a singular power of reckoning to one party only. It is therefore clear that the formula provided for reckoning the period of limitation provided for in section 12 was designed to provide certainty to the period by prescribing the occurrence of a specific crucial event, an event which lies at the heart of a mortgage

arrangement, namely default in payment, as being indicative of the beginning of the period of limitation. The court therefore finds that the applicable section is section 12.

17. However, although the Defendants reference the correct section on the limitation period, the Defendants are incorrect in their submission that time began to run upon the expiration of eight months from the date of the mortgage. This submission runs contrary to the clear meaning of section 12. According to the Claimant, the last date of payment on the mortgage loan was the 1st September 1981. This has not been disputed. The court finds therefore, in accordance with section 12 of the Real Property Limitation Act that the action for recovery by the Claimant was brought beyond the 16 year limitation period and is therefore statute barred. This is so regardless of the whether the action for recovery was brought against the mortgagor or not as the effect would be the same, that is the recovery of possession to the exclusion of the mortgagor in any event and for this there is a limitation period provided for by law.
18. Having regard to the finding of the court, the other grounds do not arise for consideration.
19. The court notes that although the 4th Defendant was served he did not enter an appearance and took no part in these proceedings. Be that as it may, the decision of the court must in these circumstances operate in his favour because of the nature of the finding.
20. The claim is therefore dismissed in respect of all of the defendants.
21. In relation to costs, the court notes that the affidavit filed in opposition was done by one deponent on behalf of the first, second, third and fifth defendant (by implication as the fifth defendant was joined subsequent to the filing of the claim). Further, the said defendants were singularly represented and submissions and the submissions made on their behalf were the same. Although each successful party is therefore generally entitled to costs in these circumstances, the court is of the view that it ought to apply Parts 66.6(3)(a), 66.6(5) and 67.5(4) CPR and award each of the successful Defendants (save for the Fourth Defendant), a percentage only of the allowable prescribed costs.

22. The claim being a non monetary one the court shall treat the claim as one for \$50,000.00 and allow each of the Defendants (except for the fourth defendant), 80% of their prescribed costs each. The Claimant shall therefore pay to the First, Second, Third and Fifth Defendants 80% of the prescribed costs of the claim in the sum of \$11,200.00 each.

23. In relation to the Fourth Defendant there shall be no order as to costs.

Dated this 19th day of April 2013

Ricky Rahim

Judge