

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-04381

BETWEEN

GUARDIAN ASSET MANAGEMENT LIMITED

CLAIMANT

AND

**DAVID DESLAURIERS
LEONORA DESLAURIERS**

DEFENDANTS

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mrs. D. Peake S.C. and Mr. K. Garcia instructed by Ms. S. Indarsingh for the Claimant

Mr. D. Mendes S.C. instructed by Mr. F. Al Rawi for the Defendant

Reasons

1. By application dated the 30th August 2013, the Claimant sought an order for the sale of the Second Defendant/ Judgment Debtor's property known as No. 28 and 29 Victoria Square, Port of Spain, to satisfy the judgment debt, interest and costs due to the Claimant/ Judgment Creditor. This court gave its oral decision on the 27th October 2012 and promised to give written reasons at a subsequent date. These are the reasons for the court's decision.

Background

2. On the 25th October 2011, this court gave judgment for the Judgment Creditor on its claim filed on the 20th November 2009 for breach of contract in relation to a loan secured by the Judgment Debtors to finance the construction of two residential towers situated at Hevron Heights (hereinafter called the "Hevron Heights property"). The judgment was registered at the Registrar General's Department that very day, and has remained in force and effect up to the date of determination of this application.
3. The Judgment Debtors subsequently applied to the Court of Appeal for a stay of execution of judgment, pending appeal. That application was dismissed and the Judgment Creditors were ordered to pay the costs of the application for the stay of execution in the sum of \$100,000.00. At the date of the decision of this court on the application for sale the debts owed to the Judgment Creditor amounted to the sum of \$30,789,570.63.
4. The Hevron Heights property was also the subject of a mortgage in favour of the Judgment Debtor. In that regard the Judgment Debtor instituted proceedings on the 22nd April 2013 by way of Fixed Date Claim seeking vacant possession of the Hevron Heights property pursuant to the terms of the mortgage. On the 29th September 2014 this court granted the order for vacant possession and granted a stay of execution of ninety days.

5. By virtue of Deed of Assent registered as 18372 of 1998, the Judgment Debtor was assigned the unexpired residue of the term of One Hundred and Ninety Nine years in the property situated at numbers 28 and 29 Victoria Square Port of Spain (hereinafter referred to as “the property”). The evidence of the Judgment Creditor reveals that there are no encumbrances on this property, save for the 2011 judgment that was registered by the Judgment Creditor and this is not in dispute. On the evidence of the Judgment Debtor the ground floor of the multi story building appears to be tenanted out to Columbus Communications Ltd, they having held a lease for a term of three years from the 1st April 2007, and having remained in possession since that date. No evidence has been presented to the court as to whether Columbus Communications has since entered into a new lease or is in fact a tenant holding over.

6. By way of an unregistered Deed of Settlement dated 8th December 2009, the Judgment Debtor purported as settlor to create a trust of the property in her children. This trust was expressed to be contingent upon the conveyance of the legal title in the trustees. As set out in the deed, the Judgment Debtor expressed an intention to have the said title transferred to the purported trustees shortly after execution of the Deed of Settlement. On the evidence however, no such conveyance of the property from the Settlor to the Trustees was executed.

Submissions

First Issue

Whether the Remedies of Creditors Act gives to the court a discretion to factor in the value recoverable in relation to the yet unsold Hevron Heights property in considering whether the court should grant the order for sale of the Victoria Property.

7. In this regard, the Judgment Creditor claimed that the Victoria Square property can lawfully be sold in satisfaction of the Judgment debt as the Judgment Debtor is in proper ownership of the land and that there are no encumbrances other than those placed by the Judgment Creditor itself. It claims that its registration of the judgment debt enables the Judgment Creditor to possess a charge on all the lands of the Judgment Debtors, once they hold a beneficial interest in them at the date of the registration. They submit that the court once satisfied, has no discretion to await the sale of the Hevron Heights property or even factor in the sum which is likely to be recoverable from that sale.
8. The Judgment Debtor submits that the court has a residuary discretion to factor in the sum likely to be recoverable from the sale of the Hevron Heights property. In so doing it becomes clear that the value of the said property as set out in the evidence of the Judgment Debtor provides a sufficient basis for the court to conclude that sale of the Hevron Heights property will settle the entire debt. According to the valuation report commissioned by the Judgment Debtor, (which is disputed) the Hevron Heights property is now valued at seventy seven million dollars (\$77M), (see valuation report of Raymond and Pierre exhibited as LD1 to the affidavit of Leonora Deslauriers sworn to and filed on the 4th April 2014).
9. It is the evidence of the witnesses for the Judgment Creditor, Brent Ford and Leon Ramdeen at paragraphs 13 and 8 respectively of their affidavits each sworn to and filed on the 7th May 2014, that the value ascribed is extremely high and out of line with previous valuations submitted by the Judgment Debtor. Further, Mr. Ford states in the said affidavit that the Judgment Creditor has been unable to value the Hevron Height Property because it was not in possession thereof.
10. In relation to the Victoria Square property the evidence of the Judgment Debtors is that the property is worth eighteen million dollars (\$18M) as per the valuation done on the 10th November 2009 by Messrs. Linden Scott & Associates Limited. The Judgment Creditors' evidence by way of report from the said Linden Scott & Associates Limited

which is of later date ((23rd February 2012) gives the value of the Victoria Square property as sixteen million dollars (\$16M).

Court's ruling on the issue

11. Sections 28 to 64 of the Remedies of Creditors Act Cap 8:09 set out the procedure for the enforcement of judgments against lands.
12. Section 28 of the Remedies of Creditors Act Cap 8:09 provides that if the value of the debtor's personal chattel is yet insufficient to satisfy the order for execution, after the Marshal has endorsed such results of the levy on the order for execution, the creditor is entitled

"... to an order for the sale of any beneficial interest of the execution debtor in any lands within Trinidad and Tobago, whether the interest is legal or equitable, or is of a freehold or chattel nature, or is several or joint or in common with others, and whether in possession, reversion or remainder".

This order is made subsequent to issuance and execution a writ of execution. Section 30 provides that in such a case, a summons for sale is then to be issued so that an order for sale may be obtained by the creditor.

13. Sections 34 to 44 describe separate summons for sale procedures including an application for the sale of the debtor's lands *ab initio* without having recourse to the process of issuing a writ of execution. By virtue of this provision, execution on the chattels of the Judgment Debtor under such a writ is not the first option of the Judgment Creditor. Section 37 of the Act reads as follows:

A summons for sale may also issue without the issue of any order for execution by any Judgment Creditor whose judgment is registered and the registration of which is in force and effective, on the filing of an affidavit showing, to the best of the knowledge of the applicant or other deponent, the lands to which it is alleged the

debtor was beneficially entitled at the time of registration of the judgment, or at any time after the registration and before the issue of the summons for sale, and the nature of the beneficial interest, and referring by their registered numbers to the material deeds and assurances affecting the lands, and giving the names and addresses of the persons to be served with the summons.

14. What section 37 makes clear is that the Judgment Creditor is free to pursue any of the available remedies to satisfy the judgment debt. It is equally clear that the application of the Judgment Creditor to sell the said property in this case is brought under the provisions of section 37. As the section prescribes, a summons (application) for sale was issued without a writ of execution having first been executed, the judgment having been registered. The affidavit of the witness, Richard Avey filed on behalf of the Judgment Creditor, contains the relevant requirements of a section 37 application. As such, in the court's view, the Judgment Creditor's application falls squarely to be considered under section 37. In this regard the court notes that one of the submissions of the Judgment Debtor made in passing, was simply that as a preliminary step towards making an application to sell property in satisfaction of judgment, a judgment creditor ought properly to first issue a writ of execution. In so submitting, the Judgment Debtor was in effect arguing that it was only in the case where the proceeds of the execution of the writ proved insufficient to satisfy the judgment that a judgment creditor could validly exercise the option to bring an application for sale. In the court's view this submission goes against the expressed provisions of the Act referred to above. To apply the provisions in such a manner would result in wasted time, resources and costs where the judgment debt is substantial and is unlikely to be satisfied by personal effects.

15. In *Escovalez v Torres & Ors* CV2012-00801, (relied on by the Judgment Creditor), Kokaram J set out the criteria which must be met for the Judgment Creditor to be successful in his application for sale. The first is that the judgment must be registered. The judgment entered against a judgment debtor operates as a charge upon all the lands to which he is entitled, seized or possessed and against all persons claiming under him after the judgment. For the judgment to operate as a charge it must be registered.

At the time of entering the judgment it will affect the legal estate in the judgment debtor. In the present application, the judgment was registered on the 25th October 2011. Therefore at the time of the application for sale the judgment was in fact a registered judgment.

16. The second is that the Judgment Debtor's land is subject to a charge. Even if the registration of the judgment had expired at the date of the court's order, this would not be a basis for the dismissal of the application as registration amounts to notice to the world and does not effect the date on which the charge on the property was created. As stated by Stollmeyer J in *Tinto v Thompson* CV 548 of 2005 and set out with approval at paragraph 52 of *Escovalez*, the charge is created at the date of entry of the judgment, registration being notice to the world of the charge which has been created. The words of Stollmeyer J bears repeating:

“In Trinidad and Tobago the effect of registration of a judgment is dealt with solely by the provisions of the Remedies of Creditors Act. In summary, Section 5 creates a blanket equitable charge upon every estate or interest, legal or equitable, in land to which the judgment debtor is beneficially entitled when judgment is entered, and this charge is binding on him and on any person claiming under him after that judgment is registered. By Section 7, however, that judgment does not affect “... lands as to purchasers, mortgagees or creditors or have any preference against heirs, executors or administrators, in the administration of their ancestors’, testators’ or intestates’ estate ...” unless and until the judgment is registered. Section 8 gives to the judgment creditor the same remedies in equity against the lands in question as the judgment debtor had power to charge those lands and had done so in writing... The consequence of registration under Section 7 of the Remedies of Creditors Ordinance is effectively to give notice to the world, since the Register is available for public inspection, although no statute so provides. By Section 5, however, the charge created is as against any interest or estate held by the judgment debtor at the time of entering up the judgment, or at any time after that, or over which he might exercise any power of disposal for his own benefit without the agreement of any other person.”

17. In the present case therefore, a charge was created on the Victoria Square property at the date of entry of judgment prior to registration. This is the effect of the provisions contained in the Remedies of Creditors Act. Once these criteria are satisfied the

Judgment Creditor is entitled to an order for sale to assist in the recovery of the judgment debt. To impose an additional criteria in relation to the court's conduct of an enquiry in relation to the likely sum recoverable on another property would be to impose criteria which the legislation does not itself impose. It could not be the case that the legislation permits such an exercise or was intended to permit such an exercise by the judge as the law provides a mechanism by which the balance of the proceeds of sale, after deduction of the sum owing is remitted to the Judgment Debtor. When looked at in this context, the exercise becomes one of reconciliation of accounts. This is not a function which can be or ought to be conducted by the court, the property having not yet been sold. While a valuation may in some instances be a good guide to the price that may be fetched for property, whether such a price is fetched or not is oftentimes subject to prevailing market conditions and other variables. The stated value of property is not necessarily the same as the price that a vendor may receive on the open market. Section 37 of the Act requires the Judgment Creditor to set out the extent of the interest of the Judgment Debtor but there is no requirement to set out the value so that the value does not appear to be a criterion under the Act. The criteria set out in the Act once met, entitles the Judgment Creditor to his order for sale without, in the court's view, recourse to the value of any other property from which part of the judgment debt may be recoverable. It is to be noted that no authority was provided to this court in support of the submission of the Judgment Debtor in this regard.

Second Issue

Whether a trust was created in favour of a third party

18. It was the submission of the Judgment Debtor that the purported declaration of trust by way of deed did fact create a trust at which point an immediate equitable interest would have been created in favour of the intended beneficiaries. No authorities were supplied to the court in support of this submission prior to the court's ruling despite the court's request for same.

19. The Judgment Creditor submitted that the declaration having been made by an unregistered instrument, no trust could have been created. It was further submitted that at the highest, the declaration was that of an intention to create a trust, conditioned upon an event which never occurred. No trust was therefore created.

20. On that issue, the Judgment Creditor relied on the unchallenged evidence by way of affidavit of Miss Jo-Anne Julien, an Attorney at Law with considerable experience who specializes in conveyancing. It is her evidence at paragraph four of her affidavit that recital (4) of the unregistered Deed, which reads “The Settlor intends shortly to transfer the Trust Property into the names of the Trustees to be held by the Trustees upon the trusts hereinafter declared” offends section 10 of the Conveyancing and Law of Property Act, which stipulates that all conveyances are void unless made by deed. Recital (4) of the Deed clearly states that the Settlor’s intention was to convey the property to the Trustees shortly after the execution of the purported trust deed. This conveyance however never occurred. In light of the aforementioned section 10 therefore, a conveyance, according to the witness cannot be inferred or imputed by presence of an intention to convey. Ms. Julien therefore testified that the Judgment Debtor has yet to be vest the property in the purported beneficiaries and so both the legal and beneficial estates are still held by the Settlor/ Judgment Debtor.

21. In effect, the witness testified that the Deed of Settlement therefore only demonstrates the desire of the Settlor to transfer her property to the Trustees at some point in the future. That desire, according to the witness is not an operative part of the Deed, but merely a Recital. All it does is “set out in detail the terms upon which the Trustees will hold the Trust Property once vested”. Any later provisions within the Deed that seek to refer to the Trustees as holding or managing the property are therefore similarly ineffective, as again, the interest of the Settlor has not been assigned to them. As Miss Julien stated, “the Trustees cannot exercise dominion or seek to manage property which they do not hold”.

22. The Judgment Debtor was given ample opportunity to file an affidavit in opposition to the evidence of this witness but failed so to do. Be that as it may, the issue being one

of law, the court is nonetheless required to make a determination of the applicable law and resolve the issue on its own accord. Having so done the court is of the view that the legal effect of the Deed was simply that of a declaration of an intention to create a trust in the future, contingent upon the occurrence of an event which has apparently not yet occurred (a conveyance). The court therefore finds that no valid trust of the property was created for the following reasons.

23. In *Milroy v Lord* (1862) 45 ER 1185, (relied on by the Judgment Creditor), the Claimant executed a voluntary deed purporting to assign shares to the Defendant, but never carried out the necessary transfer by way of entering such transfer in the books of the bank. It was held that no valid trust was created. Just as in the present case, the trust in *Milroy* was not founded on valuable consideration but was merely gratuitous and voluntary. (See the dicta of Lord Justice Knight Bruce at page 5, paragraph 272).

24. Further, Lord Justice Turner at paragraph 274 of page 5 of *Milroy* specifically set out the following in treating with the maxim that equity does not perfect an imperfect gift;

“ ...in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him”.

25. *Milroy* is therefore ample authority for the conclusion in this case that title to the Victoria Square property having not been transferred, a trust was never created. The alleged declaration of trust appears not to be one whereby the Judgment Debtor is declaring that she holds on trust for her children. It is one whereby she is saying that they will hold on trust for her when she transfers to them shortly after the date of the Deed of Settlement in December 2009. Some five years later this was not done. It could therefore not have been her intention to create a trust as she herself has never fulfilled the condition that she has imposed in the Settlement Deed and even if she had, the intention, it appears was to retain the beneficial interest in the said property.

26. In *Bhawanie & Ors v Guppy* CV 2012-02649 two deeds of settlement were signed, both reciting an intention to shortly transfer property shares into the name of the

trustee to be held on the trusts declared in the deed. The recitals explicitly stated that the settlement was to take effect immediately upon execution of the deed. However, the shares were never transferred to the trustee. In that case, the argument of the claimants was that the settlors in effect constituted themselves as trustees of their own property. Aboud J at paragraph 15, page 6 of the judgment first set out the principle that must be regarded in order for a trust property to be properly constituted; “the settlor must either validly transfer the property to the trustee, or, if it remains in his hands, declare himself as the trustee of the property”. If neither occurs, interest in the property remains unchanged. This quite simply is the state of affairs in the present case. The Judgment Debtor has neither validly transferred the property nor has she declared that she holds on trust for beneficiaries. As a consequence both the legal and beneficial interests in the remainder of the term of years in the Victoria Square property remain vested in the Judgment Debtor. (See also the Report on title of Glenda Edwards Attorney-at-law).

The Tenant

27. The Judgment Debtors also submitted that because they are not in possession of a substantial portion of the Victoria Square premises and part of the building is in fact leased to a tenant, Columbus Communications Limited (the Third Party), the third party must be served and their interest considered in the proceedings. The Judgment Creditor submitted in response that the lease did not derogate from the entitlement of the Judgment Debtor to recover its judgment, and it was therefore unnecessary to summon or otherwise involve the tenant in the court proceedings.
28. The sole question that arises for the consideration of the court in this regard is whether any rights of the tenant are affected or whether the tenant will be prejudiced by an order for sale. Section 31 of the Remedies of Creditors Act provides:

The Rules and Orders of the Court for the time being in force as to substituted service and notice in lieu of service shall be applicable to the service of a summons for sale and of notice thereof; and it shall be lawful for a Judge, at his discretion, to direct that any one of any class of persons interested jointly or in common for any interest, other than the fee simple in possession, legal or equitable, of and in any lands, may be served with, or having been served may appear to, any summons for sale on behalf of or as representing the other or others of the class, and any trustee shall, for the purpose of the summons, be deemed to represent his cestuis que trustent, and any executor or administrator, beneficiaries under a Will or intestacy, except in so far as the Judge may otherwise direct, and be served and appear on their behalf.

29. This court was of the view that prima facie, no prejudice would occur to the tenant should the order be granted subject to the tenancy. Indeed none was demonstrated by either party in this application. In any event, the court was of the view that any unforeseeable prejudice (should the court be wrong on the issue of prejudice) could be assuaged by providing for the tenancy in the order for sale.

30. For these reasons the court proceeded to make the order for sale of the Victoria Square property on the 27th October 2014.

Dated this 30th day of January 2015.

Ricky Rahim

Judge