REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-00236

Between

TRINIDAD AND TOBAGO MORTGAGE FINANCE COMPANY LIMITED

Claimant

AND

LAWRENCE ADAMS
(IN HIS CAPACITY AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF LAWRENCE DAVID ADAMS, DECEASED)

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Ms. C. Harper for the claimant

Ms. S. Indarsingh for the defendant

Judgment

1. On the 28th January, 2016 the claimant filed a Fixed Date Claim Form supported by an affidavit deposed by one Caren Atwaroo seeking inter alia the following relief;

    i. *Possession of ALL THAT Condominium forming part of the property situate at Aranguez in the Ward of St. Anns in the Island of Trinidad and described in the First Schedule to the Lease and being one of the Condominiums delineated and shown as Condominium No. "2" Building No. "14" "Coconut Palm" comprising 62.4m² shown on the Strata Plans dated 16th February 2000 and on the General Plan dated the 16th February 2000 and annexed to Deed of Sub Lease registered as No. DE 2000 50302 880D001 respectively TOGETHER with all sewers drains pipes wires ducts and conduits used solely for the purposes of the said Condominium but no other and including one half severed vertically horizontally or otherwise as the case may require all such walls floors and ceilings as are external to such Condominium except and reserving from the demise the main structural parts of the building of which the apartment forms part including the roofs foundations and external parts thereof ("the subject property");*

    ii. *Payment of the sum of $65,268.91 together with interest accruing thereon at the rate of $2.78 per day or 6.00% per annum from 8th January, 2016; and*

    iii. *The defendant do pay to the claimant the costs of this action.*

2. By Deed of Mortgage dated the 21st September, 2001 and registered as DE200102303283D001 ("the mortgage"), Lawrence Adams ("the deceased") assigned the subject property to the claimant as security for a loan of one hundred and fifty-seven thousand, five hundred dollars ($157,500.00).

3. The deceased died on the 8th September, 2010. He defaulted on the repayment of the loan and as such the claimant wishes to exercise its power of sale under the mortgage. By order dated the 26th October, 2015, Justice Rampersad ordered that the defendant be appointed

as Administrator Ad Litem to represent the estate of the deceased. The defendant did not challenge the claim of the claimant save and except for a challenge on the issue of costs. As such, the only issue which remains for determination by this court is whether pursuant to clause 5(i) of the mortgage, the claimant is entitled to the costs it actually incurred in instituting this claim.

4. Although the defendant was given an opportunity to file written submissions, he failed to do so.

The submissions of the claimant

5. The claimant submitted that the relationship between it and the defendant in the present action is governed by the mortgage. Clause 5(i) of the mortgage provides as follows;

"The Mortgagee shall be entitled to incur such expenses as may be necessary to safe guard the interest of the Mortgagee:-

1) For insurance premiums for fire and other perils insured against in respect of the said Dwelling House;
2) For taxes and other rates and charges levied against the said Premises and the said dwelling House which have priority over these presents
3) For any emergency expense
4) For such other purposes and in such amounts as may be approved by the Mortgagor in writing

And all such expenses incurred as aforesaid together with all costs properly incurred at any time in relation to this security or the exercise of any power or right hereunder shall be payable on demand with interest at the consolidated rate and until paid shall be charged on the said Premises and the said Dwelling House."

6. As such, the claimant submitted that pursuant to clause 5(i) of the mortgage, it is entitled to the actual costs it incurred in instituting and maintaining this action. According to the claimant, to date it has actually incurred the sum of $16,198.75 in legal fees and out of pocket expenses. This sum can be broken down as follows;

Legal fees – Notice of Application	$3,305.00
Legal Fees - Fixed Date Claim Form, Statement of Case & Supporting Affidavit	Attorney Fees – $7,000.00 Disbursements - $150.00 Non-VAT - $150.00 VAT - $893.75 **Total - $8,193.75**
Legal Fees Attendance at court hearings, management and conduct of matter	Attorney Fees – $3,000.00 Disbursements - $200.00 Non VAT – $150.00 VAT -$400.00 **Total - $3,750.00**
Bailiff Fees – Service of Claim Form etc. by William Soon on 05/02/2016	$950.00
TOTAL	**$16,198.75**

7. In so submitting that it is entitled to the sum of $16,198.75, the claimant relied on ***Halsbury's Laws of England, Volume 32, paragraph 1049,*** which provides as follows;

"The mortgagee is entitled to be allowed in his accounts all costs properly incurred by him in ascertaining or defending his rights, so far, that is, as he acts reasonably with respect to such rights as his mortgage title gives him. Costs needlessly incurred are not allowed. In order that costs properly incurred may be included, they must be claimed at the hearing, and, if the claim is supported by proper evidence, an inquiry will be directed as to costs, charges and expenses properly incurred by the mortgagee in respect of his mortgage security, not being costs of the action."

8. The claimant submitted that in considering whether to grant the costs award in the sum of $16,198.75, the court should consider 1) the meaning of phrase properly incurred and 2) whether the incurrence of the costs were due to improper, unreasonable or negligent conduct on the part of the claimant or its legal representative.

9. According to the claimant, Part 48.3(1)(a) &(b) of the Civil Procedure, Volume 1 of the United Kingdom which specifically provides for costs under a contract provides some guidance on the phrase properly incurred for which there is a presumption that the costs have been reasonably incurred or were reasonable in amount. Part 48.3 (1)(a)&(b) provides as follows;

"48.3(1) Where the court assesses (whether by summary or detailed procedure) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract provides otherwise, to be presumed to be costs which-
(a) have been reasonably incurred; and
(b) are reasonable in amount; and the court will assess them accordingly."

10. The claimant submitted that whether legal fees will be held to have been reasonably incurred depend on the facts of the case. The claimant relied on the case of ***Dryden v Frost [1835-42] All ER Rep 390,*** wherein it was held that the question to be asked of the court is whether the claimant acted reasonably. At page 393 Lord Cottenham LC stated as follows;

"This court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract or the legal or equitable consequences of it entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. But even as to the costs in equity this court exercises a discretion, and refuses to him his costs if his conduct has been improper, and, in some cases, order him to pay them. In Detillin v Gale (4) LORD ELDON says that he [the mortgagee] ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him: England v

Codrington (5) Morony v O'Dea (6) R v Trecothick (7). In this case the plaintiff's title was in equity only; but, without applying to a court of equity, he assumes to himself the right of taking possession, and adversely retains the key, the symbol of possession, to the extent of defending the action of trover. In all this he was wrong, as the judgment at law proves. The costs he has incurred and been compelled to pay in that useless and ill-advised contest were not in furtherance of any rights to which he was entitled as mortgagee, but in asserting a supposed right which did not belong to him. Did be in so doing act reasonably as an equitable mortgages? Were those costs necessarily or properly incurred in asserting or defending the right which his mortgage gave him? Certainly not. Those costs arose from a mistake as to his rights, from an attempt to obtain that to which he was not entitled, and cannot, therefore, be brought within any rule or principle under which a mortgagee is entitled to costs."

11. The claimant submitted that it is undisputed that at the time of the filing of this action, the defendant had fallen into arrears and that the claimant had made various attempts to notify him of those arrears (s*ee paragraphs 8 and 9 of the Affidavit of Caren Atwaroo filed on the 28th January, 2016).* The claimant further submitted that even though it took all reasonable steps to avoid the instituting of this action, it was left with no other alternative but to do so. As such, the claimant submitted that the only conclusion that can be drawn under the circumstances of this case is that the fees incurred in instituting this action were reasonably incurred.

12. Moreover, the claimant submitted that none of the costs incurred were incurred in bad faith or due to any improper or negligent conduct on its behalf and/or its legal representative. According to the claimant, it has only taken the necessary steps to advance this matter. As such, the claimant submitted that since the costs were reasonably incurred and reasonable in amount, it should be entitled to recover same.

13. The claimant relied on the case of ***Church Commissioners for England v Ibrahim & another [1997] 1 EGLR 13,*** wherein a landlord brought a claim against its tenants for possession of the property, the tenants having fallen into arrears. By clause 9 of the agreement the tenants agreed to pay and compensate the landlord fully for any cost,

expense, loss or damage by reason of any breaches of the agreement, and to indemnify the landlord in respect of all actions, claims and liabilities. The Court at first instance declined to make an order for costs holding that the claim was a straightforward claim for possession; that the respondent had done nothing to justify an award for costs on an indemnity basis; that costs were always in the discretion of the court and that parties to litigation could not fetter with the court's discretion as to costs by agreement. The landlords appealed and the appeal was allowed. The Court of Appeal held as follows;

"A *successful litigant's contractual rights to recover costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. Such a litigant is not to be deprived of his contractual rights to costs unless there is a good reason; this applies to the making of a costs order in his favour and to the extent that costs are to be paid to him. Where the parties have agreed the basis of taxation, it would be an improper exercise of the court's discretion to direct taxation on some other basis…"*

14. At page 14, Roch LJ stated as follows;

"…A good reason for depriving a successful litigant to part of the costs to which the contractual term would entitle him would be that that part of the costs came within the definition of wasted costs in section 51(7), that is to say they were costs incurred by him as a result of improper, unreasonable or negligent conduct on his part or that of his legal or other representatives. There may well be other sufficient reasons for interfering with the basis of taxation.

In my opinion, it is not a proper exercise of a judge's discretion to refuse to allow a successful litigant to recover his contractual entitlement to costs because the judge considers that a lessor has an unfairly strong bargaining position or it is desirable that the courts keep a careful control of costs in undefended possession claims. Of course a landlord cannot by contract provide that he should recover a greater sum by way of costs than the costs that he has actually and reasonably incurred."

15. The claimant also relied on the case of **Chaplair Limited v Kumari [2015] EWCA Civ 798,** wherein the Court of Appeal was required to determine whether it had the power to order a tenant to pay costs to the landlord (with the amount assessed) under the terms of the lease which contained a provision to the effect that the tenant was *"to pay to the landlord all costs, charges and expenses [including legal costs and fees payable to a surveyor] which may be incurred by the landlord in or in contemplation of any proceedings under Section 146, 147 of the law of Property Act 1925 notwithstanding any forfeiture may be avoided otherwise than by relief granted by the Court"* or whether it was constrained to a fixed sum for costs pursuant to the Civil Procedure Rules relating to the small claims track to which it has been assigned. At paragraph 33, Arden LJ stated that the judge was correct to hold that Chaplair could recover the costs under the terms of the lease. His Lordship further stated that the relevant law is as it was held in ***Church Commissioner v Ibrahim*** supra.

16. According to the claimant, the authority of ***Scotiabank Trinidad and Tobago Limited and Carlos Law and another CV2016-00027*** is distinguishable from the facts of this case as this case concerns the issue of the mortgagee's contractual entitlement to costs whereas in ***Carlos Law*** the only issue for determination before the court was whether the fixed or prescribed cost regime applied. In ***Carlos Law*** supra at paragraphs 19 & 20 Justice Boodoosingh stated as follows;

"19. Thus for claims arising from a mortgage where a stipulated sum is claimed and / or possession, the fixed costs regime applies unless the matter is challenged by the defendant. This is similar to what happens when default judgment is taken up over the counter in ordinary claims where a specified sum is claimed. If the defendant does not challenge the claim, fixed costs apply. Default judgment only gives the claimant a right to fixed costs unless the court assesses costs: Part 12.9. It is only where a defence is put in and the matter then has to come up for hearing at a case management conference that prescribed costs would apply. The only real distinction is that claims by fixed date claim forms cannot be taken up over the counter but must come up for hearing before a judge.

20. This position arrived at seems to be similar to the position in England and Wales although their relevant Part 45.1 is much more specific than our Part. In Atkin's Court Forms/Costs Vol 13/Practice/G discussing the English position regarding claims for recovery of land there is this passage:

"[102]

Possession claims are commenced in accordance with CPR Part 55 and the CPR Preaction Protocol for possession claims (by social landlords) based on rent arrears or the CPR Pre-action Protocol for possession claims based on mortgage or home purchase plan arrears in respect of residential property. Claims may be allocated to one of the three tracks with appropriate cost consequences but only to the small claims track if both parties agree. If a possession order is made and the defendant takes no part in the proceedings, the claimant will only be granted an order for fixed costs. If the defendant (in a possession claim other than a possession claim against trespassers) does not file a defence within the time limits he may take part in any hearing but the court may take his failure to do so into account in relation to costs. Where permission is given to enforce a judgment or order for the recovery of possession of land by writ of possession, if costs are allowed on the judgment or order, the costs allowed are fixed and are added to the judgment or order. 'Possession claim' in England and Wales means a claim for the recovery of possession of land including buildings and parts of buildings: CPR 55.1(a)."

Findings

17. In this case, the mortgage specifically provides for the recovery of costs properly incurred in the exercise of any power or right under the mortgage. The said clause also provides for the reimbursement of expenses, separate and apart from costs. It is to be noted that the clause creates a charge on the property for such expenses and costs properly incurred. The first issue for the court's determination therefore is whether the use of the word "costs" in the mortgage refers to legal costs incurred in the recovery of possession and the balance outstanding on the mortgage.

18. The court is of the view, that the natural and ordinary meaning of the word "costs" as contained in the clause is clear. It can only mean costs payable on demand that is, costs associated with the exercise of a power or right under the mortgage without recourse to the making of a claim in court. Further, the fact that the costs are payable on demand fortifies the fact that such costs cannot be costs which are ordered to be paid by the court after a claim has been made. An example of such a cost associated with the exercise of a power or right under the mortgage is the right of the claimant to enter the subject property and cause to be executed any repairs or other works as may be needed: See clause 4(k) of the mortgage.

19. Clause 4(k) of the mortgage provides as follows;

"To permit the Mortgagee to enter the Said Dwelling House at all reasonable times in the daytime for the purpose of inspecting the state and condition thereof and forthwith upon demand of the Mortgagee to effect or execute any repairs or works stipulate in writing by the Mortgagee."

20. If there is a cost associated with such entry and demand (possibly in writing by an attorney at law), then those costs would fall under clause 5(i) and become payable on demand. This is quite a different matter from legal costs ordered to be paid by a court on the basis of that which is permissible on matters such as this where judgement is given without trial and without any dispute from the other side.

21. The definition of "costs" in clause 5(i) does not include expenses which is separately provided for in the said clause and also in 4(k);

"In default of the execution of such instructions the Mortgagee may without any previous notice enter upon the said Premises and the said Dwelling House and execute or cause to be executed any such repairs or other works thereto or thereon and the cost of such repairs or other works shall be an emergency expense for the purpose of Clause 5(1)."

22. Further, it is equally clear that clause 5(i) refers to costs that are properly incurred as distinct form costs which are reasonably incurred, the latter being the basis of the court's

assessment of costs. It follows that costs properly incurred refers to the costs which have been incurred without recourse to the filing of a legal claim. The court therefore finds that the word "costs" as used in clause 5(i) does not refer to legal costs recoverable upon determination of a claim.

23. With regard to the two cases the claimant has relied upon, that is ***Church Commissioners v Ibrahim*** supra and ***Chaplair Limited v Kumari*** supra, the court finds that the clauses in those two cases can be distinguished from clause 5(i) in this case as the clauses in those two cases specifically provided that the landlords would be indemnified for legal costs whereas clause 5(i) makes no such specific reference.

24. The court agrees with dicta of Justice Boodoosingh in ***Scotiabank Trinidad and Tobago Limited and Carlos Law*** supra that the fixed costs regime applies in the case where the claim is undefended and is determined in favour of the claimant mortgagee. The defendant shall therefore pay to the claimant the fixed costs of the claim.

Dated the 23rd day of February, 2018

Ricky Rahim
Judge