

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

CV2017-02536

IN THE MATTER OF CL FINANCIAL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CHAPTER 81:01

AND

IN THE MATTER OF AN APPLICATION BY SELECT PROPERTIES LIMITED

Before the Honourable Mr. Justice Kevin Ramcharan

Date of Delivery: November 19, 2019

APPEARANCES:

Mr. Anand Ramlogan SC, Mr. Ganesh Saroop, instructed by Mr. Jared Jagroo for the Applicant

Mr. Bronock Reid, instructed by Ms. Krystal Richardson-Dumitru for the Company

Ms. Deborah Peake SC, Mr. Ravi Heffes-Doon, instructed by Mr. Romney Thomas for the Attorney-General

Mr. Stephen Singh Instructed by Ms. Shalini Rampersad-Campbell for First Citizens

DECISION

1. This is an application by the applicant for several orders related to the order of this court dated the 18th September, 2019, where it was ordered, *inter alia* that permission was not granted to CL Financial (in liquidation) (the company), Home Construction Limited (HCL) and Trinity Commercial Centre Limited (TCCL) to sell a certain portion of land situate in the City of San Fernando. The applicants are seeking firstly that this

order be stayed, secondly, that the file be unsealed to allow the applicant to have sight of the application, the reasons for the order, and to obtain a CD copy of the audio recording of the proceedings. Secondly, they are seeking an order that the order be set aside and that the sale be permitted to proceed.

2. The order complained of arose out of an application dated the 10th June, 2019. This application is subject to the order of the court sealing this file (other than the orders of the Court), but in terms in so far as is relevant, related to the Joint Liquidators seeking permission to (a) put the lands owned by the company and its various subsidiaries up for sale, and (b) approval for the sale of 2 of those parcels of lands for which the subsidiaries had executed an agreement for sale.
3. At the hearing of the application, various concerns were raised by First Citizens, a Debenture Holder many of the company's subsidiaries (including TCCL) and the Government of Trinidad and Tobago (GORTT), the major creditor of the company. In so far as it relates to the lands in question, the concern raised was that the land was being sold without it having been advertised, and although the purchase price was said to be in line with the value of the land, it was felt that it should have been advertised for sale to ensure that the highest price possible was obtained for the land.
4. This is a concern which the court had also felt when perusing the application. In attempting to call in the assets of the company, the liquidators must endeavour to ensure that the greatest value possible is received for the assets insofar as this is practical. For this reason, the court withheld permission for the sale of the subject lands, and instead authorised the advertisement of the lands along with other lands

owned by the company and its subsidiaries for sale. It is to be noted that nothing in the courts order excludes the applicant from submitting a bid for the land.

5. Considering now the agreement for sale, the lands in question are owned by TCCL. TCCL is a wholly owned subsidiary of HCL, which in turn is a wholly owned subsidiary of the company. It is to be noted that neither HCL nor TCCL are in liquidation. They continue to operate as going concerns.
6. In or around October, 2018, the applicant approached HCL offering to purchase the subject lands for a certain price (the price is not disclosed in these reasons to protect the bidding process). This price was said to be within the range of values for the said lands. Negotiations then took place between TCCL and the applicant and an agreement was executed between TCCL as vendor and the applicant as purchaser on the 9th January, 2019 for the price which had been offered. Under the terms of the agreement, a 10% deposit was paid by the applicant.
7. In February, 2019, the applicant was contacted by someone from TCCL and advised that the agreement had to be amended to insert a clause requiring judicial approval for the sale. According to the affidavit of Vishnu Maharaj, a Director and shareholder of the applicant, he was at first reluctant to sign the agreement, as the agreement was with TCCL's parent company, HCL and the fact that it required the court to approve the sale. However, he eventually did sign, when the Chairman of HCL advised him that the court approval was a "mere formality".
8. Following this, he kept asking for updates on the matter, and was always told that they were waiting for the court to approve the sale. As the date for completion

approached, TCCL wrote to the applicant asking for an extension of time for the completion. The applicant wrote back to indicate that they would grant an extension, subject to enough time being given to their financiers to complete the legal formalities prior to the date of completion.

9. The next the applicant heard was from the CEO of TCCL on the 4th October advising the applicant of the order dated the 18th September, 2019.

10. The applicant wishes to have the file unsealed to allow for the applicant to view and peruse the Application which led to the court's order of the 18th September 2019. It is to be noted that this transaction was but a small part of the entire application and was in fact spoke of together with another agreement for sale which had been executed by one of the various subsidiaries. In relation to the instant transaction, the application just sought approval for the sale, and noted that the proposed purchase price was within the range of values for the subject lands. It would do the applicant little benefit to have sight of the application as nothing arises from it. The application as it relates to the subject transaction is a mere recital of the bare facts surrounding the sale, and devoid of any particulars.

11. On the other hand, there is information contained in the application which does not relate to this transaction in any way. It relates to several parcels of land which are owned by the subsidiaries of the company, and their subsidiaries. This has nothing to do with the applicant, or the transaction in question. In the circumstances, I decline to unseal the file to allow the applicant to view the application, or to have access to a

CD copy of the proceedings. With respect to the reason for the court declining to approve the sale, this has been outlined above.

12. With respect to the order made by the court on the 18th September, 2019, the applicant seeks to attack it on several fronts. Firstly, it complains that it was not given an opportunity to be heard on the application. It contends that this raises a serious constitutional principle on the right to be heard.

13. This submission is misconceived. What the court is considering in whether to approve a transaction or not in circumstances like these is what is in the best interest of the company and its creditors and other contributories. The interests of the purchaser do not arise. By analogy, in circumstances where approval by a mortgagee is required before mortgaged property can be sold, the purchaser does not make supplications to the mortgagee to say why the sale should be approved, the mortgagee will consider whether the terms of the sale are sufficient to protect its (the mortgagee's) interest.

14. In like manner, the court in this case is not considering whether the terms of the sale are in the best interest of the purchaser, but as stated above, whether to allow the transaction would best serve the interests of the liquidation in terms of the realisation of the company's assets. In such circumstances, the rights of the purchaser do not fall to be considered.

15. The applicant, while not attacking frontally in this application, has raised the issue of the fact that the supplemental agreement is not between the registered owner of the land (TCCL) and the applicant, but rather TCCL's parent company/shareholder, HCL. It has specifically reserved the right to challenge the effectiveness of this agreement. In

light of this reservation, I will not make any comment on whether the fact that the party signing the supplemental agreement was HCL and not TCCL.

16. If we were to assume that the agreement is valid, then the situation is straightforward.

They agreed that the sale was subject to obtaining court approval. They agreed to the terms of compensation in the event that the sale could not be concluded as a result of the court not giving approval for the transaction.

17. The applicant seems to be contending that the supplemental agreement was only

entered into because its director Mr. Maharaj was assured that the application was a mere formality. As a seasoned man of business, Mr. Maharaj must have understood that the court cannot be a rubber stamp, and that there was a chance that the transaction would not have been approved. He could not have reasonably considered that the Chairman of HCL was speaking on behalf of the court, or that the court would not have considered the application fully. While a court is not experienced in business or commercial matters, and therefore should be slow in refusing an application of liquidators who would in general be experts in those fields, the fact of the matter remains that where a court has concerns about a proposed transaction, it is there to voice these concerns and to act so as to protect the best interests of the company.

18. In the circumstances, if it is the agreement is valid, then the applicant is bound by it and cannot interfere with the order of the 18th September, 2019.

19. However, the applicant may challenge the validity of this agreement. What if it is that the supplemental agreement is void or voidable. Assuming that the supplemental agreement is void because it was executed by HCL, and not TCCL, the question arises

as to whether the agreement for sale is subject to the approval of the court given the fact that it is not TCCL which is in liquidation, but rather the parent company of its parent company. Again, it is to be noted that at this time I express no opinion on the validity of the supplemental agreement.

20. It is trite law that when a company is in liquidation, the job and function of the liquidator is to gather in the assets of the company, and then distribute these assets to those with a valid claim against the company in order of their priority. At the end of this distribution, whatever remains is distributed among the shareholders of the company. A company which is insolvent would not have anything left over to distribute to the shareholders, obviously.

21. In the instant case, the company in liquidation was a holding company. Its entire business was being the owner of various subsidiaries, which had their own business activities and some of which held their own subsidiaries. With the exception of CLICO and CIB, none of the subsidiary companies of the company, including the HCL or TCCL were in liquidation or under some other intervention. If this is the case, the question which arises is what power if any do the liquidators have over the affairs of the subsidiaries? The management of a company is conducted by the Directors, not the shareholders. The Companies Act Chapter 81:01 makes this clear.

22. In gathering in the assets, the joint liquidators had to consider whether it would be more beneficial to sell these individual companies as a going concern, strip the companies of their assets and sell the assets, or some combination of the 2, that is to say, selling some of the assets of the company and selling the remainder as a going

concern. It is not clear what the position of the liquidators are with respect to TCCL, but from the conduct of the liquidators, it is clear that the sale of the subject lands was within their contemplation. Further, it is to be noted that under the Companies Act, the directors owe a duty to the shareholders and employees of a company.

23. In those circumstances, in considering whether to make a significant disposition of a subsidiaries' assets where its parent company (or the parent company of that company) regard must be had as to whether such a disposition, and the terms of such a disposition are in the best interests of the company in liquidation. Conversely, the liquidators must consider whether a proposed disposition by a subsidiary, or a subsidiary of a subsidiary would be beneficial for the gathering in of the assets. In short, where a subsidiary of a company in liquidation, though not in liquidation itself, is engaging in activity which is outside its normal business activity, such activity must be susceptible to scrutiny by the liquidators, and by extension, in a court ordered liquidation, scrutiny by the court. In the circumstances, the agreement was always subject to the approval of the court, and the supplemental agreement merely emphasises this point.

24. In the circumstances, even if the supplemental agreement is void, or voidable, the transaction, having not been approved by the court, cannot be saved or revived.

25. In light of the above, the application dated the 16th October, 2019 is dismissed.

Kevin Ramcharan
Judge