

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL No. 47 OF 2007**

**BETWEEN**

**COLONIAL HOMES AND COMMERCIAL PROPERTIES LIMITED**  
**Formerly called BALMAIN PARK LIMITED**

**APPELLANT**

**AND**

**KASSINATH PERSAD**  
**INDRANI PERSAD**

**FIRST RESPONDENTS**

**AND**

**SCEPTRE TRINIDAD LIMITED**

**SECOND RESPONDENT**

**AND**

**COLONIAL HOMES AND COMMERCIAL PROPERTIES LIMITED**  
**Formerly called BALMAIN PARK LIMITED**

**THIRD PARTY APPELLANT**

**AND**

**SUSHILLA SHIVAPRASAD**

**AND**

**SUSHILLA SHIVAPRASAD legal personal representative of**  
**Lakshmidatta Shivaprasad, Deceased**

**THIRD PARTY RESPONDENTS**

**APPEARANCES:** Mr. Kawalsingh for Colonial Homes and Commercial Properties Ltd.  
Mr. Harnanan for Kassinath and Indrani Persad  
Mr. Broomes for Sceptre Trinidad Ltd.

**PANEL:** I. Archie, C.J.  
A. Mendonça, J.A.  
A. Yorke-Soo Hon, J.A.

**DATE OF DELIVERY:** JULY 14<sup>th</sup>, 2010

I agree with the judgment of Mendonca J.A. and have nothing to add.

I. Archie,  
Chief Justice.

I too agree.

A. Yorke-Soo Hon,  
Justice of Appeal

## **JUDGMENT**

Delivered by A. Mendonça, J.A.

1. The dispute in this matter concerns a parcel of land comprising 579.7 square meters (or approximately 6,237 square feet) in the ward of Chaguanas (the disputed parcel of land). Both the Appellant, Colonial Homes and Commercial Properties Limited (hereinafter referred to as Colonial Homes), and the First Respondents, Kassinath and Indrani Persad (the Persads), claim to be owners of the disputed parcel of land. The Persads claim that it was conveyed to them by deed of conveyance registered as number 4770 of 1988 (the 1988 conveyance) and that the deed registered as number 11819 of 1991 (the 1991 conveyance) by which the disputed parcel of land was purportedly conveyed to Colonial Homes is null and void. Colonial Homes on the other hand, contends that the 1988 conveyance is null and void

and the disputed parcel of land was properly conveyed to it by the 1991 conveyance. The outcome of this appeal therefore depends on which of the two deeds was effectual to pass title to the disputed parcel of land.

2. The relevant background to this appeal is not complicated.

3. By deed of mortgage registered as number 1643 of 1979 a parcel of land comprising thirteen (13) acres in the ward of Chaguanas (the mortgaged lands) were conveyed to Lakshmidatta Shivaprasad, Sushilla Shivaprasad, Vinod Shivaprasad, Sudarshan Shivaprasad and Vidur Shivaprasad by way of mortgage to secure the payment of sums to the extent of \$1,300,000. The mortgage was given by Commercial Finance Company Limited, the then fee simple owner of the mortgaged lands. The monies secured by the mortgage were expressed to be payable on demand. I will refer in this judgment to this mortgage as the Commercial Finance mortgage.

4. In 1987 the Shivaprasads entered into an agreement with Trinity Land Enterprises Limited (Trinity) for the sale to it of the mortgaged lands. The mortgaged lands however were not conveyed to Trinity under this agreement.

5. The next relevant transaction is the 1988 conveyance. By that time, because of dealings among themselves the number of the Shivaprasads in whom the Commercial Finance mortgage was vested was reduced. The 1988 conveyance is made between the Shivaprasads in whom the mortgage was by that time vested, Trinity and the Persads. The 1988 conveyance recites, inter alia, that Trinity had agreed with the Shivprasad to purchase the mortgaged lands but no conveyance had been executed and that Trinity had agreed with the Persads to sell to them the disputed parcel of land. The operative part of the deed provides, inter alia, that:

[The Shivaprasads] as beneficial owners and by the direction of [Trinity] hereby convey and [Trinity] conveys and confirms unto the [Persads the disputed parcel of lands] to hold the same unto and to the use of the [Persads] in fee simple...

6. It is relevant to note, as this is highly material to Colonial Homes' argument in this appeal, that the Shivaprasads are expressed in the 1988 conveyance to convey the disputed parcel of land, not as mortgagees, which they were, but as beneficial owners.

7. On the conveyance of the disputed parcel of land to the Persads, they in turn conveyed it to Trinity by way of mortgage to secure the sum of \$50,000 being the unpaid balance of the purchase price of the disputed parcel of land.

8. The transaction that is next relevant is the 1991 conveyance to Colonial Homes. This deed is made between Sushilla Shivaprasad in her own capacity and as legal personal representative of the estate of Lakshmidatta Shivaprasad (who by then were the only two (2) Shivaprasads with an interest in the Commercial Finance mortgage), Trinity and Colonial Homes, which at that time was known as Balmain Park Limited. By this deed a portion of the mortgaged lands comprising 0.6708 hectares was conveyed to Colonial Homes by the Shivaprasads and Trinity in "fee simple freed and discharged from all claims and demands under" the Commercial Finance mortgage. It is not disputed that the disputed parcel of land forms part of the lands purportedly conveyed to Colonial Homes by this deed. It is also relevant to note that in this deed Sushilla Shivaprasad is correctly described as conveying as mortgagee and as the legal personal representative of Lakshimidatta Shivaprasad.

9. On August 12<sup>th</sup>, 1991 by deed of release registered as number 3242 of 1991 Trinity released and re-conveyed to the Persads the disputed parcel of land freed and discharged from the mortgage granted to Trinity by them to secure the unpaid balance of the purchase price.

10. On January 13<sup>th</sup>, 1992 by deed of lease made between Colonial Homes and Sceptre Trinidad Limited (Sceptre), Colonial Homes purported to grant a 999 year lease to Sceptre of a portion of the lands that had been conveyed to it by the 1991 conveyance. The disputed parcel of land is part of the leased lands.

11. After the execution of the deed of lease, the Persads alleged that Sceptre by its servants or agents had entered upon the disputed parcel of land. The Persads as a

consequence commenced proceedings against Colonial Homes and Sceptre. I will mention here that the Bank of Commerce Trinidad and Tobago Limited was also named as a defendant in the action. The Bank's interest was by virtue of a debenture issued by Colonial Homes which created a fixed charge over its lands in favour of the Bank. The debenture was however released before the trial of this action and the Bank's involvement at the trial was limited to the question of costs. The Bank has however played no part in this appeal and nothing more therefore need be said of it.

12. In the action against Colonial Homes and Sceptre, the Persads claimed, *inter alia*:

- i a declaration that the 1991 conveyance is null and void;
- ii a declaration that they are owners of the disputed parcel of land conveyed to them by the 1998 conveyance;
- iii possession of the disputed parcel land.

The other relief claimed, save for the question of costs, is not relevant to this appeal.

13. Sceptre and Colonial Homes defended the action and they counterclaimed. Essentially by their counterclaim they contended that the Persads had no title or interest in the disputed parcel of land. They alleged that the Shivaprasads, at the time of the 1988 conveyance were not competent in law to pass title to the Persads the disputed parcel of lands as beneficial owners as they were mortgagees of the land and not beneficial owners. They both relied on the 1991 conveyance as passing title to Colonial Homes.

14. By third party notice Colonial Homes, in the event that the Court held against it, claimed against, Sushilla Shivaprasad in her own capacity and as legal personal representative of the estate of Lakshimidatta Shivprasad, to be entitled to an indemnity against the claim of the Persads as well as damages for breach of the covenant for title and/or the covenant for quiet enjoyment implied in the 1991 conveyance.

15. Sceptre also maintained a claim against Colonial Homes for an indemnity in the event that it was held liable to the Persads. Sceptre further claimed against Colonial Homes damages for breach of the covenant for quiet enjoyment.

16. The Judge, Myers J., in his judgment noted that it was not disputed that at the time of the 1988 conveyance the Shivaprasads were the mortgagees of the disputed parcel of land. He outlined the competing positions of the parties. He stated that the Persads primary case was that the power of sale under the Commercial Finance mortgage had arisen and so the Shivaprasads were in a position to convey to them the legal estate. Secondly, and in the alternative the Persads contended that even if the power of sale had not arisen, and so the legal estate did not pass by the 1988 conveyance, the effect was to convey to them all the right title and interest that the Shivaprasads and Trinity had in the disputed parcel of land. As the Shivaprasads' and Trinity's title and interest passed to the Persads on the 1988 conveyance they contend that nothing passed to Colonial Homes with the 1991 conveyance. The position therefore, on the Persads case, was that the 1991 conveyance was null and void in relation to the disputed parcel of land and they were the owners of it.

17. On the other hand Colonial Homes and Sceptre's position was that the 1988 conveyance was void. They disputed that the power of sale under the Commercial Finance mortgage had arisen and even if it did, that was irrelevant as the Shivaprasads in the 1988 conveyance to the Persads did not intend to exercise the power of sale conferred by the Commercial Finance mortgage with the result that nothing passed by the conveyance to the Persads.

18. As a result of the various contentions, Myers J. noted that the entire case turned on the effect of the 1988 conveyance. He stated that there were three issues he had to decide. First, whether the power of sale had arisen under the mortgage in favour of the Shivaprasads at the time of the 1988 conveyance. Secondly, if the answer to that question was yes then he would have to decide the relevance of that fact given that the Shivaprasads had described themselves as fee simple owners and not mortgagees in the 1988 conveyance. Thirdly, the Judge stated, that depending on the outcome of those two issues he would next have to decide whether, if the 1988 conveyance failed to pass the fee simple to them, it passed to them, any interest that the Shivaprasads had at the time.

19. With respect to the first issue whether the power of sale had arisen, the Judge held that it had not as the Persads failed to prove that the debt secured by the mortgage was due.

The second issue therefore did not arise for consideration. With respect to the third issue, the Judge held that whatever interest the Shivaprasads had when they executed the 1988 conveyance was conveyed by that deed notwithstanding the fact that they were not beneficial owners as they were described in the deed. Accordingly the Judge granted a declaration that the Persads are the owners and entitled possession of the disputed parcel of land subject however to the equity of redemption in favour of Commercial Finance Company Limited. In other words the Judge was of the opinion that the 1988 conveyance passed to the Persads, all the Shivaprasads title and interest as mortgagees under the Commercial Finance mortgage. The Judge further declared that the 1991 conveyance to be null and void and of no effect in so far as it purported to convey the disputed parcel of land or any part thereof. The Judge also made an order granting possession to the Persads of the disputed parcel of land.

20. With respect to the third party proceedings by Colonial Homes against the Shivaprasads, notwithstanding the Judge's conclusion, that by the 1998 conveyance the Shivaprasads had passed whatever interest they had in the disputed parcel of land to the Persads and so had no title or interest to pass to Colonial Homes by the 1991 conveyance, he proceeded to dismiss the third party claim. He came to that conclusion on the basis of oral evidence led on behalf of the Shivaprasads, which he accepted. The evidence was to the effect that Colonial Homes was aware of the 1988 conveyance to the Persads and that attorney-at-law acting for the Shivaprasads had requested that the disputed parcel of land be omitted from the 1991 conveyance. The Judge appeared to be of the view that the disputed parcel of land had therefore been wrongly included in the 1991 conveyance which had been executed in error in so far as it related to the disputed parcel of land.

21. Myers J. however granted the claim of Sceptre against Colonial Homes for an indemnity against any and all of its liability to the Persads. The Judge also ordered Colonial Homes reimburse the premium paid by Sceptre for the lease.

22. Colonial Homes have appealed to this Court. It challenges the conclusion of the Judge that the Persads had any title or interest in the disputed parcel of land. It argues that no title or interest in the disputed parcel of land passed to the Persads under the 1988 conveyance. Colonial Homes contends that as the power of sale under the Commercial Finance mortgage had not arisen at the time of the 1988 conveyance to the Persads, the

Shivaprasads could not sell to them the disputed parcel of land. The most the Shivaprasads could pass was their interest as mortgagees. Whether this occurred or not was subject to the question whether there was a contrary intention to do so appearing in the 1988 conveyance. It submitted that upon the true construction of the 1988 conveyance the intention was not to convey the Shivaprasads' interest as mortgagees. Colonial Homes therefore submitted that nothing passed to the Persads under the 1988 conveyance and that title to the disputed parcel of land passed to it under the 1991 conveyance. Alternatively Colonial Homes contends that if any title or interest passed to the Persads in respect of the disputed parcel of land by the 1988 conveyance then when the Persads executed the mortgage in 1988 to Trinity their title or interest passed to Trinity, which in turn was conveyed by Trinity in the 1991 conveyance to Colonial Homes. In this regard Colonial Homes draws attention to the fact that the release of the 1988 mortgage in favour of Trinity was done after the 1991 conveyance with the result that it was ineffectual to re-convey any interest in the disputed parcel of land to the Persads.

23. So far as the third party proceedings by Colonial Homes against Shushilla Shivaprasad are concerned there was in fact no challenge by Colonial Homes to the Judge's conclusion. With respect to the Sceptre's claim against Colonial Homes, of course if the latter's position is correct that they became the owners of the land by the 1991 conveyance and no title or interest passed to the Persads under the 1988 conveyance, then it would follow that Sceptre's claim should have failed and the Judge was wrong to grant Sceptre any relief. Apart from that however there was no direct challenge by Colonial Homes to the order made by the Judge in respect of Sceptre's claim.

24. Sceptre for its part while content to rely on the relief granted to it by the Judge, nevertheless supported the primary submissions of Colonial Homes that the 1988 conveyance passed no title or interest in the lands to the Persads and the disputed parcel of land was properly conveyed to Colonial Homes by the 1991 conveyance.

25. The Persads submitted that in relation to them the Judge was correct to hold that the 1998 conveyance passed to them whatever interest the Shivaprasads and Trinity had in the disputed parcel of land. As a consequence there was no title or interest in the lands which the Shivaprasads or Trinity could have passed to Colonial Homes by the 1991 conveyance.



26. The Court also received written submissions on behalf of Sushilla Shivaprasad. These supported the contention that the Shivaprasads by the 1988 conveyance passed to the Persads whatever interest they had in the disputed parcel of land and contended that consequently the Persads became the mortgagees in possession of the disputed parcel of land subject to the outstanding equity of redemption in favour of Commercial Finance Company Limited. The submissions however go on to argue that the equity of redemption was extinguished by the passage of time as more than sixteen (16) years have passed since the date the Persads became mortgagees in possession of the lands. I do not think however that the submissions with respect to the extinguishment of the equity of redemption can be entertained in this action where Commercial Finance Company Limited was not represented and where that was not an issue at the trial and was not explored. I do not intend to say anything further on that score.

27. There are therefore two (2) issues for determination in this appeal. The first is the effect of the 1988 conveyance. Was it effectual to pass the Shivaprasads' title or interest to the Persads in respect of the disputed parcel of land? Secondly if the 1988 conveyance passed the Shivaprasads' title or interest to the Persads was that title or interest passed to Colonial Homes by virtue of the Persads' mortgage to Trinity and the latter joining in the 1991 conveyance to Colonial Homes?

28. With respect to the first issue it is relevant to distinguish between the exercise of the power of sale by a mortgagee in cases where the power has arisen and in cases where it has not. Where the power of sale has arisen the mortgagee can make good title with the purchaser free from the equity of redemption. This is so even if the power of sale has not become exercisable. Where however the power of sale has not arisen, the mortgagee has no statutory power of sale at all and the most he can do is to transfer his mortgage (see **Selwyn v Garfit** (1888) R.R. 38 Ch. D 273).

29. The Commercial Finance mortgage incorporated the statutory power of sale as contained in the **Conveyancing and Law of Property Act** but varied the provisions contained in the Act as to the exercise of the power. The **Act** provides that the power of sale arises when the mortgage moneys have become due (see Section 39(1)). In this case the Judge concluded that the power of sale had not arisen because there was no evidence that the

moneys under the Commercial Finance mortgage were in arrears. In other words, there was no evidence that the moneys were due. In my judgment the Judge was correct to come to that conclusion on the evidence. The mortgage is a demand mortgage and there was no evidence before the Judge that payment of the mortgage moneys had been demanded and had not been paid.

30. It is however surprising that Colonial Homes should not have accepted that the power of sale had arisen. Both the 1988 conveyance and the 1991 conveyance are sub-sales. They both recite the agreement by the Shivaprasads to sell the lands to Trinity and refer to the fact that the sale to Trinity was not completed. The power of sale that the mortgagees sought to exercise is the power of sale that is said to have arisen prior to the agreement to sell the mortgaged lands to Trinity and is the same in relation to both the 1988 conveyance and the 1991 conveyance. If the power of sale did not arise in relation to the Persads then arguably the same would apply to Colonial Homes. Be that as it may, the fact of the matter is that the Judge found that the power of sale had not arisen in relation to the 1988 conveyance and there has been no appeal from that finding. I shall then proceed on the basis that the power of sale had not arisen.

31. As I mentioned earlier if the power of sale has not arisen the conveyance may operate as a transfer of the mortgagee's mortgage. The mortgage in favour of the Shivaprasads by Commercial Finance Company Limited in this case, as is the norm in relation to common law lands, that is to say lands not held under the Real Property Ordinance, is a conveyance by the mortgagor of his estate or interest in the lands subject however to the equity of redemption. In this case Commercial Finance Company Limited was the fee simple owner of the lands so in the Commercial Finance mortgage it was expressed that the Company conveyed the mortgaged lands to the Shivaprasads to hold the same unto and to their use in fee simple subject to the equity of redemption. If therefore the 1988 conveyance to the Persads operated as a transfer of the mortgage what would have been transferred to them would include the fee simple in the mortgaged lands subject to the equity of redemption.

32. The question that arises in this case is whether the 1988 conveyance to the Persads transferred the mortgage. As it is apparent from the submissions before this Court the contention of Colonial Homes and Sceptre are that it did not. They argue that the 1988

conveyance was not expressed to be a conveyance by the Shivaprasads as mortgagees. The Shivaprasads purported to convey the fee simple fee from the equity of redemption which they could not do. On the other hand the Persads rely on section 17 of the **Conveyancing and Law of Property Act** and contend that whatever title or interest the Shivaprasads had in the disputed parcel of land passed with the 1988 conveyance.

33. Section 17 of the **Conveyancing and Law of Property Act** provides as follows:

“17(1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies to conveyances made after the 1<sup>st</sup> of January, 1885.”

34. The effect of this section is that under a conveyance made after January 1<sup>st</sup>, 1885 there passes whatever estate, right, title, interest, claim and demand the grantor had at the time. This has been stated to be the prima facie position or the general rule so that prima facie or as a general rule the grantor conveys and settles every interest with which he can part and which he does not except (see **Johnson v Webster** 43 ER 592 and **Williams v Pinckney** (1897) 77 LT 700). So that in **Thellusson v Liddard** [1900] 2 Ch. 635 where the grantor purported to convey the fee simple to the defendant but he had only an equitable leasehold interest, it was held that the conveyance served to pass the equitable interest and the plaintiff was bound to give effect to it. Thus if section 17(1) applies the 1988 conveyance would pass to the Persads the Shivaprasads' title and interest in the disputed parcel of land as mortgages, in other words the fee simple subject to the equity of redemption in favour of Commercial Finance Company Limited.

35. However section 17(2) provides that the section applies only so long as a contrary intention is not expressed in the conveyance and has effect subject to the terms of the conveyance and to the provisions therein contained. In other words the prima facie position

or the general rule may give way to a contrary intention expressed in the conveyance and to its terms and provisions.

36. Counsel for Colonial Homes submitted that the 1988 conveyance contained a contrary intention. This was indicated by the fact that the deed clearly purported to pass the fee simple and not the Shivaprasads' interest as mortgagees.

37. The purport of Counsel's submission is that where in a conveyance the capacity in which a grantor conveys is not correctly stated, then whatever interest the grantor in fact has cannot pass. So that in this case where the Shivaprasads were in fact mortgagees but conveyed as beneficial owners then nothing passed by the conveyance. That however is not necessarily so. As was noted in **Weston v Henshaw** [1950] Ch. 510, 516 the words as "beneficial owners" are words implying covenants for title and are not in themselves necessary. The same of course may be said for the words "as mortgagee" (see section 27(F) of the **Conveyancing and Law of Property Act**). To determine whether the deed contained a contrary intention so as to render section 17(1) inapplicable it is necessary to construe the deed.

38. The true construction of the 1988 conveyance must be arrived at by taking the deed as a whole. The whole scope of the deed must be considered "as to which especial regard is to be had to ... introductory recitals" (see **Williams v Pinckney**, *supra*).

39. It is impossible, in my judgment to discern in the 1988 conveyance a contrary intention that would render section 17 inapplicable. In the 1988 conveyance it was recited that the Shivaprasads are the fee simple owners free from encumbrances and they had agreed to sell the lands to Trinity but no conveyance was executed. It was further recited in the deed that there was an agreement to sell the disputed parcel of land to the Persads. Both Trinity and the Shavaprasads then conveyed the whole of the interest that the recitals expressed that they had in the lands. This is not consistent with a contrary intention to convey whatever interest they had in the lands but is entirely consistent with an intention to do so. The 1988 conveyance was clearly intended to pass to the Persads all the title and interest the conveying parties had in the disputed parcel of land.

40. In my judgment therefore the first issue resolves itself against Colonial Homes and the Judge was correct to hold that whatever interest or title the Shivaprasads had passed to the Persads in the 1988 conveyance notwithstanding the fact that they were not the beneficial owners as described in the deed. As I have mentioned earlier, the Shivaprasads were not in a position to convey the lands free from the equity of redemption in favour of Commercial Financial Company Limited. The effect of the 1988 conveyance therefore was to transfer the Commercial Finance mortgage to the Persads in relation to the disputed parcel of land. The Judge was therefore correct to declare the Persads the owners of the disputed parcel of land subject to the Company's equity of redemption.

41. I turn now to the second issue. In this regard the submission of Colonial Homes was that if anything passed to the Persads under the 1988 conveyance then that was conveyed to Trinity when the Persads executed the mortgage in favour of Trinity to secure the unpaid balance of its purchase price and in turn was conveyed by Trinity to Colonial Homes by the 1991 conveyance. This, submitted Counsel, was also an application of section 17 of the **Conveyancing and Law of Property Act**. The 1991 conveyance, to which Trinity was a party, must be taken to have passed all the title or interest it had in the disputed parcel of land.

42. In my judgment however, section 17 does not apply in this instance. It is clear from the 1991 conveyance that it was not the intention of Trinity to pass any interest in the disputed parcel of land that was mortgaged to it by the Persads. This is so for the following three (3) reasons. First, Trinity joined in the 1991 conveyance to convey to Colonial Homes any interest it had in the mortgaged lands which the Shivaprasads had agreed to sell to it as mortgagees but in respect of which no conveyance had been executed in its favour. This could not be taken to refer to the disputed parcel of land in respect of which the Shivaprasads, at the direction of Trinity, had executed the 1988 conveyance. Second, the scope and clear intention of the 1991 conveyance was to convey the lands the Shivaprasads had power to convey. They had however by the 1988 conveyance conveyed all their title and interest in the disputed parcel of land to the Persads and therefore had no power to convey that parcel of land to Colonial Homes. Third, Trinity's involvement in the 1991 deed related to lands it had agreed to purchase from the Shivaprasads. In other words whatever interest it had in the lands was derived under the agreement between it and the Shivaprasads to

purchase the mortgaged lands. That cannot apply to lands it had acquired subsequently by way of mortgage to it.

43. In my judgment therefore the 1991 conveyance did not pass any title or interest in the disputed parcel of land to Colonial Homes.

44. In the circumstances in my judgment the Judge was correct to make the declarations and orders that he did in relation to the disputed parcel of land. This appeal is therefore dismissed with costs to be taxed and paid by the Appellant, Colonial Homes, to the Respondents.

Dated the 14<sup>th</sup> day of July, 2010

A. Mendonça  
Justice of Appeal