

The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P163 of 2018

Civil Appeal No. P077 of 2019

Claim No. CV2016-03378

Between

HERMITAGE PROPERTIES LIMITED

Appellant

And

COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED

Respondent

PANEL:

N. BERAUX J.A.

M. MOHAMMED J.A.

M. WILSON J.A.

Date of delivery: July 31, 2023

APPEARANCES:

Mr. Mervyn Campbell and Mr. Marc Campbell, Attorneys-at-law for the Appellant

Mr. Ravindra Nanga instructed by Ms. Gitanjali Gopeesingh, Attorneys-at-law for the Respondent

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) These are two appeals from the decisions of Boodoosingh J (as he then was) given on 2nd May 2018 (“the first judgment”) and 30th January 2019 (“the second judgment”). Both appeals arise out of the claim of the appellant Hermitage Properties Limited (“Hermitage” or “the appellant”) against Colonial Life Insurance Company (Trinidad) Limited (“Clico”) for the following reliefs:

- (i) An order that Clico re-convey to it and/or release from the mortgage the forty (40) lots of land situate in Arima registered in Volume 1893 Folio 197 and now described in Certificate of Title registered in Volume 5354 Folio 81.
- (ii) An account of all monies collected from the proceeds of sales of lots under and by virtue of the said mortgage from the year 2010 to date.
- (iii) Such further and/or other relief as the Court deems necessary.

(2) The claim was supported by the affidavits of Michael Amar, Allan Hewitt and Carlos John. Clico’s evidence against the claim was provided initially by Usha Jawahir, Clico’s Finance Manager-General Accounting. Based on that evidence, Boodoosingh J delivered his first judgment ordering as follows:

“36. ...

a. The Defendant to provide a detailed account verified by affidavit to the Claimant and the Court on the payments made, when made, how the interest and changes were computed and why payments were applied to each account and whether

releases or partial releases were made for individual lots, such as their records allow;

b. This information to be provided within three months of this order;

He added that:

37. Once this is done, I will be in a position to consider whether an order should be made under paragraph 1 of the Fixed Date Claim and the terms of the order.

38. I will further make an order in terms of Part 2 of the fixed date claim to be provided within three months of the order. It is the right of any borrower to obtain a statement of their account.”

In giving the first judgment, the judge also considered the affidavit evidence of Mr. Russell Huggins, attorney-at-law for Clico who had deposed to an affidavit in support of an interlocutory application to extend time for filing of evidence on behalf of Clico. So shall I.

- (3) The direction to provide accounts was complied with by Clico through the evidence of Gratiana Boyd, Senior Manager, Billings and Collection. The judge considered the accounts provided by Ms. Boyd. See paragraphs 8 to 19 of the second judgment. At paragraphs 20 and 21 of his second judgment he then reviewed the entirety of the evidence preferring Clico’s evidence finding it more reliable. He found that Hermitage *“had not demonstrated that an order under paragraph 1 of the fixed date claim should be made”*. That is to say, he found that Hermitage had not proven that it was entitled

to release of the lots. Having found that Hermitage had succeeded on issue of provision of a statement of account but had failed to get the release of the mortgage of the 40 lots, he ordered each party to bear their own costs.

Issue

- (4) The broad issue in both appeals is whether the judge was plainly wrong to make the orders that he made in both judgments.

Summary of decision

- (5) The appeals must be dismissed. The judge was entitled to make the orders which he did make having regard to the evidence before him. He cannot be said to be plainly wrong.

The judge's decision

- (6) It is necessary to set out the judge's reasoning in respect of both judgments as well as the evidence on which he relied.

The first judgment

- (7) In making the orders set out at paragraph 2 above, the judge reasoned as follows:
- (i) The evidence as a whole from both sides revealed a lack of detail and information. As a result no proper assessment could be made of the state of the accounts between the parties.
 - (ii) Hermitage had the burden of proving that the lots should be re-conveyed but Cllico, as the party lending the money, still had to give a

detailed record of how the payments have been applied in regard to the mortgages and of how the figures have been arrived at.

- (iii) Significant sums of money have been paid which amount to more than the principal amounts on the mortgages. Clico had not done any definitive analysis of the state of the accounts and how the moneys paid were applied. Ultimately, if the payments were made, Hermitage was entitled to the remedy of having the lots released under the mortgages. A duty was placed on Clico to provide full information to Hermitage on the state of their payments and mortgages.
- (iv) Mr. Huggins' evidence that there was a need for a search of the land registry and for an accounting exercise was a sensible approach to adopt.
- (v) Hermitage also had a right to know what "*charges*" were incurred or applied to its accounts, given the evidence of Ms. Jawahir, so that it can be determined if these were legitimate charges under the mortgages and loan facility.
- (vi) While it was open to Hermitage to probe these matters in cross examination, it was also entitled to contend that Clico had not discharged its evidential duty to assist the court fully, given that Clico ought to have supporting records, to clearly set out how the end figures were arrived at.

The second judgment

- (8) The judge stated that:
 - (i) Cross-examination and a striking out order of parts of the affidavit of Ms. Boyd would be refused because the evidence was admissible given that Ms. Boyd obtained the evidence from the records of the company. She was an appropriate person within Clico to relate the

contents of those records. The matters she deposed are a questions of weight. Cross-examination was declined because there had already been a full hearing. The court simply needed further information about the matters set out in the order. Given the evidence provided by Hermitage, cross-examination of Ms. Boyd would not assist. It would only have been necessary if there had been a contest on the specific evidence.

(ii) At paragraphs 20, 21 and 22 he said:

“The claimant says they paid off the monies due. The defendant says no. I preferred the account and the evidence of the defendant to that of the claimant about the payments and the maintenance of the accounts. First the evidence was based on the records of the defendant company which from the affidavit was methodically examined. Second, the claimant had the full opportunity in its evidence to show how its payments covered what was due. Third, the Boyd affidavit taken together with the Jawahir affidavit set out the state of the accounts, the interest rates applicable, the dates, the payments made and the balances due. There was no comparable statement from the claimant. Fourth, the claimant’s evidence on the payments was general as opposed to a specific representation of an account. The statements were made by Mr. Amar that sums were paid. The defendant by contrast provided an account of payments, when made and how these were credited. The charges applied were also identified. The claimant, as a company, ought to have also had records, receipts and its own statement of account. Fifth, I noted that the claimant’s

version spoke only to the payments to the mortgages or loans. Under the mortgage documents the claimant was also liable for other charges concerning the upkeep and maintenance of the property. The defendant set out what these were and deducted from the sums due those charges that were unsupported. The figure had also to be factored in determining whether monies were still due under the mortgages. Accordingly, between the two versions the defendant's version seemed to me to be more detailed, comprehensive, justified and supported. I therefore concluded it was more reliable and I accepted it.

Even if as contended by the claimant that the one million dollar facility was unsecured this does not erase the evidence that both the 1983 and 1986 mortgages remain in arrears, inclusive of charges, and therefore the defendants are entitled to continue to hold the properties in question.

In consequence the claimant has not demonstrated that an order under paragraph 1 of the fixed date claim should be made."

It is evident that Boodoosingh J gave careful consideration to the evidence before preferring Clico's evidence.

The evidence

Appellant's evidence

(9) Mr. Amar deposed that Hermitage is the registered proprietor of two properties measuring respectively:

- (a) ten (10) acres, three (3) roods and thirty-nine (39) perches
- (b) two (2) roods and nineteen (19) perches.

Hermitage mortgaged both properties to Clico to secure the sums of one million six hundred thousand dollars (\$1,600,000.00) and two million six hundred thousand dollars (\$2,600,000.00) which Clico advanced to Hermitage. Subsequent to the mortgage, Hermitage sub-divided and developed both properties into ninety-one (91) lots. From 1985 to 2013, Hermitage sold the developed lots to third parties and re-paid Clico the sums owing under the mortgage, to wit; four million two hundred thousand dollars (\$4,200,000.00) together with interest of one million one hundred and twenty thousand dollars (\$1,120,000.00). In turn, Clico executed partial releases and discharges in respect of those developed lots which were sold. The purchase prices of the sold lots were applied to the mortgage balance held by Clico.

(10) According to Mr. Amar, Clico has failed to execute releases and discharges with regard to forty of the sub-divided lots despite Hermitage having satisfied the mortgage loan in full.

(11) In his supplemental affidavit, Mr. Amar deposed that the sums owed to Clico were \$5,320,000.00 but with the sale/disposition of some forty-nine lots, the total consideration received by Clico was \$7,290,000.00. He particularized the partial releases, discharges and memoranda of transfers in regard to certain of the lots.

- (12) He then claimed the sum of \$1,970,000.00 was owed by Clico to Hermitage, that being the difference between the total consideration of \$7,290,000.00 and the mortgage debt of \$5,320,000.00 as well as the sum of \$638,680.00 which was loss suffered when two lots (41 and 77) were sold at an under value.

Alan Hewitt

- (13) Alan Hewitt deposed that he is a director of Hermitage and has been since *"the early 1980's"*. As a director, he had *"first-hand"* knowledge of the acquisition in 1981 of the two properties. He was closely involved in the negotiations for financing and project management of the developmental activities of Hermitage. Mr. Hewitt claimed to have a clear *recall "that the housing project was funded by (inter alia), a mortgage loan with the defendant [Clico]."* He participated in the negotiations and discussions. According to Mr. Hewitt it was agreed that Hermitage's liability to Clico under the mortgage would be liquidated by remitting a minimum of one hundred thousand dollars (\$100,000.00) to Clico from the proceeds of sale of each of the 49 houses. In turn, Clico would execute partial releases of the specific lots on which the houses were built and transfer ownership of the lots to the individual purchasers. He added that *"purchasers of the completed houses obtained financing from the Trinidad and Tobago Mortgage Finance Company Ltd. ("TTMF")"*, which remitted funds directly to Clico. Thereafter, Clico executed releases of the specific lots to the individual purchasers and he gave one specific example of such an arrangement.
- (14) He further deposed that he had had sight of a letter dated 12th March 2017 to Hermitage's attorney at law in which the general manager of TTMF Ms.

V. Shields confirmed that TTMF financed the acquisition of the properties of nine customers at a total sale price two million three hundred and ninety five thousand dollars (\$2,395,000.00). Mr. Hewitt was advised by Hermitage's attorney at law that TTMF indicated through its general manger Ms. V. Shields that TTMF could not give more detail as to the number of properties TTMF financed because of:

- (a) The length of time that elapsed since the financing was provided;
- (b) The fact that the mortgages with TTMF had been repaid by the individual purchasers; and
- (c) The inaccessibility of files that had been archived in accordance with TTMF's internal policies.

He then asserted that:

"the claimant's [Hermitage's] liability to the defendant [Clico]...was wholly satisfied by the payments for partial releases...as well as the defendant's [Clico's] sale of additional lots acting in their capacity as mortgagee under the...loan [mortgage]...."

Carlos John

- (15) Carlos John deposed to being an employee of Clico in 1984 and of being appointed manager of the Mortgage Department in or about 1988. His portfolio included *"all aspects of mortgage financing including the granting and approval of mortgage loans as well as the release and discharge of mortgages."* He speaks in general terms of being aware of the loan and of

the repayment arrangements between Clico and Hermitage by way of the sale of an individual lot of the mortgaged property, direct payment to Clico of the sale price of the specific lot and 'partial' releases of the individual lot by Clico in favour of the purchaser. He ends by purporting to accept as true and correct, the evidence of Mr. Amar and Mr. Hewitt as they relate to the mortgage repayment arrangements.

Respondent's evidence

Usha Jawahir

- (16) Usha Jawahir in her affidavit dated 29th May 2017 deposed that there were two mortgages. In addition to the mortgage of four million two hundred thousand dollars (\$4,200,000.00) with interest of one million one hundred and twenty thousand dollars (\$1,120,000.00), the appellant was granted "*further facilities*" of two million seven hundred thousand dollars (\$2,700,000.00). Both mortgages were exhibited to her affidavit. The first mortgage (which I shall also call the 1983 mortgage) acknowledged receipt of one million six hundred thousand dollars (\$1,600,000.00) with a covenant by Clico to advance a further two million six hundred thousand (\$2,600,000.00) on satisfaction of certain conditions. The mortgage deed is stamped as securing the sum of four million two hundred thousand dollars (\$4,200,000.00) on which sum stamp duty is endorsed as having been paid. This confirms Mr. Amar's evidence in his affidavit filed on 7th October 2016 that the sums of \$1,600,000.00 and \$2,600,000.00 was advanced by Clico to Hermitage (this also disposes of the oral submission of Mr. Marc Campbell that only \$1,600,000.00 was advanced under the 1983 mortgage). The second mortgage refers to the sum one million seven hundred thousand dollars (\$1,700,000.00) being advanced of which receipt of three hundred

and fifty thousand dollars (\$350,000.00) is acknowledged. There is no reference to the additional one million dollars to complete the total of \$2,700,000.00. Mr. Nanga in his oral submissions later acknowledged that while an additional one million dollar facility had been granted it was not secured by the second mortgage. He accepted that that sum had to be deducted from the mortgage balance.

(17) Ms. Jawahir further deposed that:

- (i) Hermitage made payments towards the mortgages, but the facilities were not paid off in full. In fact, Hermitage is still indebted to Clico. In exercise of its power of sale as mortgagee, Clico sold parcels of land and applied the proceeds of sale to Hermitage's indebtedness and Clico executed partial releases in respect of lots alienated in the sale by mortgagee.
- (ii) Based on the Clico's records, Hermitage has not wholly satisfied its indebtedness. Hermitage had 2 accounts with Clico: account number 100183251 in respect of the \$4,200,000.00 mortgage and account number 100186184 in respect of the \$1,700,000.00 mortgage and \$1,000,000.00 facility.
- (iii) Hermitage was indebted to Clico in the total sum of \$6,900,000.00. Between the period 1983 – 2000 Hermitage repaid the sums of \$3,900,000.00 by way of payments and transfer of parcels of land to Clico in respect of account number 100183251. For that period account number 100183251 incurred interest charges in the amount of \$2,409,883.51 and \$356,420.90 in other charges. Account number 100186184 incurred interest in the amount of \$647,183.73.
- (iv) Between the period 2001 – 2007, there were no payments in respect of either account and account number 100183251 incurred charges in the amount of \$230,072.32.

- (v) During 2008 to 2010, there were no payments in respect of either account and account number 100183251 incurred charges in the amount of \$283,097.96.
- (vi) During 2011, the sum of \$224,000.00 was paid towards account number 100183251 and this account incurred charges in the amount of \$84,843.45. There were no payments on account number 100186184.
- (vii) During 2012, the sum of \$853,000.00 was paid towards account number 100183251 and this account incurred charges in the amount of \$92,707.60. There were no payments on account number 100186184.
- (viii) During 2013, the sum of \$1,735,500.00 was paid towards account number 100186184 and this account incurred charges in the amount of \$108,896.23. There were no payments on account number 100183251.
- (ix) During 2014, the sum of \$337,500.00 was paid towards account number 100186184. There were no payments on account number 100183251 and this account incurred charges in the amount of \$84,016.00.
- (x) During 2015, there were no payments in respect of either account and account number 100183251 incurred charges in the amount of \$279,598.56.
- (xi) During 2016, the sum of \$374,200.00 was paid towards account number 100183251 and this account incurred charges in the amount of \$184,912.28. There were no payments on account number 100186184.
- (xii) Since the inception of Hermitage's facilities, both accounts were accruing interest and charges. After applying the payments made by Hermitage, including the transfer of land, together with the sums

applied from the sale of lots and taking into the accruing interest and charges, Hermitage remains indebted to Clico in the sum of \$4,237,432.54.

Tedious though the details are, I have set them out as it illustrates the level of detail provided by Clico to support its claim that Hermitage is still indebted to it.

Russell Huggins

(18) Additionally the evidence of Russell Huggins filed in an interlocutory application revealed that:

- (i) Prior to the filing of this claim, Clico had no information on the status of Hermitage. He was first instructed by Clico in or about 2008 to carry out searches into the Hermitage. Several checks were made at the Companies Registry by his search clerks to ascertain whether Hermitage as a company was still in existence, but to no avail. The file could not be found.
- (ii) From 2008 and up until 9th June 2016 when Hermitage's attorney-at-law wrote to Clico requesting information about the execution of releases and discharges of the aforementioned lots under the mortgage, no information had been received by anyone pertaining to Hermitage. The attorney-at-law's letter was the first time that both Clico and he had any communication relative to Hermitage for several years.
- (iii) Clico's accounting books relative to the transactions between Hermitage and Clico were removed from Clico's premises after Clico's financial crisis in or about the year of 2009.

Further evidence of Clico

Gratiana Boyd

(19) Gratiana Boyd in obedience to the order of Boodoosingh J, swore to an affidavit dated 15th October 2018 verifying the account provided by Clico in which she deposed as follows:

- (i) The rate of interest applicable to the 1983 mortgage was fifteen percent (15%) and the applicable interest rate for the 1986 mortgage was thirteen percent (13%). Interest was payable at the respective original rates of 15% and 13% on all further advances and on all capitalized interest as well as before and after judgment.
- (ii) A decision was taken by the Board to waive all interest after the 31st October 1987 and as such no interest had been charged on the Hermitage indebtedness since that date.
- (iii) Interest was also chargeable on the expenses and charges properly incurred by Clico in respect of the management and maintenance of the mortgaged lands. Under the terms of the mortgages, Clico was entitled to pay for the upkeep and maintenance of Hermitage properties when Hermitage failed to do so.
- (iv) As part of its accounting procedure the staff of Clico maintained a general ledger into which all account activity for each loan account was posted. The ledger reflects all repayments made to each loan account, interest charged and expenses and charges incurred by Clico in connection with the loan accounts. The general ledger was exhibited to Ms. Boyd's affidavit. Based on the entries in the general

ledger, the charges incurred by Clico with respect to the 1983 mortgage between the period 1983 to 2016 total, \$1,403,750.11 which are broken down as follows:

1. 1983 to 2000 the sum of \$337,139.90
2. 2001 to 2007 the sum of \$57,434.36
3. 2008 the sum of \$126,097.01
4. 2009 the sum of \$70,638.45
5. 2010 the sum of \$86,362.50
6. 2011 then sum of \$84,843.45
7. 2012 the sum of \$92,707.60
8. 2014 the sum of \$84,016.00
9. 2015 the sum of \$279,598.56
10. 2016 the sum of \$184,912.28.

A revised statement of account was thereafter exhibited.

Ms. Boyd then goes on to provide details in respect of how other charges were applied to the account to wit:

- (a) charges for security patrols on the Hermitage properties including plumbing charges, engineering and construction charges for costs incurred by Clico to repair a disrupted sewer plant;
 - (b) payments for utility bills and taxes to the Arima Borough Corporation;
 - (c) payments to contractors re: services provided to the Hermitage properties.
- (v) Clico at all material times treated the two mortgage debts as one mortgage account due and owing by Hermitage. Up to 2013 the Finance Department posted all charges to the 1983 mortgage as the

one prior in time. However, in 2013 that a decision was taken to ascribe certain charges for that year to the 1986 mortgage in the sum of \$108,896.23. The records do not reflect any rationale for such decision.

- (vi) Clico's records reveal that Clico executed partial releases for the following lots in order to facilitate the sale of those lots: 37, 38, 39, 40, 42, 43, 46, 47, 48, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 88, 89 and 98. One lot, namely lot 77 is recorded as having been transferred from Hermitage to Marci Ashe-Gouveia. However, no release has been found in connection with the lot. Hermitage was therefore credited the sum of \$3,900,000.00 by payment of \$100,000.00 per lot sold/transferred.
- (vii) Out of the proceeds of sale of the lots, Hermitage repaid the sum of \$3,900,000.00 to which payment was applied to mortgage account no. 100183251 as principal repayment of the 1983 mortgage.
- (viii) From 2001 to 2010, Hermitage failed to make any further repayments of the principal sum or to pay any interest in respect of its indebtedness. As such, during the period 2011 to 2016, Clico sold certain other lots for specific consideration in exercise of its power of sale under the mortgages. Ten lots were detailed together with their purchase prices.
- (ix) The payments were credited towards the repayment of the principal on the 1983 mortgage as follows:
 - (a) \$224,000.00 in 2011, giving a reduced balance of \$3,248,399.18.
 - (b) \$893,000.00 in 2012, giving a reduced balance of \$2,448,106.78;

and

(c) \$374,200.00 in 2016, giving a reduced balance of \$2,622,433.62.

The payments received from the sale of the 10 lots were applied to the 1986 mortgage as follows:

(i) \$1,735,500.00 in 2013, giving a reduced balance of \$1,720,579.96; and

(ii) \$337,500.00 in 2014, giving a reduced balance of \$1,383,079.96.

(x) The file did not disclose any rationale for the application of payments to one mortgage or the other, however it did not affect the calculation of interest since the Board had taken a decision to waive all interest after the 31st October 1987 on Hermitage's indebtedness as stated at paragraph 9 above.

(xi) Between 2017 and 2018, charges continued to accrue on the 1983 and 1986 mortgages. These charges were with respect to the maintenance and general up keeping of the Hermitage properties.

(xii) To date, the total balance outstanding on the 1983 mortgage as outlined in the revised statement of account:

Account number	100183251
Interest	Nil
Charges	\$1,554,928.11
Total Balance	<u>\$2,773,611.62</u>

Analysis

(20) I shall consider the submissions of the parties as I conduct my analysis of the appeals. I must state from the outset that we are dealing here with records

which were, at the time of the filing of the fixed date claim, over thirty years old. Not only is that a significant lapse of time, but also both Clico and Hermitage had operational challenges of their own. Clico's financial difficulties are a notorious fact. The evidence of Mr. Huggins as to his difficulties in verifying the status of Hermitage speaks for itself. It is clear, therefore, that any evidence produced by either party would suffer from the difficulty of diminished memory as was the case with Carlos John for Hermitage. Indeed so too Mr. Hewitt. It was equally clear that any evidence on behalf of Clico would have been drawn from its records itself compiled by third parties in the course of the period 1983 to 2019. Additionally, the quality of the documents reproduced in the Record was poor; containing splotches and highlights rendering portions of the documents, in many cases, illegible. A greater effort ought to have been made to obtain clearer copies of the deeds and other public documents put into evidence since those documents are likely to be readily available in the Land Registry.

- (21) In my judgment, Boodoosingh J came to a conclusion which is quite sustainable on the evidence. The judge carefully weighed and considered the evidence of both parties and preferred the evidence presented on behalf of Clico. It was a conclusion to which the judge was entitled to come on the evidence. In any event, I agree entirely that Clico's evidence is to be preferred. Clico provided far greater detail and substance as to the sale of lots, the purchase price, the interest paid on the outstanding balance, charges and the payments made towards the outstanding balances on the mortgage. It was the appellant which asserted that the outstanding balance on the mortgages had been paid. The onus was thus on Hermitage to prove that assertion by cogent evidence from its own records that the mortgage had been paid off. Indeed Boodoosingh J in his first judgment found that Hermitage's evidence fell short. At paragraph 28 he noted that Hermitage

“has made assertions that the debt has been paid but has not given evidence about the second mortgage and the additional loan facility”. At paragraph 29 he added that it is for Hermitage *“to prove they have satisfied the burden of proving that the lots should be re-conveyed”*. The evidence of Mr. Hewitt and Mr. John, in particular, fell short of the mark. Both provided affidavits in support of Mr. Amar’s evidence but neither of them could provide the detail required. Mr. Hewitt asserted that he participated in negotiations for what I understand to be the 1983 mortgage. He gave no detail as to the amount of the mortgage. He boldly asserted that Hermitage had “wholly satisfied” the mortgage by direct payments for partial releases as well as by Clico’s exercise of its power of sale as mortgagee. No figures were provided of the number of lots sold and the aggregate amount paid to Clico, neither was any figure given of the amount of lots sold by Clico as mortgagee and the total payments made to the mortgage by Clico. He took no account whatever of interest and charges accruing in respect of the 1983 mortgage. Mr. John’s evidence was of even less assistance. He was Clico’s manager in charge of Mortgages in 1988. As such, he should have had direct access to Clico’s accounts. But he displayed no intimate knowledge of the details of Hermitage’s account with Clico. Instead, he spoke in general terms.

(22) Boodoosingh J also found the evidence of Clico to be lacking. And for this reason he granted the appellant’s substantive request for an account. When that account was provided by Ms. Boyd he then weighed the evidence of both sides and found that Hermitage had not proven that the mortgages had been repaid and refused to order the release of the lots. He also gave his reasons for preferring Clico’s evidence. Not only was he entitled to do so on the evidence but in my judgment, he was entirely right in doing so.

(23) Mr. Mervyn Campbell in his written submissions, contended that the judge

erred in giving Clico *“a second bite of the cherry”*. He submitted that the judge having found that Clico’s evidence was not sufficient, ought to have granted the relief sought. The submission is unpersuasive. It ignores the fact that the appellant had partially succeeded in its request for an account. The purpose of the account was to require Clico to account for the sale of the lots and to show how the sale prices were applied to the mortgage balances. The submission also ignores the fact that the judge found Hermitage’s evidence to be insufficient. It was thus equally open to the judge to dismiss the appellant’s claim. Instead, he took the middle ground of granting its request for an account and reserving further decision.

- (24) Indeed the judge was quite indulgent of the appellant. Mr. Huggins’ evidence was clear that for several years the status of the appellant as a viable company was in doubt. It could not be ascertained if it was operational. The evidence of both Ms. Jawahir and Ms. Boyd bear out that doubt. Both affidavits show that for several years no payments were made towards one or other of the mortgage accounts. Neither Mr. Amar nor Mr. Hewitt (who purported to be a director) provided any explanation for the non-payments or for the apparent non-functioning of Hermitage for some part of the period. In those circumstances, the lack of detail of which the judge complained in relation to the appellant’s evidence, is unsurprising. It rendered unreliable Hermitage’s assertion that it had paid the mortgage balances in their entirety. Non-payment of the mortgage instalments would as a natural consequence, cause interest charges to accrue. Ms. Boyd, however, gave evidence that the Clico board of directors decided to waive the accrual of interest after 1987. Mr. Campbell in his written submissions seized upon that evidence to point to Ms. Jawahir’s affidavit which referred to accrued interest at \$1,003,604.63, as being inconsistent with Ms. Boyd’s affidavit. He also pointed to the fact that Ms. Boyd’s evidence had

“conveniently” provided evidence of maintenance, security and other charges which ate up whatever surplus would have been realized from the subtraction of interest set out in the Jawahir account. But in my judgment, the need for maintenance and the provision of security was obvious given that Hermitage appeared to be non-functional for a number of years. Security would have been required for unsold units which would have been unoccupied. The judge did not advert to that latter issue in his judgment but they still go toward supporting his preference of Clico’s evidence. They also undermine the written submissions of the appellant on this issue.

(25) Mr. Campbell also pointed to the fact that Ms. Boyd deducted from the outstanding balance, certain charges to the mortgage account which she could not rationalize, as evidence of the unreliability of Clico’s accounts. That submission ignored the fact that one of the reasons why Ms. Boyd was unable to follow the calculation was the non-availability of the officers who recorded the transactions due to the lapse of time between the entries and the review by Ms. Boyd. Mr. Campbell’s submission also ignored the fact that the deduction was to the benefit of the appellant. It also ignored the fact that the onus was on Hermitage to prove its case and Hermitage’s own evidence was deeply lacking.

(26) Mr. Campbell next submitted that as between bank and debtor, the conclusiveness of bank statements would only apply if those statements represent an account stated between the parties for which there had been agreement between them as to the total amount due, with a promise by the debtor to repay the amount. He added that that was not the case here. He accepted that it was for the appellant to prove that it was entitled to the relief. On that basis, he pointed to the fact that Hermitage’s evidence was clear that for the 1983 mortgage there was a \$4.2 million disbursement

together with interest due in the sum of \$1.12 million. He added that *“Clico’s evidence was much more difficult to decipher”*. The 1986 mortgage was not endorsed on the certificate of title of the property. Clico did not produce the duplicate certificate of title in proof of endorsement of the second mortgage. He asked the court to infer that there was no such endorsement. He relied on section 45 of the **Real Property Act Chap. 56:02** and contended that in order to enforce the 1986 mortgage, Clico needed to do so pursuant to the principles set out by the Court of Appeal in **Smith Lewis v Anjan Sookdeo, Civil Appeal No. 236 of 2012**; applying the decision of the Privy Council in **Frazer v. Walker [1967] 1 All ER 649**.

(27) The submission is without merit. First, the appellant, neither in its fixed date claim nor in its evidence in support, has made an allegation that the 1986 mortgage was unregistered such as to require Clico to produce proof of registration. Second, the authorities relied on are distinguishable. The issue in **Smith Lewis** was whether the holder of an equitable interest in lands under the **Real Property Act** could defeat or take priority over the title of the registered proprietor. Further, and as Mr. Nanga submitted, in **Smith Lewis**, it was accepted that the lease and assignment in that case were unregistered. There is no such acceptance here. Indeed Clico contends that registration is evident on the face of the memorandum of transfer. Further, Hermitage alleges that it has paid off the 1983 mortgage in full. It disputes the creation of a 1986 mortgage, as a second mortgage, as opposed to a lack of endorsement of the mortgage as an encumbrance.

(28) To the extent that Hermitage contends that there was a lack of agreement as to an account stated, it then fell to the appellant to prove its case. Hermitage, unlike Clico, produced no sufficient detail to support its allegations of having re-paid the 1983 mortgage in full. Clico on the other

hand provided sufficient detail including the two mortgage instruments to support the contention that there were two mortgages and that the entire debt was not fully discharged. The judge weighed the evidence of both parties and preferred Clico's. The quality of the evidence must be weighed against the fact that these transactions were more than 30 years ago. Further, and as the judge noted, Clico's records were removed from its office during its financial crisis of 2009.

(29) I agree with Mr. Nanga that as to the second mortgage, registration is obvious on its face. It was registered on 16th September, 1986. Moreover, it was executed by Mr. Hewitt, a deponent in these proceedings who has not disputed its execution. Boodoosingh J accepted that the 1986 mortgage was a valid mortgage. He was entitled to do so. I also agree with him that while the certificate of title was the best evidence of a mortgage, production of the certificate of title was not the only way to prove its existence. A copy of the 1986 mortgage was annexed to the Jawahir affidavit and was itself proof of its existence. That exhibit, together with the affidavit evidence of Ms. Jawahir and Ms. Boyd, was more than sufficient evidence of the existence of the second mortgage; more so in light of the fact that Mr. Hewitt appears to have executed it.

(30) In his written submissions, Mr. Campbell submitted that Boodoosingh J erred in finding that one million seven hundred thousand dollars (\$1,700,000.00) had been disbursed to the appellant by the 1986 mortgage. In his oral submissions Mr. Marc Campbell, added that all that was acknowledged as having been disbursed in regard to the 1986 mortgage was the sum of \$350,000.00 as set out in the 1986 mortgage itself and, at best that was the only clear evidence of any money being advanced under the 1986 mortgage. The submissions are also without merit. Mr. Hewitt signed

the 1986 mortgage. It was open to him upon reading Ms. Jawahir's affidavit to dispute, that the sum of \$1,700,000.00 referred to in mortgage had been fully disbursed. Ms. Jawahir's evidence was in direct answer to the evidence of Mr. Amar, Mr. Hewitt and Mr. John, which was filed in support of Hermitage's fixed date claim. Neither of them filed an affidavit in answer to her evidence. There was also no attempt to cross-examine Ms. Jawahir on the *bona fides* of the 1986 mortgage or on the amount of funds disbursed under it. The judge having then considered the evidence of the parties, was satisfied that a proper account had to be provided, gave judgment in part for Hermitage and ordered that an account be provided. He was clearly of the view that further relief would follow if such was required after an examination of the accounts.

- (31) Mr. Marc Campbell made two further oral submissions; that no demand had been made for the charges accruing as a result of non-servicing of the mortgage and the provisions of the mortgage make it very clear that such a demand had to be made. In my judgment that was first of all an issue to be pleaded such as to put Clico on notice to produce the evidence. No such pleading was made in the fixed date claim form. If it is not a pleading point, then it ought to have been put to Ms. Jawahir in cross-examination. No cross-examination of Ms. Jawahir was sought. Secondly, Mr. Campbell sought to question the interest and charges put forward by Ms. Boyd in respect of the 1986 mortgage as being inaccurate or overstated. The short answer is that any such question should have been by way of evidence from an expert at the trial stage. But given that the Boyd affidavit was not part of the trial, I agree with Mr. Nanga that the proper approach ought to been an application to amend the fixed date claim to include a claim for surcharging and falsification as opposed to carrying the court through an arithmetical exercise much of which was imprecise and speculative.

(32) Finally, I come to the complaint of Mr. Mervyn Campbell that the court erred in not permitting Hermitage to cross-examine Ms. Boyd on the contents of her affidavit. In my judgment the application to cross-examine the appellant was misplaced. As Boodoosingh J rightly noted, at that stage the trial had already come to the end. This is against a background of no challenge to the Jawahir evidence by either Messrs. Amar, Hewitt or John. But even that lack of challenge was unsurprising, given that none of them displayed any detailed knowledge of the mortgage payments, the sale of the lots, the actual prices paid for the lots or even the interest rate paid on the mortgages. What Ms. Boyd had done was provide the accounts which the appellant had sought in its fixed date claim. Having provided the accounts the judge accepted that these mortgages had not been fully paid and declined to release the lots. At best it was a question of surcharging and falsification which had not been sought.

(33) Before concluding, I note that Mr. Nanga had accepted that the one million dollar facility which was credited to the Hermitage (as per the affidavit of Ms. Jawahir) had not been secured by the 1986 mortgage and that that sum had to be deducted from the balance outstanding under the mortgage. I expect that the appropriate adjustments will therefore be made. In the result the appellant has substantially failed in its claim to have the mortgage discharged and the lots released. The appeals must be dismissed. We will hear the parties on costs

Nolan Bareaux
Justice of Appeal

I have read in draft the judgment of Bereaux J.A. I agree with it and have nothing to add.

Mark Mohammed
Justice of Appeal

I have also read in draft the judgment of the President. I too agree and have nothing to add.

Maria Wilson
Justice of Appeal