

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

H.C.A. No. S-548 of 2004

BETWEEN

THE NATIONAL INSURANCE BOARD OF
TRINIDAD AND TOBAGO

Plaintiff

AND

CLAYTON BRUCE
MARIA BRUCE

Defendants

RULING

1. In this Application, which has been made by Summons filed on the 17th August, 2004, the Plaintiff seeks an order striking out the Defendant's defence. The Plaintiff invokes the Court's inherent jurisdiction and, in the alternative, relies on O.18 r. 19 *Rules of the Supreme Court* on the ground that the Defence is frivolous and vexatious and constitutes abuse of the Court's process.
2. The Plaintiff seeks as well a consequential order for Judgment for the Plaintiff in the sum of \$327,805.32 .
3. This Application was supported by the affidavit of Romanus Tsoi-a-Sue Manager of First Citizens Bank Limited, who is the agent for the Plaintiff in the action. Mr. Tsoi-a-Sue's affidavit was filed on the August 17, 2004.
4. On the 29th October, 2004, the Defendants filed an affidavit, which was sworn by Maria Bruce, the second Defendant herein.
5. The pleadings have been exhibited to the affidavit of Mr. Tsoi-a-Sue and are listed below :

- A specially Indorsed Writ where the Plaintiff claimed the sum of \$327,805.32 being the balance of monies due under a Memorandum of Mortgage between the Plaintiff as Mortgagees and the Defendants as Mortgagors.
 - In the particulars of claim the Plaintiff recites its status as a Statutory Company and the Defendants' status as its customers.
 - The Plaintiff alleges that by a Memorandum of Mortgage the Plaintiff advanced to the Defendants the sum of \$211,500.00.
 - The Plaintiff contends that the Defendants defaulted in their payments, and that the mortgaged property was sold under cl. 5 (9) of the Memorandum of Mortgage. Proceeds of sale in the sum \$195,000.00 were applied to the debt leaving a short fall of \$327,805.32.
6. The Defendant filed its Defence on 18th May, 2004. In their Defence the Defendants:
- (i) provide a bald denial that they owe \$327,805.32.
 - (ii) They admit the existence of the mortgage.
 - (iii) The Defendants admit that they were in default but contend that the Defendants were not at liberty to sell the mortgaged property.
 - (iv) The Defendants plead the *Limitation of Personal Actions Ordinance Ch. 5 No. 6*.

7. The Evidence

Affidavit of Romanus Tsoi-a-Sue

By his affidavit, Mr. Tsoi-a-Sue recounts the history of the relations between the parties beginning with the execution of a Mortgage by the Defendants in November, 1982. A certified copy of the Memorandum of Mortgage is exhibited to the affidavit and marked "**R.T.I**".

Mr. Tsoi-a-Sue deposes that the Defendants were fully aware that there were in default and that the Plaintiff was entitled to sell the mortgaged property. He deposed further that the mortgaged property was sold by the Defendant and not Plaintiff. Mr.

Tsoi-a-Sue deposed further that the Defendant wrote acknowledging their indebtedness and seeking a waiver of a portion of the debt by the Plaintiff .

In general, the purpose of Mr. Tsoi-a-Sue's affidavit was to demonstrate that the Defendants were aware of their debt to the Plaintiff.

Affidavit of Maria Bruce

The Defendants rely on the Affidavit of Maria Bruce to deny that they owe any debt to the Plaintiff.

Mrs. Bruce emphasises the words of the Memorandum of Discharge ".....*in full and final satisfaction...*" in support of her denial of liability.

The LAW

Rules Governing Applications to strike out pleadings.

1. Available learning suggests that the Court will lean against striking out a pleading, except in obvious cases. The Court's power to strike pursuant to the summary process under this rule, should be exercised ".....*only in plain and obvious cases*" See 1993 1, ***Supreme Court Practice*** Vol. 1 – 18/19/3
2. Similarly , the authorities suggest that the power conferred by O.18 r.19 ***RSC*** will only be exercised where the "*case is beyond doubt.*" See 1993 1, ***Supreme Court Practice*** Vol. 1 – 18/19/3.
3. The Court's inclination against striking persists where serious arguments are being made. The Learned authors of 1, 1993 ***Supreme Court Practice*** assert :

*"Where an application to strike out a pleading involves a prolonged and serious argument the Court should as a rule decline to proceed with the argument, **unless it not only** harbours doubts about the soundness of the pleadings but in addition is satisfied that striking out*

would obviate the necessity for a trial....."

4. The powers of the Court under this rule include the power to order the action to be stayed or dismissed or judgment to be entered. See 18/19/4 of 1, ***Supreme Court Practice***,1993.
5. The Court will give leave to amend a defect in the pleading rather than strike. See 1, ***Supreme Court Practice***1993, paragraph 18/19/5/.
6. The instant application was made under both the Court's inherent jurisdiction and the ***Rules of the Supreme Court***. The Court is cautioned by the authorities, when exercising its inherent jurisdiction to exercise "*great circumspection.*" The jurisdiction will not be exercised unless it is perfectly clear that the pleas (or defences) cannot succeed.
7. The Court will be entitled to strike a defence as being an abuse of the Court's process if the Court is convinced that it is a sham defence. See *Remington v Scoles* (1897) 2 Ch. 1.
8. In *Remington v Scoles*, (*Supra*) Justice Romer, sitting in the Chancery Division, adjudicated upon an application to strike a statement of Defence which contained admissions and denials, but which set up no positive case for the Defence. Moreover in previous proceedings, in another action the Defendant had admitted on oath several statements which were denied in his statement of Defence. Justice Romer, the learned judge at first instance and whose decision was upheld by the Court of Appeal, is reported to have cited the case of *Willis v Beauchamp* (1886), 11 p.59 in support of the following principle:

"The Court has an inherent power to prevent the abuse of legal machinery....."

Justice Romer confirmed:

"The Court has an inherent jurisdiction to strike out a statement of claim but the power of the Court is not confined to that, it applies to a statement of defence which is frivolous and vexatious and an abuse of procedure....."

9. In upholding the decision of Justice Romer, the Court of Appeal agreed that the defence in question was a sham defence. Lord Justice Lopes provided guidelines for a Court which might be confronted with a similar application. At p. 7 of the Report, Lord Justice Lopes is reported to have said:

".....to induce the Court to exercise this jurisdiction to strike under the inherent jurisdiction.....it is not enough to satisfy the Court that the allegations of fact in the statement of defenceare improbable or false, for to enter upon the question of their truth or falsehood would be trying the action prematurely. But the learned Judge was right in thinking that having regard to the character of the defence, bearing in mind what is known about that case before hand and what is known about the previous proceedings in the case, this is a sham defence and that it has been set up not honestly and bona fide as a substantial defencebut for the purpose of delay."

Lord Justice Rigby stated:

".....if the Court can on the facts that are not in dispute ascertain that the actual defence put in is really a defence which has no relation to the merits of the case, in other words, that is a sham defence then the Court ought to exercise the jurisdiction that it undoubtedly has and order that sham defence struck out....."

Submissions

Submissions for the Plaintiff

1. Learned Counsel for the Plaintiff, Mr. Deonarine submitted that two issues were canvassed by the defence, that is to say:
 - whether the Memorandum of Discharge extinguishes the Plaintiff's right under the personal covenant, and
 - whether the action is statute barred.
2. In respect to the second issue, Learned Counsel cited ***Newnham v Brown*** in support of his submission that the limitation period for the enforcement of the personal covenant under a mortgage continued to be twelve (12) years from the accrual of the cause of action even where the mortgaged property had been sold. Mrs. Van Lare conceded this point.
3. Learned Counsel also cited ***Bristol v West plc.*** (2002) 4 All E.R. 544 in support of his submission. in relation to the plea of limitation which was raised by the defence In ***Bristol and West v Bartlett*** the Court of Appeal considered three (3) conjoined appeals which all involved the question of the applicable limitation period, where a mortgagee, having repossessed and sold the mortgaged property brought proceedings to recover the shortfall in the amount due under the mortgaged debt. In the second appeal, the lender appealed a decision that proceedings for the recovery of a debt were subject to the six (6) year limitation period, instead of the twelve (12) year limitation period prescribed for money secured by a mortgage.

The Court of Appeal held:

*".....claims for a mortgage debt would be governed by s, 20 of the 1980 Act even if the mortgagee had exercised his power of sale before issuing proceedings. **There was no reason in principle why once a sale has taken place***

the express covenant to pay should be lost and replaced by an implied obligation to pay. (My emphasis) it would be highly artificialfor rights given expressly by the mortgage deed to be taken away and replace by implied rights....."

4. As to the other issue, which in his submission, had been canvassed by the defence, Mr. Deonarine pointed to paragraph 1. (3) of the Deed of Mortgage exhibited herein as "R.T.I." By paragraph 1. (3) the Borrower Covenant:

" That if and so long as any principal money hereby secured shall remain unpaid after the day hereinbefore stipulated for the payment thereof, he will thereafter pay to the Boardinterest on any such principal money for the time being remaining owing at the rate aforesaid calculated....."

Submissions for the Defendants

1. Mrs. Van Lare, in her submissions, argued that the defence was not a sham. Learned Counsel pointed to an arithmetical discrepancy in the statement of account and argued that it had not been established with certainty that the Plaintiff was entitled to judgment.
2. Learned Counsel, alluding to her earlier concession, cautioned that the concession was applicable only in normal circumstances and argued that the circumstances which were before me were not normal.
3. Learned Counsel argued further that by the Deed of Release, exhibited as "M.B.I." the National Insurance Board has acknowledged receipt of \$211,500.00, the basis of the personal covenant.
4. Learned Counsel contended that the personal covenant could have survived only by virtue of some new arrangement. Any suit upon the unidentified, unpleaded

new arrangement would not be in respect of a specialty contract and would be subjected to the *Limitation of Personal Actions Ordinance*.

5. The Defendants seek to defend the unpleaded "new arrangement" by applying to this Court for leave to amend their defence by adding the following paragraphs.

"4. *By memorandum of Discharge made on the 8th December, 1998 the Plaintiff acknowledged full payment and satisfaction of the sum of Two Hundred and Eleven Thousand Five Hundred Dollars and further advances not exceeding in the Aggregate Sixteen Thousand Four Hundred and Fourteen Dollars and ten Cents and all interest Secured by the Memorandum of Mortgage dated 23rd day of September, 1982 referred to in paragraph 3 of the Particulars of Claim herein.*

At the trial of this cause, the Defendants will rely on the said Memorandum of Discharge for its full meaning purport and effect.

5. *In the premises, the Plaintiff is not entitled to rely on the Memorandum of Mortgage dated 23rd September, 1982 and registered on the 19th November, 1982 to recover any sum whatsoever from the Defendants or at all.*
6. *If which is denied, the Defendants remained liable to the Plaintiff, such debt was in the nature of simple contract only."*

6. Mrs. Van Lare referred to and relied on the following:

- *"Words and Phrases Legally Deferred"* as to the meaning of a "Deed".

- Tyler, *Law of Mortgages* p. 731 which contained a Precedent of a Deed of Release.
6. Mrs. Van Lare referred as well to paragraph 1463 12, *Halsbury's Laws of England* (4th Ed.) :

"The words of a written instrument must in general be taken in their ordinary sense notwithstanding that the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry outbut if the provisions and expressions are contradictory and there are grounds appearing on the face of the instrument affording proof of the real intention of the parties that intention will prevail against the obvious and ordinary meaning of the words....."

Mrs. Van Lare also cited as well paragraph 1500, which defines the meaning of "ambiguity " in instrument.

8. By reference to these two (2) passages Mrs. Van Lare argued that the Deed of Release was ambiguous in that, on the one hand it acknowledged payment in full and final discharge whereas on the other hand it sought, to retain the Mortgagor's personal covenant in favour of the Plaintiff. Mrs. Van Lare submitted that the second clause in respect of the personal covenant was repugnant to the main clause of the discharge.
9. Learned Counsel cited and relied on the case of *Margetson v Glynn* (1892) 1QB 337, which concerned on the interpretation of a Bill of lading. Learned Counsel quoted and stressed the words of Lord Justice Fry:

".....general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting party."

REASONING AND DECISION:

1. This application has not been based on the ground of a failure to disclose a reasonable defence, but on the ground that the defence is frivolous, vexatious and an abuse of process.
2. I am guided by the words of Lord Lopes in *Remington vs Scoles* (1897) 2 Ch. 1, that the Court should not be satisfied with a mere conflict of facts, because entry on the question of truth or falsehood would be trying the action prematurely.
3. I should have regard to the character of the defence and what is known about the history of the case in order to decide whether the defence has been set up honestly and bona fide as a substantial defence or whether the Defence has been filed only for the purpose of delay.
4. Bearing these principles in mind, it is clear that the Defendants are in agreement with the Plaintiffs on a number of issues:
 - (i) that the parties were in a relationship of Mortgage/Mortgagee.
 - (ii) that the Defendants defaulted in their payments and
 - (iii) that the property was sold and the total sum of \$195,000.00 was paid to the Plaintiff .
 - (iv) It is equally clear from the Affidavit evidence that there is no dispute that the sale was effected, not under Clause 5(9) of the Mortgage Deed, but by the Mortgagor. The Plaintiff obviously alleged in error , at paragraph 4 of their Statement of Claim that they had sold the property under Clause 5(9). In my view, this does not entitle the Plaintiff to pretend that the reality was otherwise and that they had not voluntarily sold the property. The Defendants were aware that they had sold the property and that the Plaintiff had not acted under Clause 5 (9) of the Memorandum of Mortgage. Their plea at paragraph 3 of the Defence was therefore less than candid and would at the trial serve no useful purpose since it would be unsupported by the evidence. In

my view, the only possible purpose of this paragraph is to delay an order for liability against the Defendants.

5. As to the plea of limitation, it is clear from the recent authority of *Bristol* that the Limitation period is not altered because of the sale of the property. This point has been conceded by Learned Counsel for the Defendants. Any persistence in the use of this defence must be considered disingenuous.
6. The Defendants are not attempting to cling to the limitation point as pleaded. They have sought, to amend, their defence.
7. I must now consider whether the proposed amendment, if permitted will effect any cure to the defence.
8. The proposed amendment contains two (2) additional defences. The first relies on the language in the Memorandum of Discharge in order to contend that the debt due and owing to the Plaintiff has been discharged.
9. The terms of the proposed defence in the alternative may be found at paragraph 6 draft amended defence (exhibit “*M.B.2*”). This proposed amendment implies the creation of some new, unspecified arrangement, other than the mortgage, as creating the debt.
10. In my view the proposed alternative defence is no different from the defence which was considered by the Court of Appeal in *Bristol*. On the authority of *Bristol*, it is my view that it is artificial to contend that following the sale of the property, the debt accruing by virtue of the mortgagor's personal covenant was no longer governed by the *Real Property Limitation Ordinance*.
11. In respect of paragraph 4 of the proposed amendment, the Defendants have relied on the words of the Memorandum of Discharge whereby the Plaintiff acknowledged that they received full payment and satisfaction. The relevant words are :

*“[The Board of Management] **HEREBY ACKNOWLEDGES** to have received full payment and satisfaction of the sum of Two Hundred and Eleven Thousand Five Hundred Dollars ..and all interest thereon secured by the said Mortgage and for the consideration aforesaid the Board **HEREBY RELEASES AND DISCHARGES** the said lands from the*

Memorandum of Mortgage it being hereby declared that nothing herein contained shall affect the security of the Board under the covenants by the Borrowers for the re-payment of the moneys and liabilities for the time being outstanding and secured by the said Memorandum of Mortgage”

12. It is clear that this document releases and discharges the land, while preserving the right of the Board in respect of "*security of the Board under the covenant by the borrower for repayment of monies for the time being outstanding and secured by the mortgage.*"
13. There is no dispute on the Affidavits that the Defendants knew that their debt was not fully paid and the conjoint effect of their undisputed knowledge and the clear words of the Memorandum of discharge renders disingenuous their contention that no debt is owed.
14. I therefore regret to hold that the defence in this case is comparable to that in *Remington vs Scoles* and appears to serve only the purpose of delay.

ORDER:

15. I will therefore order as follows:
 - i. Paragraphs 2-5 of the defence be struck out on the ground that it constitutes an abuse of the Court's process.
 - ii. In so far as there appears to be a complicated query into the appropriate amount owed by the Defendants to the Plaintiff, I will order that judgment be entered in the difference between \$327,807.32 and \$500.00; that is to say \$327,307.32.
 - iii. That the Defendants be granted leave to amend paragraph 1 of their defence to contest the sum

of \$500.00 only. This amendment to be made within fourteen (14) days of today.

- iv. The Defendants to pay to the Plaintiff costs fit for Counsel.
- v. The Defendants are hereby granted leave to appeal.
- vi. There be a stay of execution six (6) weeks.

Mira Dean Armorer
Judge.