

TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB REGISTRY SAN FERNANDO**

H.C.A. Cv. S-1556 OF 2005

BETWEEN

**KARAMCHAND RAMPERSAD
KASHMATTEE RAMPERSAD**

PLAINTIFFS

AND

**DALTON CHADEE
PATRICK CHADEE
MARILYN WHIBY
GEORGIA-MARIA TSOI-A-SUE
KENNETH CHADEE
EDWARD SOON**

DEFENDANTS

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Mr. A. Ashraph for the Plaintiffs

Mr. A. Ramlogan for the Defendants

JUDGMENT

Before me for determination is the Plaintiffs' summons of 29th August 2005 seeking an injunction restraining the Defendants from selling by public auction the properties at 149-153 Coffee Street, San Fernando.

By writ of the same date the Plaintiffs ("the Rampersads") seek a declaration that the First to the Fifth Defendants ("the Mortgagees") are not entitled to enforce the judgment they obtained in HCA S1799 of 1986. I shall come to the orders made there presently. They do so on four grounds:

1. that 12 years have elapsed from the making of the orders and that they cannot now be enforced by virtue of the provisions of Section 3 of the Limitation of Personal Actions Ordinance Ch. 5 No. 6 and/or the Limitation of Certain Actions Act 1997;
2. that 16 years have elapsed since the last payment was made by the Plaintiffs on account on the original mortgage debt, pursuant to the Provisions of Section 12 of the Real Property Limitation Ordinance Ch. 5 No. 7;
3. that the Defendants failed to apply for directions as to the sale of the property as required by Order 31 Part II of the Rules of the Supreme Court 1975;
4. that one or more of the Defendants is now deceased and that no order or application has been made for substitution.

The Rampersads also seek an injunction restraining the proposed sale; an order that the Mortgagees remove a memorandum of judgment registered with the Registrar General on 14th September 2004; and that the mortgage registered as No. 5533 of 1985 be expunged from the Protocol of Deeds.

The Defendants concede grounds 3. and 4. in relation to the declaration i.e. that they are required to obtain an order for substitution and directions for the sale. I do not, in any event, have to determine these issues.

As to ground 2, it is trite law that the Mortgagees rights under the mortgage have been subsumed in the judgment obtained in HCA S1799 of 1986. Again, however, I am not required to determine this issue.

It is agreed that the short point for determination to effectively dispose of this matter at a trial is whether the Mortgagees' attempt to enforce the judgment is statute barred. It is also agreed that this turns on whether time begins to run from the date of the original judgment on 31st March 1987 or from the date on which the appeal by the Rampersads against that judgment was determined by the Court of Appeal on 17th January 2005. It is not in issue that the limitation period is 12 years. I will return to this presently.

The Defendants also raise the issue that these proceedings constitute an abuse of process, since the Rampersads could – and should – have sought relief in the original proceedings i.e. HCA S1799 of 1986. Once again, however, I am not required to determine this issue.

The circumstances in which the summons is before me is as a consequence of the Mortgagees having issued an originating summons under the provisions of Order 85 of the Rules of the Supreme Court in HCA S1799 of 1986. There they sought payment of monies due under the mortgage in question but did not ask for possession.

On 31st March 1987 Davis J. (as he then was) gave judgment in favour of the Mortgagees in terms that reflect the reliefs they had sought in their summons i.e.

"1. That the Defendants do pay to the Plaintiffs the sum of \$1,537,000.00 whereof the sum of \$1,200,000.00 is the balance of the principal sum due on a covenant to pay contained in Deed of Mortgage dated the 8th day of October, 1982, registered as No: 5533 of 1985 and made between the Defendants of the one part and the Plaintiffs of the other part and the sum of \$337,000.00 is for interest due on the said balance of the principal sum to the 8th day of July, 1986, and further interest at the daily rate of \$460.27 from and including the 9th day of July, 1986, to the date of payment

and so much of their costs as would be payable if this claim were the only relief granted.

2. *An account to be taken of what is due to the Plaintiffs under and by virtue of the said Deed of Mortgage.*
3. *Payment by the Defendants to the Plaintiffs of what shall be found to be due to them on the taking of the said account and for their costs.*
4. *In default of payment of the said sums of money, a sale of the property mortgaged in and by the said deed of mortgage as security for the payment of the said sums of money and from the proceeds of such sale payment firstly of the Plaintiffs' taxed costs of suit and then in satisfaction of what shall be due and owing to the Plaintiffs.*
5. *That the Plaintiffs shall be at liberty to bid at the said sale and if they shall become the purchasers of the said property to file their receipt for so much of the purchase money as does not exceed the sum then due to them.*
6. *The defendants do pay to the plaintiffs their costs of these proceedings, certified fit for Counsel.*
7. *Liberty to apply."*

The Rampersads appealed this judgment on 1st April 1987. They sought a stay of execution from Davis J. on 12th May 1987 which he refused on 20th May 1987. They subsequently sought a stay from the Court of Appeal on 22nd May 1987, but this was also refused. I am given no reason for these applications being refused, but I rather imagine that the Court of Appeal did so on the basis that a mortgagor wishing to prevent a sale of mortgaged property is usually required, absent good reason to the contrary, to pay the disputed sum at least into Court. That, however, is of no consequence in disposing of the present summons.

The Record of Appeal was settled on 12th October 1987 save for the Reasons of Davis J. It appears that the appeal then became totally somnolent for some 9 years – at least until an application was filed on 17th October 1996 to extend the time for filing the Record. This was dismissed on 25th November 1996.

Thereafter, nothing whatever was done – by either party – (although Mr. Ramlogan indicated from the bar table that the file apparently could not be located in the Court of Appeal Registry for some time) until 17th January 2005 when the appeal was dismissed for non-compliance. This was of course a mere formality, since the extension of time sought in 1996 for filing the record had been dismissed.

The Mortgagees then arranged for the property to be sold by public auction on 8th October 2005. In the meantime, however, and prior to the appeal being dismissed in January 2005, the Mortgagees' Attorney registered, or re-registered – it is of no consequence – the original judgment with the Registrar General on 14th September 2004.

It is trite law that the judgment on 31st March 1987 took immediate effect and could have been enforced by the Mortgagees at any time. I accept that if an appeal is pending a party, such as the Mortgagees here, might not wish to proceed to enforcement in the event of the original judgment being overturned, but had this occurred in the present circumstances, the mortgagor would have been entitled to compensation for any losses. See e.g. HCA 118 of 1956 *William Bruce v. Estella Boodoosingh and Trinidad Tesoro Petroleum Co. Ltd. and Shell Trinidad Ltd.*, HCA 561 of 1968 *Lakshmidath Shivaprasad v. Elijah Prabhudial and Vivian Prabhudial*;

There was therefore nothing to prevent the Mortgagees in this instance from enforcing the judgment in question.

Further, the two applications for a stay were dismissed. Clearly the Court of Appeal did not contemplate the appeal's chances of success as being that good.

Also, the Mortgagees were well aware of their position. They had registered, or re-registered (ineffectively, in my view), the memorandum of judgment with the Registrar General, certainly prior to the final and formal disposition of the appeal. The Mortgagees could well have taken steps to either enforce the judgment or have the appeal determined, if they thought that their position was being prejudiced. They did not do so.

There are however, two other aspects to this matter. First, even if enforcement of the judgment is not statute barred, a judgment creditor cannot enforce a judgment without leave of the Court if more than six years have elapsed since it was obtained (see the provisions of Order 45 Rule 13 of the RSC).

This is quite apart from the Mortgagees not being able to proceed because of the need to substitute and obtain directions for the sale.

Further, and more important, the Order made by Davis J. does not permit a sale of the property unless there has first been a default in payment by the Rampersads. There could be no default until the final amount due to the Mortgagees had been determined by the taking of an account, and no account was taken, nor were any steps taken with a view to having that account taken.

Plainly, and any question of limitation aside, this judgment cannot be enforced simply by a sale of the subject property.

For this reason the injunction sought at paragraph 2 of the Summons is granted. The costs of the summons will be the Plaintiffs' costs in the cause.

It does not fall for me to decide any of the other issues raised.

On the application of both parties, however, I agreed to hear and determine their joint oral application to determine the limitation issue as a preliminary point under the provisions of Order 33 Rule 3 of the RSC.

As to that issue I am satisfied that time began to run from the date of the judgment of Davis J. on 31st March 1987. Neither the appeal, nor the applications for a stay extended that time, nor caused it to run anew. There is no other fact or matter brought to my attention that would incline me to either of those views. I am given no authority to support the submission that time began to run from the date on which the appeal was dismissed in January 2005.

In the circumstances, I hold that the limitation period of 12 years has expired and that the Mortgagees, being the First to the Fifth Defendants to these proceedings, cannot enforce that judgment as a consequence of the provisions of Section 3 of the Limitation of Personal Actions Ordinance Chap. 5 No. 6 and/or the provisions of the Limitation of Certain Actions Act 1997.

By consent, there is no order as to the costs of the hearing and determination of the preliminary point. At the request of Mr. Ramlogan I give leave to appeal on the preliminary point, in the event of leave being needed.

24th October 2005

C.V.H. Stollmeyer
Judge