

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No. DOMHCV2003/0444

BETWEEN:

DOMINICA AGRICULTURAL AND DEVELOPMENT BANK

Claimant

- and -

GARRAWAY APARTEL COMPANY LTD

Defendant

APPEARANCES:

Ms Juliette Theophile holding papers for Mr Stephen Isidore, Counsel for the Claimant

Mrs Gina Dyer-Munro, Counsel for the Defendant

2023: November 6 (Defendant's Amended Submissions)
December 20 (Claimant's Skeleton Submissions)
2024: February 5 (Defendant's Submissions in Response)
October 11th
November 29th

RULING

Application to Settle Articles of Sale

Background

- [1] **JAWARA-ALAMI, J.:** The Claimant bank herein filed a Mortgage Claim on 3rd December 2003 for the balance of principal and interest owing by the Defendant, further or in the alternative an order that the mortgage property be sold in accordance with the procedure set forth in the Title by Registration Act, costs, and further or other relief.

- [2] In the Acknowledgment of Service filed on behalf of the Defendant on 3rd February 2004, the claim was admitted, and there was no intention to defend the claim. A Notice of Application with Affidavit in Support to pay by instalments was also filed on behalf of the Defendant on 3rd February 2004.
- [3] Judgment was entered for the Claimant in the sum of \$3,613,718.12 with daily interest of \$596.86 from 14th November, 2003 until 3rd December 2003 and from the 4th day of December, 2003 interest at the statutory rate of 5% per annum until final payment of the debt” that the Defendant pay to the Claimant costs of \$2,500.00;
- [4] The Claimant filed a Caveat of Seizure to the Registrar of Titles in respect of the land and estate of GARRAWAY APARTEL COMPANY LIMITED, registered in Volume G6 – Folio 89 of the register of titles of the Commonwealth of Dominica together with all the things necessary to the said land, as the same are set forth in an inventory by the bailiff effecting the seizure to be seized with a view to the sale thereof in due course of law for non-payment off the sum of \$3,219,300.00 together with interest thereon at the daily rate of \$596.86 from the date of 15th November 2003 until satisfaction and \$2,000.00 costs due to the DOMINICA AGRICULTURAL INDUSTRIAL AND DEVELOPMENT BANK by virtue of the mortgage over the said land duly noted on the Certificate of Title thereof and dated the 31st day of May, 1992.
- [5] A Summons to Settle Articles of Sale filed by the Claimant on 23rd April 2012 was settled by Justice Brian Cottle on 26th July 2012 and it was ordered; that the land described in the Certificate of Title registered in Book G6 Folio 89 in the name of GARRAWAY APARTEL COMPANY LIMITED be sold by Public Auction; the upset price shall be \$13,817,500.00 ...”.
- [6] The Defendant filed an Application to set aside the Order made on 26th July 2012 on the grounds that; the Application upon which the Order was made was not served on the Registered Proprietor personally; the Notice to pay off was not served on the Registered Proprietor personally; the Act of Seizure did not include an inventory or valuation; and the requirement that all other mortgagees and incumbrancees be notified to attend at the hearing.
- [7] Upon hearing the Application filed by the Defendants, Justice Brian Cottle ordered on 3rd September 2012 that the Order made “on the 26th July, 2012 setting the Articles of Sale, fixing an upset price, fixing the date of sale and adjusting the announcements of sale and the mode of publication thereof for the

property of the Defendants is hereby set aside” and the Application to Settle Articles of Sale filed on 23rd April, 2012 was fixed for hearing on 11th September 2012.

[8] Following this ruling, the Claimant filed an application for the judgment order dated 28th June 2014 to be varied as the sum therein was incorrect, the parties having met and agreed that the correct judgment sum is \$3,400,477.96. Justice Bernie Stephenson ordered on 15th January 2015 by consent, as follows:

- “1. That Judgment be entered for the Claimant in the sum of \$3,400,477.96 as at November 15, 2003 with interest at the rate of \$596.86 per day from November 15, 2003 to December 3, 2003 and thereafter interest at the statutory rate of 5% per annum from December 4, 2003 until satisfaction.
2. That the Claimant/Judgment Creditor be at liberty to enforce the terms of this Order only after the expiration of ninety (90) days from the date of this Order”.

[9] The Claimant, on 30th January 2023, filed another Application to Settle Articles of Sale Pursuant to Part 11 of the Supreme Court [sic] and Section 95 of the Title By Registration Act Chapter 56:50, with Affidavit in Support and Exhibits. There is an Affidavit of Service sworn to by Ivor Emmanuel and filed on 24th February 2023 indicating that he served the Application on Patricia Inglis personally on 13th February 2023. The Application was fixed for hearing on 21st September 2023 and Notice was served on Patricia Inglis on behalf of the Defendant on 18th May 2023. The Defendant filed an Affidavit in Opposition to the Claimant’s application on 19th September 2023 with Exhibits attached thereto. The Defendant filed a Supplemental Affidavit in Opposition on 6th October 2023 as well as Skeleton Submissions on 30th October 2023. The Claimant filed an Affidavit in Response to the Defendant’s Affidavit in Opposition on 2nd November 2023 together with Exhibits. The Defendant filed Amended Skeleton Submissions on 6th November 2023 with Index of Authorities, a Further Affidavit with Exhibits on 13th December 2023. The Claimant filed Skeleton Submissions with Index of Authorities on 20th December 2023 to which the Defendant filed Submissions in Response on 5th February 2024.

[10] Owing to a number of adjournments, including allowing the parties to engage in settlement discussions, the application was never heard. The matter came on for hearing before this Court on 11th October 2024 when the parties reported that there had been no settlement and for a date for hearing of the application. The Court heard oral submissions from both parties on the Application to Settle Articles of Sale and the matter adjourned to 29th November 2024 for ruling.

[11] Having extensively set out the background to this case, in this application instant, the Claimant has filed an application to settle articles of sale. The Defendant opposes the application on the basis that the Claimant had failed to follow the procedure laid down by the **Title by Registration Act**¹, on the grounds that; there is a variation of the exact sum outstanding ;that the application was not served personally on the registered proprietors of the mortgaged property; the Claimant failed to serve the notice to pay off on the registered proprietor; that the bailiff failed to appear at the mortgaged premises and serve the registered proprietor with the act of seizure; that the act of seizure did not contain an inventory or valuation nor were they annexed; and that at the hearing of the application to settle the articles of sale all other mortgagees and incumbrancees were not notified to attend.

Issue

[12] The issue falling for determination is simply whether the Claimant complied with the provisions of the TRA in settling the articles of sale

The Law

[13] For the purposes of the instant case dealing with an Application to Settle Articles of Sale, the relevant law herein is the **Title by Registration Act** and in particular **sections 74 to 97**. sections 74 to 83 are instructive as to the procedure to be followed.

[14] Section 74 requires the mortgagee to issue a Notice to Pay Off to the mortgagor or incumbrancer and cause the same to be served on the registered proprietor:

“74. When a mortgagor or incumbrancer has failed to perform the conditions of the mortgage or incumbrance, or when the mortgagee or incumbrancee may lawfully demand the repayment of the sum lent on the mortgage, or the amount of provision secured by the incumbrance, the mortgagee or incumbrancee shall serve or cause to be served upon the registered proprietor a formal notice to pay off in Form 14 requiring him to perform the acts therein required within sixty days from the date of service. Where the registered proprietor is resident abroad and there is no one in the State holding his power of attorney, he shall be served in the manner in which a defendant out of the jurisdiction may be served under the procedure of the High Court.”

[15] The mortgagee may then seize the land for non-payment of the debt after the Notice to Pay Off has been served:

¹ Chapter 56:50

“75. If the registered proprietor shall not, within the time specified, pay off the mortgage or incumbrance, or do the acts required of him in the notice to pay off, the mortgagee or incumbrancee may seize the land contained in the certificate of title on which the mortgage or incumbrancee is noted, with the things accessory thereto as set forth and enumerated in this Act as falling within the mortgage or incumbrance”.

[16] The Act of Seizure, which is to be served on the registered proprietor, is to be carried out by a bailiff:

“76. The seizure shall be complete as regards the registered proprietor by the bailiff appearing on the premises with orders to seize, but, in evidence of his act, he shall place in the hands of the registered proprietor, or leave at his dwelling place, or, if resident abroad, in the hands of his attorney acting under his power of attorney, or, if he has no such attorney, then the mortgagee or incumbrancee, in the manner in which a defendant out of the jurisdiction of the High Court may be served, shall serve the registered proprietor with an act of seizure in Form 15 in which shall be set forth, not only the land seized, but an inventory of the things accessory to the land over which the mortgage or incumbrance extends; but where the registered proprietor resides abroad, it shall not be necessary to delay proceedings because of such service”.

[17] Having seized the land/property, the Caveat of Seizure is to be presented to the Registrar of the High Court:

“77. The mortgagee or incumbrancee shall also forthwith present to the Registrar of Titles a caveat of seizure, in Form 16 which the Registrar shall note upon the certificate of title in the same manner as is provided for other caveats to prohibit all dealings with the land seized until the caveat be removed or withdrawn”.

[18] If after thirty (30) days of the seizure the debt has not been paid or the acts required in the notice to pay off are not performed, the mortgagee may lodge at the High Court articles of sale in Form 17. Importantly, the mortgagee or incumbrancee must call upon/notify all other mortgagees and incumbrancees to appear before the Court on a day specified in the sums to settle the said articles of sale, to estimate an upset price, fix a day of sale, adjust the announcements of sale and the mode of publication of the sale.

[19] CPR rule 66 and section 74 of the Act provides that ***“the mortgagee or incumbrancee shall serve or cause to be served upon the registered proprietor a formal notice to pay off in Form 14 requiring him to perform the acts therein required within sixty days from the date of service”***.

This means that the Claimant shall serve or cause to be served upon the registered proprietor a formal notice to pay off and by an affidavit of service sworn to by Ivor Emmanuel, a bailiff and dated 24th may 2023, the Registered proprietor was served personally with the hearing notice.

- [20] Section 78 of the Act provides that the articles of sale in Form 17 of the said land, and the things accessory to the said land over which the mortgage or incumbrance extends, either in one lot or in more lots, as may be thought most likely to bring the highest price, **and shall by summons, call upon the registered proprietor, and all other mortgagees and incumbrancees, to appear before the Court on a day to be specified in the summons**, being not less than three and not more than ten days after the date of the summons, to settle the said articles of sale, to estimate an upset price, to fix the day of sale and to adjust the announcements of sale and the mode of publication thereof".
- [21] This is a significant provision that ought to be followed strictly as it is mandatorily couched with the word "shall" to safeguard the registered proprietor whose property is being sold to ensure that the property is not sold without due notice to other mortgagees who are entitled to benefit from the sale.
- [22] The affidavit of service sworn to by Jeudil Pascal on 31st October 2023 at 11.22am, indicates that the National Bank of Dominica was personally served through a customer service representative by the name of Sherissa Henderson delivering to her copies of the Application to settle Articles of Sale, certificate of Exhibits RX1-RX2 and an affidavit in support of the application.
- [22] The affidavit of Ruby Xavier in response to the defendant's affidavit in opposition to the Claimant's application to settle Articles of Sale in paragraph 5g she avers that ***"steps have been taken to serve the National Bank of Dominica and exhibits the above affidavit of service as exhibit RX3"***. This in my view is in compliance with the judgement of my learned brother Justice Bryan Cottle delivered on 14th September 2012, holding that the settling of Articles of Sale requires service on the National Bank of Dominica.
- [23] Accordingly, the contention of the Defendant that the Articles of sale have not been served on the National Bank of Dominica as ordered by the learned judge, is misconceived as the National Bank of Dominica was properly served and I so hold.
- [24] The Defendant contends that **section 77 of the Title by Registration Act** requires the non-payment of the sum to be in accordance with the judgement debt and states that the varying judgement sums are not in accordance with the act.

- [25] On close perusal of the Judgement of 15th April 2015, it is apparent that the judgement was by CONSENT of both parties which varied the order granted on 7th March 2008 as follows: -

“That judgment be entered for the Claimant in the sum of EC3,400,477.96 as at November 15, 2003 with interest at the rate of \$596.86 per day from November 15, 2003 to December 3, 2003 and thereafter interest at the statutory rate of 5% per annum from December 4, 2003 until satisfaction”.

- [26] The arguments of the Defendant on this issue therefore are of no moment as it is starkly clear that the judgement sum in question was agreed to by both parties.

- [27] Further, the arguments of the Defendant with regards to the valuation of the property is also of no moment. I say so because section 79 of the Act provides clearly that

“79. On the day appointed the Court shall settle the articles of sale, **fix the upset price upon such information or valuation as may be considered necessary and sufficient, and appoint the day of sale, adjust the announcements and determine the mode of publication thereof according to the nature and value of the property.**(emphasis mine) For lands not exceeding five thousand dollars in value (to be judged by the Court from any indications or informal evidence of value which the proceedings may disclose or which may be communicated to the Court) it shall not be necessary to publicly announce the sale beyond the island in which the land is situated, but for land of greater value, the Court will determine whether the announcements should be published throughout the State, or beyond the State, or in the English journals. The day of sale shall be determined by the length of time necessary to publish the announcements in such a manner as shall bring the highest price.”

- [28] Based on the foregoing provision, the property in question will only be sold at the current valued price or upset price on the valuation report.

- [29] To conclude, I have observed that the instant application, was filed by the Claimant on 30th January 2023, eleven (11) years since Justice Cottle’s decision. The justice of this case therefore clearly dictates that the objection of the Defendant should fail.

- [30] With this said, the matter shall proceed to hearing for the settling of articles of sale on **10th February 2025** and all parties to be served.

**Justice Zainab Jawara-Alami
High Court Judge**

BY THE COURT

REGISTRAR