

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

CIVIL

SUIT NO. **DOMHCV2014/0011**

Between:

BANK OF NOVA SCOTIA

Claimant

and

**JEDANY'S COMFORT
FRANCIS GLEN JOSEPH
CLAIRE JOSEPH**

Defendants

Appearances:

Mrs. Laurina Vidal-Telemaque for the Claimant

Mr. Lennox Lawrence for the 1st, 2nd and 3rd Defendants.

2014: November 17th

2015: February 26th

JUDGMENT

[1] **Thomas, J.[Ag.]**.: This is a Mortgage Claim against the defendants in which the Bank of Nova Scotia claims the following:

1. The balance of the principal and interest owing on credit facility granted to the Defendants.
2. Further or in the alternative that the mortgaged properties be sold in accordance with the procedure set forth in the Title by Registration Act.
3. Interests and Costs.
4. Further or other relief.

- [2] In an Affidavit in Support of Mortgage Claim, the Claimant's pleaded case is that of a loan agreement made with the defendants on 9th June, 2011 on certain terms and the breach of the said agreement by the defendants.
- [3] At paragraph 3 of the said Affidavit the following is deposed:
- "By an agreement made on the 9th day of June, 2011 between the claimant and the defendants, the claimant agreed to lend the defendants the sum of USD592,322.00, together with interest at the rate of 4.1680% per cent per annum from the 10th day of June 2011 which principal and interest were payable by the defendants over a *period of 5 years beginning 30th June 2011, with a fifteen (15) year amortization*. The principal outstanding was repayable in 55 equal monthly installments of USO 3,365.47 commencing June 30, 2011. A balloon payment of USO 407,221.15 would become due on February 01, 2016."
- [4] The properties agreed to secure the loan are detailed at paragraph 4 of the said Affidavit. And at paragraph 7 of the Affidavit it is deposed that the defendants have failed to make their payment obligations in accordance with the agreement and that as of 20th November 2013, USD\$518,540.90 was due from the defendants with interest accruing at the daily rate of USD\$58.44.
- [5] In their Amended Defence, while paragraphs 1 to 6 of the Affidavit in Support of Mortgage Claim are admitted, paragraph 7 is denied. The contention in this regard is that on or about June 2013 at a meeting between the defendants, of the one part, and the Manager and Accounts Manager of the Claimant the original agreement was terminated and new terms agreed. Further, that one of the agreed terms was a reduction in monthly payments to USD\$4,375.00 towards the principal and interest with the sum of \$3,367.87 remaining on the principal and a new interest amount varied under the global sum of \$4,375.00; and even further the defendants contend that as part of the varied terms of the loan agreement, it was agreed that the payment date would be moved from the 1st of every succeeding month to the 9th day of every succeeding month.
- [6] Finally, the defendants plead reliance on the varied agreement and payments were made accordingly and received by the claimant. As such, it is contended there is no breach of the further agreement and the claim is both premature and without merit and should be denied.

Evidence

- [7] In the case of the claimant, evidence is given by Neil Selman by his Witness Statement in which he said that he is the Manager of Commercial and Corporate Banking at the Bank of Nova Scotia.
- [8] In his Witness Statement, Neil Selman, spoke to the defendants and detailed some of the terms of the loan agreement with the defendants on 9th June, 2011.
- [9] At paragraphs 6 to 7 of his Witness Statement, Neil Selman gave the result of a meeting with the defendants in order to obviate the need for legal action and pay off the arrears outstanding on the loan. The further evidence is that at the said meeting the defendants proposed to pay off the arrears and pay the loan by making monthly payments of no less than USD\$4,550.00 from income derived from the rental of seven apartments at SD\$600.00 per month.
- [10] At paragraph 12 of his Witness Statement the evidence is that the defendants, in breach of the agreement of 9th June, 2011 failed to meet their payment obligations as agreed; and they failed to make payments towards the arrears as agreed. This, according to the witness, led to the claim being filed against the defendants for the payment of the sum of USD\$518,540.90 in addition to interest of USD\$58.44 per diem from 20th November, 2013 until payment. Further, that in the alternative the mortgaged properties be sold in accordance with the procedure set out in the Title by Registration Act.
- [11] Under cross-examination Selman testified that from June 2013 the defendants have paid a lesser sum than that stipulated in the commitment letter. And under further cross examination, the witness denied that there was a variation of the agreement of 9th June, 2011.
- [12] Evidence on behalf of the defendants is given by Francis Glen Joseph and Claire Joseph, the 2nd and 3rd defendants. The evidence is quite similar and is geared to the new agreement as pleaded.
- [13] At paragraphs 16 and 17 of both Witness Statements the following evidence is given by both defendants:
- "16. Based on the Claimant's representation and new agreement arrived at the old terms were no longer in effect and that the only terms which were applicable where the new terms referred to namely, \$4,375.00 as the global amount with \$3,367.47 being paid towards the principal.

17. I say that I have dutifully kept my loan obligations though on occasions I have fallen short by a few hundred dollars."

i.

[14] Under cross-examination Francis Glen Joseph agreed that in May 2013 he was \$10,000.00 in arrears. Further, that when the action was filed on 9th January, 2014 between June 2011 and May 2013 all the payments were not made; and that in some months less than \$4,375.00 was deposited to satisfy the debt.

[15] Claire Joseph under cross-examination said that the bank accommodated "us" since we were in breach of the agreement of June 2011. The witness went on to say that she did not agree that "we" were in breach of the new agreement.

ISSUES

- 1) Whether the failure of the claimant to file a Reply to the defendants' Amended Defence gave rise to a further agreement between the parties varying the original agreement?
- 2) Whether the defendants are indebted to the claimant in the amount of USD\$518,540.90?
- 3) Whether the claimant is entitled to an order for sale as prescribed by section 130 of the Title by Registration Act, with respect to the titles deposited with the claimant in order to secure the mortgage debt?
- 4) Who is liable in costs?

Issue No. 1

Whether the failure of the claimant to file a Reply to the defendants' Amended Defence gave rise to a further agreement between the parties varying the original agreement?

[16] This issue falls to be determined in relation to Part 10 of CPR 2000 and the consequential relevant legal principles. It arises from the following sequence of the pleadings: the filing of the Fixed Date Claim Form by the claimant on 9th January, 2014 followed by a Defence of the 1st, 2nd and 3rd defendants on 7th March, 2014, a Reply to Defence on 21st March, 2014 and an Amended Defence of the 1st, 2nd and 4th defendants of 23rd April, 2014. The

latter filing emanates from an Order of the Court dated 21st March, 2014 which permitted the defendants to file an Amended Defence on or before 4th April, 2014,

Submissions

[17] Learned counsel for the Claimant, Mrs. Laurina Vidal-Telemacque, submits the failure to file a Reply to the Amended Defence is of no consequence since in the case of the Defence the consequence is set out in Part 10.2 (b) of CPR. But as regard a Reply, learned counsel contends that it is a matter of the claimant's discretion under Part 10.9 (1) (a) of CPR within 14 days after the date of the service of the Defence or at any time with the permission of the court. In the result the following submission is tendered:

"63. It is respectfully submitted that the Claimant's failure to file a reply to the amended defence, even though a reply was filed in respect of the original defence, is of no consequence and by no means results in the Claimant's admittance of the facts contained in the said defence."

[18] For the defendants the following is submitted:

- "7. CPR 2000 Part 10. 5 (4) mandates that if a Defendant denies any allegation in the Claim Form or Statement of Claim:
 - i. The defendant must state the reason for doing so;
 - ii. If the defendants intend to prove a different version of events from that given by the defendants the defendant's own version must be set out in their defence.
8. It is well settled that where a version of facts are set out in a defence which conflict with the Claimant's statement of case the Claimant is required to reply to the defence and either be joined on that issue or to contest that said version of facts as set out in the events.
9. It is submitted that where the Claimant does not reply to a defence which sets out a different version of events or which establishes a claim which radically conflicts with the claim or sets out an absolute defence to that claim and the claimant does not contest that defence that the claimant is deemed to have admitted the defence. In the circumstances of this case the claimant must be deemed to have admitted the defence of variation as set out in paragraph 2, 3, and 5 of the Amended Defence.
10. It is submitted therefore that on the basis of the uncontradicted amended defence the court should properly find that the original agreement was varied at the meeting of June 2013 as set out in the Amended Defence and that an amended principal and interest on payment was agreed to between the parties also as set out in the Amended Defence."

Reasonin,9,

[19] The central focus of the Defence, Amended Defence and Reply, (or lack of it) falls on the agreement for a loan by the claimant to the defendants and consequential legal principles relevant thereto.

[20] In the Affidavit in Support of Mortgage Claim¹ sworn to by Neil Selman, Accounts Manager of the claimant, the following is deposed at paragraphs 3, 6, 7 and 8:

"3. By an agreement made on the 9th day of June, 2011 between the claimant and the defendants, the claimant agreed to lend the defendants the sum of USD592,322.00, together with interest at the rate of 4.1680% per cent per annum from the 10th day of June 2011 which principal and interest were payable by the defendants over a period of 5 years beginning 30th June 2011, with a fifteen (15) year amortization. The principal outstanding was repayable in 55 equal monthly installments of USD 3,365.47 commencing June 30, 2011. A balloon payment of USD 407,221.15 would become due on February 01, 2016. A copy of the *Commitment Letter* evidencing the same is produced herewith and marked exhibit 'NS1'.

6. Pursuant to the said agreement the claimant disbursed the sums as agreed to the defendants.

7. The defendants, in breach of the agreement, have failed to meet their payment obligation in accordance with the terms of the agreement.

8. The amounts due from the defendants as at 19th December, 2013 are as follows:

Amount paid on principal	\$100,814.51
Amount paid on interest	<u>\$ 54,299.78</u>
Total paid	USD \$155,114.29

Principal due but unpaid	\$ 13,327.35
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Current principle balance	\$504,685.49
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Interest due but unpaid	<u>\$ 131855.41</u>
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Total due as at 20 th November, 2013	USO \$518,540.90"
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[21] In their Amended Defence², at paragraphs 2-7, the following is pleaded:

"2. Paragraph 7 of the said affidavit is not admitted. The Defendants state that there was a further agreement between the parties varying the terms of the original agreement. This said variation was agreed to in or about June 1 2013 at a meeting between the Defendants of the One Part and Mr. Jim Alston (Manager) and Mr. Neil Selman (Accountant Manager). Accordingly and by virtue of the said further agreement the original agreement was terminated and new terms agreed. One of the agreed new terms was for the reduction in the monthly payments to US\$4000.00 US\$4,375.00 towards principal and interest with the sum of \$3,367.47 remaining on the principle and a new interest amount varied under the global sum of \$4,375.00.

¹ Filed on 9th January, 2014

² Filed 23rd April, 2014

3. By virtue of the further agreement the Parties agreed that the Defendants would pay a lesser sum of 4000.00 US\$4,375.00 per month towards principal and interest. The Defendants relied on this further agreement and have been meeting their obligations under that said further agreement. As part of the varied terms of the loan agreement it was agreed that the payment date would be moved from the 1st of every succeeding month to the 9th day of every succeeding month.
4. Paragraphs 8 and 9 of the Affidavit in Support of Mortgage Claim is denied as the figures are calculated based on the original agreement and not on the further agreement between the parties which brought to an end the terms of the original agreement.
5. The Defendant further relied on the said varied agreement and paid the monthly installments both over the counter and through deposits at the ATM. All such payments were received by the Claimant who by such action confirmed the terms of the varied agreement. Accordingly the Defendants relied upon the representation of the Claimant at the meeting of June 2013 and the conduct of the Claimant in accepting payment on the varied terms as confirming the varied agreement in its entirety.
6. Paragraph 10 of the said Affidavit is denied as the Defendants are not in breach of the further agreement. The said Defendants relied on the further agreement between the parties and made monthly payment to the Claimant based on the said further agreement. In the circumstances the Defendants states that the claim is misstated and premature and that the Defendants are compliant with the terms of the further agreement.
7. The Defendants states that in view of the further agreement between the parties the claim is premature and without merit and should be denied."

The import of the non-reply

[22] While at paragraph 7 of the Affidavit the claimant has pleaded an agreement of 9th June 2011, between the claimant and the defendants, to lend the defendants the sum of USD\$592,322.00 this is "not admitted" by the defendants. Their case is that there exists another agreement varying the terms of the "original agreement." The pleadings go on to identify the parties to the further agreement and say further that the original terms were terminated and new term agreed. Thus it is fair to say that the defendants' case turns or depends on the new terms. In turn this points to the issues of variation, waiver and forbearance.

[23] In Cheshire and Fifoot - **The law of Contract**³ in discussion discharge of contract, various methods are discussed. And in discussing variation, the case of **Robinson v Page**⁴ is discussed. This concerned an oral agreement to vary an earlier written

³ Seventh Edition at page at 499-506

⁴ [1826] 3 Russ. 114

agreement for the sale of land. It was held that the oral agreement disclosed an intention to vary the earlier agreement, not to abandon it, but the variation was ineffective since it did not satisfy the statute of frauds. The learned authors go on to discuss another aspect of waiver as follows:

"Such, then, is the law where the variation is made for the mutual advantage of both parties. A different and a slightly more complex situation may arise where the alteration of the contractual terms is designed to suit the convenience of one only of the parties. One party to accede, perhaps reluctantly, to the request of the other, and promise that he will not insist upon performance according to the strict letter of the contract. This is an indulgence that is a common feature of commercial life. In the case of a contract for the sale of goods, for instance, approval may be given to the request either of the seller or the buyer that the date of delivery be postponed for a short time. An arrangement of this kind for a substituted mode of performance is generally described as either a waiver or a forbearance by the party who grants the indulgence.

[24] The matter waiver or forbearance is also discussed in **Chitty on Contracts**⁵ of immediate relevance is the following:

"Waiver or forbearance. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he was *waived* his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of 'waiver by estoppel' rather than 'waiver by election') may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation⁶.

Effect on party forbearing. The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered.⁷

[25] The 2nd and 3rd defendants both agreed under cross-examination that a Forbearance Agreement was sent to them for execution. Such a document appears at page 117 of Trial Bundle B.

[26] The documents lists the parties as being Glen Joseph and Claire Joseph as "the Borrower" and Bank of Nova Scotia "the Bank". The following recitals are also contained:

⁵ Volume I, General Principles (13th Ed.)

⁶ Ibid, at para. 22-040

⁷ Ibid, at para. 22-042

"WHEREAS:

- (A) Pursuant to the commitment letter dated June 9, 2011 between the Borrower and the Bank, the Bank agreed to make available to the Borrower a credit facility subject to certain terms and conditions (the 'Commitment Letter');
- (B) Under the Commitment Letter, the Borrower was required to repay Credit A by monthly principal payments of US\$3,365.47 each. As of the date hereof, the Borrower has failed to repay principal and interest payments for Credit A, which represents US \$11, 461.88 in outstanding principal and interest payments;
- (C) The Bank issued a demand letter to the Borrower dated May 7, 2013.
- (D) The borrower has requested that the Bank forbear from exercising its rights and remedies under the Commitment Letter and Security Documents until March 31, 2014.
- (E) The Bank has agreed to this request, but only on the terms and conditions set forth herein."

[27] Also contained are a number of definitions "for the purposes" of the Forbearance Agreement. Included are the following:

- ." 'Effective Date' shall mean the date on which the conditions set forth in section 5 of this Forbearance Agreement have been satisfied;
- 'Event of Termination' shall have the meaning set forth in section 5 of this Forbearance Agreement.
- 'Forbearance Period' shall mean the period commencing on the Effective Date and ending on the Termination Date;
- 'Termination Date' shall mean the earlier of: (i) March 31, 2014, or (ii) the date on which an Event of Termination occurs."

[28] Clause 3 of the Forbearance Agreement is of such central importance to the whole scheme of the Agreement that it warrants being set out in its entirety:

"3. Forbearance

- (a) Subject to the terms and conditions of this Forbearance Agreement, and without waiving any defaults and any rights or remedies now existing or which may arise during the Forbearance Period, the Bank agrees that during the Forbearance Period: (i) it will not, exercise or enforce any rights or remedies provided in the Commitment Letter or otherwise at law or in equity; and (ii) it will amend the Interest Rate section and Terms and Repayment section of the Commitment Letter as set out below.
 - (A) The Terms and Repayment section of the Commitment Letter is hereby deleted in its entirety and replaced with the following:

'TERM AND REPAYMENT

Credit A shall be repaid by monthly blended payments of US\$3,365.47 each. The balance of Credit A together with accrued interest and all other amounts outstanding shall be paid on or before March 31, 2014.

In addition to the above payments, the Borrower agrees that 100% of rental income for the first 7 tenants shall be applied against Credit A and 70% of the rental income from the remaining tenants shall be applied against Credit A.'

(B) The General Security section of the Commitment Letter is amended by adding the following new subsection 4 at the end:

'4. Assignment of Rental Income in favour of the Bank.'

(C) Paragraph 4 of the Reporting Conditions section of the Commitment Letter is hereby deleted in its entirety and replaced with the following:

'4. Updated Rent Roll for buildings to be provided within 21 days of the start of each school semester.'

- (b) The Borrower agrees that, upon termination or expiration of the Forbearance Period, the Bank may exercise any and all rights and remedies which it may not have exercised pursuant to section 3 (a) of this Forbearance Agreement, and the Borrower shall not assert as a defence thereto the passage of time, estoppel, delay, laches or any statute of limitations to the extent that the exercise of any such rights by the Bank were precluded by this Forbearance Agreement or any understanding of the parties which preceded this Forbearance Agreement.
- (c) In addition, the Borrower agrees that during the Forbearance Period, the rights of the Bank under the Commitment Letter and the terms and conditions of the Commitment Letter shall not be modified except as expressly provided herein. In particular, it is expressly understood and agreed that the indemnities contained in the Commitment Letter and the other Financing Documents shall continue in full force and effect with respect to any loss, cost or expense suffered by the Bank, including any such loss, cost or expense attributable to the payment of any tax, arising or resulting from the execution and delivery of this Forbearance Agreement or the performance by any party of its obligations hereunder or thereunder.
- (d) In consideration for the Bank's agreement to forbear, the Borrower agrees that:
 - a. all principal and interest payments will be made in accordance with the Commitment Letter and Forbearance Agreement.
 - b. It shall pay the Bank on demand for all fees and expenses (including legal fees) incurred by the Bank in relation to this Forbearance Agreement, Commitment Letter and Security Documents.

- c. The Borrower shall establish an operating account at the Bank and agrees to deposit 100% of rental proceeds in such operating account.
- d. The Borrower shall provide full disclosure of relevant information of tenants to be provided in accordance with the Commitment Letter together with any such additional information as requested by the Bank.

4.. Conditions Precedent

The obligations of the Bank under this Forbearance Agreement are subject to the satisfaction of the Bank in its sole discretion of the following:

- (a) This Forbearance Agreement shall have been executed by all parties and delivered to the Bank by October 15, 2013.
- (b) The Guarantors shall provide the Bank with an executed unregistered Deed of Mortgage."

[29] Without attempting to interpret the foregoing entirely, it is clear that the following facts are embodied:

- 1. There was a failure by the Borrower to pay US\$11,461.88 in principal and interest;
- 2. A demand letter was issued by the Bank dated May 7 2013;
- 3. The Borrower requested the Bank to forbear from exercising its rights and remedies under the Commitment Letter and security demands until March 31, 2014;
- 4. The Bank agreed to the forbearance;
- 5. Under section 4 of the Agreement and of the conditions precedent to the Agreement is that all parties shall have executed the Agreement and delivered to the Bank by October 15, 2013;
- 6. The Agreement contemplates a date of or prior to "...October 2013";
- 7. Section 3 of the Agreement bearing the heading 'Forbearance' spells out the obligation and rights of the parties;
- 8. Section 5 of the Agreement gives certain events in this connection.

[30] It is clear to the court that the Forbearance Agreement is within the methodology described above in that the Bank (the Claimant) agreed to forbear enforcement at the request of the Borrower (the 2nd and 3rd defendants). Under the Agreement, the Terms and Repayment

section of the Commitment Letter "is hereby deleted in its entirety and replaced...". As such, a new method of payment is stipulated in section 3 (a) apart from the Credit A monthly blended payment of US\$3,365.47 each, there is a further payment in that the Borrower "agrees that 100% of the rental income shall be applied against Credit A payment up to the amount of US\$3,365.47 of the rental agreement has been applied to Credit A, the Borrower agrees that 100% of rental income for the first 7 tenants shall be applied against Credit A and 70% of the rental income from the remaining tenants shall be applied against Credit A.

[31] In addition to the foregoing, the Borrower agreed in summary to: make all payments in accordance with the Commitment Letter and the Forbearance Agreement; pay that Bank all fees and expenses; establish an operating account at the Bank and agrees to deposit 100% of the rental proceeds in such account; provide full disclosure of relevant information to be provided in accordance with the Commitment Letter together with such additional information as requested by the Bank.

[32] But in the end the issue comes down to a very narrow compass in that in evidence both the 2nd and 3rd defendants testified that there were arrears, the meeting was held to discuss how the arrears were to be paid along with the monthly payments stipulated [in the Commitment Letter of and, critically, the Forbearance Agreement was never executed, period. And even as late as October 29, 2013 an agent of the claimant emailed⁸ the 2nd and 3rd defendants in these terms:

"Glen/Claire

More than ample time has been given to you for execution of the Forbearance Agreement. I have not received the document or correspondence from you.

Kindly provide by close of business today or the Bank will proceed with whatever steps it deems necessary."

[33] This is where the Amended Defence and Reply return in that since the Forbearance Agreement forwarded to the 2nd and 3rd defendants was never executed by the 2nd and 3rd defendants there can be no new agreement in law, as pleaded, and, as such a reply would have been superfluous and of no legal effect. Consequently, the matter of the loan by the claimant to the defendants is still governed by the Commitment Letter dated June 9, 2011

⁸ Trial Bundle B at pages 77-78

the terms and conditions of which were accepted by the 2nd and 3rd defendants on 10th and 11th June 2011, respectively.

Issue No. 2

Whether the Defendants are indebted to the Claimant in the amount of **US\$518,540.90?**

[34] Based on the court's determination that no new agreement arose because of the failure of the defendants to execute the Forbearance Agreement; the Agreement of June 9, 2011 still governed the matter of the loan. As such, it follows that the defendants are indebted to the claimant in the amount of US\$518,50.90, as at 21st November, 2013 with interest accruing at the daily rate of USD\$58.44.

Issue No. 3

Whether the Claimant is entitled to an order for sale, as prescribed by section 109 (1) of the Title by Registration Act,⁹ with respect to the title to land deposited with the Claimant for the purpose of securing the mortgage debt?

[35] It will be recalled that in terms of relief the claimant sought : the balance of principal and interest owing on a credit facility granted to the defendants and further or in the alternative the mortgaged property be sold in accordance with the procedure set forth in the **Title by Registration Act**.

Submissions

[36] In submitting that the claimant is entitled to the instant relief, learned counsel submits the following:

"56. The Memoranda of deposit which was executed by the Defendants, in respect to the two properties clearly states at paragraph 1 that the titles and caveat placed on the said titles were deposited with the Bank with the intent to create

⁹ Chap. 56:50

an equitable mortgage upon all the property, mortgage debts and sums of money to which they relate for securing the payment and discharge on demand of all money and liabilities now and thereafter due.

57. The Defendants deposited their titles and other documents pertaining to their ownership of the properties and in turn caveats were lodged with the Titles Registry of the High Court for the purposes of securing the interest of the Claimant.
58. Further, section 109 of the Titles by Registration Act Chap 56:50 states that any registered proprietor or mortgagee who is liable to the payment of a judgment debt, the Court may, at any time after the date of judgment, on the application of the judgment creditor make an order for the sale of the said property..."

[37] In the case of the defendants the submissions are in these terms:

- "30. The agreement which the Claimant seeks to enforce is a written [agreement] for mortgage loan. The Claimant does not rely on any term in the Principal agreement where the parties agreed expressly or impliedly for the sale of the mortgage property as a remedy arising from the breach of contract. Such a remedy is unsustainable on the contract between the Parties.
31. It is well settled that an Implied Term must be pleaded if an award is to be made on the basis of such a term. There were however no facts pleaded to establish the existence of such an Implied Term or Express Term. Accordingly the principle of law as set out in paragraph 32, Dominica AID Bank v Mavis Williams should be applied, that is, that there was no pleading of any facts or contractual term upon which such an order could be grounded and that the claim for such a remedy is impermissible."

Reasoning

[38] Section 109 (1) of the **Title by Registration Act** provides as follows:

"Where any registered proprietor, mortgagee or incumbrancee, or the estate or right of any registered proprietor, mortgagee or incumbrancee in or over any land brought under this Act, is liable to the payment of a judgment debt, the Court may, at any time after the date of the judgment, on the application of the judgment creditor, make an order for the sale of the estate or right of the registered proprietor, mortgagee or incumbrancee in or over the said land; but if it is proved to the satisfaction of the Court that the estate or right in question is of the value of two thousand four hundred dollars or upwards, or where the application is for the sale of the estate or right of a registered proprietor, that of the land in question, forty acres or more are under cultivation, no order of sale shall be made hereunder, except with the consent of the registered proprietor, mortgagee or incumbrancee, until the expiration of six months after the date of the application; and on any such application, the Court instead of making an order of sale may order the amount due to be levied by the appointment of a receiver or otherwise as it thinks fit."

[39] The matters of the properties owned by the 2nd and 3rd defendants and the execution of a Memorandum of Deposit and the caveats lodged with respect to the said properties cannot be in doubt in relation to the loan provided by the claimant to the defendants. These are usual and normal. Also usual and normal are the legal consequences that flow where there is a breach. As such, the court accepts the submissions tendered on behalf of the claimant.

[40] On the other hand, section 109 (1) of the **Title by Registration Act** (the Act) has as its clear purpose, the conferring of certain rights on a judgment creditor in the context of a judgment debt to make application to sell the property. But the right conferred is not at large as there are restrictions. Of relevance here is the evidence that the estate or right in question is of the value of two thousand four hundred dollars or upwards. In that case an order cannot be made unless the registered proprietor consents and six months have elapsed since the date of the application for sale.

[41] Learned counsel for the defendants points to the absence of an implied term or implied terms for the alternative order for the property to be sold. In this connection paragraph 32 of the judgment in *Dominica Agricultural and Industrial Development Bank v Mavis Williams*¹⁰ is highlighted.

[42] But that portion of the judgment was concerned with the absence pleadings to establish the existence of a concessionary rate of interest for staff. The distinguishing feature in the case at bar is that the claimant is seeking to have the court to permit the exercise of a right conferred on mortgagees and the like, by section 109 (1) of the **Title by Registration Act**, in the context of a judgment debt. The only difficulty is that the claimant in its pleadings did not take cognizance of the need for an application and the month restriction on the grant by the court for an order for sale.

Conclusion

[43] It is the determination of the court that the claimant is entitled to an order for sale of the properties used as security for the loan to the defendants; but the application for such an

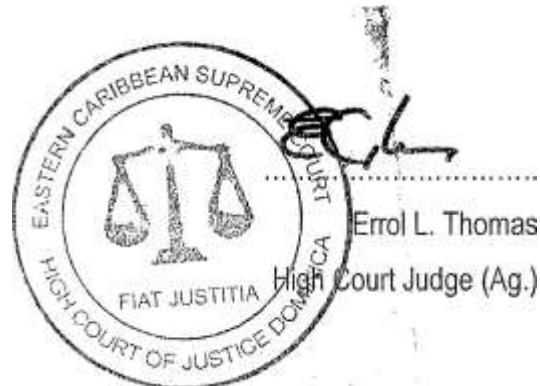
¹⁰ Civil Appeal No. 20 of 2005 (Dom.)

order must be made in the manner prescribed by section 109(1) of the **Title by Registration Act**,¹¹

ORDER:

[44] **IT IS HEREBY ORDERED** as follows:

- 1) Since the Forbearance Agreement, which accords with law, was forwarded to the 2nd and 3rd defendants was never executed there is no new agreement in law, as pleaded, and as such a Reply would have been superfluous and of no legal effect. And as such the original agreement of 9th June, 2011 is still effective in law.
- 2) Consequent on the foregoing, the matter of the loan by the claimant and defendants still takes its colour and context from the Commitment Letter of June 9, 2011, the terms of which were accepted by the 2nd and 3rd defendants on 10th and 11th June 2011, respectively.
- 3) Since the matter of the loan is still governed by the Commitment Letter of June 9, 2011 it follows that the sum of USD\$514,540.90 is owed as of 21st November, 2011 plus daily interest of USD\$58.44 up to the date of this judgment.
- 4) The claimant is entitled to an order for the sale of the properties used as security for the loan to the defendants; but the application for such an order must be made in this manner prescribed by section 109(1) of the **Title by Registration Act**.
- 5) Unless otherwise agreed between the parties, the defendants must pay the claimant prescribed costs.



¹¹ Chap. 56:50