

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

HIGH COURT OF JUSTICE

SUIT NO. GDAHCV 2008/0135

BETWEEN:

**EVELYN WHITEMAN
RAPHAEL PURCELL
(Executors of the Estate of Leonard Anthony Purcell, deceased)**

Claimants

and

**FLOYD ROSS
GARNET ROSS
THE CONSULTANT LIMITED**

Defendants

Appearances:

Mr. Ian Sandy with Ms. Giselle Whiteman for the Claimants
Mr. Nigel Stewart with Mrs. Kindra Maturine-Stewart for the Second-Named Defendant
Mr. Alban John with Ms. Thandiwe Lyle for the Third-Named Defendant

2014: December 3;17.

RULING

(Strike out; limitation periods for recovery of sums due under mortgage, possession or foreclosure; last payment or acknowledgement of title or claim; burden of proof; laches.)

- [1] **WALLBANK, J. [Ag]:** In this Ruling the Court dismisses two parallel applications to strike out the Claim filed on 12th December 2008 by the Second and Third Defendants respectively, with reasons.
- [2] On 5th March 2008 the Claimants, as executors of the Estate of Leonard Anthony Purcell ("LAP"), deceased, "the [alleged] owner until his death ... of the business L.A. Purcell" (*sic*), filed a Fixed Date Claim Form seeking to enforce a mortgage granted to the late Mr. Purcell by the First and Second Defendants ("Mr. and Mrs. Ross" respectively). The First Defendant, Mr. Floyd Ross, is the personal representative of Mrs. Ross's late husband, Mr. Denis Ross, who was originally the First Defendant.
- [3] Mr. Purcell's executors seek payment of an outstanding amount of principal and interest, in an amount as at the date of filing the claim of \$192,335.83, alternatively delivery by possession or foreclosure or sale of lands of Mr. and Mrs. Ross, which were charged by way of legal mortgage for repayment of the debt.
- [4] The Fixed Date Claim Form was supported by an Affidavit of one Ms. Richlyn Phillips, who attests that she is the Chief Bookkeeper of the Claimants.
- [5] The mortgage was dated 16th January 1988. Mr. and Mrs. Ross thereby charged certain lands to secure their repayment to Mr. Purcell of an existing indebtedness of \$100,000.00 together with simple interest at 10% per annum from 16th January 1988. A repayment date of 31st March 1988 was stipulated.
- [6] The Claimants allege that only \$11,000.00 was paid towards the principal and interest. The last payment, say the Claimants, was made on 5th March 1996 in the sum of \$1000.00. Mrs. Ross does not deny this, but she does not admit it either.
- [7] In February and/or March 2000, Mr. Ross purported to convey certain of the lands charged with the mortgage to Mr. Purcell to the Third Defendant.

- [8] The essence of the Third Defendant's answer to the claim, which has been largely adopted by Mrs. Ross (with Mr. Ross remaining silent throughout, until he deceased during the life of these proceedings), is that the claim should be disallowed for various technical reasons and alleged evidential shortcomings. The main plank of the Second and Third Defendants' defence is that the claim is time barred.
- [9] Certain of the technical defences relate to observance of procedural requirements for claims of this nature.
- [10] Counsel for both sides accept that the Court can give directions to rectify procedural defects. Because the Defendants also seek to rely upon the alleged procedural defects as grounds to strike the claim out at this interlocutory stage, as the defects complained of are not, in my view, incurably bad and can be put right with relatively little effort and expense (and a number of them commendably already have been, while others, such as the provision of a property valuation, can more usefully be supplied closer to trial), I have no hesitation in refusing to strike the claim out on such procedural grounds, and will deal no further with that aspect here.
- [11] The Second and Third Defendants also cite laches as a ground for the claim to be struck out.
- [12] In relation to laches, the Claimants submit that this defence should have been properly pleaded so that its viability can be determined at trial, and not upon an interlocutory application such as this application for a strike out.
- [13] The Claimants rely upon dicta of Thomas, J.A. (AG) in **HCVAP2006/020 Southern Developers Limited vs Lester Bryant Bird vs Ors**:
- "[Laches] is a defence whose viability is determined after a full trial. Indeed to state the obvious, these are the circumstances in which the full evidence of the delay will be known to the court."*

- [14] I accept that its viability is not suitable for determination at an interlocutory hearing and therefore will not strike the claim out on this ground.
- [15] The real issue is whether the claims are time-barred.
- [16] On 14th May 2008 Mrs. Ross filed an Affidavit. It would appear that she did this solely in respect of herself, not on behalf of her ex-husband. She attests that although they still lived under the same roof they barely communicated with each other.
- [17] At paragraph 8, Mrs. Ross attested that there had been a very close friendship between her husband and Mr. Purcell, that her husband had purchased building materials on credit from Mr. Purcell, who had a store, and that she believes the mortgage was intended to secure repayment of this indebtedness. This piece of evidence is critical for determination of these interlocutory strikeout applications.
- [18] She also claims that she had very little knowledge of her husband's business dealings with Mr. Purcell. The effect of this, and of Mr. Ross's silence, is that neither Mr. nor Mrs. Ross have admitted making payments towards the mortgage, and in particular the key alleged payment of 5th March 1996. The Claimant is left, at this stage at least, with the task of proving that Mr. and Mrs. Ross made that payment to Mr. Purcell as a payment towards the mortgage.
- [19] On 2nd July 2008 the Claimants disclosed what they called "the account ledger of the loan", in response to a Request for Further Particulars from the Third Defendant.
- [20] On the same day the Claimants disclosed the same documents in response to a Request for Further Particulars from Mrs. Ross, identifying them slightly differently as "the mortgage account card".

- [21] It appears that these appellations were descriptions applied by the Claimants after the filing of the claim to these documents. The Court treats these descriptions with caution as they could be self-serving.
- [22] These documents appear to have been neither an “account ledger of the loan” nor a “mortgage account card” but extracts from an otherwise unidentified business ledger that has come into the hands of the Claimants as executors of the Estate of Mr. Purcell, showing various transactions relating to building materials, and payments. It is only partially legible.
- [23] On 9th June 2009 the Claimants filed a further Supplemental Affidavit of Ms. Richlyn Phillips.
- [24] In this, Ms. Phillips attested that she had located three cash receipt books in the archives of the Claimants. These, she says, included carbon copies of receipts made out to Mr. and Mrs. Ross in respect of the three last mortgage payments in the “subject mortgage in this matter”, and that they match the ledger entries.
- [25] None of this documentation directly shows that the payments received were made in respect of the mortgage, nor to Mr. Purcell personally.
- [26] At the oral hearing on 3th December 2014 Learned Counsel for the Third Defendant, Mr. Alban John, brought to the Court’s attention public documents showing that there exists a company, L.A Purcell Co. Ltd, whose date of continuance was 6th February 1997. Mr. John suggested that this raised the possibility that the ledger entries pertained to that corporate entity, not to Mr. Purcell personally.

Arguments

The Applicants’ Position

- [27] The Applicants/Defendants start from a proposition that an action for possession and foreclosure must be commenced within 12 years next after the time at which

the right to bring the action has first accrued, pursuant to sections 4 and 25 of the Limitation Act.

[28] Section 25 materially provides as follows:

“[A mortgagee may] make an entry or bring an action of foreclosure or an action to recover the land at any time within twelve years next after the last payment by the person liable to make the payment of any part of the principal money or interest secured by the mortgage, although more than twelve years may have elapsed since the time at which the right to make the entry or bring the action first accrued.”

[29] They also rely upon section 30 of the Limitation Act for a proposition that an action to recover money secured by a mortgage must be commenced within 12 years *“next after a present right to receive it has accrued to some person capable of giving a discharge for or release of it, unless in the meantime some part of the principal money, or some interest thereon, has been paid or some acknowledgment of the right thereto has been given, in writing, signed by the person by whom it is payable, or his or her agent, to the person entitled thereto, or his or her agent”*.

[30] Similarly, they rely upon section 33 of the Limitation Act for a proposition that any action to recover interest shall be brought within 6 years next after the interest became due, or next after an acknowledgement of the same in writing, has been given to the person entitled thereto by the person liable, or to and by their respective agents. This aspect of the matter was not fully argued at the oral hearing on 3 December 2014.

[31] In order for the claim to have been filed within the 12 year limitation periods, the last mortgage payment must have been made on or after 5th March 1996, which is the last recorded payment in the extract from the ledger.

[32] The Applicants submit that the entries in the ledger book are not sufficient evidence of payment by the Defendants in respect of the mortgage and that they

are insufficient evidence to charge the Defendants with liability. They cite section 32 of the Evidence Act, Chapter 92, as statutory recognition of the evidential inadequacy of books of account.

[33] They go further by submitting that the receipt copies do not add much, if anything, to the evidence. Consequently, they say, the documentary evidence before the court does not amount to sufficient evidence of a part payment or acknowledgement of the debt by the First and Second Defendants. Therefore, they argue, the claim became time barred in 2000, 12 years after the mortgage repayment date of 31st March 1988.

[34] Mr. John submitted that the question of whether the Claimant has demonstrated that Mr. and Mrs. Ross paid Mr. Purcell a last instalment on 5th March 1996 now depends solely upon the Supplemental Affidavit of Ms. Richlyn Phillips filed on 9th June 2009, as the ledger extract itself and the copies of the receipts do not establish that this last payment was in respect of the mortgage, nor that it had been made to Mr. Purcell.

[35] This Affidavit was filed after the application to strike out, which indicates that the Claimants considered that, as matters stood then, they were on weak ground and needed to improve their position.

[36] Mr. John sought to raise doubts about whether the apparent payments made by or on behalf of Mr. and Mrs. Ross were in fact in respect of the mortgage. He suggested they could have been for something else, such as for purchasing building materials. He prayed in aid a similar situation described in ***Carol Radway vs GFK Capital Base Corporation et al. Court of Queen's Bench of Manitoba***, 30th May 2011, at paragraph [23]:

"In any case, the letter ... does not indicate that it is a receipt for the \$170 nor does it refer to a mortgage payment. Moreover, there is evidence that GFK was attorning rents. We also know that 264 Langside Street contained six units in total. The amount of \$170 that was given could just as well have been in relation to Mr. Funk taking a rental payment. Such a payment of rent by a tenant would not constitute a payment on a mortgage."

- [37] Mr. John submitted that the ledger was clearly a business ledger of a trading company, not an individual in his private capacity. Consequently, he argued, the Claimants would have needed to establish an agency nexus to justify receipt of mortgage payments (if they were that) by the trading company as opposed to by Mr. Purcell personally.
- [38] Mr. John asserts that the burden of proof is on the Claimants to demonstrate by proper evidence that a part payment or acknowledgement by the Defendants has occurred.

The Claimants' Position

- [39] The Claimants in effect acknowledge that the ledger entries themselves are insufficient evidence, as they rely upon the Affidavit evidence of Richlyn Phillips in her capacity as the bookkeeper of the business of the Claimants and her claims to be familiar with the mortgage account of Mr. and Mrs. Ross.
- [40] Mr. Ian Sandy, Counsel for the Claimants, urged that the Court's powers to strike out a case should be used sparingly, since strikeout deprives a party of his right to a fair trial and of an opportunity to improve his case through further disclosure, other procedures and witness evidence (cf **Citco Global Custody NV vs Y2K Finance Inc**, BVICA22/2008, paragraph [14]).
- [41] Mr Sandy also relies upon dicta of Mitchell JA (Ag) in **Tawney Assets Ltd vs East Pine Management Ltd vs Ors**, HCVAP 2012/007 out of the Virgin Islands:
- "The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. ... The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the*

*interlocutory appeal in **Ian Peters v Robert George Spencer**, where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence”.*

[42] Mr. Sandy further cited the well-known dicta of Sir Denis Byron in **Baldwin Spencer vs Attorney General of Antigua and Barbuda, CIV. APP. NO.20A OF 1997** to a similar effect.

[43] Mr. Sandy submitted that the documentary evidence does indicate upon its face that a payment of \$1000.00 had been made by or on behalf of either Mr. Ross, or both Mr. and Mrs. Ross on 5th March 1996, and given that the documents came from the Claimants, this further indicates that this payment had been made to Mr. Purcell.

Analysis

[44] The key issue is whether the evidence in relation to the alleged last payment of the mortgage on 5th March 1996 is sufficient for the Court not to strike out the claim at this interlocutory stage.

[45] Where the defendant raises a limitation defence, the legal burden of proof rests throughout on the claimant, although the evidential burden may rest on the defendant according to the particular matter in issue (**Crocker v British Coal Corporation** [1996] 29 BMLR 159. Cf **Lloyd's Bank plc v Burd Pearce** [2000] PNLR 71, Ch D.)

[46] Having considered the affidavit evidence and documents presently before the Court, the Court is not satisfied that the claims to which a twelve year limitation period applies are obviously unsustainable or cannot succeed.

[47] The reasons for this are the following:

- (a) Although the copies of the receipts and the ledger extracts do not establish that Mr. and Mrs. Ross paid Mr. Purcell money towards their payment obligations under the mortgage, it is Mrs. Ross's own evidence that the mortgage was granted by her and by her husband with the purpose of securing their indebtedness to Mr. Purcell's hardware business for materials purchased on credit.
- (b) This evidence from Mrs. Ross is the starting point, and the context within which the copies of the receipts and the ledger extracts should be regarded.
- (c) This evidence was filed well before the application to strike out, and is more telling than the attempts by the Claimants through the numerous Supplementary Affidavits of Ms. Richlyn Phillips, which are clearly calculated to improve their position, because it is adverse to Mrs. Ross's case on her application to strike out.
- (d) Any money paid by Mr. and Mrs. Ross to reduce the balance of monies owing to Mr. Purcell's hardware business would necessarily, and absent any agreement to the contrary, for which there is no evidence, also reduce the amounts due under the mortgage agreement.
- (e) There is no evidence in this case that Mr. and Mrs. Ross had any financial dealings with Mr. Purcell outside the scope of the sale and purchase of building materials and the mortgage.
- (f) There is also no evidence before the Court, in the form of affidavit evidence, that Mr. Purcell in fact conducted his hardware business through a company, rather than for his own account (the public documents raised by Mr. John indicate that Mr. Purcell at one point intended to conduct all his affairs through that company, but there is no evidence before the Court to what extent he did so, if at all). The Claimants' evidence suggests that Mr. Purcell did conduct that business in his own name.

- [48] Taken together, and absent further evidence, the totality of the evidence presently before the Court is that Mr. and Mrs. Ross, or their agent, probably did make a payment to Mr. Purcell, or his agent, on 5th March 1996 to reduce the amount due under the mortgage.
- [49] As far as these applications are concerned, the Claimants have satisfied their burden of proving that the claim had been brought within the 12 year limitation, with the help of Mrs. Ross's evidence at paragraph 8 of her Affidavit of 14th May 2008.
- [50] It is clear that there are serious live issues of fact which require further disclosure and/or oral evidence at trial from the affiants. These issues include what dealings there had been between Mr. Purcell and Mr. and Mrs. Ross and how Mr. Purcell's business was constituted (namely, whether Mr. Purcell conducted his hardware store business in his own name or in the name of a corporate entity, or as some admixture).
- [51] Consequently, the Court will not dismiss the claims for which a twelve year limitation period applies.
- [52] With regard to the claim for interest, section 33 of the Limitation Act provides:
- "No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action, but within six years next after the same became due, or next after an acknowledgment of the same, in writing, has been given to the person entitled thereto, or his or her agent, signed by the person by whom the same was payable, or his or her agent."*
- [53] At first sight this suggests that the claim for interest under the mortgage was required to have been brought within six years of 5th March 1996, that is, on or before 5th March 2002. However, the Court has not had the benefit of detailed submissions, in particular on how the Court should deal with the interest part of the

claim where the claims for recovery of principal, repossession and/or foreclosure are being allowed to proceed.

Conclusion and Order

[54] The Court therefore orders the following:

1. The applications filed on 12th December 2008 by the Second and Third Defendants respectively to strike out the claim against them are dismissed;
2. The issue of the amount, if any, of interest recoverable pursuant to the mortgage agreement by reason of section 33 of the Limitation of Actions Act shall be addressed at the trial of this claim;
3. The Second and Third Defendant shall each, severally, pay costs to the Claimants in an amount of \$1,750.00.
4. A case management conference at which further directions towards trial of the matter is fixed for hearing on 19th March 2015.

[55] Finally, the Court expresses its gratitude to Learned Counsel for all parties for their assistance.

Gerhard Wallbank
High Court Judge (Ag)