

SAINT LUCIA

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No: SLUHCv 2008/0713

Between:

First Caribbean International Bank (Barbados) Limited

Claimant

and

- (1) C & S Merchandising Depot Inc.**
- (2) Edward Francis**
- (3) Cynthia Francis (nee Joseph)**

Defendant

Appearances:

Mr. Geoffrey Du Boulay for the Claimant
Ms. Veronica Barnard for the Second Defendant
Mr. Leevie Herelle for the First Defendant and Third Defendant

**2010: February 17
March 24
April 20**

RULING

- [1] **WILKINSON, J:** On 15th July 2008 there was filed by the Claimant a claim form and statement of claim. The Claimant pleaded that the Defendants owed them certain sums of money together with interest until date of payment under and by virtue of (1) the Defendants' covenants in a Deed of Hypothecary Obligation Mortgage Debenture and Floating Charge executed 16th March 2005 and

registered in the Land Registry on 6th April 2005 as Instrument No. 1594/2005, (2) Guarantee and Postponement of Claim duly signed by the Defendants on 28th November 2006, and (3) Loan Agreement dated 27th November 2006.

- [2] It is a fact that none of the Defendants filed an Acknowledgement of Service and or a defence within the time-frame fixed by CPR 2000 and there were no orders extending the time to file same.
- [3] An application for judgment in default of acknowledgement of service was filed 15th August 2008, and on 13th January 2009 there was entered judgment in default of acknowledgement of service in the following terms:
- “No Acknowledgement of service having been filed by the Defendants herein, it is this day adjudged that the Defendants do pay to the Claimant the sums of (1) EC\$1,597,322.07 together with interest at the daily sum of \$383.77 from the 13th August 2008 to date of payment and costs (2) EC\$667,054.84 together with interest at the daily sum of \$161.76 from 13th August 2008 to date of payment and costs (3) EC\$687,616.68 together with interest at the daily rate of \$172.78 from 13th August 2008 to date of payment and costs”
- [4] An affidavit of service was made by Mr. Ernest Lafeuille and filed 9th March 2009, by the Claimant. Therein it was deposed that the Second Defendant was personally served on 30th January 2009 with the judgment in default of acknowledgment of service.
- [5] An affidavit of service was made by Mr. Fredericks Phillips and filed 17th February 2009, by the Claimant. Therein it was deposed that the law firm of Chong & Co on 13th February 2009 was served with the judgment in default of acknowledgement of service. Nothing in the affidavit set out on whose behalf the law firm was served, and it is to be recalled that there was no Appearance entered from which it could be determined who the law firm was supposed to be representing. It has become apparent that the First and Third Defendants present counsel, used to work at that law firm before establishing his own chambers and that he continues to be retained by them. At the hearing of the applications dealt with herein, I did inquire of the Claimant's counsel's why there was no personal service on the First and Third Defendants? I can find no provision in CPR 2000 which would allow the Claimant to serve counsel for a Party when counsel is not on record. At this juncture, the failure to effect personal service does not affect the ruling herein because the First and Third Defendant filed an application for extension of time to file defence subsequent, and I have also dealt with that application herein.
- [6] On 20th January 2009 there was filed by the First and the Third Defendants a joint Notice of

Application seeking an extension of time to file defence to the suit. The application was supported by an affidavit made by Third Defendant. The Third Defendant deposed that around August 2008, she had been served with the claim form and other documents and she engaged in protracted discussions with the Claimant and 2 other financial institutions in an attempt to arrange refinancing and that due to the unusual circumstances surrounding the international financial institution there was delay or refusal to refinance the mortgages. That efforts at refinancing failed as a result of international events. She was made aware from her counsel that time for filing of her defence and that of the First Defendant had expired. She was informed by her counsel that she had a good and credible defence. There were no exhibits to her affidavits and nor was there a draft defence attached. The application was fixed for hearing on 19th February 2009.

[7] Notwithstanding that the application for an extension of time was fixed for hearing on 19th February 2009, on 20th January 2009, being the same day the application for extension of time was filed, the First and Third Defendants without an order of court extending the time and granting leave to file this defence, filed a joint defence.

[8] At the hearing on 24th March 2010, counsel for the First and Third Defendants confirmed that to date the application for extension of time to file defence had not been heard.

[9] On 3rd August 2009, the Claimant filed 7 writs of execution after judgment against immovables, and instructions to the Sheriff to levy against 7 different blocks and parcels of land belong to the 3 Defendants, the immovables were as follows:

- (a) C & S Merchandising Depot Inc. – Block 1217C Parcel 91
- (b) Cynthia Joseph - Block 1456B Parcel 231
- (c) Edward Slim Francis & Cynthia Joseph – Francis – Block 1254B Parcel 314
- (d) Cynthia Joseph – Block 1254B Parcel 315
- (e) Cynthia Joseph – Block 1254B Parcel 323
- (f) Edward Slim Francis & Marilyn Francis – Block 1640B Parcel 360
- (g) Edward Slim Francis & Cynthia Francis – Block 1838 Parcel 434

[10] On 7th August 2009, the Claimant also filed 7 separate applications to fix upset prices pursuant to

Article 511 of the Code of Civil Procedure. The applications were supported by affidavit and there was cited the estimated market value recommended by Mr. Adrian Dolcy. The estimated market values suggested and which were sought in the applications to fix upset prices were as follows:

- (a) The sum of \$1,915,020.00 for Block 1217C Parcel 91.
- (b) The sum of \$300,381.44 for Block 1254B Parcel 314.
- (c) The sum of \$1,004,502.52 for Block 1254B Parcel 315.
- (d) The sum of \$195,995.84 for Block 1254B Parcel 323.
- (e) The sum of \$149,086.00 for Block 1456B Parcel 231.
- (f) The sum of \$275,860.00 Block 1640B Parcel 360.
- (g) The sum of \$526,204.80 Block 1838 B Parcel 434.

The applications and affidavits in support were served on the First and Third Defendant personally on 15th August 2009, and on the Second Defendant personally on the 17th August 2009.

[11] On 2nd September 2009, the Second Defendant filed a Notice of Application for an order that leave be granted to file opposition to the seizure and sale of all the property which the Claimant sought to fix upset prices upon. The grounds set out in the application were: (a) The First Defendant had sufficient property with sufficient value to pay the debt, (b) the upset price is a minimum bidding price, and there is nothing to prevent a prospective buyer from bidding higher, (c) that a seizure of all the properties unduly prejudiced the Second Defendant, and the Third Defendant in that the Claimant is seeking to sell property valued at \$4,367,050.60 for a debt of \$2,951,993.59, and (d) the Claimant should in all good conscience seek to sell the First Defendant's property to satisfy the debt, the First Defendant's property having sufficient value to do so.

[12] The Second Defendant in his affidavit in support of his application deposed that the Third Defendant was his wife, and that in suit SLUHCV2008/1239 Edward Slim Francis v. Cynthia Joseph Francis, there was made on 26th February 2009 an order for separation from bed and board of the marriage and it was further ordered that their properties be divided and that the Third Defendant was to be responsible for payments to the Claimant.

[13] The Third Defendant filed on 23rd October 2009, an affidavit and it was stated to be in response to the application to fix upset price. Therein she deposed that the judgment was entered in error and or unlawfully on behalf of the Claimant, and that it would be unjust to permit the application to fix the upset price. She repeated the matters deposed to in her affidavit to support her application for an extension of time to file defence. A letter issued by the Claimant and addressed to the directors of the First Defendant dated 4th September 2007, was exhibited. [It is observed that this letter is dated 1 year and 4 months prior to the default judgment]. The letter in brief stated (a) the balances of the 3 loans, (b) expressed the Claimant's concerns regarding the detracting features of the First Defendant's business, (c) requested the First Defendant to seek refinancing elsewhere, (d) asked for tangible evidence that the necessary measures were being taken to maintain records for timely audit, (e) that in an effort to protect the bank, and subject to a final credit check the Bank could look at consolidating all of the loans. She also deposed that matters of restructuring and refinancing became necessary because she had discovered that the Second Defendant had defrauded the First Defendant and herself. She repeated the matters set out in the affidavit filed to support the application for an extension of time and added that the Claimant's counsel had only told her counsel a week prior to that application that he had applied for default judgment. She deposed that the application for extension of time came on for hearing on 19th February 2009 but a case management conference ensued and the application was not heard. The Master at that hearing commented to the parties that in light of the application for an extension of time to file the defence and request for judgment in default, the Registrar would err if she entered judgment in default knowing that a defence had been filed with the application, and that the application was to be heard by a judge in chambers. She deposed that the First Defendant and herself sought to have the application relisted for hearing but again the matter was instead fixed for case management conference on 23rd March 2010. There was no sitting of the court on that date. She also stated that the First Defendant and herself did not believe that they were indebted to the Claimant in the manner and to the extent alleged by the Claimant.

[14] On 17th February 2010 the Claimant's applications to fix upset prices came on for hearing. The Court made an order adjourning the Claimant's applications and that of the Second Defendant's to 24th March 2010, and gave leave to the Claimant, the First and Third Defendants to file affidavits

in response to the Second Defendant's application for leave to file opposition to the seizure and sale.

- [15] On 3rd March 2010, the Third Defendant filed an affidavit on behalf of the First Defendant and herself in response to the Second Defendant's application for leave to be granted to file opposition to the seizure and sale of property. She deposed that she had filed an appeal against the default judgment in the Suit SLUHCV 2008/1239 Edward Slim Francis v. Cynthia Joseph Francis because she had never been served with that claim.
- [16] On 3rd March 2010, the Claimant's officer, Ms. Adriana Thomas sworn an affidavit in response to the Second Defendant's application. She deposed that the approach of 7 separate writs of execution would cause 7 separate judicial sales at 7 separate dates and this approach would be beneficial to both the Claimant and the Defendants. The benefit to the Claimant was that by placing more properties for sale, there was a greater chance of securing a sale as some properties were more marketable than others. The benefit to the Defendants was that as properties were sold, the debt would be reduced. She also stated that the judgment debt was presently \$3,378,075.31.
- [17] The matter came on for hearing on March 24th 2010. On presenting the Second Defendant's application, the Second Defendant's counsel restated that matters set out in his affidavit. The Second Defendant did not present any authorities to support his position that (a) notwithstanding that all of the properties referred were hypothecated, the Court had the jurisdiction based on "good conscience" to fix an order of priority for the Claimant to sell the properties, (b) that the subsequent order in Suit No: SLUHCV 2008/1239 Edward Slim Francis v. Cynthia Joseph Francis could in some way take priority over the Claimant's rights to the Second Defendant's property.
- [18] Curiously, when the Court hypothetically put to counsel for the Second Defendant the question that if the First Defendant's property did not satisfy the debt, then whose property should be sold next, Counsel responded that the Court should then look at the order in Suit No: SLUHCV 2008/1239 Edward Slim Francis v. Cynthia Joseph Francis. The clear suggestion to the court was that the property of the Third Defendant should then be next.

- [19] Counsel for the First and the Third Defendants at the hearing restated the matters set out the affidavit filed in opposition to the seizure and sale of the properties. Emphasis was placed on the application for an extension of time to file defence and which up to time of the present hearing had not yet been heard.
- [20] Counsel for the Claimant stated his position simply. The Defendants had put up their property voluntarily to secure the loans, the Claimant had pursuant to the applicable articles of the Civil Code, a judicial hypothec, which binds all the immovable property of the Defendants and entitles the Claimant to sell all of the properties to satisfy the debt and refund any excess. He repeated the statements of Ms. Thomas' affidavit that the manner in which it sought to fix upset prices would achieve justice.
- [21] Counsel for the Claimant submitted that the Court would be embarking on a dangerous course if it sought to prioritize the manner of sale of the properties, and it would be preventing the Claimant from exercising its rights on the immovables.
- [22] Being guided by the principle in *St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited* Civil Appeal No.6/2002, Saunders, J.A. (Ag) that applications ought to be heard in chronological order as they are filed, I find that after the claim form, statement of claim and connected documents were filed and served, the first application in time was the Claimant's request for entry of judgment in default of acknowledgment of service which was filed at August 15th 2008. At this juncture since none of the Defendants had filed an acknowledgment of service or a defence and there were no applications pending for extension of time, the Claimant was entitled once the Registrar was satisfied as to the matter of service, to its default judgment against all the Defendants. The Registrar entered this default judgment on 13th January 2009, some 5 months after the request had been made.
- [23] To my mind, a delay of 5 months in signing a default judgment is too long. In *St. Kitts Nevis Anguilla National Bank Limited*, Saunders, J.A. (AG) said:

"[17] Before examining the learned Judge's reasons it is important to re-emphasis an important philosophical change that has been brought about by the new CPR. It is that

fundamentally, responsibility for the active management of cases now resides squarely with the court...."

- [24] Some 5 months after the Claimant's request for default judgment and 6 months after service of the claim form, statement of claim and other supporting documents, the First and Third Defendants filed their application for an extension of time for file defence. The application failed to state the order that it sought, and the sole ground set out in the application was:-

"That the period of time for filing the defences has expired. An affidavit in support accompanies this application."

The sole ground cited does not in any way assist the court in making a determination on the application as it merely states the obvious. It is for the obvious reason that the time for filing defence has expired that the application is triggered.

- [25] The application has failed to comply with the mandatory requirements of CPR 2000 Part 11.7. Part 11.7 states:

11.7 (1) An application must state –
(a) briefly, the grounds on which the application is seeking the order;
and
(b) what order the applicant is seeking."

In interpreting this rule, reference was made to Halsbury's Laws of England 4th edition Reissue Vol. 44 (1) paragraphs 1391 and 1470:

"1391. Plain meaning rule. It is a rule of the common law, which may be called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only and, on an informed interpretation of that enactment, the interpretive criteria raise no real doubt as to whether that meaning is the one intended by the legislator, then the legal meaning of the enactment is taken to correspond to that grammatical meaning; but that in any other case the basic rule of statutory interpretation is to be applied."

1470. Presumption favouring literal meaning. Prima facie, the legal meaning of an enactment as it applied to particular facts is presumed to be that which corresponds to the literal meaning of the enactment in relation to those facts.

The literal meaning of an enactment in relation to particular facts is determined as follows. The starting point is the grammatical meaning of the enactments taken in isolation, that is

the meaning it bears in relation to those facts when, as a piece of English prose, it is construed, without reference to any other text, according to the rules and usages of grammar, syntax and punctuation, including the accepted linguistic canons of construction. This grammatical meaning may be clear or ambiguous or obscure. If the enactment is found to be obscure, it is first necessary for the court to work out if possible what is the intended grammatical version, which may be referred to as the corrected version. When found, the corrected version may be clear or ambiguous."

- [26] Part 11. 7 (1) uses the word **must** which compels in a mandatory manner an activity that is to be carried out. I find that I have no discretion to permit the First and Third Defendants' application to proceed without compliance with the mandatory requirements. Indeed, in *Beach Properties Barbuda Ltd. et al. v. Larius Master Fund Ltd et al.* Civil Appeal 2/2007 Barrow J.A made it clear that there were to be consequences for non-compliance with this particular rule. He stated:

"[18] The application for the injunction followed the unfortunate practice of failing to state the grounds in the application. The prescribed form for making application expressly requires the grounds to be stated in the form by providing a section beginning, "The grounds of the application are". The lawyers for the appellants thought it satisfactory to complete this section by inserting." As set forth in the Affidavits [filed in support]"

[19] This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state the grounds is to focus the thinking of lawyers. By being required to identify the ground for making an application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application has reason for thinking that perhaps it is because there are no grounds. The requirement of stating the grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no grounds, it raises the suspicion that the application may be groundless, not just in form but in substance."

- [27] I have looked at the First and Third Defendants' application both as the application for which it was filed, that is an application for an extension of time, and in the light of the circumstances now before the court, that of the Claimant now holding a judgment in default prior to the First and Third Defendants' application. I find that the application fails on several grounds. It fails to comply with CPR 2000 Part 11.7 and for this, it must attract condign consequences, and even if I am wrong in that regard, secondly, the affidavit in support has no substance. No recent proof of discussions, or other efforts were presented, just bald statements, and even if resort is had to the later affidavits

filed, the allegation of wrongdoing by both the Bank and Second Defendant is not substantiated by one iota of proof or particulars. Neither is the statement that the First and the Third Defendants do not believe that they are indebted to the Bank in the manner and extent supported.

[28] If indeed there were ongoing discussions between the Parties, the First and Third Defendants would have done well to adhere to the old practice of notwithstanding negotiations, take the necessary precaution and file their defences. Further CPR 2000 Part 10.3(7) provides for the parties to cover themselves by filing an agreed extension. Negotiations do not stop time from running under CPR 2000.

[29] The statements attributed to the Master at February 19th 2009 are certainly curious since the Claimant's request for default judgment was filed 15th August 2008, and judgment was entered 13th January 2009, exactly 1 week before the First and Third Defendants filed their application for extension of time. At February 19th 2010, there was no issue of the request for default judgment pending, it had been granted in excess of 1 month already.

[30] The First and Third Defendants' application for an extension of time to file defence is denied. For clarity, the First Defendants' and Third Defendants' defence which was filed on January 20th 2009, without the leave of the Court is struck out as it ought not to have been filed without an order to do so.

[31] I now turn to the Claimant's applications to fix upset prices filed August 7th 2009. The procedure for application to fix upset prices is prescribed in the Code of Civil Procedure at articles 511A and 511B. Article 511A states:

" 511A. The Judge or Registrar may on an application made by the judgment creditor, notice of which shall be served on the judgment debtor, fix an upset price for the sale of immovables seized by the Sheriff by virtue of a writ of execution.

511B. The judgment creditor shall file as an exhibit to his application a certificate by the Registrar showing all claims registered against the immovable."

The applications of the Claimant are the norm in the circumstances where a claimant has obtained judgment and wishes to sell the Defendant's property to partly or fully satisfy the judgment.

[32] The First and Third Defendants' response to the application was to file the affidavit at October 23rd 2009. The Second Defendant's response was the application filed September 2nd 2009 which seeks an order to file opposition to the seizures and sales. The First and Third Defendants' response to the Second Defendant's application was the affidavit filed March 3rd 2010.

[33] I believe that a convenient place to start in dealing Defendants' responses to the Claimant's applications is the Civil Code. The Civil Code states:

“ 1837. The surety is liable only upon the default of the debtor, who must previously be discussed, unless the surety has renounced the benefit of discussion, or has bound himself jointly and severally with the debtor. In the latter case the liability of the surety is governed by the rules with respect to joint and several obligations.

1863. Immovables may be pledged upon such terms and conditions as may be agreed upon between the parties. If no special agreement be made, the fruits are applied first in payment of interest upon the debt and afterwards upon the principle. If no interest be payable the application is made wholly to the principal.

1908. Hypothec is a real right and is a charge upon immovable specially pledge by it for the fulfillment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code.

1909. **Hypothec is indivisible and binds in entirety all the immovables subject to it and each and every portion of them.**[Emphasis is mine]

1910. Hypothec extends over all subsequent improvements and all alluvial increase of the hypothecated property.

It secures besides the principal, whatever interest accrues therefore, under the restrictions stated in the Book respecting Registration of Real Rights, and all costs incurred.

1913.. ...

Conventional hypothec results from agreement.

1941. Creditors having a registered privilege or hypothec upon an immovable may follow it into whatever hands it passes and cause it to be sold judicially in order to be paid out of the proceeds, according to the order of their claim.

1967. Registration gives effect to real rights and establishes their order of priority according to the provisions contained in the Book.

1968. All real rights subject to be registered take effect from the moment of their registration against creditors whose rights have been registered subsequently or not at all....”

[34] I also find the learning at Halsbury's Laws of England 4th edition Volume 32 to be of assistance. It states:

“726. **Mortgage not in fiduciary position.** A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale; he has been so described, but this only means that he must exercise the power in a prudent way, with a due regard to the mortgagor's interest in the surplus of sale money. He has his own interest to consider as well as that of the mortgagor, and so long as he keeps within the terms of the power, exercises the power in good faith for the purpose of realising the security and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it inquire whether he is actuated by any further motive. This duty to obtain a proper price is owed also to subsequent mortgagees, but not to a surety. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, so long as the amount is fixed with due regard to the value of the property.

It is sufficient if the mortgagee complies with the terms of the power and acts in good faith, but good faith requires that the property is not to be dealt with recklessly. If the sale is in good faith and he charges himself with the whole of the purchase money, he may sell on the terms that a substantial part, or even the whole, is to remain on mortgage. The mortgagee is apparently not bound to watch the market so as to sell at the highest price....

727. **Different securities held by one mortgagee.** Where different properties are mortgaged by different mortgagors to the same mortgagee, and a sale of the two properties together is beneficial, both may be sold together and the purchase money apportioned. Where the properties are quite separate, evidence is required that the joint sale will produce a higher price; where there are united, for example a house and a garden, or are undivided shares in the same property, this is not necessary; the apportionment must be made on the advice of a competent person.

[35] In *Winmark Limited v. National Insurance Corporation* Civil Appeal No. 7 of 2006. Rawlins J. A. (as he then was) stated:

“ [14] A hypothec is therefore a charge upon immovable property because article 1908 says that it is. Articles 1908 and 1941 enable the charge or secured creditor to cause the

hypothecated property to be sold in satisfaction of the debt that the hypothec secures. The Bank therefore has a right to sell the hypothecated property. The Bank also has a right of preference upon the proceeds to the extent of the amounts of the debt and a preference upon the proceeds of sale of the property as fixed by the Code.

[24] In the present case, therefore, after Winmark's property was charged in favour of the Bank, the ownership of the property, within the meaning of articles 361 and 363 of the Code, remain vested in Winmark. However, because the charges are registered by hypothecary mortgage debenture, the subject property, in the words of Lord Hoffman, forms a separate fund in which the Bank as debenture holder has a proprietary interest."

[36] The Second Defendant has sort to rely on the order in Suit No: SLUHCV2008/1239 Edward Slim Francis v. Cynthia Joseph Francis. This order was made not only subsequent to registration by the Claimant of the Defendant's covenants in a Deed of Hypothecary Obligation Mortgage Debenture and Floating Charge, but also the executed Guarantee and Postponement of Claim, and Loan Agreement but also the default judgment obtained at January 13th 2009. Further, no evidence was provided that the Claimant agreed to any variation of its arrangements with the Defendants. I therefore hold that for the purpose of these proceedings the order does not assist the Second Defendant.

[37] The Second Defendant further states that the First Defendant has sufficient property to satisfy the debt. This statement was rebutted by the Claimant's witness who has stated that at March 3rd the debt is \$3,378,075.36 and it is climbing at the rate of \$718.31 per day or \$21,549.30 per month by my calculation. The debt is therefore, at this juncture, way in excess of the value of the property owned by the First Defendant.

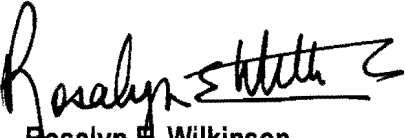
[38] The Claimant based on the provisions of the Civil Code and the authorities cited is as of right entitled to sell the properties to satisfy its debt. The Second Defendant's application for leave to file opposition to the seizure and sale of the properties is refused.

[39] I turn now to the affidavit of the First and the Third Defendant filed 23rd October 2009 in response to the Claimant's application. I find no merit in affidavit. There is no denying that money was owed and secured. There is no evidence from these Parties that there is alternative financing or that alternative arrangements have been made even at the "ninety-ninth hour". I have already dealt with

the application for an extension of time extensively and which was part of the reference in this affidavit.

[40] This Court orders:

- (1) The application by the First and the Third Defendants is denied.
- (2) The application of the Second Defendant is denied.
- (3) A date is to be fixed by the Court Office for the hearing of the application to fix upset prices and notice of that date is to be given to all the Parties.
- (4) Costs to the Claimant in the sum of \$1500.00 and it is to be borne in equal shares by all of the Defendants.


Rosalyn E. Wilkinson
High Court Judge