

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.21 OF 2002

BETWEEN:

[1] GEORGE ROBERTS
[2] ANGELLA ROBERTS

Appellants

and

CIBC CARIBBEAN LIMITED

Respondent

Before:

The Hon. Mr. Adrian Saunders
The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Marshall and Ms. Cherissa Roberts-Thomas for the Appellants
Ms. Eleanore Clarke for the Respondent

2004: May 24; 25;
September 20.

JUDGMENT

[1] **ALLEYNE, J.A.:** George Roberts is General Manager of a Cayman Islands catering business providing in-flight services for airlines calling at the Cayman International Airport. He resides in Cayman Islands. His wife Angella Roberts is a housewife, real estate agent and businesswoman residing in Antigua. She operates a property rental business known as Coral Properties. Mr. Roberts visits his wife in Antigua frequently.

[2] In April 1997 one Murio Ducille, at the time Senior Magistrate of Antigua and Barbuda, approached Mrs. Roberts and invited her to purchase his property at

Crosbies, Antigua. Mrs. Roberts considered the Crosbies area a desirable and highly sought after suburb of St. Johns, Antigua, with a variety of hotels, apartment complexes, gourmet restaurants and sporting facilities, and she thought that the Ducille property had 'competitive capabilities and marketability'. She approached the Respondent bank, the CIBC Caribbean Limited, a registered bank doing business in Antigua, and with whom she and her husband had existing relations, to finance her proposed purchase of the property. She presented the bank with a cash budget, a site analysis, and a market analysis in support of her application for loan financing of the project. There is a dispute of fact as to whether Mr. Ducille arranged for Mrs. Roberts to visit the bank for the purpose of obtaining finance for the purchase of the property as she claimed, and the learned trial Judge made no explicit finding on this. I do not think it matters whether he did or did not. The fact is that Mr. and Mrs. Roberts had an existing relationship with the bank, which, one year earlier, had re-financed their mortgage, and in September 1996 had loaned them a further sum as an education loan for one of their children. The bank had a first and a second charge on their Paradise View property to secure these loans. The second charge instrument contained a consolidation clause granting the bank the right to consolidate the first and second charges.

[3] Mrs. Roberts appears to have taken the lead in this matter and persuaded her husband that the purchase of the Ducille property was a good investment, and he agreed that she should complete the transaction on behalf of them both. She accordingly applied to the bank for full financing of the purchase in the sum of \$3,100,000.00, but the bank's head office would not consider the loan application unless the Roberts' injected equity of \$200,000.00 into the project. The Ducilles agreed to make a loan to the proposed purchasers of \$200,000.00, and on that basis the bank's head office agreed to provide the balance of the financing for the purchase of the property.

[4] On 16th June 1997, Mr. Everett Christian, the Assistant Manager of the bank, made an offer of a credit facility to the defendants in the amount of \$2,900,000.00,

which offer was contained in a letter to the Roberts'. The letter required the signature of either Mr. or Mrs. Roberts as confirmation of acceptance of the offer.

- [5] The letter from the bank to Mr. and Mrs. Roberts confirmed an increase in the existing credit facility, subject to the terms and conditions detailed in the letter. The total amount of the facility, including the outstanding balances on existing loans and the amount of \$2,900,000.00 representing the new loan, was detailed in the letter, together with the interest rate, the fees, the security requirements, the repayment schedules on the several amounts, separately, other covenants regarding the new loan, and provisions regarding events of default. The letter concluded with the following paragraphs:

"This agreement, the security and other documents held as evidence of your liabilities and obligations to the Bank, contain the entire understanding of yourself, and the Bank, with respect to the subject matter.

"This agreement supersedes all previous agreements and undertakings, and all negotiations between the parties, in respect of the credit facilities described above.

"Please acknowledge receipt and acceptance of the terms and conditions on the attached duplicate of this letter."

This letter was signed by Mr. Christian. The letter was signed as accepted by Mrs. Roberts on 17th June 1997, and is exhibited to her affidavit sworn and filed on 9th May 2001. In her affidavit Mrs. Roberts acknowledges that the letter 'set out all the terms of the financing'. There is no suggestion that she failed to understand fully the meaning and purport of the letter. She says only:

"The execution of all other documents were (*sic*) in my mind, and as far as I am aware in the mind of the First Named Defendant a formality."

- [6] By the end of November 1997 Mr. and Mrs. Roberts had fallen into arrears of four months on payment of the loan. By the 5th of March 2000, according to an affidavit filed on behalf of the bank and sworn by Mr. Everett Christian, the amount due on the charge dated 23rd June 1997, in respect of the Crosbies property loan, including interest and all accrued charges, was \$4,150,981.73. The amount due

on the charge dated 28th March 1996 was \$64,370.19, and on the charge dated 10th September 1996 was \$38,402.90, to a grand total of \$4,253,754.82.

[7] On May 4th 2000 the bank, CIBC Caribbean Limited issued an Originating Summons seeking payment of all monies due to it under the charge, an order that the charge may be enforced by sale by private treaty, possession of the properties, and other relevant reliefs. Orders were made for the exchange of affidavits, and it appears that Mr. and Mrs. Roberts filed a counterclaim by way of summons supported by affidavit seeking, among other things, an order staying the Appellant from exercising any of its purported rights under the charge. The reliefs sought by the Appellants were summarized by the learned trial Judge as:

- (1) A declaration that the letter dated 16 June 1997 addressed to the Defendants and signed by the Claimant and the 2nd named Defendant (hereinafter "Mrs Roberts") is the Loan Agreement;
- (2) A declaration that clause 7 in the Instrument of Charge entered on the Register for the Crosbies Property as Entry No 4 and dated 3 July 1997 is void and contrary to the above Loan Agreement;
- (3) A declaration that clause 7 in the Instrument of Charge entered on the Register for the Paradise View Property as Entry No 11 and dated 3 July 1997 is void and contrary to the above Loan Agreement;
- (4) A declaration that clause 7 in the Instrument of Charge entered on the Register for the Paradise View Property as Entry No 10 and dated 20 March 1997 is void and contrary to the Loan Agreement;
- (5) A declaration that the entry No 11 above is in breach of the Loan Agreement;
- (6) Damages for the unlawful registration and consolidation of the charges;
- (7) An order to remove the charges from the Registers on the grounds that the Defendants were induced by the Claimant to execute the Charges without the benefit of independent legal advice and that the Charges were executed in contravention of the Loan Agreement;

- (8) A declaration that the Claimant in accepting the Valuations of 21 April 1997 and 22 May 1997 breached its fiduciary duty to the Defendants by not ensuring that the valuations were reasonably accurate;
- (9) In the alternative, a declaration that the Claimant in seeking to sell the Crosbies Property at a price below the Force Sale price of the valuations is acting in contravention of its duty as a banker to the Claimant and in particular in contravention of section 75 of the Registered Land Act;
- (10) An injunction to restrain the Claimant from selling the Paradise View property.

[8] With regard to the submission on behalf of the Appellants that the letter of June 16th 1997 contains the entire loan agreement the learned trial Judge concluded from this letter that the bank was making an offer to lend the additional monies, not as a separate transaction, but as part of the entire credit facility being extended to the Appellants, that is to say, as a part of a consolidated loan facility. I cannot but agree. It seems clear to me on the face of the document, and must have been clear to Mrs. Roberts, an experienced and astute businesswoman in whom her husband evidently and no doubt justifiably placed great confidence, that the Paradise View property was to be charged as security for the existing loans and, along with the Crosbies property being acquired, for the new loan.

[9] The learned trial Judge found that the bank intended to hold a consolidated charge on both the properties, that in the event of default the bank would be entitled to sell either one or both of the properties, and that the Appellants agreed to that. This conclusion is clearly consistent with the evidence. The learned trial Judge defined the issue to be tried by the Court as whether 'the security and other documents held as evidence' referred to in the letter signed by Mrs. Roberts and the charge instrument signed by Mrs. Roberts on 18th June and by Mr. Roberts on 19th June 1997, which clearly identified the two separate properties (three parcels) to be charged, includes the said charge instrument dated 23rd June 1997 in the amount of \$2,885,000.00 registered on the three registers for the three parcels as

a consolidated charge against both the Crosbies and the Paradise View properties.

[10] After hearing the matter, the learned trial Judge made an order that the claim for the payment of money owed be stayed until the claimant has exhausted the remedies available to it against the charged properties; declared that the claimant is entitled to possession of the charged property for the purpose of exercising its statutory remedies; dismissed the application for sale of the properties by private treaty; and dismissed the counterclaim. He made no order as to costs and granted the parties liberty to apply.

[11] The Appellants have appealed on a number of grounds, the first and the third of which can be summarised as that the learned trial Judge failed to consider or sufficiently consider the evidence. The second ground complains that the trial Judge dismissed the counterclaim 'without considering or sufficiently considering that the Appellants had claimed that the Respondent (the bank) was not entitled to sell by private treaty and in doing so were acting in contravention of section 75 of the Registered Land Act'. In fact the learned Judge dismissed the bank's application to sell by private treaty, and there is nothing in this ground of appeal by the Appellants. However, the bank has filed a counter notice of appeal on this issue and it falls for us to consider whether the learned trial Judge was right to dismiss the bank's application for permission to sell by private treaty. In their fourth ground of appeal the Appellants complain that the learned trial Judge failed to make any findings on issues in point and thereby failed to consider or fully consider the issues before him. This ground is vague and general in the extreme, and I would dismiss it on that ground in accordance with Part 62.4(6)(b) of the Civil Procedure Rules 2000.

Failure to consider or sufficiently consider the evidence

[12] In seeking to impugn the judgment of the learned trial Judge under the first and third grounds learned Counsel sought to dissect the judgment and to demonstrate

that 'a number of findings that have the profound effect of prejudicing the due consideration of the Appellant's case' had been made without any evidential basis, 'in that no such evidence was given or that the evidence given was contrary and uncontroverted as to what was found'.

[13] Learned Counsel challenged the finding that Mr. Ducille agreed to make a loan to the Appellants of \$200,000.00. However, the Appellant Angella Roberts, in her affidavit sworn and filed on 9th May 2001, deposed at paragraph 7 that she signed a number of documents for Mr. Ducille's lawyer at Mr. Ducille's request, '(A)nd a loan from Mr. Ducille in the amount of \$200,000.00.' Further, in her affidavit sworn on 29th June 2001 and filed on 3rd July 2001, Mrs Roberts admitted entering into an agreement with the vendors (the Ducilles) for a vendors loan, and exhibited to the affidavit a copy of the relevant document, being a promissory note in the sum of \$274,000.00. She neither admits nor denies that this loan is connected to the proposed purchase of the property from the Ducilles, indeed she offers no explanation, and it is hardly surprising that the learned trial Judge found at paragraph 18 of the judgment, in relation to the amount of \$200,000.00, that '(I)t is much more likely that she (Mrs. Roberts) was the one who discussed with the Ducilles the way to meet the Head Office requirement.'

[14] In relation to the finding of the learned trial Judge that Mrs. Roberts had requested that, to save the legal fees of the bank's solicitors, she should be permitted to make her own arrangements for the preparation of the security instruments, the Appellant's witness Everette Christian was consistent in his assertion that Mrs. Roberts made all the arrangements for the preparation of these instruments.

[15] Even more significantly, and no doubt decisive in the mind of the learned trial Judge, Mrs. Roberts herself, at paragraph 6 of her first affidavit, said that at no time does she recall the plaintiff (the bank) suggesting that they (Mr. and Mrs. Roberts) obtain a lawyer. Indeed at paragraph 7 of the same affidavit Mrs. Roberts deposed that she attended a meeting with Mr. Ducille and signed a

number of documents for Mr. Ducille's lawyer, a Mr. Rudd, at Mr. Ducille's request. She relates these documents to the sale of the Ducille property "(A)nd a loan from Mr. Ducille in the amount of \$200,000.00" without further explanation. There was ample evidence on which the learned trial Judge could properly and reasonably come to the conclusion that he did.

[16] The Appellants take issue with the finding of the learned trial Judge at paragraph 16 of the judgment that "Mr. Rudd was not acting as solicitor for the claimant bank, but as solicitor for Mr. Ducille and Mrs. Roberts." However, that finding is clearly justified by the evidence of Mrs. Roberts referred to in the previous paragraph of this judgment, at least in so far as the Respondent bank was concerned. As between Mrs. Roberts, Mr. Ducille and Mr. Rudd, the situation may well be different, but the bank clearly played no part in the arrangements between those parties and cannot be held responsible for any failure of duty as between Mr. Rudd as solicitor and Mrs. Roberts, or any undue influence exercised by Mr. Ducille on Mrs. Roberts.

[17] The remaining grounds of appeal of the Appellant are in similar vein, and relate to the same evidential issues, and I have come to the same conclusion in relation to them. The Appellant's appeal is dismissed.

Sale by private treaty

[18] The Appellant submitted that in seeking to sell their property in pursuance of the charges by private treaty, the bank was acting in contravention of section 75 of the **Registered Land Act**¹. The learned trial Judge, at page 25 of his judgment, held that "The only power of sale available to a chargee in Antigua and Barbuda under the **Registered Land Act** is a power to sell by public auction. A sale by private treaty is unauthorised by law and is contrary to the express provision in the Act, and the Court has no jurisdiction to (give) directions for such a sale." He dismissed the Respondent's claim in that respect, and the Respondent has filed a

¹ Cap. 374 of Revised Laws of Antigua and Barbuda.

counter-notice of appeal. The ground of the Respondent's cross-appeal is that the learned trial Judge erred in law in holding that the Court has no jurisdiction to grant sale by private treaty.

[19] The Respondent, in support of the cross-appeal, submitted that the originating proceedings were brought under Order 58 of the Rules of the Supreme Court 1970, under which a mortgagor or mortgagee or any person having the right to foreclose or redeem any mortgage may institute a mortgage action for a range of relief, including sale of the mortgaged property. In any such action, Counsel for the Respondent urges, the Court may order that the mortgaged land or part thereof be sold, and the Court may order the sale in such manner as it deems fit. Learned Counsel relies on Order 31.

[20] Order 31 empowered the Court, in any cause or matter relating to land where it appeared expedient for the purposes of that cause or matter that the land or any part thereof should be sold, to order such sale, and in any manner that the Court might order. Sub-rule 2(4)(b) makes provision for, among other things, sale by private treaty, and sub-rule 4 makes it clear that the rule applied to mortgages. However, by the time this matter was heard the Rules of the Supreme Court 1970 were no longer applicable, and in any event these Rules were procedural Rules contained in subsidiary legislation, and were incapable of altering substantive legislative provisions enacted by Parliament in the **Land Registration Act**.

[21] Learned Counsel has submitted that these procedural rules were substantially re-enacted by Parts 66 and 55 of the **Civil Procedure Rules 2000 (CPR)**. In particular, Part 55.2(3)(v) provides that an applicant for an order for sale must give evidence on affidavit stating, among other things, the proposed method of sale and why such method will prove most advantageous. Part 55.4 provides, among other things, that on making an order for sale the Court may direct the manner in which the land is to be sold, or permit the person having the conduct of the sale to sell the land in such manner as that person thinks fit. Learned Counsel submitted

that the discretion of the Court in this matter is unfettered so that the Court can do justice between the parties.

[22] Section 75 of the Act provides that a chargee exercising his power of sale may sell or concur with any person in selling the charged land *by public auction*. No other method of sale is provided for in the Act. Section 77 provides that the provisions of section 75, as well as of other sections mentioned, may be varied or added to *in the charge*. This clearly refers to a power, by mutual agreement between the parties to the charge, to vary the statutory limitations *in the charge*. It does not by its terms confer on the chargee, or on the Court, the power to unilaterally vary the statutory limitations of the rights of the parties. I do not agree with learned Counsel for the Respondent that this section, read together with the provisions of the Rules referred to earlier, gives the Court an inherent jurisdiction to order the sale of property by private treaty, thereby overriding the statutory limitation imposed by section 75. Section 77 preserves the parties' freedom to contract out of the limitation, it does not grant the Court the right to override the statutory proscription.

[23] Learned Counsel for the Respondent cited in support of his contention that the Court has an inherent jurisdiction to unilaterally vary the statutory limitation on the right to sell otherwise than by public auction the case of **Tse Kwong Lam v Wong Chit Sen and others**². This case, however, has no relevance to the point, but relates to the duties of a mortgagee in exercising its power of sale. The order of the Court in the case of **Canadian Imperial Bank of Commerce v Emmanuel & Or.**³, cited by learned Counsel for the Respondent, is a bare order and is unhelpful. The same must be said of the order in **CIBC v William Powell**⁴, a consent order standing alone.

² [1983] 3 All ER 54.

³ [1996] High Court Suit # 282 of 1988 (unreported)

⁴ [2001] High Court Suit # 174 of 1999 (unreported)

- [24] Learned Counsel cited a number of cases on the principles by which the Court is to be guided when ordering sale by private treaty, but if, as I believe to be the case here, there is no power in the Court to order sale by private treaty, these principles are of no assistance.
- [25] I agree with learned Counsel for the Appellant that subsidiary legislation making procedural provisions cannot, in the absence of specific statutory provisions authorising it, vary the provisions of principal legislation enacted by an Act of Parliament.
- [26] The Respondent's cross appeal seeking an order for sale by private treaty is accordingly dismissed.
- [27] In the circumstances, the order of the High Court dated the 16th day of September 2002 and entered the 10th day of October 2002 is affirmed. The parties will bear their respective costs of this appeal.

Brian Alleyne, SC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]