

**The Eastern Caribbean Supreme Court
In the High Court of Justice**

Commonwealth of Dominica

DOM HCV 1999/0561



Between:

ROYAL BANK OF CANADA

Claimant

and

CLAYTUS PREVOST

Defendant

Before the Hon. Justice Brian Cottle

Appearances:

Mr. Lennox Lawrence Counsel for the Defendant

Mrs. Joan Prevost Counsel for the Claimant

2012: 9th March

ON WRITTEN SUBMISSIONS

- [1] **COTTLE J:** The Defendant negotiated an equitable mortgage on certain properties in 1994 to secure two loans from the Claimant bank. To protect its interest the bank registered a caveat against the property in 1994. The Defendant defaulted in repaying the loans and the Bank instituted the present claim on 18th October 1999. The Defendant did not file a defence and on 20th April 2000 the Claimant obtained judgment in default.
- [2] Subsequently to the filing and service on him of the claim, the Defendant executed a Memorandum of Transfer of the mortgaged property to George O'Shaugnessy and Mary Austrie. This document was executed on 10th February 2000. It has never been registered. The transferees occupied the property. They made payments towards the mortgage loans on behalf of the Defendant. They also say that they effected costly renovations and repairs to the property.

[3] In July 2000 the bank converted the equitable mortgage to a legal mortgage. They entered upon the property on 27th December 2000 and seized it in enforcement of the judgment obtained. In February 2006 the transferees notified the bank that the Defendant had agreed to sell the property to them at a price equivalent to the then outstanding mortgage debt. They indicated that the defendant had executed a Memorandum of Transfer to them.

[4] Acting under the Power of Sale in the legal mortgage, the bank sought and obtained the leave of the Court to sell the property to the Government of Dominica by private treaty. It is to be noted that the Government had already expressed its intention to acquire the property compulsorily to facilitate the building of the national stadium. The property was sold to the Government for .5 million dollars At the time of the sale the debt on the mortgage was said to stand at \$778,900.00 but the bank was willing to forego the balance of the debt. The Government was thereupon registered as proprietors.

[5] The Defendant is now deceased. This matter concerns the application of the transferees to be substituted as Defendants. They wish to apply to set aside the judgment in default. The transferees wish the Court to determine the following issues

1. ***Whether Claytus Prevost as transferor could properly transfer to the applicants as transferees that property registered in Book P10 Folio 20 while a caveat securing the mortgage loan was registered on the said title.***
2. ***Did the Applicants as transferees under the Memorandum of Transfer dated 10th February, 2000 obtain and interest in the property registered in Certificate of Title Book P10 Folio 20; and if so, whether the interest of Claytus Prevost as transferor, and his equity of redemption, did pass to the transferees upon the due execution of the Memorandum of Transfer.***
3. ***Whether the Applicants as transferees were the proper owners of the said property and/or entitled to the equity of redemption in 2006 at the date that the property was sold.***
4. ***Whether the bank as mortgagee owed any duty of care to the Applicants as transferees at the date that the said property was sold in enforcement of the default judgment, and whether the bank breached its duty of care to the applicants as owners of the property which was sold and of the equity of redemption therein.***
5. ***Whether the applicants as transferees of the said property do have an interest in determining the quantum and /or proper balance which forms the default judgment and /or in the proper judgment that may be enforced in any possible sale of that property of which they were the transferees as at 10th February, 2000.***

[6] The bank identifies the issues as :

Whether the Applicants have made out a case to satisfy the conditions for substitution instead of the Defendant. Firstly did any interest in the property of the Defendant in question pass to the Applicants? And secondly are there matters between Claytus Prevost and the Applicants or between the Respondent and Defendant with regards to the enforcement of the default judgment and the sale of the property that to can be resolved more effectively by substituting the applicants for Claytus Prevost?

The Law

It is common ground that the property in question, being registered property, is governed by the Titles by Registration Act Chap 56:50 of the Laws of the Commonwealth of Dominica. Section 6(1) of the Act reads

“From and after the time when any land is bought under the operation of this Act, all dealings with the said land shall be in the forms and governed by the principle set forth in this Act; and all such dealings shall take effect from the date and act of registration, and not from the date of the execution or delivery of any instrument or document, or otherwise, save as in this Act provided. It shall not be necessary to register under the provisions of the Registration and Records Act, dealings with lands brought under the operation of this Act, which are in accordance with the provision of this Act. “

Under section 20 (1) it provides as follows;

When land has been brought under this Act, the registered proprietor thereof if he desires to transfer it on sale or otherwise, shall execute a Memorandum of transfer in Form 5, and the memorandum of transfer shall be presented to the Registrar of Titles

[7] A procedure is laid out that a registered proprietor must follow to transfer the land. Counsel for the transferees argues that this section authorizes an owner to transfer his land with or without a caveat. He points to section 24 of the Act which is these terms:

Where any mortgages or incumbrances are noted on the certificate of title issued to a transferee, the covenant shall be implied that the transferee has accepted the land subject to the mortgages and incumbrances, and that he will pay the interest accruing thereon, and discharge the principle sums for which the mortgages and incumbrances have been granted, and indemnify the transferor from the payment of the same in all time to come.

According to counsel this means that land can be transferred subject to a mortgage

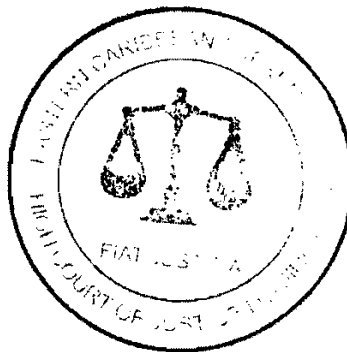
- [8] It appears to me that this argument misses the point. The issue is not whether land subject to a mortgage can be transferred but rather what is the effect of a Memorandum of Transfer which is not registered. A caveat forbids the dealing with the land while the caveat remains enforced. The clear words of Section 20 (1) require two elements in order to effect a valid transfer of registered land. Firstly there must be a Memorandum of Transfer in the appropriate form. Secondly that Memorandum of Transfer must be presented to the Registrar of Lands. It is this act of registration which vests and divests title. This is the hurdle at which the transferees fall.
- [9] The Privy Council case of Frazer v Walker 1967 1 AUER 649 makes it clear that this is the correct legal position. The transferees, having failed to register the Memorandum of Transfer, can obtain no rights to the real property under it. They may have personal remedies against the transferor but that is another matter
- [10] Having regard to my finding on this point it is clear that the application to be substituted as Defendants must fail. The C.P.R 2000 at part 19 (2) (5)

"The Court may order a new party to be substituted for an existing one if the –

- (a) Court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or***
(b) Existing party's interest or liability has passed to the new party

No interest of the Defendant in the land has passed to the applicants. It is also to be noted that the personal representatives of the Defendant have taken no issue with the judgment in default. That judgment has already been enforced. The property has been sold to a bona fide purchaser for value with the sanction of this court. In my view there remain no matters in dispute between the Claimant and Defendant.

- [11] For the above reasons I decline to make an order substituting the Appellants as Defendants



Justice Brian Cottle

High Court Judge