

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0082

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

1. ANGELICA BAKER
2. ANDREW SAUNDERS
3. SONJA SAUNDERS

Respondents

Appearances:

Mr. Garth Wilkin for the Applicant

Mr. Glenford Hamilton for the Respondents

2019: October 17
October 28

JUDGMENT

- [1] **VENTOSE, J.:** The Respondents filed an application with supporting affidavit on 4 April 2019 purportedly pursuant to section 94 of the Title by Registration Act, CAP 10:19 (the "**TRA**") of the Revised Laws of Saint Christopher and Nevis seeking the following orders:

1. A declaration that the basis on which the Order of Master Jan Drysdale dated 31st May 2018 was premised, was erroneous in that at the time the order was made, the Mortgagor's account with the Mortgagee was not delinquent, was not in arrears and was current.
2. A declaration that the Articles of Sale of the property described in Certificate of Title dated 28th October 2008 and registered in Book H3 Folio 450 of the Register of Titles for the Island of Saint Christopher were misconceived

Background

- [2] On 29 March 2017, the Applicant filed an application with supporting affidavit for substituted service in respect of the notice to pay off under section 71 of the TRA for the documents required to be served on the Respondents pursuant to sections 71 to 94 of the TRA to be published in a local newspaper and that such publication to be deemed good and sufficient service on the Respondents. The order was granted by the court on 4 April 2017. On 3 May 2018, the Applicant filed an application with supporting affidavit to settle the articles of sale pursuant to section 75 of the TRA. The order was granted by the court on 31 May 2018. The sale was to take place on 11 April 2019. The Applicant filed an application on 28 March 2019 with supporting affidavit for permission forcefully to enter the mortgaged property. The order was granted by the court on 1 April 2019. It was then that the Respondents filed their application made purportedly pursuant to section 94 of the TRA.

The Title by Registration Act

- [3] The long title of TRA states that it is an Act to make provision for the issue of indefeasible certificates of title in respect to lands brought under the operation of the TRA; and to make provision for related or incidental matters. It is divided into 14 parts and contains 5 schedules. Part VI relates to land tax mortgages and encumbrances; and the sale of incumbered land. Sections 71 to 94 fall within Part VI and under the umbrella of the section dealing with "sale of encumbered lands

and estates". These sections relate to the process of the sale of such lands and estates from the time of serving the notice to pay off (section 71) to the completion of the scheme of division and distribution of the price (section 81). Section 94 provides that:

94. Questions arising in course of sale to be settled by the Court.

Any question arising in the course of a sale of land or estate, from the time of serving the notice to pay off till the completion of the scheme of division and distribution of the price, either between the registered proprietor and the mortgagee or encumbrancee prosecuting the sale, or between either of the parties and any receiver appointed by the Court, or between any other mortgagees and encumbrancees themselves, or between any other creditor and any of the parties named, or any one pretending right to any of the property seized, shall be heard and determined by the Court in such manner as the Court may direct.

- [4] The question for determination is whether the Respondents can ground their application pursuant to section 94 of the TRA.

The Mortgage Realization Process

- [5] I wish gratefully to adopt the process helpfully described by Counsel for the Applicant as follows: Sections 71 to 94 of the TRA (based on the Torrens system of land ownership) provide the process by which a mortgagee can enforce its mortgage over property held by Certificate of Title by a court-controlled and administered sale. To initiate the process, a mortgagee must issue a statutory "Notice to Pay Off" in a specific form. The mortgagee has 60 days to settle the debt (section 71). The next step is for the mortgagee to statutorily "seize" the property which can either be by the actual taking of possession of the property, by appointment of a receiver or by the Bailiff appearing on the property and presenting an Act of Seizure (with the registered proprietor remaining in possession) (sections 72 and 73).
- [6] After the statutory seizure, a Caveat of Seizure is to be presented by the mortgagee and noted on the Certificate of Title for the property (section 74). On non-payment of the debt, 30 days after the statutory seizure, the mortgagee is required to apply to the High Court to settle the Articles of Sale of the mortgaged

property, set the upset price and make other related orders guiding the sale by a court-administered public auction (sections 75, 76 and 78). If the mortgaged property is sold at public auction, the mortgagee must apply to the High Court to settle the Scheme of Division of the purchase price, at which hearing, orders are made as to how the proceeds of sale are to be divided (section 81).

The Court's Considerations

- [7] I have read carefully the submissions filed by the parties and have had regard to the oral arguments made at the hearing on 17 October 2019. I am in full agreement with the Applicant that the Respondents cannot ground their application pursuant to section 94 of the TRA. The first part of section 94 provides that “[a]ny question arising in the course of a sale of land or estate, from the time of serving the notice to pay off till the completion of the scheme of division and distribution of the price ... shall be heard and determined by the Court in such manner as the Court may direct”. The words in bold state clearly the first limit of the court's power, namely, the question must arise in the course of a sale of land or estate. This presumes that the mortgagee has exercised properly the power of sale. The second limitation is that any such question must arise “from the time of serving the notice to pay off till the completion of the scheme of division and distribution of the price”. The question of whether the Applicant properly exercised its power of sale is not a question that arises from the time of serving the notice to pay off. It goes to the validity of the notice to pay off itself, which concerns matters that would have arisen before the notice to pay off is served.
- [8] The Respondents are not correct to interpret the words “Any question arising in the course of a sale of land or estate” found in section 94 of the TRA as including the jurisdiction “to hear and determine **all or any dispute** arising between the parties”. The words of section 94 are clear and the Respondents have impermissibly sought to expand the meaning of those words. I agree with the Respondents that one “needs look no further than to interpret the provision to give effect to its obvious meaning” but that obvious meaning is the one contended for by the Applicant and not the one submitted by the Respondents. The questions

that the Respondents claim arise, namely, first, was the Applicant authorized to go back on its arrangement with the Respondents which both sides concluded in or about August 2014 and upon which the Respondents relied and made monthly payments. Secondly, there being no arrears on the account since August – September 2014, what if anything triggered the move to issue a notice to pay off and the move to sell the property, are questions that arise prior to the serving of the notice to pay off and do not arise in the course of sale, but are of necessity questions affecting the validity of the notice to set off itself.

[9] I do not agree with the submission of Counsel for the Respondents that section 94 of the TRA is the only proper vehicle for the raising of disputes between the parties. The TRA is not concerned with “disputes between the parties”. The submission fails properly to appreciate that the court is moved to resolve substantive disputes when its jurisdiction is engaged through the filing of a claim form utilizing the civil procedure process for resolving disputes. The application filed by the Respondents purportedly under section 94 of the TRA can have no effect on the order of the court dated 31 May 2018. The proper method by which the Respondents should approach the court to stay any sale is to file an application for an interim injunction and to file contemporaneously or subsequently a claim form and statement of claim.

[10] I agree with Counsel for the Applicant that, first, the mortgage realization process does not involve the adjudication of any contractual rights between the mortgagee and mortgagor; and second, it is simply the statutory process by which notice is provided to the mortgagor(s) of the sale of the mortgaged property by public auction and by which the court makes orders to control the process. For reasons already explained above, I agree with the following submissions of the Applicant: First, in deciding whether or not the Respondents’ application can be dealt with under section 94, among the most important words or phrases in the section which bear on this matter are: “question arising”, and “in the course of a sale”. Second, a “question” is neither a “claim” nor an alleged “cause of action”. Third, “in the course of a sale” cannot mean “at any time and under the general law”. Fourth, if

the legislature intended section 94 to be a catch-all provision, it would have included the words "any dispute, action or claim arising" in section 94. Fifth, far from being open-ended, "any question ... to be heard and determined" in section 94 must arise from the sale and must also relate to the time period specified in section 94, which covers the matters regulated by sections 71 to 93 of the TRA.

- [11] I also agree with Counsel for the Applicant that the proper course is for the Respondents to file a claim against the Applicant and simultaneously to apply for an interim injunction to stop the statutory mortgage realization process. This is the only lawful way for the Respondents to stop the mortgage realization process commenced by the Applicant.

Disposition

- [12] For the reasons explained above, I make the following orders:

- (1) The application is hereby refused.
- (2) Costs the sum of \$750.00 to be paid by the Respondents to the Applicant within 14 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar