

**BARBADOS**

[Unreported]

Suit No: CV1339 of 2008

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Civil Division**

**BETWEEN**

**JUSTIN MCINTOSH** - **1<sup>st</sup> PLAINTIFF**  
**BRUNETTA MCINTOSH** - **2<sup>nd</sup> PLAINTIFF**

**AND**

**FIRST CARIBBEAN INT'L**  
**BANK (B'DOS) LTD** - **DEFENDANT**

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.*  
*Judge of the High Court*  
*[In Chambers]*

**2009: March 23**  
**May 5**

**Miss. Bernadette Callender for the Plaintiffs**  
**Mr. Edmund Hinkson in association with Ms. Jehan Lashley of Messrs.**  
**Fitzwilliam, Stone & Alcazar for the Defendant**

## DECISION

- [1] Crane-Scott J: This is an application by the Plaintiffs, Justin and Brunetta McIntosh, brought by Summons filed September 28, 2008, pursuant to **Order 14** of the **Rules of the Supreme Court** for Summary Judgment against the Defendant together with damages to be assessed, interest and costs.
- [2] The application is brought on the ground that the Defendant has no defence to the Plaintiffs' claim save as to the amount of damages.
- [3] The application is supported by two affidavits of Justin McIntosh filed on September 23, 2008 and February 23, 2009 respectively. The facts set out in the Plaintiff's affidavits are apparently not in dispute as no affidavit was filed on the Defendant's behalf.
- [4] When the matter came on for hearing, Counsel for the Defendant, Mr. Hinkson indicated that it was his intention to oppose the application. He referred the Court to a Defence which had been filed out of time (and without leave) on October 10, 2008.

### The Facts:

- [5] The facts set out in the Plaintiff's two affidavits are not in dispute and have been accepted by the Court. They may be stated briefly as follows:
- (a) By Conveyance dated 15<sup>th</sup> October, 1996, the Plaintiffs became the owners in fee simple of a parcel of land situated at Ashton Hall, St. Peter - (*Exhibit "JM 1"*);
  - (b) By a Deed of Charge dated the 15<sup>th</sup> October, 1996 and a Deed of Further Charge dated the 27<sup>th</sup> day of October, 1998

respectively, the Plaintiffs mortgaged the said property to the Defendant - (*Exhibit “JM 2”*);

- (c) As is the usual practice in such matters, the original title deeds for the mortgaged property were held by the Defendant as Mortgagor by way of security;
- (d) In June 2005 the Plaintiffs entered into an agreement for the sale of the said property to a Purchaser. The completion date for completion of the sale to the Purchaser was stipulated in the agreement as September 6, 2005. Additionally, by Clause 5 of the said agreement, the Plaintiffs also agreed to give a “*good and marketable title*” to the Purchaser. (*Exhibit “JM 3”*);
- (e) With a view to completing the sale to the Purchaser, the original title deeds were requested from the Defendant. The Defendant, however, informed the Plaintiffs that it was unable to produce the original title deeds as they had been lost or mislaid whilst in its custody;
- (f) The Plaintiffs were, accordingly, unable to complete the sale to the Purchaser by the completion date stipulated in the sale/purchase agreement;
- (g) In February 2007, the Defendant executed a Deed of Indemnity (*Exhibit “JM 5”*) in favour of the Plaintiffs by which the Defendant, its successors and assigns covenanted with the Plaintiffs to keep them “*fully indemnified against all losses, costs, charges and expenses which [the Plaintiffs] may suffer by reason of the fact that they have not the custody of the missing deeds...*”

- (h) In October 2007, the Purchaser's attorney-at-law indicated his client's willingness to accept a Registrar's Conveyance in place of the original title deeds and formally requested the Plaintiffs to institute title suit proceedings in order to obtain a Registrar's Conveyance in respect of the land. ***(Exhibit "JM 4")***;
- (i) In December 2007, the Plaintiffs through their attorney-at-law initiated negotiations with the Defendant in respect of the Plaintiffs' loss and damage and demanded an interim payment on account of the damages likely to be assessed to enable them to commence the title suit proceedings;
- (j) The Defendant through its attorneys-at-law then sought to persuade the attorneys-at-law for the Plaintiffs and the Purchaser respectively, that despite the unavailability of the original title deeds, "*a good and marketable title*" could nonetheless be shown to the Purchaser by the Defendant producing to the Plaintiffs certified copies of the missing deeds together with a "declaration of lost deeds" produced by the Defendant. ***(Exhibit "JM 6")***;
- (k) In November 2008, the Purchaser's attorney-at-law indicated that the Purchaser intended to purchase the property notwithstanding the lost title deeds. He reiterated his earlier request for the Plaintiffs to commence title suit proceedings with the aim of obtaining a Registrar's Conveyance in respect of the land. ***(Exhibit "JM 7")***;
- (l) Finally, by letter dated December 8, 2008, the Defendant's attorney-at-law informed the Plaintiffs' attorney-at-law that

the Defendant was prepared to “...fully defend against the contention that it has to bear the cost of a foreclosure suit in order to rectify the issues with respect to the lost title deeds.” (*Exhibit “JM 9”*).

**The Issues:**

- [6] *The case for the Plaintiff:* Counsel for the Plaintiffs, Miss. Bernadette Callender referred to paragraph 3 of the proposed Defence and submitted that it was not in dispute that the original title deeds had been lost and could not be produced by the Defendant.
- [7] She referred to the replacement documentation listed in paragraph 3 of the Defence which the Defendant had produced to the Plaintiffs and which, in the Defendant’s view, would enable the Plaintiffs to fulfill their legal obligation to the Purchaser to give “*a good and marketable title*” to the property.
- [8] She stated that in this case, the Purchaser was insisting on the production by the Plaintiffs of the original title deeds, or failing that, on the production of an original deed in the form of a Registrar’s Conveyance to be obtained by way of a foreclosure suit or title suit proceedings.
- [9] Miss. Callender contended that the Plaintiffs were relying on the Deed of Indemnity which the Defendant had given to them in 2007 under which the Defendant had agreed to keep the Plaintiffs “*fully indemnified against all losses, costs, charges and expenses which they may suffer by reason of the fact that they have not the custody of the missing deeds or any of them or the benefit of any covenant ...acknowledgment for their production...*”.

- [10] Counsel for the Plaintiff submitted that the single issue for the Court's determination was whether the documents which the Defendant had produced to the Plaintiffs as replacements for the original title deeds, were sufficient secondary evidence to enable the Plaintiffs to give "a good and marketable title" to the Purchaser.
- [11] In the Plaintiffs' view, the replacement documents which the Defendant had produced were unsatisfactory and would not satisfy the Plaintiffs' obligations under the agreement for sale to give "a good and marketable title" to the Purchaser. Counsel for the Plaintiffs cited the following authorities: *Re The Halifax Commercial Banking Company Limited and Wood*, (1899) L.T. 536, *European Asian Bank A.G. v. Punjab & Sind Bank (No.2)* [1983] W.L.R. 642 and *R.G. Carter Ltd v. Clarke* [1990] W.L.R. 578.
- [12] She also drew the Court's attention to an unpublished academic thesis entitled "*The Foreclosure Suit in Barbados: A Twentieth Century Fiction*" written in 1973 by Molly A. Reid, a Barbadian attorney-at-law and experienced conveyancer, in which the history and use of the foreclosure suit as a means of obtaining a "good and marketable title" to land in Barbados is discussed.
- [13] Miss. Callender cited the commentary at paragraph 14/1/1 of the *Supreme Court Annual Practice, 1997* and submitted that the Defendant had advanced an unarguable defence which could not be sustained. She urged the Court to enter summary judgment in favour of the Plaintiff as prayed.
- [14] *The case for the Defendant*: While conceding that he sympathized with the position in which the Plaintiffs had found themselves due to the unavailability of the original title deeds, Counsel for the

- Defendant, Mr. Edmund Hinkson nonetheless submitted that the Defendant's view was that the Plaintiffs' insistence on obtaining a Registrar's Conveyance by way of a foreclosure suit was unnecessary since the secondary evidence of title which the Defendant had produced as replacements would be sufficient to enable the Plaintiffs to give "*a good and marketable title*" to a purchaser.
- [15] Mr. Hinkson stated that there was no statute law governing the matter in Barbados. He submitted, however, that in Barbados, where title deeds are lost or mislaid by an attorney-at-law or by a firm of attorneys, it was accepted conveyancing practice for certified copies of the "lost" deeds together with an affidavit by the attorney-at-law in question to be accepted as replacements for the lost deeds and would provide a marketable title to the property.
- [16] In answer to a question from the Court, Counsel for the Defendant conceded that the current practice in Barbados of accepting secondary evidence where deeds were lost or mislaid by attorneys-at-law was, for some unexplained reason, not also adopted where the title deeds were lost or mislaid by a bank. He contended that there was no good or logical reason for the distinction. He explained that if the matter were allowed to proceed to trial, the Court would in effect be invited to extend the practice to banks by declaring that the secondary evidence which had been produced by the Defendant in this case was sufficient to establish a marketable title.
- [17] In closing, Mr. Hinkson urged the Court to find that the Defendant had an arguable case. He cited extracts from the following legal texts: *Halsbury's Laws of England, Vol. 17 para 140 – Proof of lost or destroyed document, Fisher & Lightwood's Law of Mortgage, 11<sup>th</sup>*

*Edition, Butterworths, 2002 @ para 28.82 and Conveyancing Solutions: Investigation & Proof of Title, M.S. Thompson, (Sweet & Maxwell, 1991) @ page 120.*

**Discussion:**

[18] The Court has examined the authorities submitted by both Counsel in relation to this matter. The Court is satisfied that the purpose of the **O. 14** procedure is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. Further, where the Defendant's only suggested defence is a point of law and the Court can see at once that the point is misconceived (or if arguable, can be shown to be plainly unsustainable) the Plaintiff is entitled to judgment. See *Supreme Court Annual Practice, 1997 paragraph 14/1/1*.

[19] After assessing the strength of the Plaintiff's case *vis-à-vis* that of the Defendant as set out in its proposed Defence and having considered the submissions of Counsel, the Court is satisfied that the Plaintiff is entitled to Summary Judgment herein for the following reasons:

- (a) The Plaintiffs have entered into a binding agreement for sale of the property in question to a Purchaser and are under a contractual duty to give the Purchaser a "*good and marketable title*" to the property;
- (b) The Court is satisfied that the expression "*a good and marketable title*" means a title which will enable a purchaser to himself sell the property without the necessity of making special conditions of sale restrictive of the

purchaser's rights. See *Re Spollon and Long's Contract [1936] Ch. 713 @ p. 718.*

- (c) Additionally, for a title to be “*marketable*”, the vendor's estate ownership must be supported by the maximum evidence which may be required by conveyancing law and practice and which must suffer no blot to which a prudent purchaser might properly object. See *Contract and Conveyance, J.T. Farrand, 2<sup>nd</sup> Edition pp.88-89;*
- (d) the Defendant has admitted that it is unable to locate and produce the Plaintiffs' original title deeds which the Defendant has admitted were in its custody and possession, as Mortgagee;
- (e) The Purchaser in this case has expressly stipulated that in accordance with the usual practice in Barbados, she is prepared to accept a Registrar's conveyance issued under the *Judicial Sale of Land Act, Cap.227* and pursuant to an order for sale granted by the Court in foreclosure proceedings;
- (f) Section 16 of the *Judicial Sale of Land Act, Cap.227* (as amended by Act No: 1980-43) provides, *inter alia*, that:

“... *all conveyances executed by the Registrar in pursuance of an order directing the sale of any land or interest therein shall effectually pass such interest in the land thereby expressed to be conveyed as specified in the conveyance and shall effectually discharge such land from all estates, rights, interests, liens and encumbrances*

*of all persons, including the Crown) except as specified in such conveyance and subject and liable to which the Registrar conveys the land.”*

- (g) The Court is satisfied that the foreclosure suit and the resultant Registrar’s conveyance is, in Barbadian conveyancing practice, widely regarded as the most acceptable means by which a “*good and marketable title*” can be obtained for property for which the original title deeds are either lost or unavailable;
- (h) Additionally, in the light of the affidavit evidence showing the legal objections which have been raised by at least two attorneys-at-law as to the marketability of the replacement documentation produced by the Defendant, the replacement documents identified in paragraph 3 of the proposed Defence are of questionable legal validity and unlikely to provide a “*good and marketable title*” to any prudent purchaser;
- (i) Having regard to the Deed of Indemnity executed by the Defendant in February 2007, the Defendant is liable to indemnify the Plaintiffs, *inter alia*, for the full costs of the title suit/foreclosure proceedings which the Plaintiffs have been required to institute in order to meet their contractual obligation to the Purchaser to give “*a good and marketable title*” to the property;
- (j) Finally, the Court is satisfied that while arguable, the point of law which has been advanced on behalf of the Defendant

in these proceedings and which is set out in paragraph 3 of the proposed Defence, is misconceived and completely unsustainable.

**Disposal:**

[20] In the result, the Plaintiffs shall have Summary Judgment against the Defendant herein, together with damages to be assessed, interest and costs, such costs to be taxed if not agreed.

**Maureen Crane-Scott,  
Judge of the High Court**