

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 1724 of 2012

Between

REPUBLIC BANK (BARBADOS) LIMITED

CLAIMANT

AND

A.A.G. INVESTMENTS INC

DEFENDANT

**Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of
the High Court**

2014: June 9, 10, 12, 13, 19, 20;

2015: March 19;

Mr. Ryan O. Drakes of Messrs Clarke Gittens Farmer for the Claimant

Mr. John Adrian Simm, Director of the Defendant in person

DECISION

[1] This is an interlocutory application for a series of orders sought by the defendant, inter alia that

- 1) The claimant case be struck out
- 2) The claimant's Attorney's be disqualified from representing the claimant
- 3) The current proceedings be stayed *sine die*
- 4) The presiding Judge Cornelius recuse herself forthwith from proceedings

- [2] In the substantive proceedings, the Claimant seeks the payment of \$925,833.48 (\$630,000.00 plus fees and interest) plus interest of \$169.94 per diem being proceeds obtained by the defendant from them by virtue of a Deed of Charge by way of Legal Mortgage dated 6th November 2007. In the alternative, the claimant seeks possession of the properties concerned and/or foreclosure and/or sale of the properties plus any further relief and costs.
- [3] The original Deed of Charge was executed between the Barbados National Bank a company incorporated under the provisions of the *Companies Act Cap 308* and which changed its name by virtue of Special Resolution dated 9th December 2011 to **Republic Bank (Barbados) Limited**.
- [4] The defendant is a company registered under the provisions of the *Companies Act* with a registered office situate at 71A Banff Springs, Sandy Lane in the parish of St. James in this Island.
- [5] In December 2008, the claimant agreed to lend the defendant the sum of approximately \$630,000.00. The security provided for the mortgage was freehold property situate at Fitts Village in the parish of St. James and made up of two parcels of lands. The moneys were to be repaid on 10th June 2009. The mortgage was thereafter upstamped by \$30,339.21 thereby making an aggregate indebtedness of \$660,339.21. By oral agreement the time for

repayment was extend by three months to 10th September 2009 but the defendant failed to pay the moneys due on that date.

[6] The defendant's Director Mr. John Simm, who appears on its behalf, and Ms. Gillian Sim executed a Deed of Guarantee dated 6th November 2007 and by letter dated 23rd November 2009, the claimant through its Attorneys, Clarke Gittens Farmer, wrote to them demanding payment. The sum by this time was now \$720,454.63. Despite numerous demands, the defendant failed to pay the moneys due under the loan facility and by 17th August 2012 shortly before proceedings commenced, the total indebtedness stood at \$925,833.48. The total payments to that date stood at \$34,274.61.

[7] The defendant's case may be briefly rehearsed. In or about April 2007, the defendant approached the claimant (then Barbados National Bank) for a loan of \$490,000.00 to assist in completing the purchase of 2,106.4 Sq. m of land located at Fitts Village St. James owned by a Mrs. French. The parties agreed terms for a five year loan in the sum of \$490,000.00. The claimants requested the provision of a number of title documents to show that there was a good and marketable title. In the contract for sale between Mrs. French and the Defendant, it was represented that there was a Right of Way over lands owned by Vernon L Ellis.

- [8] The defendant submitted that the claimant's lawyers never received Covenants from Ellis but nevertheless included the Right of Way within the security documents. The claimant was also given a copy of planning permission detailing an approved ten plot layout to be built on the land and an access road to the said plots over the Ellis Right of Way. The claimant ought to have known that no covenants were provided by Ellis to allow for a Right of Way to the proposed properties and that it would be impossible for the properties to be sold without the Ellis Covenants. The claimant had a duty to advise the defendant of the defect in Title and accordingly, the Defendant would not have entered into a loan agreement if it was impossible to sell the properties without the existence of sufficient and adequate road access.
- [9] On 23rd October 2007, the parties entered into a five year term mortgage for \$660,000.00. The defendant (no doubt desirous of having the plots sold) asked the claimant the basis upon which they would release each plot as they were sold and the claimant's officer Mr. Mark Jones responded indicating that the claimant would accept \$63,000.00 per plot.
- [10] On 22nd November 2007, the defendant entered into a contract with Mr. and Mrs. Bates for the sale of Plot 6. On 28th November 2007, the defendant paid \$165,127.80 to the claimant for the release of plot 5 and 6 (\$126,000) and

the balance to cover future interest payments. The claimant agreed to the release of the said plots by e-mails dated 11th February 2008. On 14th February 2008, plot 5 was sold to Mr. James Norville.

- [11] In May 2008, the defendant asked the claimant to advance a further \$158,000.00 to assist with the construction of the said properties in accordance with the planning permission and by agreement dated 9th June 2008, the said funds were advanced (Exhibit JAS 11 indicates the credit arrangements a new demand loan of \$158,000 and a term loan of \$471,924.00).
- [12] In September 2008, at the claimant's request, negotiations commenced to change the term loan to an interest only facility. The claimant assured the defendant of future capital repayment by way of property sales and not on a monthly repayment basis. The defendant agreed to terminate the five year term loan and on 10th December 2008, the said five year loan was repaid in full and the defendant exhibits the receipt given and account statement accordingly. The defendant maintains that the mortgage dated 23rd October 2007 was discharged.
- [13] On 10th December 2008, the defendant entered into a new demand loan agreement under account #071304200604. The security for this new loan could not be the same as for the original loan since the defendant had

already paid some \$126,000 for the release of plot 5 and 6. A new written agreement with the relevant security should have been issued. Prior to the issuance of the new loan, the defendant was required to sign a demand note and did so under duress as the Claimant appeared desperate to complete the new loan quickly.

[14] Despite the absence of security documents, the defendant completed payments for the six month period ending June 2009. The defendant relied upon a prior agreement with the claimant's Commercial Manager that capital and interest would be repaid from sales in the majority and to a much lesser extent assessed rental income. To date the claimant has never made an assessment of rental income nor attempted to recover any repayment from rental.

[15] To date contracts have been exchanged for six properties and there is now \$250,000.00 in escrow pending completion.

[16] The matter is now at case management stage.

THE INSTANT MATTER

[17] The application engaging the Court was filed on 6th May 2014. The defendant seeks the following orders

- 5) The claimant case be struck out
- 6) The claimant's Attorney's be disqualified from representing the claimant

- 7) The current proceedings be stayed *sine die*
- 8) The presiding Judge Cornelius recuse herself forthwith from proceedings
- 9) The Order entered 9th April 2014 be set aside.

Striking Out the Claimant's case

[18] Neither party has addressed the legal principles in this jurisdiction upon which a case may be struck out. Part 26.3 (3) of the *Supreme Court (Civil Procedure) Rules 2008 (CPR)* makes provision for the striking out of a statement of case

The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim; or

(c) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[19] The stated provisions provide the basis upon which the Court is to determine whether or not to strike out the claimant's case as per the instant application. In this matter, a number of issues have arisen. Without engaging in any determination of the matters therein, some of the issues to consider

are (1) is there good and marketable title to the property situate at Fitts Village St. James; (2) was it the responsibility of the claimant or the defendant to provide good and marketable title; (3) Is the mortgage agreement a valid mortgage agreement; (4) Is the security which the claimant claims to hold the same as for the original mortgage deed; and (5) was there an agreement between the defendant and the claimant via its officers to alter the terms of the credit facilities from loan facilities to interest only facilities and did the parties act in reliance on this agreement? These are but a few of the issues in this matter which should be addressed by a Court and in the interest of Justice and accordingly, the Court must refuse to exercise its discretion to strike out the claimant's case.

[20] Under the head, it is convenient to look at a point raised by the claimant. They have highlighted that the defendant's application has not been accompanied by a Certificate of Truth as required by CPR 3.12. They have stated, and quite correctly that a court may strike out the defendant's application in light of CPR 3.13 but the claimant has not gone further and applied accordingly. In *Grantley Burnett v. Dacosta Mannings Inc.* 240/2011, this court pointed out that a certificate of truth is a mandatory requirement under 3.12 which cannot ground a default judgment but that the absence of such a certificate can be rectified by order of the court. In

accordance with CPR 26.4(3), I direct that the defendant is to amend his application accordingly to include the Certificate of Truth as required by the CPR and further that the application shall continue as if so corrected.

Conflict Of Interest

- [21] The defendant submits that there is a conflict of interest between the Claimant and its lawyers and the Claimant's lawyers should be disqualified from further representation of the Claimant as required by the CPR, Statute, Public and Private Law and in the public interest. The claimant's lawyers failed in their duty of care to independently check the Root Title and ensure their client had a valid security (including over Ellis land) which they wrongly described within the security schedule 1 of the mortgage.
- [22] The defendant submits further that the claimant's lawyers have admitted to not being able to fully redeem the said security which they knew, must be taken to have known or should have known from the information supplied by the defendant was vital to the development proposal and which now prevents, *inter alia*, the issue of Compliance Certificates which in turn has prevented purchase contracts 'to complete and the flow of funds'. Therein lies an apparent conflict of interest between the claimant and its lawyers arising as a result of the claimant being unable to fully redeem the Mortgage exactly in accordance with the security schedule of the mortgage contract.

[23] The defendant states further that the trigger for such conflict of interest is very low and the claimant's lawyers must therefore be disqualified from representing the claimant forthwith.

[24] The defendant has filed an affidavit dated 6th May 2014 in support of the application. The essence of the defendant's submissions under this head is that the claimant's lawyers were negligent in drafting the documents and approving the security to be held by them; that he wrote to the claimant on 9th February 2014 under CPR 34 (Requests for Information) requesting that they confirm that upon Redemption they would be able to offer a good and marketable title; that the defendant's development intentions required access over Ellis Land; that the claimant's lawyers had to act independently with due diligence to ensure that security offered to their client in exchange for money was valid for the intended purposes; and that the claimant has at least a right to recover from its lawyers in negligence. The defendant submitted further that the Court should have recognized the conflict and disqualified the Claimant's lawyers from representing them.

[25] Mr. Simm suggests further that Mr. Ramon Alleyne, one of the claimant's lawyers was listed to appear as a witness at trial. He referred to section 39 of the ***Legal Profession Act Cap 370A*** which provides that where an Attorney-at-Law is a witness for his client, he should entrust carriage of the matter to

another Attorney. The Defendant submits that in the circumstances, the claimant's lawyers should resign or be disqualified by the Court for an apparent conflict of interest and further that they could be sued in negligence for losses as a result of a lack of good and marketable title.

[26] The court cannot accept these arguments. The claimants are entitled to retain an Attorney of their choice and the matters complained about by the defendant and matters properly addressed between the claimants and their counsel. If at any point, the claimants feel that they have not been adequately represented, there are a number of avenues for recourse which they may engage.

[27] The role of a bank's lawyers in a mortgage transaction is to ensure that the title presented to the bank is good title to the property which it is proposed that the bank will hold as security. It is not the bank's role to ensure that the original conveyance held by the mortgagor was executed correctly in the first place as the defendant seems to suggest. If there are defects in the defendant's title which make his plans difficult to complete, that is not the fault of the bank's lawyers. Their role is to ensure that the bank has a good and proper charge over the property which is to be held as security. It was for the defendant in this case to ensure that his title was as it should be for the purposes of his investment. If no covenants necessary for his

development were present, that could not possibly be the fault of the bank; the bank after all is not the owner of the freehold in this matter - the defendant is.

[28] In all the circumstances, there is no conflict of interest requiring the court to disqualify the claimant's lawyers from acting as such.

Stay of Proceedings

[29] The defendant submits that in cases where the contracts are unable to be completed due to apparent lawyer negligence, the normal course of events would be for the parties to recover from their lawyers professional indemnity insurance since they were not obliged to carry out long and uncertain litigation to recover losses from other potentially innocent parties (*Target Holdings v Redfern* [1995] UKHL 10).

[30] This is a premature suggestion and as structured, it is not a proper ground for the stay of proceedings. Whether the claimants have a claim against their lawyers is not an issue before the court at this point and no determinations have been made accordingly. There has been no legal basis for the imposition of a stay presented to the court and the court so holds.

Recusal of the Trial Judge

[31] The presumption of impartiality of judges forms one of the justice system's pillars. Judges are to be assumed to be persons of 'conscience and

intellectual discipline, capable of judging a particular controversy fairly on the basis of its own conscience’ (*R v S (RD)* 3 SCR 484 at 32 referred to by **Burgess JA** in *Ward v Walsh* decided on an oral application before the **Barbados Court of Appeal**). There are thus two instances where the presumption of impartiality is displaced; firstly, on the rule that no person can be a judge in his own cause; and secondly, if a fair minded and informed observer would conclude that there was a real possibility that the Judge was biased as set out in *Porter v Magill* [2002] 2 AC 357.

- [32] There has been no suggestion of the first instance in this case. In the latter instance, the Court must consider, after setting out the material facts, whether a fair minded and informed observer, having full knowledge of the facts would conclude that there was a real possibility that the Court would be biased against the claimant. In so doing the following must be considered: ‘a fair minded and informed observer can be assumed to have access to all of the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular Judge ... who is under scrutiny.’ (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2). The facts therefore may go beyond what the defendants suggest

they are. Given the nature of this matter, it is important that I set out fully, the arguments as advanced by both parties

Defendant's Arguments

[33] In support of the application the defendant submitted the following arguments (arguments are repeated as presented in full). He stated that the Court did not

- a) "Consider properly as a matter of the Civil Procedure Rules (CPR 1), statute, Administrative, Public or Private law or the public interest the arguments the defendant tried to raise in respect of Claimant lawyers conflict of interest with their client (not disputed by the claimant) – but was cut short by the Judge who simply said nothing could be done about it, whereas the defendant avers the Judge should have immediately adjourned the hearing to hear further evidence and argument since this was serious objection raised by the defendant so that Justice should be seen to be done and a written judgment produced from which an Appeal could be raised if necessary.
- b) Confer with the defendant upon strike out of the claimant's case. The Judge conferred only with the claimant about a possible strike out of the defendant case (and was even prepared to allow a strike out application by the claimant at the pre-trial review and not the case management conference to avoid costs and wasted court time contrary to the overriding objective under CPR1) but failed to ask or even consider if the defendant had any strike out applications assuming this was a simple possession case. In fact this case is littered with apparent lawyer negligence and the defendant has two causes for strike out of the claimant case based upon a void contract and proprietary estoppel which the judge failed to consider in part or at all.

- c) Act upon the fact that the claimant lawyer being listed to be called as a witness at trial (as agreed to by the claimant) was contrary to the ***Legal Profession Code of Ethics Cap 370A*** paragraph 39 (2) where there would be an apparent conflict of interest and disqualified the claimant's lawyers firm forthwith from representing the claimant.
- d) Give sufficient weight or consideration under Part 1 CPR for the subpoena of Mr. Mark Jones (who solely represented the claimant in detail during the mortgage application in 2007) from out of the jurisdiction, and simply told the defendant that they could subpoena Mr. Jones although he would likely be a hostile witness. It is of first importance procedurally that the claimant be obliged under Part 1 CPR by the Court to offer first hand evidence as opposed to leading mere hearsay evidence. Given that the defendant is not legally represented and in line with Part 1 it is important to ensure procedurally that the parties as far as possible are upon equal footing – the claimant is in a far stronger position financially to subpoena Mr. Jones from Canada with all its associated costs.
- e) Failed to confer properly or at all with the defendant upon trial dates for pre-trial event and trial and only dealt with the claimant. The first date set was the 28th March 2014 for final affidavits which was clearly not practicable bearing in mind the Judge told the defendant they would have to subpoena Mr. Jones from out of jurisdiction which would require finding him, serving documents and obtaining a witness statement which in all probability would require a response from the defendant and possibly the claimant.
- f) Demonstrated an unwarranted hostility towards the defendant in a previous decision 1824 and 1827 of 2102 (a linked case) claiming that the defendant 'will not sell' the properties (built upon the secured land) to purchasers whereas in fact the defendant has never taken that stance and is keen to sell to avoid a huge loss but unable to as a result of the claimant unable to provide a good and marketable title (including access over Ellis Land) upon

Redemption and alleged lawyer negligence which the Judge failed to investigate in part or at all”

[34] The defendant submitted that it was clear that the “Judge did not wish to engage the defendant or give adequate time or chance for the defendant to respond to the matters concerning the conflicts of interest, had not given even weight to the defendant case in respect of strike out nor given sufficient thought to the time required for the production of affidavits and simply wished to assist the claimant in rushing through a case to trial regardless of the defendant. In the premises the defendant avers that there is a danger that the Honourable Judge has and will continue to exhibit an apparent bias towards the claimant "which she should be keen not to do especially when the defendant is a litigant in person”. The defendant supports his argument by reference to *Ansar v Lloyds TSB* [2006] EWCA 1462 and states that “in view of the apparent bias the Judge must recuse herself forthwith”.

[35] The claimant’s response to the issues raised is as follows:

- a) *In respect of the arguments that a conflict of interest existed the judge made a ruling on point and the defendant had the option to appeal which it did not*
- b) *In respect of the argument that the Judge failed to admit a copy of a plan the judge provided the opportunity to submit the plan in one sheet rather than a few was afforded to the defendant when the judge allowed further affidavit evidence to be submitted.*
- c) *In respect of the argument that the Court dealt with key dates without reference to the defendant the defendant was present at the*

hearing and therefore had an opportunity to make representation to the Court. The order to amplify evidence through oral evidence was made specifically to assist the defendant.

- d) *In respect of the Judge further appearing to exhibit bias by asking if the claimant wished to strike out any of the defendant's case but failed to ask the defendant a similar question* the court indicated to the defendant that the claimant had been generous not to strike out aspects of the defendant's pleadings especially in relation to affidavits which contained submissions and hearsay evidence.
- e) *In respect of the argument that the claimant responding to the strike out matter saying that they would apply to strike out later in the proceedings contrary to CPR 1* the defendant is incorrect at law. A judge should only strike out proffered evidence at an interlocutory stage if it appeared that no matter how the proceedings may look at trial, the evidence will never appear to be relevant or if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it (**White Book 2009** at para 32.4.21)
- f) *In respect of the subpoena of Mark Jones* Part 29.1 CPR allows the Court to control the evidence to be given at any trial. The Court could certainly make an order to summon Mr. Jones or any party to attend. The defendant was never told who should be or should not be its witness but the court did order that further affidavit evidence could be submitted on or before 28 March 2014 in addition to the opportunity to amplify the evidence orally. The defendant had every opportunity to submit evidence of any individual it thought could support its case. The claimant had to decide how to prosecute its claim and had tendered the evidence necessary to achieve the Order.
- g) *In respect of the submission that the Judge said that the defendant 'would not complete' demonstrated a mindset of bias against the defendant* the mere fact that a Judge, earlier in a previous case commented adversely on a party ... would not without more found a sustainable objection. In any event in this matter the Court took a neutral stance and was not making a determination. The full

statement is “at this stage the Court cannot say whether the contract can be completed or not and the defendant given final possession... Equally untenable is the fact that the defendant has all the purchase price and cannot or will not complete.”

[36] The claimant submitted further that in light of the Court’s actions on the day, the fair-minded and informed observer will not conclude that there was a real possibility that the Court was biased. The Court was referred to *Ansar* where it states thus

“Although it is important that justice must be seen to be done, it is equally important that Judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour”

[37] The claimant submits further that it was clear from the defendant’s application that the issue of bias was raised as an attempt to have its case tried by someone it thinks is more likely to decide the case in their favour, and that the Court should not accede to the application for recusal.

[38] The facts, therefore, that a fair minded and informed observer would have to consider in this case are as follows

- 1) The defendant complained about a conflict of interest between the claimant bank and their lawyers. The bank had no such objection to their lawyers. The court indicated to the defendant that he had to prove the conflict of interest and it had to be more than his need to

call the bank's lawyer. The relationship between the bank and its lawyer was not therefore the Court's concern.

- 2) The court dealt with key dates leading up to trial in the presence of both parties
- 3) The court indicated that the claimant had been generous not to strike out aspects of the defendants pleadings despite them being incorrect in content and format. The court then asked whether the claimant wished to strike out any of the defendant's case.
- 4) The defendant submitted evidence from himself as the only witness for the defence and raised a matter of a subpoena to another party, one of the claimant's officers. The claimant did not call the said person as one of their witness yet the court ordered generally that further affidavit evidence could be submitted by the parties at a later date which was set.
- 5) The court stated in a previous decision (where the same Judge adjudicated) related to this matter that it could not say whether the contract could be completed or not and that it was untenable that the defendant has all the purchase price and 'cannot or will not complete'.

*(The cases referred to at 5 above refer to No 1824 of 2012 **Fabby v AAG Investments** decided 20th August 2013 and No 1827 of 2012 **Norville v AAG Investments** decided 20th August 2013 in the Supreme Court of Barbados.*

In both of these matters, the claimants entered into contracts for sale with the defendant for the sale of condominiums on the West Coast of Barbados. These condominiums are the same one which Mr. Simm, the defendant's director had for sale. Each of the claimants sought injunction relief arising out of non-performance of the contract by the defendant. The claimants each sought possession of the respective properties but the defendant argued that the agreements were both *void ab initio* or frustrated and thus not enforceable. The Court held in each case that the balance of justice lied in favour of refusing the injunction and maintaining the status quo. In each case, damages would be an adequate remedy

6) The defendant director tried to submit documents to the court improperly and in highlighting this point to the court and thus refusing to accept the documents improperly, the court made an order allowing for additional evidence to be submitted via affidavit.

[39] Having set out the material facts, a fair minded and informed observer, aware of the judicial oath, and the presumption of impartiality would conclude that despite the numerous failings in the procedure followed by the claimant, orders were made which would have allowed the defendant to do his case in a proper way and to correct the failings accordingly. The observer would be conscious of the fact that Judges are trained to adjudicate objectively, and without fair or favour in accordance with the law. Despite the allowances made for the defendant as a Director appearing in person, he appears to have formed the view that decisions which have not gone his way reflect a favour on my part for the claimant and its counsel. There is no evidence of such.

[40] Accordingly, I find no substance in the allegation of apparent bias laid against me and the application for my recusal in this matter is thus without merit.

Setting Aside the Case Management Order

- [41] The defendant submits that the dates set in the order for the final service of affidavits was not agreed and could not reasonably be justified where a subpoena out of jurisdiction would be required for one of the witnesses. The judge ordered the claimant to send out the draft order for the various dates to be agreed but did not order that the draft order be sealed in the event of the defendant's objection. The defendant submitted that the proper course was for the Court to require the claimant to ask the defendant to agree revised dates and if this was not possible to set down a further hearing where a written judgment would be issued.
- [42] The claimant submits that the dates set in the case management conference (CMC) were set by the court. The Court did not order the claimant to send out a draft for dates to be agreed but the parties at the CMC were asked by the Clerk of the Court to confirm that the dates obtained in the Order were reflected in their notes. This was done by the other parties present but not by the defendant. Under the new CPR, the Court dictates the timelines for matter. There is no obligation on the Court to set orders at the convenience of any party.
- [43] In a case management conference, the dates set by court are dates set as the Court pleases. The Judge is required to have control of the matter before him

or her and accordingly, can set dates without the prior agreement of any party. It is for the Judge to 'run' the case as she sees fit and inherent in that is the ability to set the dates convenient for the Court to adjudicate. Accordingly, the defendant's submission is not well founded.

DISPOSAL

[44] Having considered the submissions therein, the defendant's application is dismissed in its entirety. In the normal course, the Order for costs would be in the claimant's favour as the party who succeeded and I see no reason to order otherwise. The claimant shall have its costs certified fit for one counsel to be assessed accordingly.

**Jacqueline A.R Cornelius
Judge of the High Court**