

**MERIDIAN MORTGAGE CORPORATION LTD — The plaintiff**

V

**GILBERT FITZROY SELVER — The defendant**

**BEFORE THE HON JUSTICE ROBERT SHUSTER  
MR NEIL COLEMAN FOR THE PLAINTIFF  
MS GLENDA CLARKE FOR THE DEFENDANT  
DATES OF HEARING 30<sup>th</sup> APRIL AND 1<sup>st</sup> MAY 2015  
WRITTEN SUBMISSIONS RECEIVED 20<sup>th</sup> MAY 2015 @ 15.15pm  
JUDGMENT TO BE DELIVERED 16th JUNE 2015 @ 08.30am**



**JUDGMENT**

1. This is a simple case concerning an action brought by the plaintiff company Meridian Mortgage Corporation Limited [hereinafter called the plaintiff] against the defendant Gilbert Fitzroy Selver [hereinafter called the defendant] as the registered proprietor of a parcel of land situated in Blue Hills Providenciales Turks and Caicos Islands.
2. The action has been brought by the plaintiff, pursuant to section 77 of the Registered Land Ordinance, Chapter 72. The plaintiff asks this court to make an order to the effect: - that clause 9 [d] of "the Meridian Mortgage Corporation Limited document" dated 30<sup>th</sup> August 2007; the plaintiff's mortgage document containing the terms and conditions of an agreement entered into by the plaintiff and defendant on 27<sup>th</sup> August 2007. Because the defendant's mortgage loan remains outstanding, the plaintiff wants the agreement enforced to enable the plaintiff to sell the parcel of land identified as #60501 1 89 situated at Blue Hills, Providenciales, Turks and Caicos Islands: - be sold by way of private treaty.
3. During 2008 the parcel of land identified as #60501 189 Blue Hills Providenciales mortgaged by the defendant; was mutated. The parcel to-date comprises five [5] remaining residential lots numbers #60501 / 172, 175, 178, 179 and 189. The plaintiff by his action today, asks the court to order the five [5] remaining lots be sold by private treaty to recover the defendant's outstanding debt.
4. The defendant opposes the plaintiff's application to sell his land by way of private treaty. The defendant claims any debt which might have been due owing to the

plaintiff in respect of the loan agreement executed on 30<sup>th</sup> August 2007, has long since been repaid / extinguished and on that basis, the defendant opposes the plaintiffs application for sale of his land - by private treaty.

5. In this court the defendant averred his original loan with the plaintiff secured in August 2007 has been repaid in full. The defendant claimed various TCI banking institutions in 2008 and 2009 sent completion cheques for various lots purchased from the defendant - direct to the plaintiffs company.
6. The defendant claims the plaintiff has a legal duty to account for all funds received by the plaintiff on account of sales of the defendant's residential lots during 2008/9. The defendant said sufficient funds had been remitted by the purchaser's TCI commercial banks to cover the defendant's loan payments in full. The defendant claims his original debt was extinguished long ago.
7. The trial of this matter commenced Thursday 30<sup>th</sup> April and concluded Friday 01<sup>st</sup> May 2015. The court heard evidence from both the plaintiff and the defendant; neither party called any other witness. At the close of the defence case counsel were instructed to provide the court with closing submissions within two weeks. Judgment would be on notice with a caveat if counsel's submissions were received on time; judgment would be delivered on 03<sup>rd</sup> June 2015. On that date the case was adjourned as counsel for the defendant was off island.

#### **THE FACTS OF THE CASE**

8. **The facts:** - In Aug 2007 the plaintiff and defendant entered into an agreement with each other calling for the plaintiff to loan the defendant US\$200,000.00 with a view to the defendant purchasing leasehold Crown land in Blue Hills, Providenciales. The defendant would develop the Crown lease land; into residential lots and market residential lots and attempt to create a profit.
9. It was agreed by the parties that the \$200,000.00 loan would be provided by Meridian Mortgage Corporation Ltd; the loan would be secured on the defendant's property #60501 / 89 by way of a charge as is normal practice in this jurisdiction.
10. A written loan commitment letter was executed on 28<sup>th</sup> Aug 2007. Following the receipt of the commitment letter the plaintiffs mortgage agreement was agreed and the agreement was signed by the defendant on 30<sup>th</sup> Aug 2007 the mortgage agreement was registered that same date. These are clear findings of fact they were not disputed during the trial.
11. The court finds as a fact that the mortgage document together with the charge document dated 30<sup>th</sup> Aug 2007 and registered that same date are legal documents. These are documents which when taken and read together they evidence the existence of a valid contract, made and existing between the two

parties since 30<sup>th</sup> Aug 2007.

12. Upon acquiring ownership of Crown land under title #60501 / 89, in Aug 2007 the defendant caused the parcel of land #60501 / 89 to mutate. The defendant then subdivided that parcel of land into a number of "new" residential lots. These new lots were serviced and then they were developed by the defendant via his construction company. After subdividing #60501 189 the new lots were marketed as residential lots early in 2008 by the defendant with the plaintiffs knowledge.
13. Over a period of time; beginning 05<sup>th</sup> May 2008 the evidence reveals a number of the defendant's residential lots were sold for building new homes. Lots #60501 / 181, 182, 177, 176, 180 and 185 were sold in 2008. Lots #60501 / 183, 174 and 184 were sold in 2009. The court accepts that the plaintiff was made aware of the sales of the lots the plaintiff consented to their sale on behalf of his company. The facts also reveal the plaintiff executed proper discharges of his companies' interest over certain divided lots whenever requested to do so by the defendant.
14. The defendant claims proceeds of the sale of the various lots sold in 2008 and 2009 were paid direct to the plaintiff company by commercial banks in the TCI. According to the defendant's evidence direct payments were made to the plaintiff after commercial banks approved financing on behalf of respective purchasers. Funds were then paid direct to the plaintiff for credit to the defendant's loan account,
15. The defendant said in evidence in his \*opinion his outstanding mortgage debt of \$200,000.00 with the plaintiff had been extinguished long ago. To support this statement the defendant said he relied on the repayment of his mortgage loan from the proceeds he received from the sale of his Blue Hills lots during 2008/9.
16. The defendant blamed poor accounting practices by the plaintiff. He also blamed accounting errors for any debt / shortcomings which the plaintiff claims remain outstanding on his loan account today. The defendant however produced no documents to prove his allegations or assertions.
17. This assertion" of either [a] the full repayment of the defendant's loan or, [b] any shortcomings by the plaintiff or his company was hotly contested by the plaintiff, during the trial. The plaintiff provided the court with up to date documentary evidence detailing the defendant's payment history, his payment schedules and all outstanding balances recorded against the defendant's account from Aug 2007 when the loan was first advanced up to the date of trial. The court studied the documentation submitted by the plaintiff.
18. The evidence reveals the plaintiff's accounting documents were intact the documents were up to date on the other hand the defendant was unable to contradict the outstanding loan balances or payment schedules provided by the plaintiff during the trial, relating to the defendant's account this is a finding of fact

19. The plaintiff says since the defendant's development of his Blue Hills land began, payments including specific down payments had been paid directly to the defendant as deposit towards the sale of a number of the defendant's residential lots in 2008/9. The plaintiff claims cash deposits had been paid direct to the defendant and cash deposits had not been accounted for by the defendant.
20. The plaintiff says the defendant on occasions when times were good, early in the morning he visited the plaintiff's offices the defendant is said to have asked the plaintiff for an "advance" to service his "South Dock loan account" which was also administered by the plaintiff from his office.
21. The plaintiff also claimed that on unannounced visits to the plaintiff's office, the defendant obtained advances of money which the defendant used for other purposes rather than pay down his loan. The plaintiff claims the defendant used in excess of \$250,000.00 from the sale of Blue Hills lots; either for his personal use, or for his construction company, to settle debts, purchase items, settle bills or pay workers.
22. Upon hearing the evidence and viewing documents submitted in this case the court believes the plaintiff's evidence in respect of his claim the defendant received over \$250,000.00 from the sale of lots and that sum of \$250,000.00 was not applied for the purpose of reducing / clearing the defendant's secured loan.
23. The court accepts the plaintiff's evidence that arrangements were made for the defendant to use money advanced personally for the benefit of his family and also his construction company. According to the evidence "monetary advance" arrangements were made "between the parties and those arrangements were made during times when the economy in TCI was "strong."
24. The court has had sight of documentary evidence proving the plaintiff was correct when he told the court over \$250,000.00 was used for the sole benefit of the defendant and that sum was not used to pay out or settle his secured loan.
25. The plaintiff claims and the court accepts the plaintiff's evidence that the defendant's original one-year secured loan for \$200,000.00 taken out in August 2007 has effectively been rolling over since August 2007. Since 2011 the plaintiff said no payment [regular monthly / quarterly payments] have been made by the defendant in an attempt to settle his now delinquent account.
26. The plaintiff has also stated no compromise or settlement has been offered by the defendant [or his counsel] to the plaintiff or to the plaintiff's counsel since proceedings were issued; in an attempt to clear the defendant's outstanding debt. That is a clear finding of fact.
27. The plaintiff asserts by continuing with this action, the plaintiff merely seeks to

protect its assets. The plaintiff seeks a court order, enabling the plaintiff company to sell #60501 / 89 - comprising lots #60501 / 172, 175, 178, 179 and 189, by private treaty in accordance with the August 2007 agreement. The plaintiff claims all other options to recover his debt from the defendant have failed.

## **SUMMARY**

28. The court accepts that: - in Aug 2007 the plaintiff granted the defendant "a draw down loan facility" for \$200,000.00 secured on a mortgage. The relevant charge against the defendant's property was registered on 30<sup>th</sup> Aug 2007.
29. That loan agreement was known as the "Blue Hills Mortgage." That said the court accepts as a fact that a valid signed legal contract exists between the parties from 30<sup>th</sup> August 2007 — up to the date of trial and today's date.
30. The court accepts the defendant's evidence that during that same material time, the defendant operated a second loan facility with the plaintiff / company, known as the "South Dock Mortgage" that is also common knowledge.
31. The court accepts in 2007 the plaintiff held a single charge over lot #60501 / 89 until the single lot was mutated and subdivided. The mutated lots were developed and sold by the defendant to repay the plaintiff's loan in an effort by the defendant to create a profit with the plaintiff's consent.
32. The court accepts that over a period of time up to 2010 the defendant drew down in excess of \$200,000.00 on his Blue Hills loan account. The court accepts the plaintiff's evidence that at first the defendant's Blue Hills loan account was serviced properly, through the sale of new subdivided lots.
33. The court accepts the evidence that during 2008/9 the defendant sold several lots and at the same time he repaid a substantial portion of his original \$200,000.00 loan with the plaintiff. These payment arrangements, were allowed with the plaintiff's written agreement and his prior consent.
34. The court accepts the evidence that the defendant was authorised by the plaintiff, to sell certain lots without making payment[s] towards the loan to sell a lot to certain of the defendant's family members. The arrangement to sell land to a family member was allowed by the plaintiff, because the loan to land value ratio was less than 50% at that time; and; because the loan to land value ratio was less than 50%; the plaintiff was willing then on occasion to provide a discharge for the defendant's lots without payment, but **ONLY BY EXPRESS** written request.
35. The court accepts in late 2009 after selling a number of lots the debt owed by the defendant to the plaintiff, reduced to less than \$80,000.00. The defendant's debt of \$80,000.00 however remained secured by the original charge over the

defendant's property. At that time the remaining lots valued at approximately \$192,000.00. In due course the TCI economy deteriorated. The TCI real estate market slumped, and the defendant failed from then on, to service his remaining debt with the plaintiff's company. Interest was added to the remaining balance, as per the parties' original agreement.

36. The court accepts that on 01<sup>st</sup> Jul 2011 the plaintiff served the defendant with a formal demand notice pursuant to section 72 of the Registered Land Ordinance. According to the evidence and the court accepts as a fact the defendant has made no payment to his loan account since Jul 2011. The defendant's secured loan continues to exist; his loan remains outstanding / delinquent and the loan bears ongoing accrued interest charges levied at the prescribed rate.

37. The court accepts the evidence that at the time of the plaintiff's first affidavit in Jul 2014, the loan outstanding to the plaintiff, by the defendant was \$125,807.68 and on 30<sup>th</sup> Apr 2015, the defendant's outstanding loan stands at \$141,377.42, plus legal costs.

***Having heard all the evidence on oath and upon reviewed the various affidavits and exhibits submitted in this case; these are my findings of fact:-***

38. The court finds as a fact the mortgage document and charge document signed by the parties are in law and in fact; they are legal documents. They are documents which clearly evidence the existence of a valid contract made and agreed between the parties on 27<sup>th</sup> Aug 2007. The legal documents were officially executed on 30<sup>th</sup> Aug 2007 and are in evidence.

39. The court finds as a fact that as at the date of trial 30<sup>th</sup> Apr 2015 the defendant is indebted to the plaintiff in the sum of \$141,377.42; plus legal costs. This figure is well documented and is accepted by this court. Further interest charges continue to accrue as per the original agreement and interest charges can properly be added to the outstanding debt in accordance with the agreement.

40. The court finds as a fact that **NO FUNDS** held by the plaintiff and or his company were **EVER MISAPPROPRIATED** by the plaintiff as has been alleged by the defendant during the course of the trial, and the court so finds.

41. The court believes the evidence of the plaintiff in its entirety. The facts reveal the plaintiff is and was; a long term employee of his company. The plaintiff dealt fairly with the defendant for many years; and by all accounts both parties developed a good working relationship with each other - until these proceedings were issued.

42. There can be no doubt in the courts mind the defendant's development project in the Blue Hills area initially flourished. The defendant was doing well until the recession hit, and a real estate downturn hit the TCI and the world economy.

43. The recession no doubt hit the defendant hard he fell on bad times, but, since 2011 he has failed to honour his loan obligations and his written contract. The facts reveal the defendant did not keep his word and repay a lawful debt. The defendant could have negotiated with the plaintiff but he seems to have just buried his head in sand.
44. At all times during this trial the plaintiff appeared as a confident witness. He was on top of the facts of the case throughout the proceedings. The plaintiff was and is a believable witness. He maintained what he had stated in his various affidavits throughout the trial. The plaintiff had the required documentation to hand at all times to back up what he said in evidence. He was not swayed during cross examination he was as I have stated in fact - a truthful and also a believable witness.
45. On the other hand, the defendant whilst in the witness box; he appeared evasive. The defendant frequently delayed answering simple questions put to him and he prevaricated. He had few documents which backed up his wild claims. The court was not impressed with the defendant's testimony.
46. At a point in time during cross examination, the defendant finally accepted during cross examination by Mr Coleman for the plaintiff; that he was the beneficiary of all proceeds from the sale of his residential lots in his Blue Hills subdivision. The court notes that the defendant took a great deal of time to come to that pure inevitable conclusion.
47. It is also important for this court to note; the defendant had very little to say by way of explanation when confronted about the circumstances when in 2014 the plaintiff visited the defendant's Blue Hill's subdivision and he found [a] a two-storey construction on one lot, and [b] building foundations laid on another lot. The plaintiff testified that in 2014 he was not aware any of the defendant's lots had been sold since 2011 while the defendant's 2007 loan remained delinquent.
48. In connection with the event described to the court in 2014, the court finds as a fact, when questioned by the plaintiff's counsel, the defendant did not tell this court the truth. He was evasive, and he prevaricated when asked questions by counsel for the plaintiff about those circumstances.
49. This court accepts an originating summons was issued on 19<sup>th</sup> Jan 2012, pursuant to section 77 of the Registered Land Ordinance Chapter 72 — for an order pursuant to clause 9 [d] of the charge dated 30<sup>th</sup> Aug 2007 seeking an order / power of sale for the land charged by way of private treaty.
50. This court accepts as a fact that there is no acknowledgement contained in our court file, to indicate the defendant ever disputed the plaintiff's claim. There is no affidavit evidence on file by way of rebuttal, provided by either the defendant or

his counsel, disputing the debt due to the plaintiff.

- 51 Perusing the history of the case; the court is certain the defendant has been well aware of the plaintiff's claim against him; from day one. Nothing has been received by this court, and nothing had been filed in court within the required time limits which disputes this outstanding debt. Nothing to that effect has been filed by the defendant or his counsel.
- 52 Nothing has been disputed by the defendant, until 12<sup>th</sup> Aug 2014, which as the plaintiff's counsel pointed out is two and a half years after this claim was first pleaded, yet still there has been no proper response by the defendant or his counsel to acknowledge the plaintiff's claim.
53. The evidence suggests the defendant is / was an astute businessman. The evidence shows the defendant has supported / established various business ventures during his lifetime. The defendant dealt with the plaintiff's financial institution for many years. The court concludes the defendant with his experience is / was well aware of how a business would / should practice in the TCI.
54. The facts revealed the plaintiff ordinarily supported the defendant in a professional manner; in fact one might go so far as to say the plaintiff supported the defendant through thick and thin providing him / his company with financial services.
55. The facts reveal the defendant was to all intent and purposes on good terms with the plaintiff **UNTIL** the plaintiff went on an inspection / visit to the defendant's Blue Hills site in 2014 and the plaintiff observed a two storey building constructed on a supposed unsold lot, and he saw foundations laid on another lot in preparation to build thereon.
56. The plaintiff said in evidence his company was NOT aware of the sale of either lot on the Blue Hills property in 2014; or of any construction project[s] on the sites and the court believes him. On further investigating at the Blue Hills development site the plaintiff told the court he ascertained from the people constructing buildings in 2014 that the new purchasers believed: - [a] that they had clear title to the property and [b] they said they had paid the defendant for those lots.
57. On the evidence before the court this court finds as a fact; in 2014 one new purchaser had paid the defendant in excess of \$50,000.00; the other person had paid the defendant in excess of \$26,000.00. According to the evidence nothing from those sales, has been paid by the defendant to the plaintiff, towards clearing the defendant's outstanding 2007 debt.
58. The court accepts the plaintiff's evidence that since 2014 when the plaintiff inspected the defendant's Blue Hills property and he found building work in progress; and the plaintiff ascertained the defendant had received \$76,000.00 in



payment without clearing his original debt: - that mutual trust and good relationship, previously established between the parties has broken down.

### **DECISION — AND ORDERS**

Having considered the evidence contained in the various affidavits provided by both the plaintiff and defendant and, having considered the evidence received on oath and or by way of affirmation and upon studying the bundles of exhibits provided in this case:-

- This court believes the plaintiff to be the more credible witness. The court rejects the evidence of the defendant. In the courts considered opinion the defendant was not a credible or a truthful witness during these proceedings.
- There is evidence before this court to prove the defendant manipulated payments which he received from the sale of two of his Blue Hills lots; particularly sales discovered by the plaintiff in 2014 on a site inspection visit. The facts reveal the defendant clearly withheld deposit payments keeping the proceeds \$76,000.00 for his own use, rather than continue to pay his 2007 secured loan.
- There is abundant evidence before this court to prove the defendant used money due his Blue Hills Loan account to cover his other loan. The defendant also used cash in excess of \$250,000.00 for his own personal use when times were hard. The evidence reveals the defendant blamed other persons for supposed accounting irregularities on his loan account, when in fact there were none.
- There is substantial evidence before the court to prove the defendant did not account for the payments he has received from the sales of his Blue Hills lots and deal with people with honesty and with integrity. In 2014 the defendant sold two of his lots for \$76,000.00 and he told the purchasers they had clear title to the property when they did not. That fact caused considerable concern to the plaintiff as CEO of his company and from then on their business relationship broke down even further.
- In the courts view the defendant has put up no legitimate defence in this case. The defendant could not substantiate his wild allegations he made against the plaintiff whilst claiming the plaintiff did not carry out the defendants written instructions.
- There is also no basis to the serious allegation made by the defendant that the plaintiff misappropriated some of the defendant's funds. The defendant could produce no such evidence to justify his belief. In the courts view the defendant made wild exaggerations in an attempt to discredit the plaintiff and he has tried to avoid paying a lawful debt he has owed since August 2008.
- In the courts opinion, the defendant's evidence was totally discredited by the plaintiff's counsel Neil Coleman via counsel's concise focused cross-examination

and this court so finds.

**COURT ORDER**

- **JUDGMENT FOR THE PLAINTIFF AGAINST THE DEFENDANT.**
- The court make an **ORDER** to the effect that clause 9 [d] of the mortgage document dated 30<sup>th</sup> August 2007, entered into by the plaintiff and defendant be **ENFORCED**, allowing the plaintiff to sell five [5] parcels of land, first identified as 60501 / 89 - which parcels of land were mutated and now comprises five [5] lots number 60501 / 172, 175, 178, 179 and 189. The court orders the five parcels of land be sold **BY PRIVATE TREATY**.
- The plaintiff is awarded costs of these proceedings; to be taxed if not agreed.



Shuster J  
Judge of the Supreme Court  
AND CAICOS ISLANDS