



# The Court of Appeal for Bermuda

## CIVIL APPEAL No. 1 of 2011

Between:

**VERA MARIE HAYWARD**

*Appellant*

**-v-**

**E & C WELL DRILLING SERVICES LIMITED**

*Respondent*

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**Before:**    **Zacca, President**  
              **Ward, J.A.**  
              **Auld, J.A.**

**Appearances:**        Mr Mark A.C Diel for the Appellant  
                              Mr Jai Pachai for the Respondent

### **Judgment**

**Date of Hearing:**                                **8 June 2011**  
**Date of Judgment:**                           **17 June 2011**

**AULD JA:**

### **Introduction**

1.    This is an appeal by Vera Marie Hayward against orders of the Chief Justice on 13<sup>th</sup> January 2011 to enforce payment of a debt owed by her to E & C Well Drilling Services Ltd (the Company”) and secured by a deed of mortgage on her home held under long lease, in favour of the Company.

2. The Chief Justice so ordered on his determination of two over-lapping issues raised by Mrs Hayward in response to the Company's originating summons against her to recover the money owed and/or to enable it to enforce payment by sale and the grant of possession for that purpose. The issues were:

- 1) whether the Company, "a local company" within the meaning of that expression in section 2(1) of the *Companies Act* ("the *Act*") and without express landholding power or ministerial consent for it, was prohibited by section 120(1) of and paragraphs 12 and 13 of the First Schedule to the *Act* as they stood at the date of the mortgage deed, from acquiring or holding land in Bermuda in the absence of such power or consent; and, if so,
- 2) whether provisions in the mortgage Deed purporting to render the Company a landholder by assignment of the lease rendered it unlawful and, therefore, ineffective as a means of enforcing either the debt or the mortgage security.

#### **The relevant facts and law**

3. Clause 1 of the mortgage deed provided:

*"..... in consideration of the ... principal sum ... paid by the Mortgagee to the Mortgagor... the Mortgagor as Beneficial Owner **Hereby Assigns** unto the Mortgagee **All** ... the mortgaged lands ... **To Hold** the mortgaged lands hereby assigned.... **Unto** the Mortgagee for all the residue now unexpired of the term of years granted by the ... Lease **Subject** to the proviso for redemption ... **And In Any Such Case** [i.e. redemption by the Mortgagor] the mortgaged lands shall at any time thereafter at the request and cost of the Mortgagor be re-assigned to the Mortgagor or as the Mortgagor shall direct."*

Clause 2(a) required Mrs Hayward to repay the principal debt and interest on it, according to its terms.

Clause 3 provided that the Company could, without the consent of Mrs Hayward, sell the mortgaged property in the event of her "failure to comply with all or any of the terms and conditions contained in" the Mortgage Deed.

4. As the Chief Justice correctly ruled, Bermudian law as to ownership of property under mortgage is still governed by English law as it stood before the wide-ranging reforms of the *Law of Property Act 1925*, namely that on execution of a mortgage deed a mortgagee acquires ownership from the mortgagor of the property and holds it subject to a proviso for redemption on satisfaction of the debt. So here the Company acquired *legal* title to Mrs

Hayward's leasehold interest by way of assignment on the execution of the mortgage Deed - on the face of it contrary to section 120 of the *Companies Act*, as it then stood.

5. However, the Chief Justice ruled, by reference to an authoritative resumé of the English law of property in *Megarry & Wade, Law of Property* (3<sup>rd</sup> ed.), at 882, on which the Company relied, that such acquisition of title, as a result of the inroads of equity on the common law since the 17<sup>th</sup> century, is a fiction. Or, as he put it, “a mortgagee does not in any meaningful sense acquire or “hold” mortgaged land. See also *Halsbury's Laws*, 4<sup>th</sup> ed. Reissue, Vol 2, para. 304. The passage from *Megarry & Wade* on which he relied and which he quoted is set out as an Appendix to this Judgment. The thrust of the passage was summarised by the authors in a further passage in the work under the heading *Equity of Redemption*, which the Chief Justice also set out partly in his judgment:

*“Although at law he [the mortgagor] has parted with his land and has only a limited right to recover it, in equity he is the owner of the land, though subject to the mortgage ...; the mortgagee on the other hand, is at law the owner but in equity a mere incumbrancer. ... The mortgagor's equity of redemption, in the wider sense of the term, is thus an interest in the land ... which includes his right to redeem it, but is much more than a mere right of redemption. It is an interest in the land which the mortgagor can convey, devise, settle, lease or mortgage, just like any other interests in land. ...”*

### **The Chief Justice's Judgment**

6. In the light of that incontrovertible analysis of English law prior to the 1925 reforms, the Chief Justice held, at paragraph 16 of his judgment:

*“... I think that that extract makes it plain that a mortgage is a legal fiction under which, when his rights are analysed, the mortgagee has no power to enter and enjoy the property during the life of the mortgage. In the event of default his primary remedy is sale, either under the express power contained in the deed or the statutory power of sale conferred by section 30 of the Conveyancing Act 1983. It is only if the mortgage was brought to an end by a decree of foreclosure that the possibility of the mortgagee achieving an unhampered freehold would arise. Even then, it would be a possibility, as the Court would normally order sale if the property was worth more than the debt. The Court can do that summarily, over the objection of the mortgagee: see section 36(2) of the Conveyancing Act. I do not think, therefore, that the taking of a mortgage by way of security for the loan of money is caught by the prohibition in section 120 of the Companies Act.”*

The Chief Justice also held that Mrs Hayward's debt would be unaffected by any defect in the security and, therefore and in any event, remained due, referring to the following words in *Halsbury's Laws*, Vol 32, at paragraph 302, "Every mortgage implies a debt and a personal obligation by the mortgagor to pay it." He added that a mortgagor's personal obligation to pay is severable from the security, as is apparent from his or her continuing liability for any balance of the debt remaining due where the proceeds of sale are insufficient.

### **Submissions on the Appeal**

7. Mr Mark Diel, for Mrs Hayward, challenged the Chief Justice's conclusions both as to the enforceability of the mortgage security and as to recoverability of the debt.

8. As to enforceability of the mortgage security, he reiterated Mrs Hayward's claim that it was unlawful on account of the provisions of clause 1: that the Mortgage Deed purportedly "assigns" the property to the Company for her to "hold" the property "unto" the Company for the then unexpired residue of the lease; and for it to be "re-assigned" to her on redemption. He also challenged the legality of clause 3(a) of the Deed, purportedly entitling the Company, without her consent, to sell the mortgaged property in the event of her failure to comply with all or any of the terms of the Deed.

9. Mr Diel added that those clauses concerned legal, not equitable, ownership, and were not, therefore caught by the general analysis of *Megarry & Wade* and the jurisprudence on which it is based; so they could not permit the Company to acquire or hold Mrs Hayward's land either on execution of the Deed or in the exercise of the wide power of foreclosure seemingly conferred on it under clause 3(a). However, he acknowledged that if recovery of the debt is severable from enforcement of the mortgage security, the point is academic. An unsecured creditor can achieve the same outcome by obtaining judgment on the debt, and then and if necessary, enforcing it under sections 30 and 36(2) of the *Conveyancing Act* 1983 against the debtor by a writ of *fiери facias* empowering the Provost Marshal to enforce payment by taking possession and sale of the mortgaged property.

10. As to recoverability of the mortgage debt, Mr Diel maintained that it was inextricably linked with the security provided by the Deed - the only contractual document on which the Company relied; therefore, if the security was unenforceable so also was the debt.

11. In the alternative, Mr Diel, in his written submission, suggested that the Company was prohibited from acquiring and holding Mrs Hayward's property because such property was not "*bona fide* "required for ... [its] purpose ...", as required by section 120(1) of the *Companies Act* (see paragraph 2 above), in that it is in the business of well-drilling not lending or banking. However, he did not develop it in his oral submissions to the Court.

12. Mr Diel rightly did not persevere with a further argument put to Chief Justice in which he relied on a number of authorities in many different contexts to submit that the passing of property may be unenforceable under an illegal contract. Such argument, he acknowledged, did not assist the main thrust of Mrs Hayward's case.

13. Mr Jai Pachai, for the Company, submitted, as he had done successfully to the Chief Justice, that, regardless of the wording of Clauses 1 and 3(a) of the Mortgage Deed as to assignment of the property to the Company and to Mrs Hayward holding it on the Company's behalf, the intervention of equity, as described by the Chief Justice, had rendered such assignment to and holding on behalf of the Company a "legal fiction". It followed, he submitted, that a mortgagee to whom land has been conveyed or assigned in Bermuda does not, in any meaningful sense, "hold" mortgaged land in contravention of section 120 of the *Companies Act*. He added that "legal fiction" or not, those Clauses were directed more at the conventional mechanics in Bermuda for enforcement of a mortgage security and recovery of the debt than as to who technically owned property during the currency of the mortgage. That is because, read together, they gave the Company the power of an owner to sell the land in the event of foreclosure.

## **Conclusions**

14. The issue before the Court is one of construction, both of section 120 of the *Companies Act* and of the mortgage. As both Mr Diel and Mr Pachai have submitted, the Court should look for the plain meaning of the relevant provisions of the Deed as a matter of substance rather than form and in their context. Plainly, section 120(1) of the *Companies Act* should be construed in the light of equitable jurisprudence so that it is not overridden in this context by the wording of mortgage contracts of whatever form. And the Deed, clauses 1 and 3(a) in particular, should be considered in the context of Bermudian law as it is applied, that is, tempered by that jurisprudence so that a mortgagee does not hold land in the sense of being its owner unless and until he is entitled to and does foreclose. In our view, Those provisions were clearly drawn with regard to the conventional mechanics in this

Territory for enforcement of a mortgage security and recovery of debt rather than whether in the meantime Mrs Hayward as mortgagor, or the Company as Mortgagee, held the property as legal owner before giving effect to equitable principles. And, as Mr Pachai pointed out, Mrs Hayward's case also ignores the realities. During the currency of the mortgage the company could not, without recourse to the court, exercise the main powers of an owner of land, namely take possession of, sell or rent the property.

15. We have mentioned Mr Diel's additional argument in his written submission on appeal - but not developed in his oral submissions - that the mortgage security and the debt were unenforceable because the granting of mortgages was not "*bona fide* required for the purpose of the Company", as required by section 120(1) of the *Companies Act*. However, this contention was not part of the overlapping issues put before Chief Justice, effectively as a preliminary issue. In any event, no evidence relevant to it was put before him as to the circumstances giving rise to this mortgage debt and security, for example, whether it was part of a wider commercial activity of the Company or a unique transaction arising out of or incidental to the Company's main business of well-drilling. In the result, there is no basis upon which the Court can rule on it even if properly under appeal.

16. For those reasons, already considered and well expressed by the Chief Justice, Mrs Hayward is not entitled to have set aside the Chief Justice's orders for recovery of her debt to the Company (subject to an outstanding issue as to its calculation) or for enforcement of the debt by orders of possession and for sale.

17. Accordingly, the appeal is dismissed.

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Auld, JA

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Zacca, P

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Ward, JA

## APPENDIX

### **“3. Seventeenth century onwards**

(a) *Form of mortgage.* By the beginning of the seventeenth century two changes had taken place. First, the form of a mortgage was usually a conveyance in fee simple with a covenant to reconvey the property if the money was paid on the fixed date. This was the modern form before 1926, and it simplified proof of title: whether the fee simple was vested in the mortgagor or not no longer depended merely upon whether the money had been paid within the fixed time, but depended upon whether a reconveyance had been executed by the mortgagee. Mortgages made by granting leases of the property were, however, equally possible, and were employed where there were special reasons for preferring them.

(b) *Intervention of equity.* Secondly, a far more important change had been made by the intervention of equity. By this time loans at interest were no longer illegal, but a maximum rate of interest was from time to time fixed by statute. This greatly altered the function of a mortgage; for instead of providing both security for capital and a source or profit in lieu of interest, the mortgage ought henceforth to be a security only, and should not yield profit to the mortgagee over and above the interest permitted by law. The Court of Chancery, at this time expanding its jurisdiction and concerned as always to prevent unconscionable dealing, now undertook to enforce this policy. No longer might the mortgagee reap any benefit from his fee simple. If he took possession, equity held him liable to account for a full rent to the mortgagor. Thus it was no longer an advantage to the mortgagee to occupy the land; and there emerged the modern type of mortgage where the mortgagor remains in possession and conveys the fee simple to the mortgagee merely by way of security.

(c) *Mortgages as securities.* Equally important, it was repugnant to every idea of equity that the mortgagor should lose his property merely because he was late in repaying the loan. At first equity intervened in cases of accident, mistake, special hardship and the like, but soon relief was given in all cases. Even if the date fixed for repayment had long passed, equity compelled the mortgagee to reconvey the property to the mortgagor on payment of the principal with interest and costs. The mortgagor was thus given an equitable right to redeem at a time when the agreement between the parties provided that the mortgagee was to be the absolute owner. No longer, therefore, did the mortgagee stand to gain by obtaining a property which might be worth much more than the debt. Equity compelled him to treat the property as no more than a security for the money actually owed to him.”