In The Supreme Court of Bermuda

CIVIL JURISDICTION

Civ. 2010 No. 315

IN THE MATTER OF a Mortgage Deed dated the 14th day of November 2003 made between VERA MARIE HAYWARD (as the Mortgagor of the First Part) and ROSEVILLE LIMITED (as the Lessor of the Second Part) and E & C WELL DRILLING SERVICES LTD. (as the Mortgagee of the Third Part)

BETWEEN:

E & C WELL DRILLING SERVICES LTD.

Plaintiff

- and -

VERA MARIE HAYWARD

Defendant

Date of Hearing: 10th December 2010
Date of Judgment: 13th January 2011

Jai Pachai for the plaintiff; and
Mark Diel for the defendant.

JUDGMENT

INTRODUCTION

1. This action is brought to enforce a mortgage. This ruling is given in respect of a legal point raised by the Defendant in opposition to that enforcement. Technically, I think that it has to be regarded as given on the adjourned hearing of the Originating Summons itself, because there was no order for the trial of a preliminary issue. The consequence of that is that it is the only point raised by the defendant in these proceedings, she having filed no evidence.

2. The point is a short but fundamental one. The Plaintiff is a local company within the meaning of that expression as defined in the Companies Act 1981[1] ('the Act'). Such entities are prohibited from holding land unless they have a land holding power in their Memorandum of Association and the specific consent of the relevant Minister. This company had no express land-holding power and no such ministerial consent. Mr. Diel, for the defendant, therefore argues that the mortgage was and is unlawful and unenforceable.

3. The relevant facts appear from the plaintiff's affidavit in support of the Originating Summons. By a mortgage deed of 14th November 2003 a residential unit at 5 Rose Gardens in Warwick, known as "Prosperity", was charged by the defendant, Ms. Hayward, in favour of the plaintiff to secure a debt $150,000. The loan was repayable on demand, subject to a proviso in schedule 8 that if Ms. Hayward paid interest and observed the covenants it would not be called for five years. The deed does not contain a provision as to when interest should be paid. There is the following in the fifth schedule:

"**Monthly Days**

The 14th day of each month commencing on the 14th day of December, 2003"

The obvious assumption is that that was the day intended for the payment of interest, but there is no operative provision in the body of the deed which refers to the fifth schedule, or expressly requires the regular payment of interest on that date.

4. The property itself is a leasehold[2], and the lessor therefore joined in the mortgage deed. The plaintiff says that Ms. Hayward is substantially in default, and by notice of 27th July 2010 it demanded repayment in full. The Originating Summons of 23rd September 2010 claims payment of the principal plus interest in the total sum of $222,850; an order for sale; delivery up of possession and costs.

[1] Section 2(1) of the Companies Act 1981 contains the following definition:
""local company" means any company incorporated in Bermuda other than an exempted company;".
[2] It is described in the seventh schedule to the mortgage, and not the tenth schedule as wrongly recited in the body of the deed.

5. I am told by Mr. Diel that the defendant is an elderly lady who borrowed the money to make an investment, but that the capital was subsequently lost or taken by her investment advisor, who is himself now impecunious. She has no money to repay the loan and is legally aided. It appears that the mortgaged property is her only home. Apart from that I know nothing about the making of the loan, or how this lender came to be involved, beyond the fact that the defendant only received in hand $113,079.19 from the proceeds of the loan. That is set out in the demand letter of 27th July 2010, which appears at exhibit ER 2 to the plaintiff's affidavit. At the hearing the plaintiff also produced a copy of the cheque paid to the defendant in that amount, although it was not formally in evidence. Of the balance $14,000 appears to have gone to a real estate firm, and it may be that the rest went on legal fees.

6. The way this comes before the Court requires some comment. The first hearing of the Originating Summons was fixed by notice for 4th November 2010. RSC Ord. 28, r. 4(2) provides that –

> "(2) Unless on the first hearing of an originating summons the Court disposes of the summons altogether or makes an order under rule 8, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof."

As it was, at the first hearing the parties presented a consent order for an expedited hearing with directions for a staggered exchange of submissions. There were no directions as to the filing of evidence, and the defendant has not sought to file any evidence. Nor was there a direction for the trial of a preliminary or other issue. In theory, at least, the hearing fixed pursuant to that consent order was the final hearing of the matter. In practice the parties appear to have treated it as a special appointment to deal with the discrete issue of enforceability.

THE LAW

7. Section 120 of the Act, as it stood at the time of the mortgage[3], provided:

> **"Acquisition of land by local companies**
> 120 (1) Without prejudice to paragraph 12 of the First Schedule[4], a local company may acquire and hold in its corporate name with the previous sanction in each case of the Minister, but not otherwise, any land in Bermuda, bona fide required for the purpose of the company, not exceeding in the whole the limit of its land holding powers specified in its memorandum.
> (2) Notwithstanding subsection (1) of this section and section 7(1)(g) but subject to subsection (3) of this section, where a local company is licensed under the Trust Companies Act 1991, the company shall have the power to acquire and hold in its corporate name any land in Bermuda provided it holds such land in its capacity as trustee of any trust or settlement established by written instrument.
> (3) Nothing in subsection (2) overrides any provision in Part VI of the Bermuda Immigration and Protection Act 1956 relating to the acquisition of land, or the holding of land, in trust."

8. No question of the Minister's sanction having been obtained arises in this case. It is certainly not asserted that it ever was obtained. In the absence of such sanction subsection (1) is in effect a complete ban on the holding of land by local companies.

9. Against that background, Mr. Diel argues that a mortgage is the holding of land, and he relies upon the nature of a mortgage in Bermuda, where the law still stands as it stood in England prior to the wholesale reforms brought about by the Law of Property Act 1925. Thus in Bermuda a mortgage is effected by an outright conveyance, subject to a

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[3] The section has been much amended since, in particular in 2001 to change the reference to the relevant Trust legislation in subsection (2); in 2006 to add subsection (4) permitting leaseholds for the purposes of the company's business; and in 2010 to add subsections (5) and (6) concerning hotels.

[4] Paragraph 12 of the First Schedule, as it stood in 2003, provided:

> "A company limited by shares, or other company having a share capital, may exercise all or any of the following powers subject to any provision of law or its memorandum —
> . . .
> 12 to take land in Bermuda by way of lease or letting agreement for a term not exceeding fifty years, being land bona fide required for the purposes of the business of the company and with the consent of the Minister granted in his discretion to take land in Bermuda by way of lease or letting agreement for a term not exceeding twenty-one years in order to provide accommodation or recreational facilities for its officers and employees and when no longer necessary for any of the above purposes to terminate or transfer the lease or letting agreement;"

The essence of that has now, by the 2006 amendment, been uplifted into the body of the Act as section 120(4), and the first schedule has been repealed.

proviso for redemption upon satisfaction of the debt. In accordance with that, the mortgage deed in this case recites that –

> "In pursuance of the said agreement hereinbefore secondly recited and in consideration of the said principal sum . . . paid by the Mortgagee to the Mortgagor . . . the Mortgagor as Beneficial Owner HEREBY ASSIGNS unto the Mortgagee ALL THAT the mortgaged lands . . . TO HOLD the mortgaged lands hereby assigned or demised or expressed so to be UNTO the Mortgagee for all the residue now unexpired of the term of years granted by the said Lease SUBJECT to the proviso for redemption hereinafter contained"

10. Mr. Pachai responds that that is a legal fiction, and that we should follow the English position, as set out in Halsbury's Laws, 4th ed. reissue, vol. 32, para. 304, which does not regard a mortgage by way of legal charge as vesting any estate in the mortgagee. Mr. Diel responds with some force that that is as a result of the statutory provisions of the 1925 Act, which do not apply in Bermuda.

11. Mr Pachai also points to paragraph 13 of the First Schedule to the Companies Act, which provides –

> "A company limited by shares, or other company having a share capital, may exercise all or any of the following powers subject to any provision of law or its memorandum —
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> . . .
>
> 13 except to the extent, if any, as may be otherwise expressly provided in its incorporating Act or memorandum and subject to this Act every company shall have power to invest the moneys of the Company by way of mortgage of real or personal property of every description in Bermuda or elsewhere and to sell, exchange, vary, or dispose of such mortgage as the company shall from time to time determine;"

12. However, I accept Mr. Diel's point that that does not advance the argument because the power thus conferred is "subject to this Act" and if the holding of land by way of mortgage is prohibited by section 120, then this power would not be available to this particular company. Nor, on a strict interpretation, does paragraph 13 defeat Mr. Diel's

point that there is no power to hold land in the company's memorandum of association[5], which in paragraph 4 simply has "N/A" against the power to hold land. In my view, in the absence of an express power to hold land, paragraph 13 does not imply any such power into the memorandum, for the following reason. The paragraphs of the First Schedule were, at the material time[6], implied into the powers of a company by operation of section 11(1) of the Act, which provided:

> **"Powers and objects of a company**
> 11 (1) Subject to any provision of the law a company limited by shares shall *without reference in its memorandum* have the powers set out in the First Schedule unless any of such powers are excluded by its memorandum." [My emphasis]

Thus, section 11(1) works by conferring the powers it contains "without reference in [the company's] memorandum". It does not, therefore, imply them into the memorandum: it simply confers them. It follows that the power conferred by paragraph 13 of the First Schedule to the Act was not a power "specified in [the company's] memorandum" for the purposes of the conditions contained in section 120.

13. On the other hand, there is nothing in the company's memorandum which expressly excludes the power to advance money on mortgage, and so, subject to the section 120 point, this company would have had power to do so. Moreover, paragraph 13 does demonstrate that the legislature saw nothing inherently objectionable in corporations holding mortgages.

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[5] The Company's documents were all put before me as an annexe to Mr. Diel's submissions rather than by affidavit, but no point is taken on that,

[6] The First Schedule was swept away in 2006, and section 11(1) replaced by a provision which is about as broad as it could be –

> "**Objects and powers of a company**
> 11 (1) Subject to any provision of law, including a provision in this or any other Act, and any provision in its memorandum —
> (a) the objects of a company are unrestricted; and
> (b) a company has the capacity, rights, powers and privileges of a natural person.".

CONCLUSIONS

14. I think that the short answer to the section 120 point is that a mortgagee does not in any meaningful sense "hold" the mortgaged land. This is explained in a helpful historical review from Megarry & Wade, Law of Property (3rd ed.), at p. 882, which Mr. Pachai put before me:

> **"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.
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> *(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.
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> *(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."

15. This is all summed up at page 885 of the same work:

> "Although at law [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 encumbrancer."

16. The learned authors are, of course, talking about the "old", pre-1925 form of mortgage – i.e. the type we still have in Bermuda. 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 only 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.

17. Were I wrong on that, I would nevertheless have held that the debt itself was unaffected by any defect in the security and was still due, and I would (subject to a point made in the next paragraph) have given judgment accordingly. Mr. Diel argues that the debt would be rendered irrecoverable by any illegality in the mortgage, but that is to confuse the debt and the security for its repayment. As Halsbury's Laws (*op. cit.*) states at para. 302 –

> "Every mortgage implies a debt and a personal obligation by the mortgagor to pay it."

The personal obligation to pay is severable from the security, and survives it. That is demonstrated when the security is discharged by sale, and the proceeds are insufficient. In such a case the mortgagor remains personally liable for the balance.

18. Before giving judgment for the claim for interest, however, I do need to hear further argument on why the contractual rate of 9% per annum is not itself unenforceable by reason of section 7 of the Interest and Credit Charges (Regulation) Act 1975, being in excess of the statutory rate.

19. In view of the way that this point came before me (see para. 6 above) I also think it right to give the defendant a further chance to be heard before giving final judgment in this matter. I will also hear the parties on costs. I will do all of those things when I deliver this judgment.

Dated this 13th day of January 2011

Richard Ground
Chief Justice