



In The Supreme Court of Bermuda
CIVIL JURISDICTION
2022: No. 36

BETWEEN:

JOHN ROWE

Applicant

-and-

(1) CAMERON HILL

(2) HSBC BANK BERMUDA LIMITED

Respondents

Before: **Hon. Chief Justice Hargun**

Appearances: **Ms. Ariana Caines, of Conyers Dill & Pearman Limited for the Applicant**
Mrs. Jennifer A. Haworth JP and Mr Dan Griffin of MJM Limited, for the 2nd Respondent
Mr. Cameron Hill, 1st Respondent in Person

Dates of Hearing: **17 August 2022**

Date of Judgment: **6 October 2022**

JUDGMENT

Lease agreement entered into by the “landlord” without the authority of the legal owner of the property or the mortgagee; whether the mortgagee can affirm the unauthorized lease and whether the mortgagee is entitled to the rents paid under the lease

HARGUN CJ

1. By Originating Summons dated 24 March 2022, Mr John Rowe (“**the Tenant**”) made an application to the Court seeking to determine, pursuant to RSC Order 17 whether the sum of \$47,728.62 held in the trust account by Conyers Dill & Pearman Limited (“**Conyers**”) (“**Rent**”) be distributed either to HSBC Bank of Bermuda Limited (“**the Bank**”) or to Mr Cameron Hill (“**Mr Hill**”).

Background

2. It appears from the First Affidavit of Lavonne Brown, Retail Credit Recovery Manager at the Bank, sworn on 31 May 2022, that the sum of \$47,728.62 represents the rent paid by the Tenant (“**Rental Payments**”) in respect of Unit 16C, 13 Grosvenor Court, Pembroke (“**the Property**”).
3. It appears that the Property was purchased in or around July 2010 by BCB Paragon Trust Limited (as trustee of the Zandra Trust) (“**the Trustee**”), a trust established in Bermuda (“**the Trust**”). It appears that Mr Hill and members of his family are the beneficiaries under the Trust. The Trust purchased the Property by securing a loan from the Bank in the amount of \$600,000 on terms set out in the facility letter dated 2 July 2010 (“**the Facility Letter**”). The loan from the Bank to the Trust is secured by a first legal mortgage on the Property under a Mortgage Deed of Leasehold Land and Premises dated 18 August 2010 (“**the Mortgage Deed**”). The loan from the Bank is further secured by a guarantee given by Mr Hill in favour of the Bank in the amount of \$600,000 under a written guarantee dated 9 July 2010 (“**the Guarantee**”).
4. After the purchase of the Property, the Trustee entered into a lease agreement with Mr Hill whereby Mr Hill was allowed to occupy the Property. However, by a written document

headed “A Leasing Agreement” dated 8 October 2018, Mr Hill purported to lease the Property to the Tenant for a period of three years commencing on 15 October 2018 (“**the Lease Agreement**”). That document is signed by Mr Hill under the legend “SIGNED by the LANDLORD, Signatory represents he or she is legally permitted to bind set property”, under Clause 4 (a) of the General Leasing Conditions attached to the Lease Agreement, under the heading “Ownership”, it is said that “The LANDLORD represents that he has the legal capacity to enter into this Leasing Agreement on behalf of the legal owners driving title to the Premises.” The “LANDLORD” in the Lease Agreement is described as “Cameron Hill”.

5. Under the Leasing Agreement, the tenant is to pay a monthly rent of \$4,250 for the first year and \$4,500 thereafter. The funds in the trust account of Conyers represent the rent paid by the Tenant under the Leasing Agreement.

Position of the parties

6. The main contention by Mr Hill is that he has entered into a lease with the Tenant and therefore he is entitled to the rent payable by the Tenant pursuant to the terms of the Lease Agreement. The Bank’s brief response is that Mr Hill had no authority to enter into any such lease with the Tenant or anyone else.
7. Mr Hill also makes a claim on behalf of Ms Heather Funk, who is (or was) his girlfriend and it is said by Mr Hill that, without having consulted the Bank, she is alleged to have paid for some improvements to the Property in advance of the Lease Agreement. The Bank’s response to that claim is that there is no proper evidence in support of that claim which the Court could accept.
8. Mrs Haworth for the Bank says that it is entitled to the Rental Payments as the authorities make it clear that if the Bank elects to accept the Lease Agreement it will be enforceable, and the Bank will be entitled to the Rental Payments and any future rent. The Bank relies upon the statement by Cross J in *Stroud Building Society v Delamont* [1960] 1 All ER 749:

“When a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, instead of treating the tenant as a trespasser, consent to treat him as his own tenant or he may act in such a way as precludes him from saying that he has not consented to take him as a tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy.”

9. On that basis, Mrs Haworth contends, it has taken the position of landlord and has become entitled to the rent. The Rental Payments are therefore in effect rent arrears due to the Bank. The Bank also points to section 3 of the Landlord and Tenant Act 1973 which provides: *“Any person entitled under any contract of tenancy to any rent in the arrear, made by action recover such rent from the tenant, whether or not the contract of tenancy is continuing.”*

10. Furthermore, Mrs Haworth argues, the only other party which may conceivably make a claim to the Rental Payments is the Trustee of the Trust and in this case the Trustee has elected not to make any such claim in respect of the Rental Payments in question. In the circumstances as the Bank, as a judgment creditor of the Trustee in the amount of approximately \$700,000 in respect of the loan advanced by the Bank to purchase the Property, is entitled to the Rental Payments.

Directions given by the Court

11. The Directions Order dated 2 June 2022, noted that the Bank had filed its evidence in response to the First Affidavit of the Tenant dated 14 February 2022 by way of the First

Affidavit of Lavonne Brown. The Court directed that Mr Hill shall file his evidence in response to the Bank's evidence within 21 days of the date of the Directions Order. In the event, Mr Hill elected not to file any evidence in relation to this interpleader application. In the circumstances, it is not possible for this Court to make any findings of fact contrary to the evidence filed by the Bank in this case.

Mr Hill's claim to the Rental Payments

12. Mr Hill contends that as he entered into the Lease Agreement with the Tenant dated 8 October 2018, he is entitled to the Rental Payments. Under the Lease Agreement, Mr Hill, as noted earlier, describes himself as the "Landlord" and the term of the lease is said to be for a period of three years from 15 October 2018. The monthly rent of \$4,250 for the first year to is to be deposited in Mr Hill's personal bank account at the Bank. Under the Lease Agreement, Mr Hill, as the landlord, is responsible for land tax, ground maintenance and pool maintenance relating to the Property. Again, as noted earlier, under the "General Leasing Conditions", Mr Hill represents that he has the legal capacity to enter into the Leasing Agreement on behalf of all legal owners deriving title to the Property.
13. As noted earlier, the Bank challenges that Mr Hill had any authority to enter into the Lease Agreement. Mr Hill has elected not to file any affidavit evidence which supports his representation in the Lease Agreement that he has the legal capacity or authority to enter into the Lease Agreement on behalf of the legal owners.
14. The only evidence which the Court has in relation to the issue of Mr Hill's authority to enter into the Lease Agreement is the letter from the Trustee, the legal owner of the Property, dated 24 January 2019. In that letter, addressed to the "OCCUPANT" of the Property, the Trustee states in clear and unequivocal terms:

*"BCB Paragon Trust Limited (the **Trustee**) is the trustee of the Trust. The Trustee is the lessor pursuant to a lease agreement dated 1 September 2010 (the **Lease**) made between the Trustee and Mr Cameron Hill (**Mr Hill**).*

On 9 October 2018, the Trustee delivered Mr Hill a termination letter dated 6 October 2018, providing Mr Hill with one month's prior written notice pursuant to Clause 4 (d) of the Lease that the Lease would be terminated effective 30 November 2018.

On 20 December 2019, Mr Hill was served with a Notice to Quit demanding that Mr Hill deliver up possession of the Premises and give vacant possession of the Premises on or before 31 January 2019.

It has come to the Trustee's attention that the Premises are currently being occupied by someone other than Mr Hill. You are therefore occupying the Premises without lawful authority. We therefore give you notice that vacant possession of the Premises is required.

If you fail to give vacant possession of the Premises on or before 31 January 2019 we will issue proceedings for possession."

15. In light of this letter, the Court is bound to conclude that Mr Hill had no authority from the legal owner of the Property to enter into the Lease Agreement with the Tenant. The Court so holds.
16. Before this Court and apparently for the first time, Mr Hill contended that the Lease Agreement is properly to be considered as a sub-lease. Mr Hill contends that he had authority to enter into the Lease Agreement (as a sub-lease) because he was a party to the lease between the Trustee and himself. Mr Hill submits that the Court can properly draw an inference that he had the authority to enter into the sub-lease.
17. There are a number of difficulties with Mr Hill's submission that he had the authority to enter into a sub-lease with the Tenant. First, when questioned by the Court as to the terms of the head lease between himself and the Trustee, Mr Hill advised that it would be a month-to-month statutory lease. There is no evidence which the Court can properly accept

in support of this assertion. Further, if Mr Hill had the benefit of a month-to-month statutory tenancy, it is difficult to see how he can properly sublet the Property for a fixed period of three years.

18. Furthermore, during the relevant period, Mr Hill's tenancy arrangements had been terminated and he was no longer the tenant of the Trustee. Given that, at the relevant time, he did not have the benefit of a lease from the Trustee, it is difficult to see how, conceptually, Mr Hill could grant a sub-lease to the Tenant.

19. As noted from the letter from the Trustee dated 24 January 2019, on 9 October 2018, the Trustee delivered to Mr Hill a termination letter dated 6 October 2018, providing Mr Hill with one month's prior written notice pursuant to Clause 4 (d) of the Lease that the Lease would be terminated effective 30 November 2018. Furthermore, on 20 December 2019, Mr Hill was served with a Notice to Quit demanding that Mr Hill deliver up possession of the Property and give vacant possession of the Property on or before 31 January 2019.

20. Accordingly, the factual position is that on 9 October 2018, Mr Hill knew that his head lease from the Trustee would be terminated with effect from 30 November 2018. In the circumstances, it is difficult to see how Mr Hill could legitimately seek to grant a lease to the Tenant for a period of three years commencing 15 October 2018. Before the commencement of the three-year lease, it would have been obvious to Mr Hill that he could not properly represent to the tenant that "*he has the legal capacity to enter into this Leasing Agreement on behalf of the legal owners*", as set out in Clause 4 (a) of the General Leasing Conditions. Mr Hill had no general authority from the trust to allow him to conclude the Lease Agreement on behalf of the Trust. He could not grant a sub-lease to the Tenant on the simple grounds that he had no relevant interest in the property which he could sublet: *nemo dat quod non habet*.

21. Additionally, Mr Hill was aware that there was a prohibition against subletting of the Property under the Mortgage Deed entered into between the Trustee and the Bank. Mr Hill was aware of the Mortgage Deed since he had signed the Guarantee dated 9 July 2010

whereby he personally guaranteed the Trustee's obligations, up to an amount of \$600,000. In this regard, it is to be noted that by the Facility Letter from the Bank addressed to the Trustee dated 2 July 2010, the Bank offered to lend to the Trustee \$600,000 and as security required (i) Legal Mortgage over the Property; and (ii) a guarantee from Mr Hill in the amount of \$600,000. The terms of the facility letter were accepted by Mr Hill when he signed that letter on 9 July 2010.

22. By Clause 2 (k) of the Mortgage Deed the Trustee, as the borrower, covenanted with the Bank: *“Not to assign, underlet or part with possession of the Property or of any part thereof, including the grant of any easement, tenancy or lease, without first having obtained the written consent of the Lender which may be withheld without reasons given.”* Mr Hill accepted during the hearing that any attempt by him to sublet the property would be in breach of Clause 2(k) of the Mortgage Deed. However, Mr Hill contends that the sublease creates binding obligations between him and the Tenant and he is entitled to the Rental Payments even though such an arrangement constitutes a clear breach of the covenant in the Mortgage Deed.
23. It is also to be noted that under the Lease Agreement, Mr Hill undertook to be responsible for the land tax, ground maintenance and pool maintenance relating to the Property. In an email to Mr Ben Adamson of Conyers dated 18 December 2019, Mr Hill states that he has fulfilled his obligations under the lease between himself and the Tenant and in the circumstances, it is appropriate that the Rental Payments should be made to him. However, it is the sworn evidence of Ms Brown of the Bank that Mr Hill failed to fulfil his obligations under the Leasing Agreement. It is the evidence of Ms Brown that in June 2020, the Bank had to make a payment in the amount of \$31,675 on account of the maintenance payments. Ms Brown also states that, as at 27 January 2021, despite the terms of the Leasing Agreement requiring Mr Hill to pay the land tax in relation to the Property, the land tax had not been paid for a period of three years.
24. In all the circumstances of this case, the Court is satisfied that Mr Hill had no authority to enter into the Lease Agreement with the Tenant. Specifically, he had no general authority

from the Trustee allowing them to enter into the Lease Agreement and there was no relevant lease in existence between himself and the Trustee so as to allow him to sublet the Property. Further, the entry into the Lease Agreement by Mr Hill was in breach of Clause 2 (k) of the Mortgage Deed. Mr Hill accepts that if the Court finds that he had no relevant authority to enter into the Leasing Agreement he could not maintain that the Rental Payments should be made to him. He accepted, absent any claim by the Bank, the rents would be payable to the Trustee. Accordingly, the Court concludes that Mr Hill is not entitled to the Rental Payments held by Conyers representing the rents paid by the Tenant under the Lease Agreement.

25. Finally, the Court should deal with the claim that part of the Rental Payments should be paid to Ms Heather Funk. It appears that in November 2020, Mr Hill wrote to MJM Limited, attorneys for the Bank, stating that the Rental Payments should be paid to Ms Funk on the basis that Ms Funk had paid for some improvements to the Property in advance of the purported lease.

26. This aspect of the matter can be dealt with briefly. As noted earlier, Mr Hill was given an opportunity to file affidavit evidence which properly supported the claims he was making. There is no proper evidence which the Court can accept in relation to this claim. Ms Funk herself has made no such claim or filed any evidence which substantiates this claim. In the circumstances, the Court does not accept that any part of the monies held by Conyers should be paid to Ms Funk on account of the claims which have been hinted upon by Mr Hill in correspondence.

Bank's claim to the Rental Payments

27. The basis of the Bank's claim to the Rental Payments, relying upon *Stroud Building Society v Delamont* [1960] 1 All ER 749, is set out at paragraph 8 above. In response, Mr Hill argues that *Stroud Building Society* is not an authority for a retrospective tenancy between the Tenant and the Bank. He says that the Bank may be entitled to receive rent from the Tenant going forward from the date when the Bank affirmed the Tenancy Agreement.

However, Mr Hill argues, the Bank is not entitled to rental payments which are either outstanding or paid to a third-party (such as Conyers) which relate to the period prior to the affirmation of the lease by the Bank.

28. Mr Hill also points the Court to the decision of Harman J in *Lever Finance Ltd v Trustee of property of Needleman* [1956] 2 ALL ER 378, a case cited in the judgment of Cross J in *Stroud Building Society*, in support of his argument that the Bank is only entitled to future Rental Payments after the Bank has affirmed the lease. Mr Hill relies on the following passage in the judgment of Harman J at 383 I:

*“I should also have been prepared to dismiss the summons on the other point, namely, that there was a recognition of the second defendant's tenancy which created a **new relationship of landlord and tenant between her and the mortgagees** which would be enough, the tenancy not having been determined, to answer the claim for possession, which alone is the subject-matter of the action.”*
(emphasis added)

29. However, it is to be noted that these cases were dealing with the issue whether the mortgagee has lost his right to treat the tenant as a trespasser. These cases are not dealing with the separate issue of the extent of the entitlement of the mortgagee to be paid the rent under an unauthorised lease. In this regard, it is to be noted that Cross J in *Stroud Building Society* states that the mortgagee can “confirm” the lease between the mortgagor and the tenant. Cross J held that “*The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if it chooses not to accept it, **but he can confirm while waving his right to avoid it.***” **(emphasis added)** If the lease has been affirmed by the mortgagee, as is clearly the case here, there is no reason in principle why the mortgagee should not be able to claim the entirety of the unpaid rent including the unpaid rent which is referable to a period prior to the affirmation. There is no legal or public policy justification for allowing a person who had no relevant authority to enter into the lease to retain rental payments for any period in preference to the mortgagee.

30. In any event, here it is common ground that if, as the Court has held, Mr Hill had no authority to enter into the Lease Agreement, then the rent is payable to the Trustee. In this case, the Trustee makes no claim to the Rental Payments held by Conyers and is content that the Rental Payments should be paid to the Bank as the mortgagee. This is not a surprising position for the Trustee to take given that the Trustee is a judgment debtor of the Bank to the extent of approximately \$700,000 due to its liability under the loan secured by the mortgage under the terms of the Mortgage Deed.

31. In all the circumstances, the Court is satisfied that the Bank is entitled to the Rental Payments held by Conyers in the amount of \$47,728.62 and the Court orders Conyers that this amount (together with any accrued interest) be paid to the Bank or within 14 days of this Judgment.

32. The Court will hear the parties in relation to the issue of costs.

Dated this 6th day of October 2022

NARINDER K HARGUN

CHIEF JUSTICE