



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 298

IN THE MATTER OF a Mortgage dated 8 August 2003 made between **BULL’S HEAD CAR CARE CENTRE LTD.** and **SHARTHUR ENTERPRISES LTD.** (as Mortgagors) of the one part and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)** (as Mortgagee) of the other part

AND IN THE MATTER OF a Second Equitable Charge dated 8 August 2003 made between **SHARON HELENE EVADNE RIVIERE, SHARTHUR ENTERPRISES LTD.** and **BULL’S HEAD CAR CARE CENTRE LTD.** (as Mortgagors) of the one part and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)** and **THE BANK OF N T BUTTERFIELD & SON LIMITED** (as Equitable Mortgagees) of the other part

AND IN THE MATTER OF a Further Equitable Charge dated 16 August 2004 made between **SHARON HELENE EVADNE RIVIERE,** and **BULL’S HEAD CAR CARE CENTRE LTD.** (as Mortgagors) of the one part and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)** and **THE BANK OF N T BUTTERFIELD & SON LIMITED** (as Equitable Mortgagees) of the other part

AND IN THE MATTER OF a Share Charge dated 8 August 2003 between **SHARON RIVIERE, ARTHURTON RIVIERE** and **DENISE RIVIERE** and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)**

AND IN THE MATTER OF a Promissory Note dated 16 August 2004 between **BULL’S HEAD CAR CARE CENTRE LTD.** of the one part and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)** of the other (the “Promissory Note”)

AND IN THE MATTER OF Joint and Several Guarantees dated 8 August 2003 and 11 August 2004 made between **ARTHURTON RIVIERE, SHARON RIVIERE** and **DENISE RIVIERE** of the one part and **HSBC BANK BERMUDA LIMITED (Formerly The Bank of Bermuda Limited)** of the other part (the “Guarantees”)

BETWEEN:

**HSBC BANK BERMUDA LIMITED
(Formerly the Bank of Bermuda Limited)**

Plaintiff

- and -

BULL’S HEAD CAR CARE CENTRE LTD.

First Defendant

- and -

SHARTHUR ENTERPRISES LTD.

Second Defendant

- and -

SHARON HELENE EVADNE RIVIERE

Third Defendant

-and-

ARTHURTON RIVIERE

Fourth Defendant

-and-

DENISE RIVIERE

Fifth Defendant

RULING

Date of Hearing: 2 November 2021

Date of Ruling: 26 January 2022

Appearances: John Hindess, Marshall Diel & Myers Limited, for Plaintiff

Jaymo Durham, Amicus Law Chambers Ltd., for Defendants

RULING of Mussenden J

Introduction

1. By a Summons dated 22 July 2021 the Plaintiff HSBC Bank Bermuda Limited (the “**Bank**”) seeks summary judgment pursuant to R.S.C. Order 14 against the Defendants for

possession of the Mortgaged Property and enforcement of the Mortgage by sale and costs. The Plaintiff relies on the facts as set out in the affidavits of:

- a. The First Affidavit of Tanaya Christopher sworn on 3 September 2020 and Exhibits thereto (“Mrs Christopher’s Affidavit”);
 - b. The Statement of Claim dated 8 March 2021;
 - c. the First Affidavit of Alison D Phillips sworn on 5 July 2021 and Exhibits thereto (“Mrs. Phillips’ Affidavit”); and,
 - d. The First Affidavit of Steven McGuinness sworn 14 October 2021 and Exhibits thereto (“Mr McGuinness’ Affidavit”)
2. The Defendants object to the application for summary judgment on the basis that the Plaintiff has acted unconscionably and committed unfair acts in respect of changing the interest rate for the relevant mortgage but not changing the repayment amount such that there was a balance outstanding at the end of the Mortgage. The Defendants rely on their Affidavit sworn on 29 September 2021.

Background

3. By way of a facility letter dated 21 July 2003, the First Defendant entered into an on-demand loan for the sum of \$582,000.00 and an on-demand overdraft facility in the amount of \$78,000.00 (the “**Bull’s Head Loan**”). Part of the security for the Bull’s Head Loan was a mortgage over the property known as 53 Serpentine Road in the City of Hamilton (the “**Mortgage**” and the “**Mortgaged Property**” respectively).
4. The Bull’s Head Loan was amended by facility letters on 10 August 2004 and 12 February 2013 (all the facility letters referred to as the “**Facility Letters**”). They contained various terms of condition of the Bull’s Head Loan as amended including that the payment term was 15 years from 2004 with a maturity date of 8 May 2019, to provide the Bank with business information and any information of any Events of Default which were also set out in detail.

5. The Sharthur Loan was a term loan facility entered into between the Plaintiff and the Second Defendant on 21 July 2003 for the sum of BD\$450,000 to assist the Second Defendant with the purchase of the Mortgaged Property. The Sharthur Loan has the exact same terms as set out in the preceding paragraph above but the maturity date was 8 January 2029 (the “**Sharthur Loan**” and the “Bull’s Head Loan” together the “**Loans**”).
6. The remedies upon default under the Bull’s Head Loan included the ability for the Bank to enforce the Mortgage and sell the Mortgaged Property. The Bank claims that the Defendants are in default of the terms of the Mortgage as there is an unpaid balance owing on the Mortgage at the end of the term of the Mortgage.

The Plaintiff’s Submissions

7. Mr. Hindess submitted that the Mortgage was a commercial mortgage, rather than a residential mortgage, with an on-demand term meaning the Bank could demand full payment at anytime. Further, he submitted that the Mortgage was a registered mortgage and thus the equitable principles did not apply. He also argued that because the Bank did not change the repayment amount did not mean that the Bank still could not demand full payment of the Mortgage. He submitted that there were monthly online bank statements that showed the monthly paydowns and the outstanding balances.
8. Mr. Hindess submitted that during the term of the Loans, the Defendants breached the conditions by failing to:
 - a. Provide financial statements;
 - b. Record an annual positive net income;
 - c. Provide monthly or quarterly operating reports;
 - d. Provide financial information within prescribed time periods or at all;
 - e. Notify the Bank of the occurrence of events of default; and
 - f. Notify the Bank of material adverse changes to the business.

9. Mr. Hindess submitted that the Defendants committed Events of Default as defined in the Loans by failing to:
 - a. Pay sums owed to the Bank on the due date;
 - b. Made incorrect or misleading representations to the Bank;
 - c. Pay debts as they fell due; and
 - d. Breaching the conditions of the Loans as set out in paragraph 8 above.

10. Mr. Hindess submitted that the Bull's Head Loan matured on 8 May 2019. Up to that point the Defendants were current with their payments. However, at the end of the term of the Mortgage, the full amount of \$214,419.62 became due and owing. To the date of the hearing, the Defendants had made no payments towards this amount. At this date, \$228,910.09 was still owed on the Sharthur Loan. Therefore, the Defendants were in default of payments under the Sharthur Loan as of January 2019. The Bank made demand under each of the Loans by letter to the Defendants dated 4 July 2019. Between July 2019 and December 2020, the Bank held numerous meetings with the Defendants and made significant and generous concessions in time and money to the Defendants to seek an amicable resolution. However, the Defendants were unable to show that they could afford the loan facilities and therefore, the Bank sought possession of the Mortgaged Property.

11. Mr. Hindess submitted that although the Bank is entitled to seek repayment against all of the securities including various guarantees and the charge against the residential property at 93 St. John's Road, the Bank is only seeking possession and power of sale over the commercial Mortgaged Property.

12. Mr. Hindess submitted that in respect of the pleadings:
 - a. Paragraphs 5 through 16 of the Statement of Claim set out the terms and conditions of the Loans as stated above.
 - b. Paragraphs 25 and 26 of the Statement of Claim state: "*The Defendants are in possession of the Mortgaged Property and Charged Property and are in default of the monthly payments of principal and interest for the Loan Facilities*" and "*the*

Defendants are also in default under the Loan Facilities as they have failed to provide financial statements to the Plaintiff.”

- c. Paragraph 5 of the Defence states that “*paragraphs 5 to 27 of the Statement of Claim are admitted.*”
13. Mr. Hindess submits that the Bank is entitled to summary judgment under R.S.C. Order 14 rule 1. Mr. Hindess also submitted that that this action is a writ action¹ which is not covered in the exceptions set out in Order 14, rules 1(2) and 1(3) and therefore, Order 14, rule 1 applies to this action. He also relied on Order 14, rules 2(1) and 3(1). He argued that the purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.
14. Mr. Hindess relied generally on the Supreme Court Practice 1999 and submitted that if the Defendants’ only suggested defence is a point of law that is misconceived or unsustainable, the Bank is entitled to summary judgment. However, if the Bank’s application is properly constituted, it is prima facie entitled to judgment unless the Defendants show cause to the contrary or the application is dismissed. Therefore, the onus shifts to the Defendants to show cause after the plaintiff has shown that the application under Order 14 has been properly made. He relied on the case of *The Performing Right Society Limited v Defontes Broadcasting Company Limited*² where Ward J stated “*When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff.*”
15. Mr. Hindess submitted that the Defendants may show cause against the Bank’s application under Order 14 by either a preliminary or technical objection or on the merits; in relation to the latter, the Defendants must show that there is either:
- a. a good defence to the claim on the merits; or
 - b. that a difficult point of law is involved; or

¹ By an Order dated 4 February 2021 it was ordered that the Originating Summons shall stand as the Writ of Summons and the action shall proceed as a writ action.

² 1988 Bda LR 108 at p 99

- c. a dispute as to the facts which ought to be tried; or
- d. any other circumstances showing reasonable grounds of a bona fide defence.

16. Mr. Hindess submitted that if a legal objection is raised, the facts and the point of law arising thereon must be clearly stated; indeed, in all cases, sufficient facts and particulars must be given to show that there is a triable issue and a bona fide defence. He again relied on the case of *The Performing Right Society Limited v Defontes Broadcasting Company Limited*.

17. Mr. Hindess submitted that once the mortgagor has made default in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, including an order for possession and power of sale. He relied on Halsbury's Laws of England/Mortgage (Volume 77 (2021))/9. Remedies of Mortgagees/(1) General Right to Pursue Remedies/(i) Right to Pursue Remedies Concurrently/516. Mortgagee's right to exercise remedies concurrently. He also relied on the Bank's facility letter dated 21 July 2003 for the Bull's Head Loan which set out a provision on "Waiver" at page 11 which stated "*No failure to exercise, nor any delay in exercising, on the part of the Bank, any right or remedy under this facility letter or any of the Finance Documents shall operate as a waiver of such right or remedy, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise of such right or remedy or the exercise of any other right or remedy.*" Thus, if the Bank did not change the monthly payment amount, then this did not constitute a waiver of its remedies.

18. Mr. Hindess submitted that as the Defendants have expressly admitted that they are in default under the Bull's Head Loan and the Mortgage that the Bank is therefore entitled to exercise the remedies thereunder, one of which is the sale of the Mortgaged Property. Further, the Bank having fully complied with the procedural rules of Order 14, the Defendants must show cause against the Plaintiff's application on the merits but that they have utterly failed to do so. He added that the Plaintiffs have shown further admissions of Events of Default in that they admitted that the business was closed and they have been attempting to sell the Mortgaged Property which shows there is no prejudice to the

Defendants in the relief of sale that the Bank seeks. He also submitted that the Defendants seek to argue that the amounts owing under the Loan Facilities have not been calculated correctly and that this means that the Bank is somehow obligated to forgive the amount owing under the Bull's Head Loan and should also restructure the Sharthur Loan, an argument put forth without legal basis. He again relied on *Performing Right Society Limited* where Ward J stated that the Defendants' desire to investigate alleged obscurities and hope that something will turn up is not a valid reason to deny judgment to the Bank in this regard.

The Defendants' Submissions

19. The Defendants submitted that summary judgment should not be granted for several reasons. First, Mr. Durham submitted that the terms of the facility letter dated 10 August 2004 which incorporated terms of the Mortgage provided for a variation of the mortgage repayment amounts as follows: (a) a repayment amount on the loan was to be by way of monthly installments of \$6900 with a variable interest rate; (b) the interest rate would change automatically, without notice, whenever the base rate changed; (c) further interest would be payable monthly in arrears by way of a standing order debit to the Defendants' mortgage account; and (d) the facility further provided that the Bank reserved the right to review the level of repayment, should interest rates rise above current rate. Mr. Durham submitted however that the clear consequences of the Bank's stated course of action in not applying the requisite amortization schedule, which would have resulted in the loan being retired during the course of the term, was that the Defendants were left with a significant lump sum payment that they could never have foreseen.

20. Mr. Durham highlighted that Mr. McGuinness has accepted that the Defendants were current in their payments during the term of the Mortgage but had failed to pay the balance at the end. However, he challenged the statement of Mr. McGuinness where he said "*The Defendants claim that they expected the "Bull's Head Loan" to be paid off at the Maturity Date. There is nothing in the Bull's Head Loan or any loan documentation to state or even imply that and there is no requirement for the Bank to restructure or refinance with the*

defendant at the end of the Maturity Date.” Mr. Durham countered that statement as being manifestly untrue because the documents including the Mortgage Deed of 8th August 2003 expressly set out that the repayment amounts were structured “to ensure” that the Loans would be fully retired at the end of the term of Mortgage. Mr. Durham qualified this point by explaining that whilst this provision did not relate to the Bull’s Head Loan, it is indicative of what was understood by the Defendants in relation to how the Plaintiff would administer the Loans in general.

21. Second, Mr. Durham argued that the Defendants had no knowledge of the increase of the interest rate, as the rate was subject to increase without notice, as provided in the Mortgage terms. Mr. Durham reiterated that the Bank controlled the amount to be deducted from the Defendants’ account and applied to the loan. Mr. Durham submitted that there can be no doubt that the terms of the Mortgage implied that the applied repayment schedule would result in the Mortgage being retired during the term and the Defendants’ understanding would have been based on this representation. It was now unconscionable for the Bank to assert there was now an outstanding balance to be paid.
22. Third, Mr. Durham submitted that the said representations to the Defendants were unfair and have given rise to the inducement of a breach of contract, in that they inferred that by meeting the monthly repayment amounts, as calculated and administered by the Bank, they would have discharged their obligation to the loan at the end of the specified term.
23. Mr. Durham argued that the provisions in the deed were ambiguous, in that they did not specify that, should the Bank choose not to increase the repayments, based on a variable interest rate, the Defendants would be liable to pay any accrued shortfall. Further, the terms of the deed as outlined above, were deceiving in that the Bank ought to have known that the Defendants being of senior age at the time of entering into the mortgage, would have had an inability to understand that the consequences of the Bank not applying the variable interest rate would result in a substantial balloon payment being owed on demand at the end of the term. He added that the Defendants no longer wanted to sell the Mortgaged Property but wanted to repurpose it into a restaurant business.

24. Fourth, Mr. Durham submitted that an Event of Default was in respect of an event during the course of the term of the Mortgage but not at the end of the term of the Mortgage. He referred to the Bank's facility letter dated 21 July 2003 for the Bull's Head Loan which set out the Events of Default at page 9. He submitted that the Facility Letter did not contain a refinancing option so once the monthly payments were completed successfully within the term of the Mortgage then the Bank could not make a further demand for any balance.
25. Fifth. Mr. Durham submitted that as the Bank was seeking the equitable remedy of foreclosure, the Defendants were relying on the equitable principle that the Bank must "come to the matter with clean hands", but clearly the Bank did not have "clean hands" in this matter.

Analysis of the Defendant's Applications

26. In my view, the Bank's application for summary judgment should not be granted for several reasons. First, in my view, there is a dispute about the construction of the contractual terms as set out in the Facility Letter dated 21 July 2003, namely the terms Events of Default, Remedies and Waiver as well as the Mortgage Terms as set out in the Mortgage Deed dated 8 August 2003, namely the Borrower's Monthly Payment and the Mortgagor's Monthly Payment. The terms of those two monthly payments' clauses include language that seem to indicate that the monthly payment amount would be an amount that would "ensure" full repayment of the Loans by the end of the term of the Loans. At this stage, I find the use of those terms to be of some significance that will require a full analysis. This is the main thrust of the Defendants' argument which will require a trial of the matter as to the proper construction of the agreements, further evidence and a thorough analysis. In my view, this line of defence amounts to a good defence to the claim on the merits and also demonstrates that there is a dispute as to the facts.
27. Second, the Bank seeks to rely on the Facility Letters and the Mortgage Deed. I note that these documents were prepared by the Bank and or its attorneys³. As indicated above, this

³ The Mortgage Deed indicates the name of the Bank's attorneys who prepared it

matter calls for the determination of the construction of the contractual terms. At this stage, I am reminded of the *contra proferentem* principle. It seems to me that the Defendants seek to avail themselves of this principle at trial as in their Defence they aver that the “Bull’s Head Loan” was void for lack of certainty. In the case of *Michael Kuczkiewicz v HG (Bermuda) Ltd.*⁴

27. *The Plaintiff also relies on the contra proferentem principle on the basis that the bye-laws belong to the Company. Chitty on Contracts³ Volume I General Principles Para 15-012:*

“This principle of construction embraces two differing, but closely related principles...First, since the party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, ...any doubt or ambiguity will be resolved against him and in favour of the other party...Secondly, as in the case of any other written document, ...in situations of ambiguity the words of the document are to be construed more strongly against the party who made the document and who now seeks to rely on them...”

28. *This principle was applied in Capital Partners Securities at para 51:*

“51. CPS in the alternative to its primary construction arguments invoked the contra proferentem rule in its Skeleton: “83...CPS was not legally qualified to and did not finalize or approve the Core Documents...CPS looked to an relied on Mr. Shimazaki (appointed by the Fund to act on its behalf as its legal expert) and Appleby as the legal experts on these matters...As such it is entirely proper for the wording in the 2007 Bye-Laws and the Core Documents to be construed against the Fund if this Court is of the view that there is any ambiguity.”

52. CPS’s right to rely on this rule was not as such disputed. It follows that to the extent that the Bye-Laws are ambiguous CPS is entitled to rely upon the contra proferentem rule.”

28. Third, I have viewed the Demand Letter dated 4 July 2019 sent by the Bank to the Defendants in which it made a final demand for the payment of \$470,794.26. I have also reviewed the Statement of Claim and the Defence. The Bank submits that the Defendants had admitted that they are in default of the monthly payments of principal and interest for the Loans and the Bank is thus entitled to summary judgment in this application. However, in my view, the Defence is squarely aimed at the issues of an incorrect calculation of the amortization rate, a lack of certainty in the Loan agreements and denials that they were in

⁴ [2018] SC (Bda) 26 Com (19 March 2018)

breach or default in relation to the Bull's Head Loan. In my view, this gives rise to a good defence on the merits and is a dispute on the facts which ought to be tried.

Conclusion

29. For the reasons above, I refuse the Plaintiff's application for summary judgment for possession of the Mortgaged Property and enforcement of the Mortgage by sale and costs.

30. In respect of directions for the way forward, the parties should file a Form 31TC and seek to agree directions to have the matter set down for trial on similar terms as the Order dated 4 February 2021.

31. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendants against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 26 January 2022

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**