



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No 281

BETWEEN:-

HSBC BANK BERMUDA LIMITED

Plaintiff

-and-

**JOHN PERCIVAL WHITE
(formerly JOHN PERCIVAL SIMMONS)**

Defendant

JUDGMENT

(In Court)

Mortgage possession action – Order 88 of the Rules of the Supreme Court 1985 – whether Court has power to set price for sale of mortgaged property – scope of Court’s jurisdiction to stay possession order

Date of hearing: 8th June 2017

Date of judgment: 16th June 2017

Ms Jennifer A Haworth, MJM Limited, for the Plaintiff

Mr Kim White, Cox Hallett Wilkinson Limited, for the Defendant

1. By an originating summons dated 9th March 2017 the Plaintiff Bank (“the Bank”) seeks an order for the principal and interest said to be due under

various mortgage loans which it made to the Defendant (“Mr White”) and orders for the possession and sale of the three properties belonging to him against which the loans were secured: (i) 37 Spice Hill Road, Warwick; (ii) 13 Marsh Folly Road, Pembroke; and (iii) 23 Marsh Folly Road, Pembroke (together, “the Properties”). The originating summons was preceded by a demand letter dated 1st December 2016.

2. The Bank claims that as of 7th March 2017 the amount due under the mortgages was \$1,699,994.14. This breaks down as follows: \$1,535,110.93 principal; \$130,681.21 interest; and \$34,202.00 enforcement costs. The Bank has indicated that it does not intend to seek payment of interest beyond that date.
3. It was a term of the mortgages that Mr White would repay the mortgage loans through a consolidated monthly payment, consisting of both principal and interest, in the sum of \$10,380.00. If Mr White failed to make these payments then under the mortgage deeds the Bank was entitled to sell the Properties without any consent of or notice to him. It was further entitled to enter into possession of the Property in exercise of its power of sale. Pursuant to RSC Order 88, if the Bank needs to enforce its right of possession, ie if Mr White does not voluntarily give up possession, then it must do so through an order of the Court.
4. Mr White fell into arrears. On 8th January 2014 the Bank issued a letter demanding repayment of the mortgage debt in full, which then stood at \$1,612,869.14. The letter noted that the mortgage facility was over 181 days in arrears for a total amount of \$53,585.43.
5. The parties entered into discussion. They had a meeting, following which the Bank sent Mr White an email dated 27th April 2015 (“the April 2015 email”). It contained a list of the Bank’s requirements. These included:

“1. An understanding from you of if you are 1. Providing the Bank power of sale and handing over the keys or 2. injecting the difference between the rental income received

and the monthly installment amount in order for the Bank to consider restructuring the loan.

2. Your approval to work with Decouto & Dunstan Real Estate (Chris Ward) and Century 21 realty (Forth-Anglies) to review the appraisal values assessed recently to three properties against the existing asking prices and adjust them accordingly. Copies of existing listing agreements, terms and periods.

.....

4. Agreed amount that will be transferred from your operating account at BNTB to HSBC to cover the monthly installment shortfall of the John P Simmons (White) loan until such time as a servicing account can be set up for the John P Simmons facility. Once a servicing account is opened for your John P Simmons loan, the Bank's expectation is that all rental income will be credited to it and you will redirect all your construction business income from BNTB to HSBC.

.....

6. Written consent from you that the Bank (as your lender) is approved to contact the Office of the Tax Commissioner, at any time, to request updates on the land tax position of

- a) 13 Marsh Folly Road, Pembroke*
- b) 37 Spice Hill Road, Warwick*
- c) 23 Marsh Valley [sic] Road, Pembroke*

7. Written consent from you that the Bank (as your lender) is approved to contact any insurer providing coverage for any of the below properties (at any given time) to request updates on policies and confirmation of coverage:

- a) 13 Marsh Folly Road, Pembroke*
- b) 37 Spice Hill Road, Warwick*
- c) 23 Marsh Valley [sic] Road, Pembroke”.*

6. By a letter dated 11th May 2015 (“the May 2015 letter”) Mr White responded as follows:

“I, John Simmons (White) hereby grant permission to HSBC power of sale of the foresaid properties. This is inclusive of excess and possession of keys to the foresaid dwellings from the property manager.

I hereby grant approval to HSBC to work with DeCouto & Dunstan Real Estate (Mr. Chris Ward) and Century 21 Realty (Mrs. Forth-Anglies) to review the appraisal values assessed recently to two properties against the market price at \$450,000 for 13 Marsh Folly Road, Pembroke and \$400,000 for 23 Marsh Folly Road, Pembroke net value. These properties are subject to be reviewed should not be sold after 1 year both parties. In addition to copies of listing agreements, terms and periods:

.....

- *Agreed amount that will be transferred from the operating account at BNTB to HSBC to cover monthly installment shortfall of the John P Simmons (White) loan until such time as a servicing account can be set up for the John P Simmons facility. This permission is granted for the purpose that all rental income will be credited to the loan. I give permission to HSBC to collect all from the above mentioned real estate agents which shall include rent for 37 Spice Hill, Warwick.*

.....

- *Written consent from HSBC is approved to contact the Office of the Tax Commissioner at any time to request updated on the land tax position of:*

- a) 13 Marsh Folly Road, Pembroke*
- b) 23 Marsh Valley [sic] Road, Pembroke*

- *Written consent from the HSBC is approved to contact any insurer providing coverage for any of the below properties at any given time to request updates on policies and confirmation of coverage:*

- a) 13 Marsh Folly Road, Pembroke*
- b) 23 Marsh Valley [sic] Road, Pembroke*

Should the mortgage become current I would like the bank to reconsider this agreement”.

7. 13 Marsh Folly Road is Mr White’s home. He used to rent out 23 Marsh Folly Road and 37 Spice Hill Road. However the Bank evicted the tenants from these Properties in order to carry out renovations prior to sale. I have not seen the notice to quit for 23 Marsh Folly Road, but the notice to quit for 37 Spice Hill Road was dated 1st November 2016. The Bank claims that it took possession of both Properties pursuant to permission granted by Mr White in the May 2015 letter. Mr White claims that he granted no such

permission and submits that the rent which he would have received had the tenants not been evicted should be deducted from the mortgage arrears. He puts his case in two ways. First, he says that under the May 2015 letter he only gave the Bank permission to take possession of the two Marsh Folly Road Properties and not 37 Spice Hill Road. Secondly, he says that under that letter the period in which the Bank was authorised to take possession of and sell those two Properties was limited to one year.

8. The April 2015 email and the May 2015 letter are not easy documents to construe, in part because of their terse and sometimes ungrammatical language. There is a debate to be had as to whether the May 2015 letter amounts to acceptance in part of an offer contained in the April 2015 email and/or amounts to a counteroffer; or alternatively whether it merely constitutes a written consent. On the offer/acceptance/counteroffer analysis the consideration given by the Bank would be its implied promise to forbear for the time being from issuing mortgage possession proceedings. For present purposes it is unnecessary to resolve this question but necessary to resolve another one, namely what it is that Mr White agreed to.
9. In considering this question, in my judgment the May 2015 letter falls to be construed, whether directly or by analogy, in accordance with the general principles for interpreting contracts. Thus in construing the letter the Court will seek to ascertain the intention to be implied from an objective reading of it and disregard any evidence of Mr White's subjective intention; and take into account both the text of the letter and the context in which it was written. The context includes both the 15 April 2015 email to which the May 2015 letter was a reply and the commercial context of negotiations to prevent the Bank from foreclosing on the mortgages. When construing the language of both the May 2015 letter and the April 2015 email the Court will have regard to the fact that they were written by lay persons not lawyers and that the drafting is consequently somewhat less precise than if it had been drafted by an attorney. Eg see Arnold v Britton [2015] 2 WLR 1593, UKSC, *per* Lord Neuberger at para 15 and Wood v Capita Insurance Services Ltd [2017] AC 1095, UKSC, *per* Lord Hodge at para 10.

10. In the May 2015 letter, Mr White agreed, amongst other things, to grant the Bank a power of possession and sale over “*the foresaid properties*”. That was clearly a reference to the Properties mentioned in the April 2015 email. But was it a reference to all three Properties, or only to the two Marsh Folly Road Properties? Paragraph 1 of the April 2015 email is silent on that point. But paragraphs 2, 6 and 7 of the email refer expressly to all three Properties. Reading paragraph 1 in the context of those paragraphs, it is in my judgment clear that the Bank sought a power of possession and sale over all three Properties: a construction of the email which would make sound commercial sense.
11. The May 2015 letter does not state in express terms what was meant by “*the foresaid properties*”. Had the letter been drafted by a lawyer, I should have been minded to interpret the phrase to refer to all three Properties mentioned in the April 2015 email. However the May 2015 letter was not drafted by a lawyer. Its responses to paragraphs 6 and 7 of the April 2015 email make clear that Mr White was not prepared to grant the Bank all the powers which it was seeking with respect to all three Properties but only with respect to the two Marsh Folly Road Properties. This would make no sense if he were prepared to grant the Bank a power of possession and sale over 37 Spice Hill Road. The concession that the Bank can collect the rent for 37 Spice Hill Road is an exception to the general position taken in the letter that Mr White is not prepared to grant the Bank relief in relation to that Property. Construing the May 2015 letter as a whole, I am satisfied that “*the foresaid properties*” is a reference to the two Marsh Folly Road Properties only.
12. It follows that the Bank had no authority to take possession of 37 Spice Hill Road and evict the tenants: in doing so it acted unlawfully. The fact that Mr White did not protest the eviction at the time does not in my judgment mean that he consented to it. Mr White is therefore entitled to offset against the mortgage the rent that he and therefore the Bank would have received had the tenants not been evicted. The rent thus credited runs from the date of eviction to the date of any possession order that I make.

13. The second limb of Mr White’s case – that he only gave the Bank permission to take possession of and sell the two Marsh Folly Road properties for one year – turns upon the construction of the somewhat cryptic phrase: “*These properties are subject to be reviewed should not be sold after 1 year both parties*” in the May 2015 letter. I do not accept Mr White’s submission that this means the power of possession and sale came to an end after one year. Rather, I prefer the Bank’s interpretation of the phrase as meaning that the sale price of the two Marsh Folly Road Properties was to be reviewed if they failed to fetch their appraisal values after one year. This interpretation is the one that best fits with the natural meaning of the words, particularly when construed in the context of the April 2015 email, and with the commercial context within which both the April 2015 email and the May 2015 letter were written.
14. I therefore accept that Mr White authorised the Bank to take possession of 23 Marsh Folly Road. Once in possession, the Bank was entitled to evict the tenants provided that it did so in accordance with the terms of the Rent Increases (Domestic Premises) Control Act 1978. It has not been suggested that the Bank did otherwise. Indeed it is common ground that one of the tenants was in arrears of rent. I do not accept Mr White’s contention that the May 2015 letter made the grant of possession subject to the condition that the Bank continued to let out the Property.
15. Mr White makes another point in relation to the mortgage arrears. It concerns the cost of the renovations which the Bank undertook in relation to 37 Spice Hill Road. There is no dispute that the Bank would be entitled to charge Mr White for the cost of renovations to the Property after it has lawfully taken possession. But Mr White submits that as the Bank has not yet lawfully taken possession of the Property it can only charge him for the cost of renovations carried out in accordance with the procedure laid down at paragraph 2 of the mortgage deed:

“The Bank HEREBY COVENANTS with the Lender as follows:

(f) To keep any buildings erected on the Property in good and substantial repair and condition, and in order to satisfy itself as to the Borrower's compliance with this provision the Lender may require the Property to be inspected at any reasonable time upon not less than 48 hours notice given to the Borrower by a surveyor appointed by the Lender who will be entitled to enter upon the Property. The Lender shall not be liable as a mortgagee in possession nor for the actions of the surveyor in so entering the Property. The surveyor will report to the lender and such report will be taken as conclusive evidence of the condition of any buildings upon the Property, AND IF the surveyor's report indicates that there are works to be done upon the Property, the Lender will serve notice upon the Borrower identifying and detailing those works and the Borrower shall immediately at his expense carry out such works to the satisfaction of the Lender's surveyor. In the event that the Borrower does not carry out such works the Lender may by its agents and servants enter upon the Property and carry out such works, without making the Lender liable as a mortgagee in possession, and the cost of such works shall be added to the balance of the Loan then outstanding upon which interest at the Default Rate will be charged until payment is made in full by the Borrower."

16. I disagree. If the Lender, not being in possession or at least lawful possession of the Property, carries out works to it pursuant to the surveyor's report after following the procedure in paragraph 2(g) then it will not be open to the Borrower to challenge the cost of or necessity for those works. The Borrower will have to pay the Lender the cost incurred by the Lender in carrying them out. If, however, the Lender carries out works to the Property without following that procedure then it will be open to the Borrower to mount such a challenge. The Borrower, pursuant to his covenant to keep the Property in good and substantial repair, will nonetheless be liable for the reasonable cost of any works which the Lender can establish were reasonably necessary for the purpose of the covenant. In the present case, I am not in a position to find whether the works carried out by the Bank were reasonably necessary or at a reasonable cost. I therefore postpone consideration of this question to a future hearing at which the Court will assess the amount owing under the mortgages.
17. The Bank put 37 Spice Hill on the market in March 2016. The listing price, based on a 2016 valuation by Bermuda Realty Company Limited ("Bermuda Realty"), was \$625,000. Various offers were made and rejected, including

one made on 4th May 2016 by a former tenant, Karla Parfitt, for \$550,000. The offer was rejected as it was below the listing price yet received within the first six months of the Property being listed. In April 2017 the Bank reduced the listing price to \$495,000. This was slightly below the average of two valuations obtained by the Bank in 2017: one from Rego Sotheby's International Realty of \$550,000 and one from Bermuda Realty of \$450,000. The Bank has received an offer to purchase the Property for \$495,000 which it wishes to accept.

18. Mr White objects that this sum is too low. He has obtained a valuation for the Property from the Property Group of \$595,000. The valuation date was 23rd April 2007. The valuation report summarises the marketing history of the Property, noting that it was first put on the market by the current owner about three years ago at \$850,000 but was withdrawn unsold. The report goes on to state:

“Whilst the property offers three apartments it would benefit from modernization, including new kitchens, bathrooms and windows, it has limited parking and garden space and there are apparently some unresolved electrical issues. We are not currently experiencing a great deal of interest for properties in need of work.

*NB We do believe that the fact that the property has been on the market for over three years has ‘tarnished’ its desirability and therefore its perceived value. **Our opinion of value has been based on the assumption that the property were to be offered for sale for the first time.***

.....

Market value as at the date of valuation, in its current condition and that the property were to be offered for sale for the first time, and that full vacant possession could be offered.

\$595,000. ...”

[Emphasis as in original.]

19. Thus the Property Group valuation does not purport to give the current market value of the Property. It is a hypothetical valuation based on the

premise that the Property is being marketed for the first time when in fact, as the report acknowledges, the Property was originally placed on the market about three years ago. It is hard to see why a valuation based on this premise was ever commissioned.

20. Be that as it may, Mr White says that the sale price for 37 Spice Hill should be \$550,000. He says that Ms Parfitt still wishes to purchase the Property at that price and that another former tenant, Cleopatra Mallory, also wishes to do so. When this matter was listed before me on 23rd May 2017 I adjourned the hearing to give the Bank an opportunity to explore these potential sales. It transpired that Ms Parfitt had only secured funding of \$470,000, which made the Bank understandably sceptical that she would have been able to pay \$550,000 had her May 2016 offer been accepted. The Bank did not try to contact Ms Mallory, not having been supplied with any contact details for her.
21. When exercising its power of sale, the Bank is under a duty to act fairly towards the mortgagor. See Lusher v King, Civil Appeal No 14 of 1997, CA, per Cons JA at 89. Thus the Bank must get a fair price. But, save in exceptional circumstances, the Court will not interfere in the sale. It is for the Bank to decide which offer to accept. If Mr White objects to the sale price, his remedy lies in an action for damages. Alternatively, and perhaps more cost effectively, the Court can deal with the point at the hearing to assess the amount owing under the mortgages. On the evidence before me, \$495,000 seems a fair price.
22. Although the Bank seeks an order for sale, this is not strictly necessary. As I have noted above, a right to sell arises under the mortgage deed. Paragraph 6(b) provides:

“If the Borrower fails to make any of the payments under the terms of this mortgage or the loan Agreement as and when the same became due, or fails to fully and properly comply with any of the covenants made herein or in the loan Agreement herein or if the Borrower is otherwise in default hereunder, then and in such case:

(i) It shall be lawful for the Lender to sell the Property without any consent of or notice to the Borrower.”

23. Thus in Four Maids Ltd v Dudley Marshall (Properties) Ltd [1957] 1 Ch 317 Ch D at 321 Harman J noted that where the mortgagor was in possession the mortgagee would often take out a summons for possession but seek no other relief:

“... where the mortgagee is in a position to exercise his power of sale, that is all the help he requires from the court”.

24. Mr White resists the sale of 13 Marsh Folly Road because it is his home and where his business is based. He says that he has paid the Bank on average \$4,000 per month towards the mortgage, and that this would support the mortgage of this property once the other two properties are sold.

25. I have every sympathy with Mr White. But, as his counsel recognised, these points are no answer to the Bank’s right of sale and claim for possession. Harman J summarised the position in stark terms in the Four Maids case at 320:

“The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there is an attornment clause, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.”

26. Counsel for the Bank referred me to authority suggesting that the Bank is entitled not only to possession of all three Properties but to immediate possession, specifically a passage from the judgment of Russell J in Birmingham Citizens Permanent Building Society v Caunt [1962] 1 Ch 883 Ch D at 912, which was approved by the Court of Appeal of England and Wales in Cheltenham and Gloucester v Krausz [1997] WLR 1558 EWCA at 1564 F – H:

“Accordingly, in my judgment, where (as here) the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring. When I say the sole exception, I do not, of course, intend to exclude adjournments which in the ordinary course of procedure may be desirable in circumstances such as temporary inability of a party to attend, and so forth.”

27. Notwithstanding this powerful authority, where a mortgage is secured against the mortgagor’s home, courts in Bermuda typically allow the mortgagor a grace period of up to three months in which to find alternative accommodation. This is an example of the common law adapting to the local needs and circumstances of Bermudian society. It is fair to say that, having very properly brought this authority to my attention, the Bank did not strenuously contest the point.
28. In the premises, I make an order for the possession and sale of all three Properties as requested. This is “belts and braces” as the Bank appears already to be in possession of 23 Marsh Folly Road and 37 Spice Hill Road and, as noted above, can sell all three Properties without any order of the Court. However in the case of 13 Marsh Folly Road, which is Mr White’s home, the possession order is suspended for three months. By suspending the order, I am not extending the common law but recognising that it has already been extended in Bermuda and applying it accordingly. It may be that during that grace period Mr White can come to an arrangement with the Bank which will allow him to retain the property. I hope so. I adjourn determination of the amount owing under the mortgages, which will likely be substantial, to a future hearing.
29. I am grateful to both counsel, Ms Haworth for the Bank and Mr Kim White for Mr White, for their assistance.

30. I shall hear the parties as to costs and further directions.

DATED this 16th day of June, 2017

Hellman J