



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 314

**In the matter of the property known as 40 Happy Valley Road, Pembroke
Parish, HM20**

And in the matter of Order 113 of the Rules of the Supreme Court 1985

BETWEEN:-

HSBC BANK BERMUDA LIMITED

Plaintiff

-v-

MARCUS WILLIAMS

Defendant

JUDGMENT

(In Chambers)

Date of hearing: 14th November 2014

Date of judgment: 14th November 2014

Mr Kevin Taylor, Marshall Diel and Myers Limited, for the Plaintiff
The Defendant in person

1. The Plaintiff (“HSBC”) is the mortgagee of the property known as 40 Happy Valley Road, Pembroke Parish, HM20 (“the Property”). The mortgage is dated 22nd February 2000 (“the Mortgage”). On 22nd August 2013 the Chief Justice ordered that the Mortgage be enforced by sale and that the mortgagor, who was living at the Property, deliver possession of the Property to HSBC. The Plaintiff issued a writ of possession, which the Provost Marshall executed on 19th March 2014. The mortgagor has since left the Property.
2. The Property consists of three apartments. One of them is occupied by the Defendant (“Mr Williams”). HSBC wrote to him on 13th May 2014 asking him to vacate the Property on or before 16th June 2014. Mr Williams declined to do so. He tells me, and I accept, that until receipt of that letter he had no idea that his landlord needed the permission of the Bank to lease the apartment to him.
3. By an originating summons dated 29th August 2014, HSBC therefore seeks an order “*confirming and granting*” the Plaintiff exclusive possession of the Property and requiring Mr Williams to vacate it, and remove all his personal belongings, within two weeks. The order is sought pursuant to Order 113 of the Rules of the Supreme Court 1985 (“RSC”).
4. Mr Williams resists the application. He states that he entered into a written “*non-paying lease agreement*” (“the Agreement”) with the mortgagor. Under the Agreement, he occupied one of the apartments rent free and in exchange he undertook to renovate all three apartments. He states that he has invested significant time and monies in the Property. According to Mr Williams, the Agreement is due to expire on 15th March 2015. He states that he has every intention of vacating the Property “*in due course*” and asks that, if ordered to leave, he be given until the end of January 2015 in which to do so.
5. Mr Williams states that the Agreement was for a term of three years and that he entered into it in or about March 2012. This was subsequent to the date of the mortgage. HSBC say that the Agreement was entered into without their knowledge or consent. This is material

because at paragraph 2(g) of the Mortgage deed the mortgagor covenanted with HSBC:

“Not without first obtaining the consent thereto in writing of the Mortgagee (which consent the Mortgagee may withhold without assigning any reason therefor) ... [to] lease agree to lease part with the possession of or grant any person a contractual right licence or interest to occupy the mortgaged land or any part thereof”.

6. I accept that the mortgagor entered into the Agreement with Mr Williams. Although he no longer has a copy of the Agreement, the mortgagor would not have allowed him to occupy the apartment without an arrangement of some sort. This raises the question of whether the Agreement gave rise to a lease or alternatively a licence. Although I shall answer that question, on the particular facts of this case the answer will make little practical difference to the outcome of the hearing.
7. A lease confers an interest in land as distinct from a personal permission to enter the land and use it for a specified purpose or purposes. It gives rise to a relationship of landlord and tenant. The test for a lease is whether the grantee was given a legal right of exclusive occupation for a specified period or periods, eg for a term or from year to year or for a life or lives. See the judgment of Windeyer J in the High Court of Australia in Radaich v Smith (1959) 101 CLR 209 at 222; cited with approval by Lord Templeman, giving the judgment of the House of Lords, in Street v Mountford [1985] 1 AC 809. Payment of rent by the tenant is commonly a feature of a lease but is not necessary to create one. See the judgment of the Court of Appeal of England and Wales, given by Fox LJ, in Ashburn v Anstalt [1989] 1 Ch 1 at 10 B – C.
8. A licence to occupy land is not generally binding on a purchaser. See Ashburn v Anstalt at 15 H. By parity of reasoning, it is not generally binding upon a mortgagee who takes possession of the mortgaged property. I say that it is not “*generally*” binding because there is authority that a licence will give rise to a constructive trust in favour of the licensee where the owner of the property has acted in such a

way that it would be inequitable to allow him to deny the licensee an interest in the property. See the speech of Lord Diplock in Gissing v Gissing [1971] AC 886 at 905. For present purposes, the relevant owner would be the mortgagee. See Ashburn v Anstalt at 26 C.

9. At common law, where the mortgage postdates the lease, the lease will be valid against the mortgagee. This is because the mortgagee cannot acquire greater rights than the mortgagor had. Where the mortgage predates the lease, however, the lease will not bind the mortgagee, who can evict the tenant as a trespasser. See Rogers v Humphreys (1835) 4 A&E 299, *per* Lord Denman at 313.
10. In Bermuda, tenancies are regulated by statute. Statutory regulation supersedes the common law. But where a statute states expressly that there is a particular circumstance to which it does not apply, then in that circumstance the common law will continue to apply.
11. Most domestic tenancies fall within the ambit of the Rent Increases (Domestic Premises) Control Act 1978 (“the 1978 Act”). Section 7 of the 1978 Act provides in material part that:

“(1) Save as is provided in section 8, no tenancy existing on 1 July 1978, or which may thereafter subsist, shall terminate during the continuance in force of this Act:

Provided that, subject to any contrary agreement between the landlord and the tenant, this section shall not apply to any tenancy of an apartment in a building a part of which is occupied by the owner where such a building does not comprise more than 3 living units and such tenancy commences after 30 June 1983; and for the purpose of this proviso "living unit" means a part of a building so constructed or divided as to be occupied as a complete dwelling area.

(2) Save as is provided in section 5, a tenancy shall not by virtue of this Act continue in existence after any change in the identity of the landlord or tenant which would terminate such tenancy in law; but for the purposes of this Act a tenancy shall be deemed to continue in existence notwithstanding any change in the rent payable.”
12. Section 8 of the 1978 Act provides various grounds on which a domestic tenancy may be terminated.

13. Part IV of the Landlord and Tenant Act 1974 (“the 1974 Act”) also deals with termination of contracts of tenancy. However section 7(2) of the 1974 Act provides that nothing in Part IV applies to a contract of tenancy which is subject to the 1978 Act.
14. I am satisfied that the Agreement created a tenancy. Indeed HSBC did not suggest otherwise. The criteria for a lease were satisfied in that Mr Williams had exclusive possession of the apartment and the lease was for a specified period, namely three years. It is immaterial that Mr Williams was not paying rent, although I accept that he carried out works to improve the condition of the apartment in which he is staying.
15. The tenancy was a domestic tenancy under the 1978 Act. Therefore the provisions of Part IV of the 1974 Act do not apply. However it was a tenancy commencing after 30 June 1983 of an apartment in a building which was part occupied by the owner and comprised not more than 3 living units. See section 7(1) of the 1978 Act. Moreover the change in identity of the landlord from the mortgagor to HSBC terminated the tenancy at common law as it was created after the date of the mortgage and contrary to its express provisions. See section 7(2) of the 1978 Act. Thus the restrictions on the termination of a domestic tenancy in sections 7 and 8 of the 1978 Act do not apply. Consequently the termination of the tenancy is governed by common law. As noted above, that means that it was terminated when HSBC repossessed the Property from the mortgagor.
16. Had the Agreement only given rise to a licence, then the licence, being purely contractual, would not have been binding upon HSBC. There are no circumstances which, even arguably, constitute HSBC as a constructive trustee in favour of Mr Williams. In this regard I note that HSBC was at all material times unaware of the renovation work said to have been carried out by Mr Williams on the Property. Moreover, HSBC has exhibited a Structural Survey Report dated 23rd May 2014 prepared by Mason & Associates Ltd, a local engineering and consulting company, which identifies a number of items in need

of attention and repair, and concludes that the Property is in “*below-market condition*”. Assuming that there is no tenancy, there is no evidence before me from which I can properly conclude that the mortgagor intended to confer any other interest in the Property on Mr Williams. Even if there were such an interest, it would rank subordinate to the rights of HSBC as mortgagee.

17. I therefore confirm that the order for possession of the Property made by the Court on 22nd August 2013 is binding upon Mr Williams and I order that he vacate the Property within 28 days. In setting that period, I take into account that, albeit through no fault of his, Mr Williams occupies the Property as a trespasser; that he was served with a notice to quit on or about 13th May 2014; and that due to damage caused by the recent Hurricane Gonzalo there is an urgent need to repair the roof of the Property. HSBC has been advised that for this purpose the Property needs to be vacant, although I am not satisfied that no repairs can be carried out while it is partially occupied. During that 28 days Mr Williams must give HSBC, its insurers, and any workmen instructed by them, reasonable access to the apartment which he occupies in order to assess damage and effect repairs.

18. Although Mr Williams has my sympathy, HSBC was the successful party. There is no good reason for departing from the general rule that costs follow the event. I therefore order that Mr Williams must pay HSBC’s costs of and incidental to this application, to be taxed if not agreed.

Dated this 14th day of November, 2014 _____

Hellman J