

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 2013/0328

BETWEEN:

FIRST BANK PUERTO RICO

Claimant

and

THE SCOTSMAN LIMITED
VIOLA LLOYD
BEVERLY DIAN TODMAN

Defendants

Appearances:

Mrs. Hazel-Ann Hannaway-Boreland for the Claimant

Mr. Glenroy Forbes and Ms. Tamara Hodge for the Defendants

2014: July 16th

2014: October 28th

JUDGMENT

- [1] **BYER J.:** In 2000 the First named Defendant purchased the unexpired term of a fifty year lease dated the 29th May 1980 from the Second named Defendant.
- [2] The lease was in relation to a portion of a parcel of land registered as Parcel 93/1 Block 2638B West Central Registration Section ("the Property") measuring twenty one thousand two hundred and ninety seven square feet (21,297 sq.ft).
- [3] In 2000 at the time that the First Defendant acquired the leasehold interest in the Property, he also purchased a building that had been constructed on the land from

the previous Lessee Little Apple Bay Company for the sum of \$389,500.00 which sum he originally borrowed from Barclays Bank PLC.

- [4] In 2006, without any reason given as to why, the First Defendant refinanced his outstanding liability to Barclays Bank PLC with the Claimant Bank in the sum of \$260,000.00 and executed a charge as Debenture Instrument #425/2006 and a charge was placed on the leasehold interest of the First Defendant in the said Property which was registered as 2725/2006 in the Land Registry and dated 4th October 2006 ("the charge") in favour of the Claimant.
- [5] During the currency of the lease and the charge in favour of the Claimant, the freehold interest was conveyed to the Third Defendant herein on 2nd June 2008, which led to the inevitable result of her becoming proprietor subject to the lease in favour of the First Defendant.
- [6] From the evidence that was led before the Court at trial of the matter, it was apparent that the First Defendant who never appeared in the matter was consistently late or entirely failed to pay the rent due to the Third Defendant prior to her becoming registered proprietor as lawful attorney for the Second named Defendant and then in her own right subsequent to 2008.
- [7] As a result, the Third Defendant relying on the terms of the lease on 8th March 2012, gave the First named Defendant notice to quit and deliver up the leasehold interest in the property with an expiration date of 14th September 2012.
- [8] Subsequent to the service of the notice to quit and before its expiration, the First Defendant also fell into arrears under his loan agreement with the Claimant.
- [9] By letter dated 13th April 2012 the Claimant wrote to the First Defendant seeking payment of the outstanding sums, all of which was at this time unknown to the Third Defendant.

- [10] The First Defendant failed to make any payments to the Claimant or the Third Defendant and at some time between May and June 2012, the First Defendant was no longer operational and its Managing Director Mr. Alan Anderson had absconded from the Territory.
- [11] Subsequent to the notice to quit having expired, the Third Defendant entered into possession of the Property and effected termination of the leasehold interest of the First Defendant and proceeded to undertake repairs of the said building on the leased premises.
- [12] Some two weeks subsequent to the re-entry effected by the Third Defendant, on the 25th September 2012, the Claimant's representative attended at the property upon the Claimant utilizing its receivership powers under its charge and met the Third Defendant in possession of the same effecting repairs.
- [13] Upon the Claimant's realization that the Third Defendant had entered the premises and was relying on her rights under the lease agreement for forfeiture the Claimant made overtures to the Third Defendant during the course of the latter part of 2012 and the first half of 2013 in an apparent attempt to settle the matter.
- [14] Specifically between March 2013 and the filing of the claim some six months later in November 2013, the Claimant sought to cure the arrears to avoid forfeiture but the said plan was not accepted by the Third Defendant who up to the trial date remained in possession of the said Property.
- [15] The Claimant therefore sought the intervention of the Court to forestall the complete forfeiture of the lease and filed their claim by Fixed Date Claim Form on 14th November 2013.

[16] The First named Defendant was never served with the process and the Second Defendant who had no interest in the property at time of filing never participated in the proceedings and subsequently died.

[17] The Claim of the Claimant was therefore as follows:

- (i) An order pursuant to the Registered Land Ordinance, Cap 229 s. 57 against the Second and Third Defendant for relief from forfeiture;
- (ii) An order pursuant to the CPR Part 66(1)(d) against all Defendants to deliver possession of the *parcel 93/1 Block 2638B West Central Registration Section (Property)* to the Claimant for the execution of the charge registered as *Instrument Number 2725/2006 (Charge)*;
- (iii) An order for the Claimant to execute such charges, guarantees and other encumbrances entered into between the parties by the sale of the Property pursuant to CPR Part 66(1)(g);
- (iv) Judgment summarily pursuant to CPR Part 66:3;
- (v) Such further or other order as the Court deems fit; and
- (vi) Costs

[18] The trial of the matter between the Claimant and Third Defendant proceeded in July 2014 and judgment was reserved.

The Claimant's Submissions

[19] The Claimant couched their submissions to this court around 3 main issues:

- (i) Does section 62 of the Registered Land Ordinance ("the RLO") have the effect of barring the Claimant from Section 57 relief from forfeiture, in view of the wording of Section 57? In any event, is there evidence that the Section 62 process has been undertaken by the Third Defendant for termination of interests under the lease?

- (ii) Was the Lessor's consent a pre-requisite of the perfecting of the Charge, or otherwise put can the Charge be invalidated by the absence of such consent?
- (iii) Did the Third Defendant have prior knowledge of the Claimant's interest? If so, what are the implications of the Third Defendant's conduct and position in this matter in the exercise of the court's powers in relief from forfeiture?

[20] The Claimant argued that despite there not being any requirement by the Third Defendant under the law as Lessor to give them as mortgagee notice of the intention to forfeit the lease or even having forfeited the lease, they were still entitled to apply for relief from forfeiture under Section 57 of the Registered Land Ordinance ("Section 57").

[21] Section 57 as contended by the Claimant allows for parties to seek the Court's intervention from forfeiture, either where it is contemplated or where it is in fact completed.

[22] The Claimants therefore argued whether or not the Third Defendant had completed the acts required for forfeiture or were contemplating them; The Court pursuant to the legislation in the Territory still had the ability to grant relief.

[23] Having that right to apply for relief, the Claimant then submitted that in order to be entitled to that relief, the Court must be satisfied that it is just and equitable to do so.

[24] The Claimant argued that neither the Third Defendant nor anyone, through whom she was claiming, was required to give consent to the creation of the charge into which the First Defendant had entered with the Claimant.

[25] In fact it was submitted by the Claimant that that requirement for consent which was normally part and parcel of any lease agreement was specifically excluded

from the terms of the lease agreement under which the Third Defendant was entitled.

- [26] The Claimant therefore submitted that the First Defendant not having obtained consent to charge his leasehold interest was of no moment due to the express exclusion of that requirement. All that was required by the terms of the lease was that the First Defendant had to give notice to his Lessor subsequent to the creation of the lease that the charge had been created. The Claimant submitted that as there was no definitive evidence as to whether this event actually occurred, it was clear to them that the charge must remain valid.
- [27] Having thus established that the Charge was valid, that the Claimant was entitled to *seek relief*, the last issue for the Claimant was whether the Claimant would be *entitled* to the relief as sought.
- [28] The Claimant therefore submitted that the Court had to be guided by equitable considerations in viewing the case at bar. They therefore submitted that even though no consent was obtained it was of no moment as the Third Defendant knew of the interest granted to the Claimant both by constructive notice and by formal disclosure in previous civil proceedings brought by the First Defendant.
- [29] The Claimant argued that the charge was registered as required by Law in the Land Register since 2006. They therefore contended, that even if at the time of registration in 2006 the Third Defendant may not have had notice, she must have at the very latest, had had such notice when the transfer to her of the entire parcel in 2008 was affected.
- [30] The Claimant further submitted and relied upon authorities, proffered that in the instance where the person who purports to enforce forfeiture not only knows of the interest of another but also could be adequately compensated in damages for any

inconvenience or other trampling of their rights, then, the Court is entitled to exercise its discretion as being a proper case to grant relief.

- [31] The Claimant submitted that there was no intention on their part to obtain any advantage greater than what would have obtained by the First Defendant as Lessee but that they merely wanted the opportunity to make things right with the Third Defendant and be entitled to recoup as much as they can under the defaulted obligation.

The Third Defendant's Submissions

- [32] The issues for the Third Defendant were framed differently from the Claimant in many regards and were as follows:
- (i) Whether or not the Lease was forfeited by the Scotsman and the effect of that forfeiture; and/or alternatively;
 - (ii) Whether Ms. Todman was at liberty to take vacant possession of the Property after the Lease was forfeited by the Scotsman; or alternatively, after the principal of the Scotsman had absconded the Territory;
 - (iii) Whether Ms. Todman had notice of the Bank's interest and, if so, whether the effect of such notice has any effect on the forfeiture of the Lease and repossession of the Property by Ms. Todman; and
 - (iv) Whether the Bank's interest in the Property ceased to exist when the Lease was forfeited and/or terminated.
- [33] The Third Defendant's first submission was that without any further act on the part of the Third Defendant, that once there was the issuance of the notice to quit the First Defendant delivered vacant possession to her in September 2012.

- [34] Upon receiving such vacant possession the Third Defendant contended she was entitled to exercise her rights of forfeiture pursuant to Section 55 of the RLO. The Third Defendant submitted that once she invoked the powers provided for under Section 55(4) of the RLO in particular seeking to forfeit the lease, "**every... interest appearing in the register relating to that lease**" was terminated.
- [35] The Third Defendant submitted that she being so entitled to exercise her right of forfeiture did so by following the procedure set in Section 56 of the RLO and her re-entry which took place in September 2012 completed such action of forfeiture.
- [36] Having so undertaken re-entry the Third Defendant contended she had no notice of the Claimant's interest in the property. She was therefore able to proceed to effect forfeiture and ensure that the lease was brought to an end. There was no requirement to give notice to anyone save and except the lessor to bring the lease to an end and having not given the Claimant notice of her intention did not in any way affect the efficacy or legitimacy of her act.
- [37] Thus having pursued her right of forfeiture the Third Defendant contends that the interest of the Claimant in the property was now at an end.
- [38] It was submitted on behalf of the Third Defendant that the Claimant having failed to ensure that their mortgagor was adhering to the terms of the lease meant that they naturally ran the risk of having their security being jeopardized with the result of now not being able to recover their debt.
- [39] The Third Defendant therefore submitted that it was unfortunate that the Claimant has found itself in the position where they now stand to be disadvantaged but the Third Defendant, was entitled to enforce her rights and there was no behaviour on her part which could properly result in her being prevented from enforcing her rights.

Court's Consideration and Analysis

[40] In looking at this matter, the issue for this Court is quite simple – ***Whether the Claimant claiming an interest in the property as mortgagee is entitled to relief from forfeiture as provided for by the RLO?***

[41] Section 57 of the RLO gives this Court the jurisdiction to entertain this claim on the part of the Claimant.

[42] Section 57 (2) in particular speaks to any person other than a lessee who has the right to seek relief.

[43] Section 57 (2) in its entirety states as follows:

"The court on application by any person claiming as sub-lessee or chargee any interest in the property or part of the property comprised in the lease forfeited or sought to be forfeited, may make an order vesting the property or such part in such sub-lessee or chargee for the whole period of the lease or any loss period, upon such conditions as the court in the circumstances of the case thinks fit. (my emphasis) "

[44] It is therefore clear to this Court that once a party who is entitled to forfeiture invokes that right, any person affected by the operation of that intention to so forfeit can apply to divert the dire results that may ensue. For as Section 55 (4) of the RLO states:

"The forfeiture of a lease shall terminate every sublease and every other interest appearing in the register relating to that lease."

[45] It is therefore clear that this right must be weighed in each and every case with all the circumstances that present themselves, as against the resulting end.

[46] Therefore it is incumbent upon the Court to undertake the exercise mindful of the need to ensure that there is an adequate balancing act.

- [47] In order for the Court to so determine it may be helpful for me to address my mind to the nature of the evidence that was led before this Court at trial.

The Evidence

- [48] There were only three witnesses in this matter. There were two for the Claimant who were officers of the Bank who gave evidence of the establishment of the Claimant's interest by way of the charge entered into by the First Defendant – Mr. Harold Jones and Mr. Paul Carty. They led the evidence of what transpired up to the discovery of the re-entry by the Third Defendant and the negotiation that they reported was entered into with the Third Defendant in an attempt to settle matters and recoup their losses.
- [49] The third witness was the Third Defendant herself. Her evidence centered around the history between herself as lawful attorney for her aunt and then as sole proprietor of the Property with the First Defendant when he was in occupation. She also spoke to her lack of knowledge of the interest of the Claimant and the actions she took subsequent to the notice to quit including the expending of her life savings on repairs of the building which had been occupied by the First Defendant previous to the termination of the lease.
- [50] Upon an assessment of this evidence in general, I found by and large the Third Defendant to be a witness of truth. However, I am hard pressed to believe her on a balance of probabilities that she had no notice of the Claimant's interest before September 2012 when she met the Claimant's witness Paul Carty on the property conducting an inspection.
- [51] I do believe she had knowledge of the Claimant's interest but I also find that this does not assist the Claimant to any great extent.

- [52] With regard to the Claimant's witnesses, they essentially related factual occurrences and I make no finding as to their participation and responses to questions on cross examination however suffice it to say, despite their attempt to try and convince this Court that they had done all they could to obviate the need for this trial or even to ensure that there was compliance by their mortgagor, this Court was anything but convinced.
- [53] In fact Mr. Harold Jones the Commercial Loans Manager of the Claimant, admitted in cross examination that the breach of the lease by the First Defendant in 2012 which led to the act of forfeiture, was not the first time that he was aware that the First Defendant had done so.
- [54] This alone is telling in the Court's mind that this Claimant's position that the Third Defendant is not entitled to rely on her right of forfeiture for breach of the lease agreement is untenable.
- [55] It cannot be, for this Court, that the Claimant can come to it and say, we may have failed in what may not have been our strict duty but certainly our responsibility to ensure that this mortgagor, knowing his history of default remained within his covenants; however we must be allowed to recoup our losses and seek to refrain that person who has the legal right to bring the lease to an end from so enforcing it.

Relief from Forfeiture

- [56] It is widely accepted and without dispute that relief from forfeiture statutorily or by common law remains a discretionary equitable determination on the part of the Court.

- [57] In so making that decision the court must consider "***the proceedings, and the conduct of the parties and the circumstances of the case***"¹
- [58] Thus in the case at bar, the Claimant herein became an interested party by the execution of a charge in its favor by the First Defendant of his interest in the land.
- [59] It is therefore pellucid that the Claimant cannot claim or be entitled to anymore or any less than the First Defendant as lessee. The Claimant must step into the shoes of the First Defendant, holes, sole-less and all.
- [60] They must take both the benefits and the burdens of the person through whom they are claiming. Indeed I do not get from either party that it was an issue ***whether*** the Claimant is entitled to make the claim but rather whether they are entitled to ***succeed*** on the claim.
- [61] So therefore in order for the determination to be made the conduct of the party through whom the Claimant is claiming must be examined.
- [62] From the evidence before the Court it is clear that the First Defendant was habitually in breach of the covenant to pay his rent –"in the days and in the manner" required from as far back as 2000 when the First Defendant took over the unexpired portion of the lease from the original lessee Little Apple Bay Company Limited.
- [63] This evidence was not refuted by the Claimant and in fact Mr. Jones in his cross examination admitted that the Claimant was aware that the First Defendant had breached his lease at least one time previous to the 2012 breach.

¹ Per Michel J in Attorney General v Ordinance Land Co. Ltd ANUHCv2007/0648 at para. 34

- [64] The evidence of the Third Defendant was that this failure was a continuous event that she battled with, resulting in legal action being taken as far back as 2008 including the issuance of a notice to quit and letters of demand.
- [65] None of this conduct has been disputed by the Claimant and indeed they indicated that they were not in a position to speak of a habitual pattern as they were only ever concerned "***with ... making sure that the property and the contents were always maintained and that the actual payments were made to the bank.***"²
- [66] It is also quite clear that for over a period of 12 years the Third Defendant forbore with the First Defendant and by 2012 had had enough. A Notice to quit was issued and she, from both her evidence and the grudging admission by the Claimant, took possession of the property.
- [67] On the evidence it was therefore apparent that the person though whom the Claimant seeks this order did not fulfill his required obligations of his side of the bargain.
- [68] It cannot be that a discretionary remedy must be used to force a party to the bargain to remain in the bargain which has obviously over a period of time, fallen apart.
- [69] It is clear that in exercising that discretion there are no rigid rules guiding its usage³. However generally it is recognized that each case must stand in its own circumstances.
- [70] The Court has assessed the factual matrix that was presented whereby the Third Defendant consistently was bombarded by the default of the First Defendant which

² Official transcript of proceedings page 11.

³ Per Earl Loreburn LC in Hyman v Rose [1912] AC 623 at 631

must be weighed against the interest of the Claimant who assumed the risk to mortgage a mere leasehold interest.

[71] The Court is not satisfied that the fact (which the Court accepts) that the Third Defendant knew of the charge before the act of re-entry is sufficient to tip the scales in favour of the Claimant.

[72] The Court is satisfied that the knowledge of the Third Defendant cannot upstage the risk that had to be absorbed by the Claimant for "***in the case of a mortgage by sub-demise, that mortgagee is always at risk of the lessor obtaining re-entry for breach of covenant ... Every mortgagee therefore knows that this is the risk he runs... that is one of the risks of the game.***"⁴

[73] The Claimant by their Counsel also sought to rely on the alleged fact that they had tried to negotiate a settlement with the Third Defendant which was proffered as an example of unconscionable conduct upon which the Court should act and deny the Third Defendant her right.

[74] This Court is not in agreement with that assessment.

[75] The Third Defendant in her evidence admitted that overtures had been made to her but in her words "***the Bank did not try to make good on the lease in a timely manner when from 2011 Mr. Anderson was in breach... He was asked to leave and by September 2012 there was nothing from the Bank or Mr. Anderson between there and then 2013 which would be two years later, ...they didn't make an effort to remedy the breach for two years.***"⁵

⁴ Per Greene MR in Egerton v Jones [1939] 2 KB 702 cited with approval in Smith v Spaul [2002] EWCA CW 1830

⁵ Official Transcript page 53

- [76] This Court does not accept that this was an unreasonable position to be taken by the Third Defendant who by which time had expended "***all [her] savings and all [her] livelihood***"⁶
- [77] The final ground upon which the Claimant has sought to show that the conduct of the Third Defendant should result in her being barred from her right of remedy was that the Third Defendant should not be entitled to benefit from the acquisition of a building which was not part of the lease agreement and to which the Claimant had provided the funds to refurbish.
- [78] By clause E 1(5) of the Lease Agreement, it is stated quite clearly that the Lessee would "**at the expiration or sooner determination of the said term peaceably ... surrender and yield up to the Lessor the Leased Land with any improvements thereto in accordance with the foregoing covenants**" (my emphasis).
- [79] It is therefore clear, without more, that any improvements to the leased land remained to the benefit of the lessor at the determination of the lease.
- [80] Further it has been clear since the 1960s in the seminal case of **Mitchell v Cowie**⁷ that Wooding CJ made it quite clear that what cannot be removed from the land runs with and forms part of the land.
- [81] To this Court it therefore seems that this argument must dismally fail.
- [82] In looking at this matter therefore in totality it is indeed unfortunate that the events transpired as they did.

⁶ Official Transcript page 53
⁷ (1964 7 WIR 178)

[83] The First Defendant absconded and left these two parties facing serious financial implications.

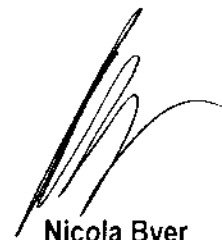
[84] However as much as this Court commensurates with the Claimant, I am unable to apply any of the equitable principles in favour of the Claimant whose only claim can be made through the same undisputedly culpable First Defendant. They seek ***"an equitable remedy in circumstances where it has come to the court against the backdrop of culpable and willful non observance of ... obligations leaving the Defendant to incur responsibilities."***⁸

[85] The parties are not of even standing and the Claimant being preoccupied by their only concern as to whether the First Defendant was paying them, failed to ensure or at least monitor the stability of their security.

[86] The unfortunate consequence is therefore that I find the Claimant is not entitled to their prayers and I dismiss the Claim.

[87] The order of the Court is therefore as follows:-

1. The Claim is dismissed in its entirety.
2. Costs to the Third Defendant to be assessed if not agreed within 21 days of this order.



Nicola Byer
High Court Judge

⁸ Per Burgess J in Shah Din & Sons Ltd v Dorgan Properties Management Ltd [2012] NICL 34 at Para. 22(h)