IN THE COURT OF APPEAL

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

APPEAL NO. 6 OF 2013
G 139 of 2012

BETWEEN	**PHILLIP HYRE** **KEVON HYRE**	**APPELLANTS**
AND	**HSBC BANK (CAYMAN) LTD.**	**RESPONDENT**

Before **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr. Justice I. Forte, J.A.
The Hon. Mr. Justice E. Mottley, J.A.

In the presence of Mr Dennis Brady for the Appellants and Mr William Jones of Ogier for the Respondent.

Hearing: 24 July 2013
Reasons released: 31 December 2013

REASONS FOR JUDGMENT

1. On the 24th July, 2013 having heard the submissions of Counsel for the Appellants and without calling on Counsel for the Respondent, we dismissed this appeal and affirmed the judgment of the Court below. These now are our reasons for having done so.

2. The Appellant by an Originating Summons dated 17th March 2012 claimed the following relief:

   i. An injunction restraining and prohibiting the Respondent whether by itself, its servants or agent or otherwise from any and all action pursuant to Section 64 (2) of the Registered Land Law (2004 Revision) the objective of which is to proceed to sell several properties owned by the Appellants and for which the Respondent holds the legal charges.

   ii. An order of mandamus that the Respondent provides consent to –

      (a) The stratifying of the housing units situated at Registration Section Prospect, Block 22E Parcels 78 and 80.

(b) The sale of raw land situated at Registration Section, West Bay North West Block 4E Parcels 118, 119 and 120.

(c) The sale of the apartment units after being stratified in order that the Plaintiffs might realize monies from the sale of the said units in order to pay off the sum of monies owed to the Respondent.

iii. An order that the two percentage surcharge by the Respondent be revised.

3. Having considered the evidence advanced by way of affidavits as well as oral testimony, the learned trial Judge dismissed the Appellants originating summons.

The Appellant appealed that order.

4. The issues in this appeal arose out of the Respondents (on the application of the Appellants) granting credit facilities to the Appellants. The credit facility in the form of a mortgage was for the sum of $1,189,024.66 on a 23 year term at a variable interest rate of the Bank's base rate plus 0.50% per annum with an effective rate of 3.75% per annum at the time of the offer. The loan was pursuant to the terms and conditions of the Facility Letter dated 26th March, 2012, and was to be applied to the refinancing of mortgages over five parcels of property on Grand Cayman that is to say:

i. An existing Duplex at Registration Section Prospect Block 22E Parcel 78 (the Duplex).

ii. An existing Triplex at Registration Section Prospect Block 22E Parcel 80 (the Triplex) which is adjacent to the Duplex.

iii. Three parcels of raw land at Registration Section West Bay North West Block 4E Parcels 118, 119 and 120.

5. **SECURITY AND CONDITIONS OF THE MORTGAGE**

A. Security

The Respondent, as part of the Security for the Mortgage, registered (a) just legal charges against the properties by way of variation of charge against the Triplex which was previously charged to the Bank of Nova Scotia ("Scotia Bank") and (b) collateral charges against the Duplex and the raw land.

B. **Conditions**

The terms and conditions of the mortgage agreement entered into by the parties were –

i. The mortgage was to be repaid by way of variable monthly repayments representing payments of principal and interest amortized over the 23 year term, with payments initially in the sum of US$6,436.05 per month with the first payment due on the 30th April, 2009.

ii. Interest on overdue monthly repayment sums would be charged at a rate of 2% per annum above the variable interest rate.

iii. The Appellants were to obtain adequate all-risks insurance of the full replacement value on the Duplex and Triplex, with the Respondent noted as the mortgagee on the insurance policy.

iv. The Appellants were to maintain life insurance in amounts sufficient to cover the mortgage at all times.

v. *The Appellants agreed not to sell, part with possession, lease, let or mortgage the properties without first obtaining the Respondent's approval* (emphasis added).

vi. *The Appellants agreed to promptly notify the Respondent of occurrence of any event which could reasonably be expected to materially and adversely affect their ability to perform their obligations under any Facility document* (emphasis added).

vii. The conditional assignment of all rents received from the rental of units in the Duplex and Triplex.

viii. *The Appellants were to provide cash security in the sum of US$97,500.00* (emphasis added).

ix. *The mortgage loan will remain payable on demand at the Respondent's discretion* (emphasis added).

6. I have emphasized sections of the above to indicate areas which have become relevant to the issues arising in this appeal and which will become evident later in this judgment.

7. The Appellants failed to meet the condition for the provision of cash security in the sum of US$97.500.00, and as a result of discussions with Ms. Laveda Burton of the Respondent, that particular requirement was amended by consent of both parties on 29th April 2009. The amendment waived the requirement for the cash security in the sum of US$97,500.00 and instead required the Appellant to pay a lump sum payment of CI$20,000.00 and thereafter monthly payments of US$5,000.00, until the sum of US$97,500 was reached.

8. In accordance with the amended agreement of 29th April, 2009 the Appellant commenced the payment of the monthly sum of US$5,000.00 until October 2009, but instead of paying the monthly sum for November, the Appellant withdrew the sum of US$11,500.00, leaving a balance of only US$9,707.00.

9. By January 2010, the Respondent discovered that the Appellant was also in breach of the agreement, by not insuring the properties for their full replacement value of US$390,000.00 each but instead for US$300,000.00 each.

10. On 20th January 2010, Ms. Burton met with the Appellants to review the mortgage. At that meeting the Appellants stated that they could meet the mortgage payments but would be unable to continue to pay the US$5,000.00 per month towards the cash security.

    The first named Appellant also stated at that meeting that he planned to sell the raw land which was valued at CI$220,000.00 and that he hoped to do so in three to five months. As a result of this, the Respondent agreed to suspend the payment of US$5,000.00 per month for six months to allow the Appellants to sell the raw land. However, a condition of this was that the Appellants should provide proof of their efforts to advertise the land for sale. Also that if the Appellants failed to sell the land, they would thereafter pay US$7,500.00 per month towards the cash security in addition to the monthly mortgage payment. The Appellants accepted these terms, but at the end of the six month period, the land had not been sold.

11. In fact in September 2010 Ms. Burton conducted a review of the mortgage facilities and discovered the following:

    (a) The Appellants had failed to sell the land within the six months.

(b) The Appellants had failed to provide any proof of having advertised the land for sale.

(c) The Appellants had failed to make the increased payments of US$7,500.00 towards the cash security for the months of July, August and September 2010.

(d) The Appellants were frequently included in the Respondent's delinquent reports in respect of their mortgage facilities and their credit cards.

12. At about this time the Respondent discovered through an enquiry from Scotia Bank that the Appellants were seeking credit financing from Scotia Bank to construct additional apartments on the properties on which the Triplex and Duplex were situated and against which, as we have seen, the Respondents held the first and collateral charges.

13. As a result of this information, -[and the breach of the conditions of the mortgage by the Appellants, Ms. Burton wrote to the Appellants on 10th September, 2010 expressing concern at the Appellants' attempt to obtain second charges on the mortgaged properties without first obtaining the approval of the Respondents.

In this letter, Ms. Burton again made a request that the cash security of US$97,500.00 be provided by close of business on 17th September, 2010. She also pointed to the Appellants' failure to sell the land, and to produce any evidence that the Appellants made any effort to sell the properties.

Ms. Burton then informed the Appellants that if the cash collateral security was not provided by 17th September 2010, the Respondent would increase the mortgage rate by an additional 2%, and that the outstanding balance on the credit cards would be set off from the funds currently held in the Appellants' accounts and the credit cards would be cancelled.

14. The Appellants responded to this letter on 14th September 2010, apologizing for the "areas of concern" and informing the Bank that West Bay Properties – Block 4E Parcels 118, 119 and 120 had been advertised, but were not sold. They also admitted that they had sought financing for the amalgamation of Registration Section Prospect Block 22E Parcels 78 and 80 and expected the approval. They undertook to meet the Bank's request for the cash security, but asked for further time.

15. They informed the respondent that they had received Planning permission to construct four one bed-room apartments on Registration Section Prospect Block 22E Parcels 78 and 80 and that the construction had already commenced. The estimated cost would be

CI$355,000.00. The units could be sold for a total of C$500,000.00 realizing a profit of CI$145,000. The Appellants then requested that additional financing be granted to them. They also requested permission to amalgamate the properties on which the Triplex and Duplex were built.

16. On 17th September, 2010, Ms. Burton again wrote to the Appellants, stating that the Respondent had decided that due to the Appellants' failure to provide the collateral cash security of US$90,000.00, the Bank had decided to continue with the action contained in the letter of 10th September, 2010.

17. On 14th February, 2011, the Appellants wrote again to Ms. Burton stating that they were experiencing financial difficulties and they were seeking the Respondent's permission to sell all the properties held as collateral with the Respondent. In order to sell the properties, they also sought permission to stratify the units on Registration Prospect Block 22E Parcels 78 and 80 – because they felt the stratification into individual units would make it easier to sell the property. The first Appellant undertook to ensure that the proceeds from the sales would go towards paying off the debt.

18. On 11th March, 2011, the Appellants repeated this application. However, on this occasion they requested the Respondent to provide financing in the sum of US$358,000.00 in order to finance the remainder of the construction of the four new apartment units and to refinance the mortgage. In support, the Appellants provided property valuations from JEC Property Consultants Ltd. (JEC) dated 20th March, 2011. The valuation disclosed that the Appellants had already invested CI$101,540.00 towards the construction of the four new apartment units.

19. This information caused Ms. Burton "additional and considerable concern" as the Appellants had invested over US$100,000.00 in the four new apartments at a time when they remained in breach of the conditions of the facility letter, in particular, having failed to provide cash security of US$90,000.00. In addition, they had not kept up their obligation to insure the property and meet the life insurance requirement which were due and in arrears.

20. As a result, the Respondent's Credit Committee considered the Appellants' request to amalgamate and stratify the apartments and to refinance the mortgage and decided that in the light of the Appellants' failure to comply with the terms and conditions of the mortgage, the Respondent refused the requests.

21. On 18th March, 2011, Ms. Burton informed the first Appellant by letter that the Respondent had decided to refuse his requests, as he was in breach of the terms and

conditions of the mortgage agreement. The Appellant did not respond to this letter and failed to provide the requested cash security or the life and property insurance.

22. Instead, on 31st May, 2011, the first Appellant wrote to Ms. Burton informing her that he had received an offer to purchase Registration Section West Bay North West Block 4E Parcel 119 and that closing was to take place on or before 17th June, 2011. All proceeds from the sale, except the real estate commission, would go towards paying down the Appellants' loan balance. He also stated that he had listed the other properties for sale and again requested the Respondent to grant permission for him to amalgamate Registration Section Prospect Block 22E Parcels 78 and 80 so that he could sell the apartments individually. He also enclosed a copy of the purchase agreement of Registration Section West Bay North West Block 4E Parcel 119 and confirmed that all the proceeds would go to paying off the mortgage.

23. As a result of this letter, Ms. Burton conducted a further review of the Appellants' mortgage which revealed that the Appellants had failed to make the monthly mortgage payments for over a month. At that time the most recent payment was a partial payment on 26th April, 2011 in the sum of US$1,124.38.

24. Then Ms. Burton commenting on the Appellants' agreed price of CI$48,000.00 for sale of Registration West Bay North West Block 4E Parcel 119 stated that it was CI$17,000.00 below the JEC valuation of March 2011. As a result of this shortfall, the Appellants' debt ratio between the outstanding amount of the mortgage and the total value of the Appellants' security would increase to 85% which exceeded the Appellants' maximum allowable ratio of 80%. As a result, Ms. Burton averred that the Respondent decided to refuse the Appellants' request and again denied them permission to sell Registration Section West Bay North West Block 4E Parcel 119 and to amalgamate and stratify the apartments. Ms. Burton advised the Appellants accordingly.

25. On 8th June, 2011, a member of the Respondent's Credit Board, Ms. Megan Campbell wrote the Appellants advising them that their mortgage payments were in arrears in the sum of US$16,075.23 and that the payment had been overdue for a period of 44 days. She demanded that the Appellants bring their mortgage account up to date within seven (7) days failing which the Respondent would have no choice but to refer the account to the Respondent's Legal Counsel.

26. On 16th June, 2011, the Appellants sent an email to the Respondent stating that their financial situation had worsened and that as a result they were not able to honour their mortgage obligations unless their circumstances changed. They again sought permission

to stratify the apartments and requested a loan holiday whilst they continued with their efforts to liquidate their assets. The Respondent refused their request.

27. On or about 13th July, 2011, Ms. Burton conducted a further review of the Appellants' mortgage facility with the Respondent. This review raised additional matters of concern which were:

    (a) Despite repeated requests by email and by telephone, the Appellants had failed to bring the mortgage into good standing and the facility was delinquent by 74 days.

    (b) The Appellants remained in breach of both the property insurance and the life insurance conditions set out in the facility letter of 26th March 2009.

    (c) The Appellants had still failed to provide the Respondent with the cash security of US$90,000.00.

28. In this review Ms. Burton noted that the first Appellant's company, Hycam Enterprises, was continuing to offer financing to the public. The Hycam company invited the public to "call us now – it's quick and easy to get a personal loan for any purpose. Hycam group is involved in construction. CCNN Forex Loans and Real Estate." The first Appellant admitted in his evidence that he was a 50% shareholder of Hycam and the second Appellant was the other 50% shareholder.

29. On 13th July, 2011 Ms. Burton wrote to the first Appellant referring to the Appellants' numerous requests for approval to stratify the properties Registration Section Prospect Block 22E Parcels 78 and 80 and for further refinancing. She confirmed that the Respondent would not consider any further requests until the Appellants' mortgage facility had been brought into good standing. She informed the Appellants that the facility was now in arrears in the sum of US$24,123.65 and that the life insurance and property insurance conditions remained unfulfilled.

30. The Appellants failed to bring the mortgage into good standing and the Respondent on 29th August, 2011 served formal demand notice on each of the Appellants pursuant to Sec. 64 (2) and 72 of the Registered Land Law.

31. No payments were made by the Appellants in response to the notice – the outstanding principal being at that time in the amount of US$1,128,327.04 with outstanding interest in the sum of US$31,418.69 – making a total sum of US$1,159,745.73 with interest continuing to accrue at a rate of 6.25% per annum or $195.89 per day.

32. The Appellants failed to repay the mortgage in full or at all within the prescribed three months.

33. On 1st December, 2011 the Respondent's attorneys emailed the Registered Land Law notices to the first Appellant stating that the Appellants' mortgage balance as at 1st December, 2011 was US$1,179,022.57 and indicating that in light of the Appellants' failure to repay the full outstanding balance within the prescribed three months, the Respondent intended to proceed to sell the properties.

34. On 25th January, 2012 the first Appellant met with the Respondent's attorney and asked for a further three to four months to allow him to refinance the mortgage with another Bank. The Appellant again sought permission to stratify the properties to be able to sell the apartments individually.

35. On 31st January, 2012 the Appellant wrote to the Respondent's attorney referring to the meeting of 25th January, 2012 and asking if the Respondent would agree to the request for a further three months to secure refinancing.

36. On the same day (31st January, 2012) the Respondent's attorneys wrote to the first Appellant agreeing to hold off on commencing the publication of the Appellants' properties for a period of thirty (30) days from 31st January, 2012 in order to allow the Appellants time to refinance the mortgage facility with another Bank.

37. The Appellants were unable to do so by close of business on 1st March, 2012.

38. On 14th March, 2012 the Appellants commenced these proceedings.

39. Those are the facts upon which the learned Judge dismissed the Appellants' originating summons and denied the orders requested therein.

40. The Appellants, in submissions filled with emotion but devoid of substance, has relied on one issue which has its basis on the provisions of Section 67 (g) of the Registered Land Law (2004 Revision) which reads:

> Section 67: "There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor – (a) – (f).
>
> (g) not to transfer the land, lease or charge, charged or any part thereof without the previous written consent of the chargee

but such consent shall not be unreasonably withheld” (emphasis added).

41. The Appellants contended that “the learned Judge erred in law and in fact by failing to find that the Respondent had failed to come to the Court with clean hands and were thereby debarred from obtaining the relief which was granted to them.”
Counsel continued thus:

> “The learned Judge fell into error by failing to address adequately or at all, the correct legal test and/or principles concerning the circumstances in which the Court will find that a chargee has ‘unreasonably withheld’ consent and whereby a chargee has a legal obligation when ‘exercising his power of sale shall act in good faith and have regard for the interest of the chargor’ ”.

42. It is difficult to understand the gravamen of the Appellants’ complaint in this regard, as the learned Judge outlined in detail the submissions, including the cases cited by the Appellants, and considered them in detail before coming to his conclusion, after a detailed analysis of the evidence and the cited authorities.

43. It is sufficient to record certain aspects of the learned Judge’s conclusion.

Firstly, he expressly accepted the evidence of Ms. Burton as factual and found as follows:

> “When one reviews the terms set out by the Defendants in its Facility Letter dated 26th March 2009 and accepted by the Plaintiffs together with the covenants which the Plaintiffs agreed to in the variation of charge executed by the Plaintiffs on the 21st April 2009, the following facts emerge:
>
> i. The Plaintiffs never, at any time, lodged the agreed cash security sum of US$97,000.00.
>
> ii. The Plaintiffs failed to make their monthly payments agreed to in the variation of 27th April, 2009.
>
> iii. The Plaintiffs failed, at any time, to make the lump sum payment of US$20,000.00 or after October 2009, the monthly payment of US$5,000.00 referred to in paragraph 9 above. Instead, the Plaintiffs actually withdrew US$11,500.00 and by doing so, failed to honour their agreement in relation to the cash security provision.

iv. The Plaintiffs failed, since March 2011, to provide adequate all-risks insurance for the Duplex at Registration Section Prospect Block 22E Parcel 78 and the Triplex at Registration Section Prospect Block 22E Parcel 80.

v. The Plaintiffs failed, at any time, to provide the assignment of life insurance policies in amounts sufficient to cover the loan agreement.

44. And then having examined other evidence he states:

> "When one examines the evidence, it is clear that the Defendants complied with the Plaintiffs' requests and was accommodating of the Plaintiffs' delays and defaults on payment from the date of the Facility Letter – 26th March 2009. The Defendant complied with the Plaintiffs' request for more time in which to pay the cash security deposit. It was only after the Plaintiffs had failed to sell the land and had failed to provide evidence of trying to sell the land, that the Defendant showed an unwillingness to be flexible. Consequently, the basis that the Plaintiffs had consistently failed to comply with the existing terms and conditions of the mortgage, in late 2010 and in 2011 the Defendant denied the Plaintiffs' requests to amalgamate and to stratify the apartments and to refinance the mortgage."

45. Having reviewed the evidence in respect of the Appellants' failure in performing certain conditions of the mortgage, he concluded:

> "On the evidence before me I find that the Defendant acted reasonably and accommodated many of the Plaintiffs' demands. On the other hand, the Plaintiffs constantly breached the terms and conditions of the mortgage and did not update the Defendant with any information regarding their application for Planning permission and the construction they had already commenced on the mortgaged property.
>
> On the evidence before me, I reject the Plaintiffs' contention that the Defendant acted in bad faith and I reject the Plaintiffs' contention that the Defendant somehow crafted the circumstances leading up to the exercise of this purported bad faith."

46 He then concluded that on the evidence it was "quite reasonable" for the Respondent not to provide its consent to the stratifying of the housing units:.

47. The learned Judge obviously had in mind in coming to his conclusion the decision of the House of Lords in the case of *John Kennedy v Mary Annette de Trafford, Henry Stourton (since deceased) and Joseph Bottomley Dodson* (1897) AC 180 where it was held as follows:

> "The only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in his mortgage is that he should act in good faith. In determining whether the mortgagee's conduct in that respect comes up to the required standard regard must be had to the circumstances of the particular case".

48. We cannot fault the learned Judge's reason for coming to his conclusion given the evidence before him and his findings of facts in that regard. We agree with him that the Respondent's refusal was, in the circumstances, reasonably withheld.

49. It is for these reasons that the appeal was dismissed by the Court on 24th July 2013.

Chadwick P

Forte JA

Mottley JA