

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0027

BETWEEN

BANK OF NOVA SCOTIA

CLAIMANT

and

DELVIN FORDE

DEFENDANT

Appearances:

Mr. Roderick Jones holding papers for Mrs. Maferne Mayers-Oliver for the claimant.
Defendant unrepresented, absent.

2017: Dec. 20
2018: Jan. 31

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** The Bank of Nova Scotia ('the bank') is a financial institution licensed to conduct banking business in Saint Vincent and the Grenadines. It operates from premises located on Halifax Street and provides banking services including lending facilities to its clientele. Mr. Delvin Forde applied to the bank in 2003 and 2004 and was successful in obtaining two mortgage loans totaling \$300,000.00. Both sums were secured by charges on his property situated in Brighton ('the property').
- [2] The bank alleged that Mr. Forde has failed repeatedly to service his loan obligations. By letters

issued in February and April 2015, the bank demanded that he settle the outstanding arrears. He did not. Consequently the bank initiated this claim to recover vacant possession of the mortgaged property, an injunction to restrain Mr. Forde, his servants and agents from entering the property and costs.

- [3] Mr. Forde was served with the Fixed Date Claim Form, supporting documentation and notice of the hearing date by publication of the relevant documentation in two newspapers circulating in Saint Vincent and the Grenadines. He did not attend court. Ms. Anne Arrindell testified on the bank's behalf. Although her testimony was unchallenged, the bank's evidence did not establish the salient aspects of its claim. The reliefs sought were not granted.

ISSUES

- [4] The issues are:

- (1) Whether Mr. Delvin Forde is liable to the bank in respect of the referenced mortgage debts? and
- (2) To what remedies is the bank entitled?

ANALYSIS

Issue 1 – Is Delvin Forde liable to the bank in respect of the mortgage debt?

- [5] The bank instituted this matter by Fixed Date Claim Form ('FDCF') on 3rd February, 2017. Ms. Arrindell filed an affidavit¹ (as attorney on record for the bank) which was accepted as her evidence. Her evidence was not challenged and is accepted as probative² of the facts to which she alluded, as rehearsed in this judgment.

- [6] On 16th September 2003, Mr. Forde was registered as owner³ of a lot of land at Brighton in the Parish of Saint George in the State of Saint Vincent and the Grenadines. It is described in the Schedule as being 7,494 square feet. On receiving the loans from the bank in 2003 and 2004, Mr.

¹ Filed on 3rd February 2017.

² On a balance of probabilities.

³ By Deed of Indenture No. 3245/2003, registered on 16th September.

Forde executed a Deed of Mortgage⁴ and an Indenture of Further Charge⁵ in the bank's favour, for the initial sum of \$41,900.00 and the further sum of \$258,100.00. He thereby agreed to repay the loans by equal monthly installments. Ms. Arrindell produced copies of the referenced deeds which confirmed her account. The bank subsequently provided certified copies of all documentary exhibits submitted by Ms. Arrindell⁶.

- [7] The bank alleged that Mr. Forde 'became persistently irregular with his servicing of the loans over time' as a consequence of which the bank wrote to him on 23rd February 2015 encouraging him to settle the outstanding amount. The letter was purportedly authored by Johann Supersad, Back-End Adjustor, who provided no testimony. It stated in part:

'Security: PROPERTY @ PAGET FARM BEQUIA'

No explanation was given regarding the divergence in description of the subject property. While it is conceivable that there was an error in the letter, in the absence of some indication to that effect, the court draws no such inference.

- [8] By letter dated 21st April 2015, the bank's solicitor wrote to Mr. Forde informing him that he was in default and if payment was not forthcoming, he was liable to have the bank exercise its power of sale over the property. That letter correctly identified the mortgaged property. Mr. Forde made no payments in response.

- [9] The bank's lawyer wrote to Mr. Forde again on 5th August 2016 seeking vacant possession of the property by 4th September 2016 and informing him that it was enforcing its power of sale. In paragraph 2, the letter referred to the security as comprising '13,493 Sq. Ft. of land situated at **Green Hill**' (bold added). This description differs from the mortgaged property in material respects.

- [10] Green Hill and Brighton are different localities on mainland Saint Vincent. The mortgaged property is situated on Bequia - one of the Grenadine islands. In all of the circumstances, the court is unable

⁴ No. 3273/2003, registered on 17th September, 2003.

⁵ No. 2137/2004 registered on 8th June, 2004.

⁶ For examination by the court.

to make any satisfactory connection between the property or mortgage referenced in 'the February 2015' and 'the August 2016' letters on the one hand and the subject matter of the instant claim on the other hand. Mr. Forde has remained in possession of the property.

- [11] The bank submitted that the mortgage authorized it to exercise its power of sale if Mr. Forde fell into arrears in repayment of the mortgage loans. It contended that the court's order to sell and injunction are necessary in order for the bank to exercise such power. It advanced no evidence regarding the occupants of the subject property in accordance with the Civil Procedure Rules 2000 ('CPR')⁷. It submitted that it could point to no legal authority which negated its duty to provide such details.
- [12] Part 66 of the CPR outlines the particulars which a claimant must provide where he is seeking possession of mortgaged property. Specifically, he must state the amount advanced, the interest payable under the mortgage, the amount of any periodic payments and indicate whether it contains an interest component. He must also detail the number of repayments made; the amount of any repayments due but unpaid at the dates of the claim and affidavit; the sum remaining due under the mortgage; and where interest is claimed up to judgment, the daily rate of accrual.
- [13] The contents of the mortgage deeds reveal that the initial loan attracted interest at 11.5% per annum which was reduced to 8% per annum under the further charge which consolidated both loans. It is not clear from the documentation how much of the principal amount and interest were outstanding when the further loan was advanced. This information was not provided. The charges do not disclose the periodic repayment amounts and they contain no information regarding the number of repayments made.
- [14] The bank failed to adduce particulars as to the amount of repayments due and unpaid at the date of filing of the claim and the affidavit. No evidence was supplied in respect of the outstanding mortgage sum or the daily rate of interest.

⁷ CPR 66.4(2)(i).

[15] The solicitor's letter of April 2015 does not assist the court. In this regard, it comprises hearsay material which although potentially admissible⁸, falls short of supplying the requisite material to enable the court to critically assess the weight to be attached to it⁹. For instance, no evidence was adduced regarding the date of its preparation and nothing was elicited in respect of the authors' motivation.

[16] Moreover, the letter is not accompanied by any banker's books records as contemplated by Part III of the Act. For those reasons, its probative value falls short of proof on a balance of probabilities. The court is therefore unable to rely on the contents of that letter to supply the details missing from Ms. Arrindell's testimony. I refrain from so doing.

[17] In any event, even if the court wished to act on the contents of that letter, it does not supply all the data mandated by CPR 66.4. It itemized Mr. Forde's indebtedness as at 21/41/2015 (sic) as follows:

'Principal	\$253,931.02
Interest on principal	34,214.68
Add on charges	4,912.98
Interest on add on charges	511.82
Late fees	150.00
<u>Total</u>	<u>\$293,720.50'</u>

[18] Having regard to the length of time that has transpired since the letter was purportedly issued, I am reasonably certain that application of interest would have varied the outstanding sums upwards by the date of filing of the Fixed Date Claim Form and supporting affidavit. Ms. Arrindell testified that Mr. Forde 'continued to be in default of his payments'. It is not clear if he made no payments since receiving the letter(s) or if he made one or more such payment.

⁸ Pursuant to sections 3, 46, 47 and 55 of the Evidence Act, Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 2009 ('the Act'); and R. S. C. Order 38, rules 20-32 of the English rules of court made under the UK Civil Evidence Act, 1968.

⁹ Under section 51 of the Act.

[19] While I accept that Mr. Forde was probably indebted to the bank in respect of some part of his mortgage loans at that time, the figures outlined in the mortgage agreements and letter do not permit me to ascertain the value of his indebtedness as at the date of the filing of this claim. The court is hampered in making a finding regarding Mr. Forde's outstanding indebtedness or otherwise.

[20] Suffice it to say that the bank has failed to supply all of the prescribed details mandated by CPR 66.4(2) (i). Ms. Arrindell was quite clear that Mr. Forde still owed monies to the bank. I believe her and accept her testimony, I just do not know how much. Based on the available evidence, I can find only that it is possible that Mr. Forde is indebted to the bank for an unspecified amount of money. In view of the deficiencies in the quantitative and qualitative components of the testimony adduced, I make no finding of liability against him.

Issue 2 – To what remedies is the Bank of Nova Scotia entitled?

Power of sale and vacant possession

[21] The bank seeks to invoke its power of sale under the mortgage agreement and further charge. Mortgage Deed No. 3273/2003⁴ contained a power of sale clause which was extended to and incorporated in the further charge. It stipulated that the bank could exercise its power of sale only after one of three preconditions was satisfied namely:

1. the bank must have issued notice to Mr. Forde requiring payment of the outstanding sums, after which he must have defaulted in repayment for one calendar month; or
2. some interest must have been in arrears and remained unpaid for one month after the payment date; or
3. Mr. Forde must have defaulted in another condition of the mortgage agreement.

[22] The bank provided no satisfactory evidence of any such breach by Mr. Forde. In all the circumstances, it has failed to establish a factual or legal basis to support an order for vacant possession. I make no such order.

Injunction

[23] The court may grant a permanent injunction if satisfied that it is just and equitable to do so. It considers all relevant circumstances including whether the party seeking it has acted promptly or is likely to suffer grave damage in the future. It also takes into account whether damages would be an adequate remedy for any attendant loss.

[24] The bank's claim was filed within two years of the issuance of the April 2015 letter. I consider this to have been a timely filing. However, the bank has not provided sufficient evidence of the value of its loss, if any. It is my considered opinion that any such deficit can be adequately met by an award of damages. In the premises, I am not satisfied that it is just and equitable to grant injunctive relief. The bank's prayer for an injunction is denied. The bank shall bear its own costs.

ORDERS

[25] It is accordingly ordered:

1. The Bank of Nova Scotia's claim for vacant possession and injunctive relief is dismissed.
2. No order as to costs.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar