

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0024

BETWEEN

BANK OF NOVA SCOTIA

CLAIMANT

and

TETHMORE JOSEPH

DEFENDANT

Appearances:

Mr. Roderick Jones for the claimant.

Defendant unrepresented, present.

2017: Dec. 20

2018: Jan. 31

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** Mr. Tethmore Joseph obtained three mortgage loans for the aggregate amount of \$140,000.00 from the Bank of Nova Scotia ('the bank'). He has defaulted in making the repayments. The mortgage was secured by property owned by Mr. Joseph at Campden Park and registered by Deed of Indenture No. 601/2010¹. The bank has brought legal action against him to obtain vacant possession and an injunction to restrain him, his servants and agents from entering it. The bank also seeks costs.

¹ Registered on 23rd February, 2010.

[2] The bank's Cross-Border Adjuster Ms. Anne Arrindell was the sole witness in the case. Mr. Joseph did not dispute the claim. Judgment is entered for the bank.

ISSUES

[3] The issues are:

(1) Whether Mr. Tethmore Joseph is liable to the bank in respect of the referenced mortgage debt?
and

(2) To what remedies is the bank entitled?

ANALYSIS

Issue 1 – Is Tethmore Joseph liable to the bank in respect of the mortgage debt?

[4] The bank conducts banking business from its offices on Halifax Street, Kingstown, Saint Vincent and the Grenadines. As a licensed financial institution it is authorized to provide lending facilities to its customers. A claimant must establish its case on a balance of probabilities. This is the standard which will be applied in assessing the evidence in this matter.

[5] Ms. Arrindell's affidavit account² was accepted as her evidence. She was not cross-examined. She testified that Mr. Tethmore Joseph and Ms. Laurette Joseph jointly borrowed \$90,000.00 from the bank on July 29th, 2004 as evidenced by Deed of Mortgage No. 2861/2004³. The couple used their jointly owned property as collateral. Ms. Joseph later transferred her interest in the subject property to Mr. Joseph. She was also removed from the mortgage arrangement by agreement of the parties. Indenture of Variation No. 550/2010⁴ was executed to effect this termination of Ms. Joseph's involvement and liability.

[6] Mr. Joseph acquired another loan facility from the bank in February 2010. Ms. Arrindell asserted that the loan amount on that occasion was \$90,000.00. She produced a copy of a further charge

² Chronicled in Affidavits filed respectively on 3rd February, 2017, 12th June 2017 and 10th November 2017.

³ Registered on 5th August, 2004.

⁴ Registered on 18th February, 2010.

which was registered⁵ for this purpose. It reflected that the sum advanced on that occasion was \$24,800.00. Based on the documentary evidence, I am inclined to believe that Ms. Arrindell was mistaken and made an error. I accept that the figure of \$24,800.00 entered in the further charge is correct. In this regard, I note that it was signed by Mr. Joseph who was present in court and did not challenge the accuracy of the contents of the charge.

[7] In May 2012, Mr. Joseph obtained a further advance of \$25,200.00 from the bank. Ms. Arrindell referred to this as a \$90,000.00 loan. The parties executed a Second Indenture of Further Mortgage No. 1743/2010⁶ to effect that agreement. Notwithstanding the conflict between Ms. Arrindell's recollection as set out in her affidavit, I am satisfied that the Second Indenture of Further Charge accurately captures the parties' agreement that the loan amount advanced would be and indeed was \$25,200.00.

[8] Mr. Joseph was shown the exhibits and did not deny that they were correct records of the referenced banking transactions. The signature 'Tethmore Joseph' appears on them. He did not cross-examine Ms. Arrindell; dispute that he concluded these agreements with the bank; or deny that the signature is his.

[9] The mortgage and further charges obligated Mr. Joseph to repay the advances by regular monthly installments. Ms. Arrindell indicated that the bank advanced the sum of \$140,085.00 to Mr. Joseph which attracted an interest rate of 8% per annum. She stated that the standard payments of \$1027.89 of which Mr. Joseph made 27 repayments, comprised principal and interest.

[10] She testified further the interest amount due as at the date of the claim was \$38,981.49 and that this figure had increased to \$46,201.91 by 10th November 2017 when she filed her final affidavit. The outstanding amount as at that date was \$186,638.33. She noted that the *per diem* rate (presumably interest rate) stood at 26.63.

⁵ By Deed of Further Charge No. 634/2010.

⁶ Registered on 15th June, 2012.

- [11] The mortgage agreement contained a clause which authorized the bank to enforce a power of sale over the mortgaged property, if Mr. Joseph did not honour his repayment obligations. Ms. Arrindell testified that he was persistently irregular in doing so, as a result of which the bank wrote to him in 2013 demanding that he pay the outstanding amount. That letter signed ostensibly by Jacqui Aqui, Front End Adjustor was produced. It is dated 24th June, 2013.
- [12] In it, the bank stated that Mr. Joseph was in default of his loan and had failed to pay the arrears although he had been notified. It proceeded to demand payment of the balance of \$139,011.23 within 14 days from the date of the letter. It also stated that interest will continue to accrue at the per diem rate of \$30.47.
- [13] It indicated that interest to date amounted to \$2,711.67 and that the amount past due was \$2,055.67. The bank included a warning that it would seek to enforce its legal rights if Mr. Joseph did not comply with the demand. Ms. Arrindell said that Mr. Joseph did not settle the debt.
- [14] She testified that the bank arranged for its lawyer to write to Mr. Joseph the following year in similar terms. That missive is dated 14th February 2014. She provided a copy of the letter allegedly sent by the lawyer. It contained details of the mortgage account. The outstanding balance reportedly stood at \$150,305.77, while the interest on principal had increased to \$9,841.23. The interest was purportedly accruing at the daily rate of \$30.4682.
- [15] The bank demanded that Mr. Joseph settle the debt within 30 days failing which legal proceedings would be instituted to recover the loan amount by sale of the property. Ms. Arrindell deposed that another letter was sent to Mr. Joseph, by the bank's lawyer, dated 11th November 2016, to inform him that it was enforcing its power of sale and wanted vacant possession of the property by 12th December 2016. That letter was not produced in evidence. The court will accordingly disregard this part of Ms. Arrindell's testimony.
- [16] Mr. Joseph has not complied with the bank's requests. Ms. Arrindell stated that by ceasing his monthly payments, Mr. Joseph was in breach of the clause in the mortgage which states:
 '... the Mortgagors will on demand in writing made to the Mortgagors pay to the bank or any person authorized by it to demand the same, the said sum of ninety thousand dollars

(\$90,000.00) the principal sum with interest thereon until payment at the rate of 8% per centum per annum by monthly installments.'

- [17] The bank alleged that it is not aware that anyone other than Mr. Joseph and his family occupies the mortgaged property. No details were provided of the number of persons who comprise that household or the nature of their relationship to Mr. Joseph.
- [18] Ms. Arrindell's testimony was not challenged by Mr. Joseph. Some parts consisted of hearsay, namely the letters which she tendered and referenced. The Evidence Act⁷ and the rules of court made under the UK Civil Evidence Acts 1968 and 1972⁸ permit the court to admit hearsay material in certain circumstances, in accordance with the rules⁹. Significantly, the party seeking to rely on hearsay has a duty to give the other party reasonable advance notice to enable him or her to prepare his or her case and generally to ensure fairness and the advancement of justice.
- [19] When the affidavits and exhibits were shown to Mr. Joseph at the trial, he indicated that they had been served on him and that he had no objections to them being admitted into evidence. In this regard, the bank demonstrated that it had substantially satisfied the referenced notice requirement. I am satisfied that it did.
- [20] In exercising its discretion regarding admission of hearsay testimony, the court must consider all the circumstances¹⁰ in which such statement was made and may draw any reasonable inference as to its accuracy or otherwise. If the hearsay is outlined in a document, the court must take into account its contents and form.
- [21] The court determines what weight to attach to the document, by reference to all relevant circumstances such as whether the document was created contemporaneously with the

⁷ Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 2009 ('the Act') at sections 3, 46, 47 and 55.

⁸ Chapters 64 and Chapter 30 respectively.

⁹ R. S. C. Order 38, rules 20-32 of the English rules of court made under the UK Civil Evidence Act, 1968.

¹⁰ Section 51 of the Act.

occurrence of the matters addressed in it. In addition, it must consider whether the maker of the statement had any incentive to conceal or misrepresent the facts¹⁰.

[22] Other than the date inscribed on the letters, the bank supplied no independent details from which I can ascertain when they were prepared. I accept that the bank's lawyer wrote one of the letters on receiving instructions from the bank. Although no direct evidence was provided as to what motivated Jacqui Aqui to prepare the other referenced letter, I infer from all of the surrounding circumstances that she did so in course of her employment with the bank. It is reasonable to deduce this from the designation inserted immediately below her name.

[23] Mr. Joseph has not disputed the accuracy of any part of the letters produced in this matter. He has implicitly accepted that the data recorded in them is accurate. His acknowledgement that he was served with the affidavits and exhibits sometime prior to the trial coupled with his tacit acceptance of the contents, suggests that he had no issue with the veracity of the contents. In the premises, the documents were duly admitted into evidence. I am satisfied that they accurately summarize the history of the dealings between the parties in relation to the mortgage loans and Mr. Joseph's delinquency.

[24] The bank submitted that a mortgage agreement is legally enforceable and is deemed a contract under seal between the parties. The law provides that a claimant seeking possession of mortgaged property must provide certain specified information¹¹. The bank has substantially complied by indicating the:-

1. amount advanced;
2. interest payable under the mortgage;
3. amount of any periodic payments, including any interest component;
4. number of repayments made;
5. amount of any repayments due but unpaid at the dates of the claim and affidavit;
6. sum remaining due under the mortgage; and
7. daily rate of interest where interest is claimed up to judgment.

¹¹ As stipulated in Part 66 of the CPR.

[25] It would have been helpful to have received more information regarding the present occupants of the subject property and some specifics about their relationship to Mr. Joseph. This is the ideal approach which would assist the court in arriving at a just and equitable outcome for all 'interested' parties. Be that as it may, I am satisfied that Mr. Joseph has defaulted on his mortgage payments. He is therefore liable to the bank, which may pursue its legal rights set out in the mortgage.

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

Power of sale and vacant possession

[26] By Mortgage Deed No. 2861/2004³ the parties agreed that the bank would be at liberty to sell the mortgaged property if Mr. Joseph defaulted in making repayments. By agreement, they extended this provision to the charges¹² executed in respect of the two additional loans.

[27] The power of sale was expressed in the usual terms and stated that the bank could exercise its power of sale on the happening of any one of three events:

1. the bank must issue notice to Mr. Joseph requiring payment of the outstanding monies, and he must have defaulted in repayment for at least one calendar month after receiving such notice; or
2. he must have failed to pay some part of the arrears of interest for one month after the due payment date; or
3. he must have refused or failed to comply with some other mortgage condition.

[28] The bank submitted that this is a fundamental covenant of the mortgage agreement as it goes 'to the heart of' the agreement. It argued that Mr. Joseph had ceased servicing his mortgage and had been in arrears in excess of one month. It contended that 'vacant possession is critical to allow the bank to exercise its power of sale without the attendant difficulties which arise when there is someone in occupation of the property.'

[29] Ms. Arrindell explained that the mortgage was deemed non-performing from 29th July 2013. The February 2014 letter supported this assertion and established that the bank had invoked its right to

¹² As outlined in the final substantive clause of each charge.

request payment of the mortgage within 30 days of that date. I accept that Mr. Joseph made no payment within the 30 day deadline specified in the mortgage.

- [30] The bank is therefore entitled to exercise the power of sale, a necessary incident to which is obtaining vacant possession of the subject property. I am mindful that Mr. Joseph will need a reasonable amount of time to vacate. I consider one month to be adequate. Mr. Joseph is therefore directed to deliver vacant possession of the subject property to the bank on or before 3rd March 2018 and to take all necessary steps to cause his servants and agents to do likewise.

Injunction

- [31] An injunction is a discretionary remedy which the court may order if satisfied that it is just and equitable to do so. The court must consider all relevant circumstances including whether the party seeking it is likely to suffer grave damage in the future. It also has regard to whether damages would be an adequate remedy for any attendant loss.
- [32] The bank has not supplied any evidence which demonstrates that it is likely to suffer grave damage in the absence of an injunction. It contended that the injunction is critical to prevent Mr. Joseph's ex-wife from accessing the subject property since she lives in a property in very close proximity to it. No evidence was adduced to this effect. Therefore, the court cannot take note of any such assertion.
- [33] Injunctive relief is refused as no proper basis has been laid out for the court to make such an order. The bank has liberty to re-apply if necessary. Having prevailed in this case, the bank is entitled to recover its costs.

ORDERS

- [34] It is accordingly ordered:
1. Mr. Tethmore Joseph is directed to:
 - (a) deliver to the Bank of Nova Scotia, vacant possession of the mortgaged property registered by Deed of Indenture No. 601/2010; and

- (b) take all necessary steps to cause his servants and agents to vacate the subject property,
taking all belongings with them;
on or before 3rd March, 2018.
2. The Bank of Nova Scotia's claim for an injunction is dismissed.
3. Mr. Tethmore Joseph shall pay to the Bank of Nova Scotia, prescribed costs of \$7,500.00 pursuant to CPR 65.5(2) (b).

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar