

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

IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0275

BETWEEN

**BANK OF SAINT VINCENT AND THE GRENADINES LTD
Formerly THE NATIONAL COMMERCIAL BANK (SVG) LIMITED**

CLAIMANT

AND

C & R ENTERPRISES LTD

DEFENDANT

Appearances:

Mr. Stephen Williams and with him Mr. Sten Sargeant for the claimant.
Ms. Maia Eustace for the defendant.

2016: Apr. 13
Apr. 27

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** This is a claim by Bank of Saint Vincent and the Grenadines Ltd ('the bank') to recover monies loaned to C & R Enterprises Ltd. ('C & R'). The bank also seeks an order for vacant possession of the mortgaged property and an order for permission to sell it to the highest bidder, even if that bid is below the market value.

[2] By its defence,¹ C & R acknowledged its indebtedness to the bank and accepted that it has fallen into arrears. However, it pleaded that it was in a position 'to service the mortgage regularly and in full.' C & R indicated that it did not know how much of the outstanding balance was apportioned between principal and interest. It has since conceded that it is unable to make the mortgage payments as agreed. It contends that in exercising its power of sale, the bank must take reasonable precautions to protect C & R's interest, and in doing so must advertise the sale widely and seek to obtain the best reasonable price. It submits further that it is unnecessary and inequitable to grant vacant possession of the property in advance of a sale. This court holds that C & R is liable to the bank and that this is an appropriate case in which to make an order for the bank to exercise its power of sale. Vacant possession is not ordered at this time.

ISSUES

[3] The issues are:

- (1) Whether C & R is liable to repay the bank the mortgage debt? and
- (2) To what remedies is the bank is entitled?

ANALYSIS

Issue 1 – Is C & R liable to repay the bank the mortgage debt?

[4] C & R filed no witness statements and therefore called no witnesses. The bank's two witnesses were Mr. Daverson Dick, its former debt recovery officer and Mr. Norman Robinson, its current recovery's officer. Their witness statements were accepted as their evidence in chief. They were cross-examined by learned counsel Ms. Maia Eustace on C & R's behalf. Mr. Dick indicated that he stopped working at the bank in March 2014 and is now employed as Manager at another entity. The uncontroverted testimony of Mr. Dick and Mr. Robinson is that C & R obtained a mortgage from the bank in 2007 in the amount of \$1,750,000.00 in respect of property he owns at Kingstown ('the mortgaged property'). The interest rate payable on that loan was fixed at 8.5% per annum.

¹ See amended defence filed on 24th July, 2013.

[5] C & R agreed to repay the loan by equal monthly installments of \$19,092.00 starting on 30th November, 2007. The property and mortgage are registered respectively by Deed of Conveyance² and Indenture of Mortgage.³ The bank loaned C & R a further sum of \$160,000.00 the following year which was registered by Deed of Further Charge.⁴ Under that agreement, C & R committed itself to repay the combined loans by equal monthly payments of \$20,220.00. The interest rate remained at 8.5% per annum. The deeds evidencing these loans were all exhibited.

[6] Mr. Dick testified that C & R defaulted on the payments of interest and principal and was indebted to the bank in the amount of \$2,624,262.76 as at 17th September, 2012. C & R defaulted on the agreed monthly repayments. In 2012,⁵ the bank obtained a valuation of the property which was appraised at \$3,160,000.00. It subsequently advertised the property for sale and received an offer of \$1.7 million. Mr. Dick stated that the bank incurred further expenses in 'obtaining valuations, paying for peril insurance and placing advertisements in local newspapers in relation to the mortgaged property.' He indicated that as at 3rd May 2013, the loan balance amounted to \$2,449,139.83 of which \$416,590.83 was interest. C & R's last payment of \$20,220.00 had been made on 5th December 2011.

[7] By 15th October, 2013, the outstanding balance on the loan remained at \$2,449,139.83 and was attracting a daily interest rate of \$570.35. On that date C & R's last interest payment of \$300.00 was made on 23rd September, 2011. Mr. Robinson testified that as at 30th September, 2015 the principal balance on the mortgage was \$2,345,820.33 and interest outstanding amounted to \$808,792.51. The daily interest factor was \$546.29. C & R had made no further interest payment since 5th December, 2011. The bank maintained that the security held by it is being eroded daily by the delay in having repayment issues resolved.

² Deed No. 505 of 2008.

³ Deed No. 506 of 2008.

⁴ Deed No. 2857 of 2009.

⁵ Dated 11/2/2012.

- [8] Mr. Dick acknowledged that the bank continued to accept monthly payments of \$10,000.00 from Mr. Cleve Lewis, C & R's representative, after it defaulted on the agreed payments. He said that the property was advertised for sale more than 3 times. Mr. Robinson testified that the current balance owed by C & R as at 12th April, 2016 is \$2,326,431.73 of which \$914,488.65 is interest. He added that the bank is seeking judgment in the amount of \$3,242,270.38 comprising the principal sum of \$2,326,431.73, interest of \$914,488.65, and late fees of \$1,350.00. He indicated that the bank received a proposal from C & R in which it offered to pay \$18,000.00 per month, to which the bank made a counter-offer of \$31,078.01. Presumably, C & R did not take up that offer.
- [9] Mr. Robinson explained that the \$10,000.00 per month currently being paid by C & R is inadequate. He opined that the bank is left with no recourse but to place the properties held as security on the open market in an attempt to recover the monies loaned. C & R does not dispute its indebtedness to the bank, nor does it deny that it is unable to make the agreed payments under the mortgage. The bank has established on a balance of probabilities that it loaned C & R \$1,910,000.00 and that C & R has defaulted in its repayment of the loan at the agreed rate. I find therefore that C & R is indebted to the bank in the sum of \$3,242,270.38 being the principal sum of \$2,326,431.73, interest of \$914,488.65, and late fees of \$1,350.00.

Issue 2 – To what remedies is the bank entitled?

Power of sale

- [10] Clause 7 of the initial mortgage contained a power of sale, under which it was agreed by the parties that the bank may sell the mortgaged property in the event of C & R's default in repayment. This power of sale was incorporated into the further charge by clause 4. There are however certain pre-conditions to exercise of this power, namely:
- (1) the bank must issue a notice to C & R requiring payment of the outstanding balance or principal;⁶
- and

⁶ Clause 8 (i) (a) (b) and (c) respectively.

- (2) C & R must have defaulted in repayment for at least 3 months after such request;⁶ or
- (3) interest must have been in arrears and remained unpaid for at least 4 weeks;⁶ or
- (4) C & R must have committed some other breach of the mortgage terms and conditions.⁶

[11] Mr. Daverson Dick testified that the bank has made repeated requests of C & R for payment which it has failed or refused to honour. Neither he nor Mr. Robinson provided any information regarding the date(s) of such requests to C & R. C & R by its amended defence denied receiving any such requests. The language of clause 8 seems to contemplate that written notice of demand be given to C & R. It states:

‘(i) the Power of Sale hereby conferred shall not be exercised unless and until one of the following events shall have happened namely:-

- (a) Notice requiring payment of the Principal Loan or the balance due thereon has been **served on the Mortgagor** and default has been made in payment of the Principal Loan demanded for three (3) months after **such service** or...’ (emphasis added)

[12] It does not appear that such formal notice was served on C & R. However, this default is not fatal to the bank’s claim. The bank has established that the last interest payment was made on 5th December, 2011, the outstanding interest is currently \$914,488.65 and the daily rate of interest is \$546.29. These figures demonstrate that C & R’s interest arrears have remained unpaid far in excess of 4 weeks. Accordingly, the bank may invoke its power of sale under clause 8 of the mortgage agreement.

[13] C & R contends quite correctly that in exercising this power of sale, the bank owes it certain equitable duties of care. The bank agrees. In this regard, it is settled law that the bank has a duty to act in good faith. The applicable legal principles were considered in **Cuckmere Brick Co. v. Mutual Finance Ltd.**⁷ and are adopted and applied in the instant case.

⁷ [1971] Ch. D. 949.

- [14] Acting in good faith translates practically, to the bank taking into account C & R's interests when considering what constitutes a reasonable sale price. Likewise, a mortgagee bank wishing to exercise its power of sale must take reasonable precaution to obtain a price which reflects the true market value of the mortgaged property.⁸ If it is being sold at auction, the bank may accept the best bid he can get, even if the auction is badly attended and the bidding exceptionally low. Where it is being sold by private treaty the mortgagee bank must act honestly and without reckless disregard for C & R's interest. This duty is also active at the date when a decision is taken to sell, and obliges the bank to 'obtain the true market value of the mortgaged property' at that time.⁹ Where their respective interests conflict, the bank is entitled to "give preference to (its) own interests,..."¹⁰
- [15] In light of the foregoing, once the bank takes appropriate measures, acts in good faith and obtains the best price under the prevailing circumstances, it would have fulfilled its duties to C & R, even if it ends up selling the property at a price below the market value. It can only achieve this if it commissions a current and proper valuation of the property. The valuation exhibited by the bank is now dated and would not reflect the property's present condition and value. As such it would fail to provide an objective and useful guide for the parties and prospective purchasers.
- [16] Similarly, any advertisements which were published years ago would have little utility in identifying suitable buyers. The bank would need to re-advertise and probably extend its coverage over a wider area. This would serve to widen the net and conceivably come to the attention of a broader pool of interested persons and entities.

Vacant Possession

⁸ Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

⁹ Ibid. per Salmon LJ at pg. 646 of the Cuckmere Brick case.

¹⁰ Cuckmere Brick Co Ltd and another v Mutual Finance Ltd. [1971] 2 All ER 633, pg 643 (Salmon LJ).

[17] The Civil Procedure Rules, 2000 ('CPR') Part 66 deals among other things, with claims by mortgagees for possession of a mortgaged property and delivery of possession by the mortgagee. It provides¹¹ that a claimant, must file evidence giving details of any person other than the defendant and the defendant's family who occupies the mortgaged property. The bank has not provided this information. The court notes that the valuation report describes the property as commercial and states that the ground floor accommodates 3 offices while the second floor houses offices, a boutique and, a salon. The court appreciates that a mortgagee who obtains an order for sale may experience difficulties executing such order without a concurrent order for vacant possession.

[18] Noting that the mortgaged property might be occupied by occupants other than C & R, it would seem improbable that vacant possession can be achieved immediately without inconveniencing third parties. In the absence of information regarding what interests (in any) such third party/parties might have in the mortgaged property, it is unwise to make such an order. I therefore make no such order at this time. This is without prejudice to a subsequent application by the bank. An order for sale could be frustrated unless a consequential order is made granting the bank, its servants and agents access to the mortgaged property for the purpose of inspection, valuation and other purposes related to its efforts to sell. An order to such effect is accordingly incorporated in this decision.

ORDERS

[19] It is accordingly ordered:

1. Judgment is entered for the Bank of Saint Vincent and the Grenadines in the amount of \$3,242,270.38 being the principal sum of \$2,326,431.73, interest of \$914,488.65, and late fees of \$1,350.00.
2. C & R shall pay to the Bank of Saint Vincent and the Grenadines interest:
 - (a) on the principal sum at the daily rate of \$546.29 from 18th September, 2012 until 27th April, 2016; and

¹¹ CPR 66.4 (2).

(b) at the statutory rate of 6% from the date of judgment until full satisfaction.¹²

3. C & R shall on receiving at least 72 hours advanced notice:

(a) grant access to Bank of Saint Vincent and the Grenadines Ltd., its servants and agents, to conduct a valuation of the mortgaged property; and

(b) arrange for its servants, agents, licensees and tenants (if any) to grant similar access to Bank of Saint Vincent and the Grenadines Ltd., its servants and agents.

4. The Bank of St Vincent and the Grenadines Ltd. Shall;

(a) arrange for a licensed property valuator to conduct a valuation of the mortgaged property within 30 days of today's date; and

(b) be at liberty to exercise its power of sale over the mortgaged property to recover the principal sum and interest due and owing under sub-paragraphs (1) and (2).

5. The Bank of St Vincent and the Grenadines Ltd. shall advertise the mortgaged property for sale by public auction or private treaty:

(a) in six consecutive issues of at least two weekly newspapers circulating in Saint Vincent and the Grenadines; and

(b) for a similar period, with at least one licensed local realtor who maintains or has access to a website for advertising purposes.

6. (a) The Bank of St Vincent and the Grenadines Ltd. shall be at liberty to sell the said property by public auction or private contract to the bidder or offeror who makes the highest reasonable offer;

provided that it amounts to at least 80% of the value ascribed in the valuation report obtained under sub-paragraph 4 (a).

¹² Pursuant to section 2 of the Interest Act, Cap. 27.

(b) The Bank of St Vincent and the Grenadines Ltd. shall apply to the court for further directions and/or order if the highest bid or offer received is less than 80% of the value of the mortgaged property.

7. C & R shall forthwith notify its licensees and tenants (if any) of the impending sale and finalize its arrangements to deliver vacant possession to the bank on short notice.

8. The bank shall within 14 days of today's date (i.e. on or before 12th May, 2016) serve a copy of this judgment on each occupant of the mortgaged property, and file proof of such service.

9. C & R shall pay agreed costs of \$5000.00 to the bank.

10. Liberty to the bank to apply for further consequential orders.

[20] I wish to thank counsel for their written submissions.

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Esco L. Henry
HIGH COURT JUDGE