COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Side

2010/CLE/gen/FP0166

B E T W E E N

COLINAIMPERIAL INSURANCE COMPANY LIMITED

Plaintiff

AND

GLENROY URIC BETHEL

First Defendant

AND

ALEXANDRIA MONIQUE BETHEL

Second Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Ms Wynsome Carey for the plaintiff

Mr Alonzo Lopez for the defendants

2010: 11 November

2011: 3 February; 17 May and 23 June

JUDGMENT

Gray Evans, J.

1. This action commenced by an originating summons filed 14 December 2009 in which the plaintiff seeks possession of Lot number 231 Royal Bahamian Estates Subdivision, Section "A", Freeport, Grand Bahama, The Bahamas ("the said property"), together with all sums due and owing by the defendants to the plaintiff, interest and costs.

2. The plaintiff's application was supported by the respective affidavits of Michael Ferguson filed on 8 January 2010; 11 November 2010 and 20 January 2011; Beverly Ferguson filed on 2 July 2010 and Samantha Green filed on 14 January 2011.

3. The defendant's affidavits in opposition were sworn by the first defendant and filed on 9 November 2010 and 1 December 2010.

4. None of the deponents was cross examined.

5. The defendants purchased the said property in or about 1996 and commenced construction of a dwelling house thereon, out of their personal funds. In August 2003, they agreed with Pinnacle Investments Company Limited to complete the construction at a cost of $162,500.00.

6. Also, in 2003 the plaintiff agreed to advance the sum of $176,000.00 to the defendants to assist them with the aforesaid construction and to meet some of their other financial obligations. The defendants agreed to give to the plaintiff a mortgage over the said property as security for the aforesaid loan.

7. Pursuant to that agreement, the plaintiff provided the defendants with a list of its "approved" attorneys from which to select an attorney to act for the plaintiff in the preparation of the mortgage documents.

8. The defendants selected the firm of Cafferata & Co., who prepared the said mortgage dated 22 August 2003 between the defendants and The Imperial Life Financial (Division of Desjardins Security Life Assurance Company) which was executed by the defendants and recorded in the Registry of Records of the Commonwealth of The Bahamas in volume 8864 at pages 501 to 518.

9. Between September 2003 and July 2004 the sum of $157,505.23 was disbursed from the aforesaid sum of $176,000.00, leaving an undisbursed balance of $18,494.77. The said sum of $157,505.23 was disbursed as follows:

(a) Mobilization	$32,500.00	1 September 2003
(b) 2nd and 3rd stages	$56,875.00	14 November 2003
(c) 4th stage	$32,500.00	26 March 2004
(d) 5th stage	$25,604.00	5 July 2004
(e) Legal fees	$ 5,030.23	
(f) 2% processing fee	$ 3,520.00	
(g) Contractors' insurance	$ 1,476.00	

10. By a deed of transfer of loans portfolio dated 19 January 2005 between Desjardins Financial Security Life Assurance Company and the plaintiff, certain mortgages, including the said mortgage, were transferred to the plaintiff (then called Colina Insurance Company Limited) for the consideration therein expressed.

11. The plaintiff's name was changed from Colina Insurance Company Limited name to ColinaImperial Insurance Ltd on 9 June 2005.

12. In March 2006, the plaintiff agreed to lend to the defendants the further sum of $64,000.00 to assist with their purchase of another piece of property, situate in Bahamia Subdivision, Freeport, aforesaid. That loan was secured by a further charge and deed of variation dated 21 April 2006, between the defendants and the plaintiff and recorded in the said Registry of Records in volume 9723 at pages 159 to 166.

13. In the said further charge and deed of variation, which was also prepared by the firm of Cafferata & Co., the parties agreed, at clause (G) thereof, that the sum of $217,883.23, disbursed thus far, would be "substituted for the like covenant contained in the Mortgage to the intent that the combined sum shall be amortized over the twenty-five (25) year period commencing 25 May 2006" by equal monthly payments of $1,852.36. The said sum of $217,883.23 comprised the principal and interest then due from the funds advanced under the mortgage plus the further advance of $64,000.00. It did not include the undisbursed sum of $18,494.77.

14. By letter dated 1 August 2008 the plaintiff wrote to the defendants expressing its concern about the manner in which the aforesaid loan was being serviced; advised them that the account had fallen into arrears in the sum of $3,179.80, and requested that the account be brought current by 31 August 2008.

15. The first defendant lost his job sometime in or about 2008 and in or about February 2009 the first defendant requested orally of Samantha Green, one of the plaintiff's employees, that the undrawn funds of $18,494.77 be applied against the arrears.

16. The plaintiff denied this request, advising instead in a letter dated 7 September 2009 that the undrawn funds had been cancelled because they had been left undisbursed for too long and that, in any event, it was not the plaintiff's policy to use undrawn funds to pay arrears of mortgage payments. The plaintiff also advised the defendants that their account was then 201 days past due and the amount of the arrears had grown to $11,128.12.

17. In a letter dated 5 October 2009, the defendants' contractors, Pinnacle Investments Company Limited, advised the plaintiff that the defendants had paid them and requested that the undrawn funds be disbursed to the defendants.

18. That letter was followed by the following letter dated 15 October 2009 to the plaintiff in which the defendants wrote (verbatim):

19. This action was commenced on 11 December 2009 and the plaintiff alleges that as of that date the defendants owed the sum of $224,529.00 as principal and interest in the sum of $12,835.50 on account of the aforesaid mortgage and further charge with

interest accruing daily at the rate of $49.18; that demand was made by the plaintiff of the defendants for payment of the arrears of mortgage payments to no avail, resulting in the commencement of this action.

20. The defendants do not deny having borrowed the aforesaid funds; nor do they deny having signed the mortgage commitment letter the mortgage or the further charge and deed of variation; nor do they deny having directed the plaintiff to disburse the funds borrowed, or that those funds, except for the aforesaid sum of $18,494.77, were disbursed to them or on their behalf. Nowhere in his affidavit does the first defendant deny owing the funds as alleged by the plaintiff. Indeed, in their letter of 15 October 2009, the defendants made the following admission: "our arrears with your company is a total of 11,128.12 to the date of September 23, 2009" and sought to have those arrears settled from the aforesaid undrawn funds.

21. Nevertheless, the defendants say that they should be discharged from their obligations under the mortgage and further charge, and seek an order setting them aside as illegal and void.

22. The mortgage and further charge are in the usual form and for easy reference relevant clauses are set out hereunder.

23. Clause (2) of the mortgage provides that:

> "In further pursuance of the agreement and for the consideration aforesaid the borrower as beneficial owner hereby conveys unto the Lender" (The Imperial Life Financial (Division of Desjardins Security Life Assurance Company) "all the mortgaged property....to hold the same unto and to the use of the Lender and its assigns in fee simple....provided that if the borrower shall repay to the Lender the principal sum and interest thereon and other amounts hereby secured in accordance in all respects with the terms hereof the Lender at any time thereafter at the request and costs of the borrower will reconvey the mortgaged property to the borrower or as the borrower shall direct."

24. Clause 5(a)(i) of the mortgage provides that it is agreed that:

> "if two or more of the monthly instalments herein provided for shall be in arrears and unpaid (whether lawfully demanded or not)...
>
> ...forthwith and without notice to the borrower the principal sum or so much thereof as shall be then owing by the borrower to the Lender with interest thereon at the rate for the time being payable hereunder together with all instalments in arrears fees money expended by the lender in relation to the mortgaged property costs and other payments and moneys owing to the lender shall immediately become payable by the borrower to the lender and shall be recoverable by the lender with interest thereon from the time of the same becoming payable at the rate aforesaid and the lender may at any time thereafter and from time to time in the lender's absolute discretion do all or any of the following acts:
>
> (aa) Enter into possession of the mortgaged property."

25. Clause 5(n) of the mortgage provides that:

> "The lender may at any time transfer the benefit of this indenture to anyone and in such case the redemption money at the date of the transfer shall be deemed to be the principal money then owing and shall bear interest at the rate mentioned herein from the date of the transfer and the transferee shall have the benefit of all covenants by the borrower and the provisions herein contained and may at any time thereafter exercise all rights and remedies of the mortgagee for securing the principal sum and interest."

26. By clause 4(a) of the mortgage:

> "It shall be lawful but not obligatory on the lender to advance and pay all sums of money necessary for the purpose of keeping up values determined at the discretion of the lender any insurance on the buildings which are now or may hereafter be erected on the mortgaged property....and all moneys so paid...shall be repayable on demand and

shall bear interest at the same rate at which interest shall be payable for the time being hereunder on the principal sum computed from the time or respective times or paying or advancing the same."

27. Clause 4 of the deed of variation and further charge provides as follows:

"The borrower hereby declares that except as substituted or varied herein all covenants provisions and powers contained in or subsisting under the mortgage shall operate and take effect as if the further sum and interest thereon as aforesaid formed part of the principal and interest secured by the mortgage."

28. The principles regarding the mortgagee's right to possession of the mortgaged premises are not disputed.

29. The mortgagee's right to possession of the mortgaged premises accrues at the date of the mortgage, although its right to bring an action to recover such possession may, by the mortgage deed, be postponed to some future event, as is the case of clause 5 of the said mortgage. One such future event being: if any two instalments shall be in arrears and unpaid (whether lawfully demanded or not). [5(a)(i)(aa)]. Another is the failure to pay the householder's fire insurance premium.

30. In the case of Fourmaids, Ltd v. Dudley Marshall 1957 1 AER 35 Harman, J. at page 36 said:

"... the right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right."

31. And in Major v Citibank, N.A. [1996] BHS J. No. 66 Longley, J. opined at paragraphs 9 through 11 that:

Subject to the caveat that the mortgagees right to possession is also subject to statute, I would agree with the opinion expressed by Harman, J. as representing the law with respect to the right of mortgagee to possession.

And the reason he has that right is that on execution of the mortgage, which is achieved by conveyance of the legal estate, he becomes the owner of the legal in estate in the property which vests in him on execution. Accordingly, as an incident of that legal title, he is entitled to possession. This is borne out by the case of Ashley Guarantee PLC vs. Zacaria (1993) AER v 254. There in an action for possession, inter alia, the defendant sought to deny the plaintiff's right to possession on the grounds that there were cross claims that exceeded the amount which the plaintiff contended was outstanding on the mortgage.

The Court held that a mortgagee's right to possession could not be defeated in these circumstances because the mortgagee had as an incident of his estate in the land a right to possession of the mortgaged property, and cross claims could not be unilaterally appropriated in discharge of the mortgage debt.

32. Then Ganpatsingh, J.A. in the Court of Appeal case of Citibank, N.A. v. Major [2001] BHS J. No. 6 stated at paragraph 10 that:

"The position at law is that where under a legal mortgage, being an instalment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order...; but this does not exclude a power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so."

33. He continued at paragraph 17:

"The cases cited on the impeachment of mortgage securities, all show that unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud on or irregularity in the exercise of the power of

sale, the Courts will not intervene to prevent a mortgagee from exercising his lawful rights under the mortgage deed."

34. Then, at paragraph 25:

> "Now there is a general, though not an inflexible rule of practice, that the Court will not interfere to deprive a mortgagee of the benefit of his security, in the absence of fraud or irregularity, and a departure from the practice would normally attract the equitable principle, that the mortgagor pay into Court the amount outstanding or claimed or otherwise secure the mortgagee. This rule of paying in was itself not an inflexible one in the nature of a condition. Whether it applied or not depended on the nature of the fraud or irregularity. The Court's duty in every instance was to do equity between the parties."

35. Although the defendants in the affidavit of the first defendant and through the submissions of their counsel offered several reasons why, they say, they should be released from their obligations under the mortgage and further charge, all of which I have considered, their main challenges centred around three issues, namely:

a. The plaintiff's refusal to permit the defendants to use the undrawn funds to pay off the arrears of mortgage payments.

b. The requirement by the plaintiff that the defendants select an attorney from its list of "approved" attorneys.

c. The validity of the deed of transfer of loan portfolios.

36. The evidence is that the plaintiff agreed to lend the sum of $176,000.00 to the defendants to assist them with the completion of the construction of their home on property owned by them. $162,500.00 was to be paid to the contractors and the remaining $13,500.00 was to meet other financial obligations of the defendants. All of the funds save for $18,494.77 was paid to the contractor, at the request of the defendants at various times during the period September 2003 to July 2004.

37. The defendants' evidence is that they paid the balance due to the contractor from their personal funds rather than drawing them from the remaining proceeds of the loan and according to Mr Ferguson's evidence, approximately one year after the defendants were advised that their account was in arrears, the first defendant informed him that he never intended to draw down the undrawn sum as it was his intention to satisfy the mortgage over a shorter period of time. As indicated, that evidence was not refuted by the defendants.

38. The plaintiff admits that it refused to use the undrawn funds to pay off the arrears owed by the defendants. According to Mr Ferguson, it would have been unconscionable on the part of the plaintiff, in light of the arrears then owing, $11,128.13, and the fact that the first defendant was not working, to have advanced further funds to the defendants. In addition to which, the defendants had also defaulted in paying their homeowner's fire insurance premium for the years since 2006, which breach had been remedied by the plaintiff, pursuant to clause 4(a) of the mortgage. On each occasion, notice of the payment as well as its effect on the maturity date of the mortgage was sent to the defendants by the plaintiff.

39. In any event, the plaintiff says at the date of the defendants' request to use the undrawn funds to pay off the arrears, some four years after the last disbursement, their account would have already been adjusted to reflect that the funds were undrawn and therefore the defendants would not have been charged interest on those funds as the defendants were only charged interest on funds actually advanced to them or on their behalf.

40. Further, the plaintiff says that the defendants were aware, from the commitment letter dated 21 March 2006, which was signed by the defendants, that the plaintiff could withdraw its support at any time if, in the plaintiff's opinion, there was "any material adverse change in the (defendants') financial condition". In the plaintiff's view, the first defendant's job loss, coupled with the defendants' failure to pay the aforesaid fire insurance premiums when they became due, were, counsel for the plaintiff submits, sufficient reasons for the plaintiff to refuse to advance any further funds to the defendants. It appears to me that by failing to advance further funds to the defendants in those circumstances, the plaintiff was simply using good business sense.

41. In any event, even if the defendants have a cause of action against the plaintiff for refusing to use the undrawn funds to pay off the arrears, the fact is that by the time the defendants made that request, the mortgagee's right to possession on the ground of the defendants' default had already arisen and therefore, in my view, such refusal by the plaintiff does not provide to the defendants a defence to the plaintiff's application for possession.

42. It is not disputed that the plaintiff provided the defendants with a list of its approved attorneys to act in the transaction with the defendants. Nor is it disputed that the defendants selected the firm of Cafferata & Co. However, as I understand counsel for the defendants' submissions, the defendants were "forced" by the plaintiff to engage the services of an attorney of the plaintiff's choosing, thereby creating a "conflict of interest situation"; that because the defendants were "not free" to choose their own attorney from the wider Bar, the mortgage was "illegally negotiated and contracted" and therefore "unenforceable." The defendants and their counsel contend that had they been given the opportunity to choose from the wider Bar, they would have chosen another attorney.

43. Counsel for the plaintiff points out and I accept that it is common knowledge within the legal profession that the legal fees of the lender's attorney are paid by the borrower. Consequently, the lawyer in the transaction responsible for ensuring that the borrower has a good and marketable title which he can mortgage to the lender in exchange for the loan as well as prepare the mortgage documents is really the lawyer for the lender, notwithstanding that there may be times when the same lawyer for any number of reasons may "act" for both parties.

44. Indeed, the mortgage commitment letter dated 28 July 2003 and signed by the defendants on 5 August 2003 as having accepted the loan on "the terms and conditions stated herein", included, inter alia, the following terms:

> **Title and Documents:** Title to the property and all legal matters in connection with this loan are to be acceptable to the solicitors acting for Imperial Life Financial and all documentation deemed to be necessary by Imperial Life Financial and its solicitors in connection with this loan are to be in the form and content entirely satisfactory to Imperial Life Financial and its solicitors.
>
> **Solicitors:** Firm: Cafferata & Co. – Mr Adam Cafferata

45. The evidence is that no objection was taken by the defendants when asked to choose from the aforesaid list of approved attorney, nor apparently did the defendants insist on having separate counsel.

46. The defendants also say that they did not know that the effect of the mortgage was to "make Imperial Life the owner" of their "house from the start"; that they were not advised that all they retained was a "right to recover the property in the event (they were) able to pay off the entire loan." However, I note that the defendants do not say that had they been aware of this they would not have completed the transaction.

47. In any event, I accept the submissions of counsel for the plaintiff that the attorney selected by the defendants from the plaintiff's list of approved attorneys was at all material times the attorney of the plaintiff and not the defendants; that the defendants were free to choose another attorney to represent them, while Cafferata & Co., would have represented the plaintiff's interest. Further, as pointed out by counsel for the plaintiff, the defendants do not dispute executing the mortgage deed or that, prior to their having defaulted, complying with its terms and in those circumstances I do not see how the defendants can now cry "conflict of interest." Moreover, if there was a conflict of interest situation involving the attorney, it is unclear how the defendants would have a cause of action against the lender.

48. In the circumstances, I agree with counsel for the plaintiff that the defendants have not shown how their being asked to select an attorney from the plaintiff's list of approved attorneys resulted in a conflict of interest such that would make the mortgage deed "illegally negotiated and contracted and therefore unenforceable" as argued by counsel for the defendants. In any event, it occurs to me that the attorney would not have entered the picture until after the defendants and the plaintiff would have negotiated and contracted the loan which the mortgage secured.

49. As indicated, the defendants also challenge the ability of the plaintiff to maintain this action and in their counsel's submission, the "transaction is void or at the very least unenforceable due to the lack of evidence of particulars necessary to allow a court of law to presume for the validity of a properly attested deed." By that, taken in the context of his other submissions in relation to the said transfer, I understood him to be saying that

the deed of transfer whereby the plaintiff became entitled to enforce the aforesaid mortgage is defective as it has not been properly executed and consequently the plaintiff has no *locus standi* to bring the case against the defendants.

50. In that regard, counsel for the defendants questions firstly, the authority of the signatories to the aforesaid transfer to execute the document and secondly, whether "sufficient facts (were) averred in the deed to allow the Court to presume for the validity of the transaction"?

51. In response, counsel for the plaintiff points out that the common seal of the transferor, Desjardins Financial Security Life Assurance, was affixed to the deed of transfer by persons authorized by that company's Articles of Association to execute documents on its behalf, and, therefore, in her submission, the deed of transfer was properly executed. In any event, she submits that it is for the defendants who assert the invalidity of the deed to prove such assertion, which, in her submission, they have failed to do. I agree.

52. Counsel for the plaintiff submits further that the authority of the aforesaid signatories to the deed of transfer is not an issue to be determined by this Court and in support of that submission she relies on section 98 of the Evidence Act which provides as follows:

> "When any document is produced before a court purporting to be a document which by any statute at the time in force is admissible in evidence provided that it is signed or stamped or sealed or otherwise authenticated as required by the statute, the court shall presume until the contrary is shown that:
>
> a. the signature, stamp, seal or other authentication of the document is genuine
>
> b. that the person signing, stamping, sealing or otherwise authenticating it had at the time when he so signed, stamped, sealed or authenticated it the official or other character he claims;
>
> Provided that the document is substantially in the form and purports to be executed in the manner directed by the law in that behalf".

53. Again, I agree with counsel for the plaintiff that it is for the defendants to rebut the authenticity of the execution of the document which, in my view, they have failed to do.

54. Counsel for the defendants raises other challenges to the deed of transfer, all of which I have considered. However, I agree with counsel for the plaintiff that they are all without merit.

55. Moreover, it is, in my view, clear that the defendants must have accepted that the mortgage had been duly transferred to the plaintiff as not only did they make payments to the plaintiff after the date of the deed of transfer, but they also obtained further advances and executed a further commitment letter as well as the deed of variation and further charge with the plaintiff some three years after the mortgage.

56. It is, therefore, in my view, disingenuous of the defendants to now say that the deed of transfer is defective.

57. For that reason as well as those proffered by counsel for the plaintiff, I reject the defendants' arguments against the validity and effectiveness of the deed of transfer of loan portfolio.

58. So, as much as I sympathize with the defendants' plight, the authorities regarding a mortgagee's right to possession are clear and as observed by Harman, J. in the Four Maids case, observations which I respectfully adopt:

> "If this were a case where there is a discretion in the matter, I should feel that it was a hard case; but the mortgagor has entered into a contract with the mortgagee, and the mortgagee wants his rights under the contract, and this court, in my judgment, has no power to refuse him those rights."

59. Counsel for the plaintiff points out that the principal amount owed by the defendants to the plaintiff became due and owing since 27 May 2009 as a result of the defendants' account being in arrears for at least 120 days at that date. She points out further that by November 2010, the date of the first hearing, the defendants' account was in arrears for 595 days. Consequently, she submits, and I accept, that the plaintiff's right of possession of the said property has arisen as a result of the defendants' default under

the mortgage and further charge and the plaintiff is therefore entitled to immediate possession of the said property.

60. So, having reviewed the evidence and having heard counsel for each of the parties, I have heard nothing to persuade me that I should not accede to the plaintiff's request for possession of the said property.

61. In the result, it is the order of this Court that unless the defendants, within 21 days of the date hereof (i.e. on or before 15 July 2011), pay to the plaintiff the sum of $224,529.00 together with interest thereon at the rate of $49.18 per day from 11 December 2009 until payment, the defendants are to give vacant possession to the plaintiff within 28 days of the date hereof (i.e. on or before 22 July 2011).

62. The defendants are to pay the plaintiff's costs of this action, to be taxed if not agreed.

DATED this 23rd day of June A.D. 2011

Estelle G. Gray Evans
Justice