

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2019/CLE/gen/01639

BETWEEN

MICHEL TREPANIER

Plaintiff

-AND-

KAREN MOSS TIMOTHY

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Tanya N. Wright of World Legal Services for the Plaintiff
Mr. Gregory K. Moss of Moss & Associates for the Defendant

Hearing Dates: 18 July 2022 and on written submissions dated 25 July and 2 August 2022

Civil – Originating Summons for vacant possession – Mortgagee rights vis-à-vis Mortgagor’s – Functus Officio - The effect of ‘liberty to apply’ in consent order – Whether mortgagee is a financial institution – Applicability or not of the Homeowners Protection Act, 2017

By Originating Summons filed 18 November 2019, the Plaintiff commenced proceedings against the Defendant seeking, among other things, judgment for the sums owed under a mortgage between the parties and an order for vacant possession of the Mortgaged Property.

The parties attempted to settle the matter but the Defendant failed to comply with the terms of a Consent Order, even after it was extended by a subsequent Consent Order. As a result, the Plaintiff applied for the Originating Summons to be heard. The Defendant opposed the application, contending that the Court became *functus officio* after the Consent Order was made between the parties. According to the Defendant, the Originating Summons had been heard and disposed of by the Court.

The Court heard the Plaintiff’s application on 18 July 2022 and reserved its ruling.

In the intervening period, on 29 July 2022, the Defendant filed a Summons to strike out the Plaintiff's Originating Summons on the grounds that it does not disclose a reasonable cause of action, is scandalous, frivolous or vexatious and/or otherwise an abuse of the process of the court as it was filed in non-compliance with the Homeowners Protection Act, 2017 and section 3(3) of the Interpretation and General Clauses Act. The application was made under RSC O. 18 r. 19 (1) (a), (b), (c) and (d) and under the Court's inherent jurisdiction.

The Plaintiff argued that the Defendant is wrong on all fronts.

HELD: Finding that the Court is not *functus officio*, the Plaintiff is entitled to judgment on the sum owed with interest thereon to be paid by the Defendant on or before 15 November 2022 failing which the Defendant is to give up possession of the Mortgaged Property by the said date. The Plaintiff is also entitled to his costs of these applications to be taxed if not agreed.

1. No judgment or final decision was ever made. Only interlocutory orders were made. The parties merely consensually agreed to terms of payment, which was capable of finally disposing of the matter only if its terms were complied with. "Liberty to apply" expressly provides for parties to enforce their intention having regard to the terms of settlement. By filing the Notice to hear the Originating Summons, the Plaintiff merely seeks to enforce his intention under the Consent Order to be paid the sum due under the mortgage: **Page v Skelt** [1940] 2 All ER 419 applied.
2. The Homeowners Protection Act, 2017 applies only to financial institutions and not to individual lenders: Homeowners Protection Act, 2017 and the Financial Transactions Reporting Act, 2018 applied.
3. Unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale, the Courts will not intervene to prevent the mortgagee from exercising his legal right under the mortgage: **Citibank NA v Paul Major** [2001] BHS J. No. 6 and **Finance Corporation of the Bahamas Ltd. v Roberts and another** [2016] 2 BHS J. No. 221 applied.

RULING

Charles Snr. J: Introduction

[1] There are two (2) extant applications before the Court, namely:

1. A Notice of Hearing filed by the Plaintiff, on 10 June 2022 for the continuation of the hearing of the Plaintiff's Originating Summons filed 18 November 2019 ("the June 2022 Application") and;
2. A Summons filed by the Defendant on 29 July 2022 to strike out the Originating Summons pursuant to Order 18 Rule 19 (1) (a), (b), (c) and (d) of the Rules of the Supreme Court ("RSC") and the Court's inherent jurisdiction by reason that it failed to comply with section 4 (1) of the Homeowners Protection Act and section 3(3) of the Interpretation and General Clauses Act ("the Strike Out Application").

Procedural history

[2] The parties entered into a mortgage dated 30 June 2017 ("the Mortgage"), by which the Plaintiff ("Mr. Trepanier") advanced US\$510,000 to the Defendant ("Mrs. Moss-Timothy") for the purchase of his former home situate in the Subdivision known as "Tower Heights" in the Eastern District of the Island of New Providence ("the Mortgaged Property").

[3] Mrs. Moss-Timothy went into default of the repayment provisions of the Mortgage on 9 January 2019. By Notice of Default and Intent to Sell Under Mortgage dated 14 August 2019 ("the Notice"), the attorneys for Mr. Trepanier advised Mrs. Moss-Timothy of her default in the repayment and demanded payment of the monies due under the Mortgage ("the Repayment Arrears") within 30 days failing which legal proceedings would be instituted against her.

[4] The Notice was personally served on Mrs. Moss-Timothy on 16 August 2019. Following service of the Notice, there was an exchange of emails between the parties on 20 and 21 August 2019. They agreed to a meeting to discuss the

defaults. Subsequently, Mrs. Moss-Timothy made a payment for the months of June – September 2019 but has failed and/or refused to address the other defaults set out in the Notice.

[5] As a result, on 18 November 2019, Mr. Trepanier commenced these proceedings against Mrs. Moss-Timothy seeking, among other things, payment of all sums due and owing under the Mortgage with interest thereon and an order for vacant possession of the Mortgaged Property. The application was made under RSC Order 77, Rule 1.

[6] On 17 March 2020, Mrs. Moss-Timothy filed a Summons pursuant to sections 5 and 8 of the Homeowners Protection Act, 2017 for relief from the orders sought by Mr. Trepanier. The application was heard on 18 March 2020. The parties were encouraged by the Court to settle the matter. The Originating Summons was adjourned to 9 June 2021 for report.

[7] On the adjourned date, the parties returned to Court with a Consent Order (“the June 2021 Consent Order”). By the terms of the June 2021 Consent Order, Mrs. Moss-Timothy was to pay USD \$80,660.00 representing 20 months of the monthly mortgage payment due under the Mortgage on or before 9 August 2021, which would have made her current up to August 2021. She was also to pay BSD \$5,100.00 for stamp duty of the Mortgage, failing the payments, she was to deliver up vacant possession.

[8] The parties returned to Court on 20 September 2021 when Mr. Rigby KC, who had previously represented Mrs. Moss-Timothy, sought leave for Baycourt Chambers to cease to act for her. At that hearing, learned Counsel Mr. Moss was present and intimated that he would be representing Mrs. Moss-Timothy. Promptly, on 21 September 2021, the law firm of Moss & Associates filed a Notice of Change of Attorney.

[9] The matter came back before me on 28 September 2021. By Consent Order dated 28 September 2021 (“the September 2021 Consent Order”), the terms of the June

2021 Consent Order was extended to 5 October 2021. I shall selectively set out the terms of that Order.

IT IS HEREBY ORDERED BY CONSENT THAT:

1. **The Defendant is granted relief from sanctions as prayed in the Defendant's Summons filed herein on 23rd September, 2021 pursuant to Order 31A, rule 25 of the Rules of the Supreme Court.**
2. **The Defendant shall deliver to the Plaintiff's Counsel, in the name of the Plaintiff's Firm and in Bahamian Dollar currency the following Two (2) Bank Drafts:**
 - (a) **Bank Draft in the sum of Eighty-one Thousand Six Hundred and Sixty-eight Dollars and Twenty-five cents in Bahamian Dollar currency (\$81,668.25) being inclusive of currency exchange to purchase the United States Dollar equivalent of Eighty Thousand Six Hundred and Sixty Dollars in United States Dollar currency (\$80,660.00) as arrears due to the Plaintiff under subject Mortgage for the period 1st January, 2020 to 31st August, 2021.**
 - (b) **Bank Draft in the sum of Five Thousand One Hundred Dollars in Bahamian Dollar currency (\$5,100.00) as stamp duty payable upon the stamping of the subject Mortgage.**
3.
4.
5. **That this matter is adjourned to 2nd November, 2021 at 12 o'clock noon for taxation of costs.**
6. **The parties shall have liberty to apply.** [Emphasis added]

[10] On 2 November 2021, the Court heard the taxation of costs application and gave a short oral Ruling. The Court awarded costs of \$25,000 to Mr. Trepanier.

[11] On 10 June 2022, Mr. Trepanier filed the June 2022 Application. It was heard on 18 July 2022. Thereafter, the Court reserved its decision.

[12] On 29 July 2022 and while the decision was pending, Mrs. Moss-Timothy filed the Strike out Application which was heard on written submissions.

Preliminary point: Whether the Court is functus officio/Whether the June 2022 Application is null and void

- [13] Learned Counsel Mr. Moss, who appeared on behalf of Mrs. Moss-Timothy, raised a preliminary point with respect to the June 2022 Application. He submitted that the Originating Summons filed on 18 November 2019 has been determined finally and therefore, the Court has no jurisdiction to hear the June 2022 Application which, according to him, is a nullity. Mr. Moss contended that once the September 2021 Consent Order was perfected, the Court became *functus officio* save in respect of any proper application of the slip rule or, in the case of fraud. He submitted that, as no such proper application of the slip rule would apply and as no allegation of fraud has been made or proven, the Court is *functus*. He asserted that the entire subject matter of the Originating Summons has been heard and disposed of and, as such, the Court has no jurisdiction to hear the June 2022 Application.
- [14] On the other hand, Mrs. Wright, who appeared as Counsel for Mr. Trepanier, correctly submitted that neither of the Consent Orders were final orders as they did not have the effect of disposing of the Originating Summons. She also correctly stated that the June 2021 Consent Order was made in good faith between the parties with a view to settling the matter, as they had been encouraged to by the Court to do so at the previous hearing.
- [15] By the terms of the June 2021 Consent Order, the parties charted a course for payment. The sum that Mrs. Moss-Timothy was supposed to pay under the June 2021 Consent Order was not even the full amount that Mr. Trepanier had claimed in his Originating Summons. The June 2021 Consent Order was varied on 23 September 2021 resulting in the September 2021 Consent Order. It merely extended the June 2021 Consent Order and added conditions for it to be extended. Mrs. Wright correctly stated that, if the Court became *functus* with respect to the June 2021 Consent Order, on Mr. Moss' logic, the Court would have lacked the jurisdiction to vary the September 2021 Consent Order.

[16] Succinctly put, at no point was Mrs. Moss-Timothy granted indefinite relief from the claim filed by Mr. Trepanier. The parties merely entered into an agreement/arrangement by which Mrs. Moss-Timothy would be relieved so long as she complied with the terms of the consent orders. It did not affect the viability of the Originating Summons.

[17] Both consent orders contained “liberty to apply.” Mr. Moss submitted that the “liberty to apply” provision in the consent orders does not and cannot vest the Court with a continuing jurisdiction to *‘resuscitate’* the case and to make a further order in respect of the action.

[18] Counsel next submitted that the expression does not allow the Court to hear an appeal from its own judgment which is accurate.

[19] The effect of “liberty to apply” was explained by Clauson LJ in **Page v Skelt** [1940] 2 All ER 419 at page 423:

“The object thus to be attained is effected by an order staying proceedings on the terms of the settlement—and they are usually scheduled to the order—with liberty to apply to the judge. It is not liberty to apply to the judge to given judgment in the action, but liberty to apply to the judge to make such order as, having regard to the terms of the settlement, the parties consensually agree should be made in order to enforce their intentions.”

[20] The short answer is that no judgment or final decision was ever made. The parties merely consensually agreed to terms of payment, which was capable of finally disposing of the matter only if its terms were complied with. As stated by Clauson LJ in **Page**, liberty to apply expressly provides for parties to enforce their intention having regard to the terms of settlement. By filing the June 2022 Application, Mr. Trepanier merely seeks to enforce his intention under the Consent Orders to be paid the sum due and owing to him under the Mortgage.

[21] Accordingly, the matter was never finally determined and the Court is therefore not *functus officio* nor is Mr. Trepanier’s application null and void.

The Strike- Out Application

[22] Mrs. Moss-Timothy filed her application to strike out the Originating Summons pursuant to RSC O. 18 r. 19 (1) (a), (b), (c) and (d) and under the Court's inherent jurisdiction on the ground that it was filed in non-compliance with section 4 (1) of the Homeowners Protection Act ("HPA") and contrary to section 3 (3) of the Interpretation and General Clauses Act ("the IGCA"). Learned Counsel Mr. Moss asserted that the Originating Summons does not disclose any reasonable cause of action against Mrs. Moss-Timothy and it is scandalous, frivolous or vexatious and/or is otherwise an abuse of the Court's process.

[23] Mrs. Wright correctly stated that Mrs. Moss-Timothy's former Counsel unsuccessfully argued that the HPA was applicable to the instant case. The HPA was enacted for the purpose of providing protection and relief to homeowners and for ancillary matters thereto. Section 3 provides that the Act **shall apply to financial institutions** that provide, purchase or otherwise service mortgages.

[24] Section 2 of the HPA defines "financial institution" as defined in section 3 of the Financial Transactions Reporting Act (Ch 368) thus:

"(1) For the purposes this Act, "financial institution" means –

(a) A bank or trust company licensed under the Banks and Trust Companies Regulation Act (Ch 316):

(b) A company carrying on –

(i) long term insurance business, as defined in section 2 of the Insurance Act (Ch 347);

(ii) insurance business as defined in section 2 of the External Insurance Act (Ch 348); or

(iii) such other insurance business as the Minister may designate by notice published in the *Gazette*, after consultation with the IRF Steering Committee (established under section 5 of the Proceeds of Crime Act, 2018);

(c) a co-operative credit union registered under the The Bahamas Co-operative Credit Unions Act (No 9 of 2015);

- (d) the holder of a gaming licence, proxy gaming licence, mobile gaming licence, restricted interactive gaming licence and gaming house operator licence under the Gaming Act (No. 40 of 2014);**
- (e) a broker-dealer within the meaning of section 2 of the Securities Industry Act (No. 10 of 2011);**
- (f) a trustee, administration manager or investment manager of a superannuation scheme;**
- (g) an investment fund administrator of an investment fund within the meaning of the Investment Funds Act (Ch. 369A);**
- (h) a person whose business or a principal part of whose business consists of –**
 - (i) borrowing or lending or investing money;**
 - (ii) administering or managing funds on behalf of other persons;**
 - (iii) acting as trustee in respect of funds of other persons;**
 - (iv) dealing in life insurance, and insurance business, which is investment related;**
 - (v) providing financial services that involve the transfer or exchange of cash, including (without limitation) services relating to financial leasing, money transmissions, credit cards, debit cards, treasury certificates, bankers draft and other means of payment, financial guarantees, trading for account of others (in money market instruments, foreign exchange, interest and index instruments, transferable securities and futures), participation in securities issues, portfolio management, safekeeping of cash and liquid securities, investment related insurance and money changing; but not including the provision of financial services that consist solely of the provision of financial advice;**
- (i) a financial and corporate service provider licensed under the Financial and Corporate Service Providers Act (Ch. 369);**
- (j) a Designated Non-Financial Business and Profession as defined in section 4;**
- (k) a non-bank entity licensed and regulated by the Central Bank under the Payment Systems Act (No. 7 of 2012); and**

(l) any other category of institutions that the Minister may by order designate.

(2) A person shall not be regarded as a financial institution for the purposes of this Act merely because that person carries on business as a security guard within the meaning of section 2 of the Inquiry Agents and Security Guards Act (Ch. 210)."

[25] It seems plain to me that Mr. Trepanier is not a financial institution. It follows that the HPA does not apply to the Mortgage which Mr. Trepanier provided to Mrs. Moss-Timothy.

[26] In his written submissions, Mr. Moss has failed to demonstrate how the June 2022 Application contravened section 3 of the IGCA. In a nutshell, that section interprets many words and expressions.

Vacant possession/substantive claim

[27] RSC Order 77 provides that a mortgagee is entitled to commence a mortgage action for the delivery of possession. O. 77 r. 1 provides:

"(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely —

(a) payment of moneys secured by mortgage;

(b) sale of the mortgaged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the mortgagee.

(2) In this Order “mortgagee” includes legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) An action to which this Order applies is referred to in this Order as a mortgage action.”

[28] The Court of Appeal in **Citibank NA v Paul Major** [2001] BHS J. No. 6 crystallized the court’s approach to the mortgagee’s lawful exercise of his right under a mortgage. Ganpatsingh JA expressed that unless there is some question as to the validity of the mortgage itself, fraud or irregularity in exercising the power of sale, the courts will not intervene to prevent the mortgagee from exercising his legal right under the mortgage. At para 77, Ganpatsingh JA stated:

“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. These proceedings were in every sense irregular, for there was no pending action in the equity jurisdiction of the court claiming relief in the first instance from an unconscionable bargain, as a result of the Bank acting in a way which prevented the respondent from giving proper detached consideration to his independent interest in the mortgage transaction, and which involved substantial risk to him, making such conduct unconscionable: See *Bank of Credit and Commerce v Aboody* (1989) 1 QB 923. Any such claim of course would go to the root of the mortgage transaction. The deed however would not be set aside, unless it could be established that the mortgage was to the manifest disadvantage of the respondent.”

[29] That position was restated by Fraser J in **Finance Corporation of the Bahamas Ltd. v Roberts and another** [2016] 2 BHS J. No. 221. Because there were no arguable legal grounds, the fact that the mortgagor breached the mortgage agreement was conclusive. At para 14, the learned judge stated:

“There have been no arguable legal grounds put forward by the Defendants which would affect or change the order of vacant possession. The Defendants are still in breach of the mortgage agreement and the law in that regard is clear. ”Unless there is a mortgage action in which is raised a serious question to be tried, including either the validity of the mortgage transaction itself or

fraud or irregularity in the exercise of the power of sale, the Court will not interfere to prevent a mortgagee from exercising his lawful rights under the mortgage deed." (Citibank v. Paul Major JA Ganpatsingh)."

[30] By the terms of the Mortgage, Mr. Trepanier, as the mortgagee, has legal title to the Mortgaged Property. He is therefore entitled to judgment for the sums owed under it and vacant possession of the Mortgaged Property. As at 31 May 2022, that sum stood at \$464,207.62. There should be no demur that, with the passage of time, the sum would have increased. I will leave it in the capable hands of both Counsel to calculate the exact amount owed under the Mortgage. Interest is awarded at the statutory rate of 6.25% per annum from today's date (4 October 2022) to the date of payment. Failing payment of the total sum owed inclusive of interest and costs, Mr. Trepanier is entitled to vacant possession of the Mortgaged Property by 15 November 2022.

Costs of the applications

[31] By Order filed 13 December 2021, Mr. Trepanier's legal costs were taxed at \$25,000.00. However, that sum did not account for the present applications which came after.

[32] Since Mr. Trepanier is the successful party in both applications, he is entitled to his costs to be taxed if not agreed.

Conclusion

[33] The Order of this Court is:

1. Mr. Trepanier is entitled to Judgment on the sum owed with interest thereon to be paid by Mrs. Moss-Timothy on or before 15 November 2022 failing which she is to deliver up possession of the Mortgaged Property by the said date (15 November 2022).
2. Mrs. Moss-Timothy is to pay the costs of \$25,000, awarded to Mr. Trepanier on 2 November 2021, on or before 15 November 2022.

3. Mrs. Moss-Timothy is to pay the costs of both applications to be taxed if not agreed.

Dated this 4th day of October 2022

**Indra H. Charles
Senior Justice**