BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

NO. 354 of 2009

BETWEEN

SAGICOR LIFE INC. **PLAINTIFF**

AND

MURRAY ARNOLD CHANDLER **DEFENDANT**

Before the Honourable Mr. Justice Randall Worrell, Judge of the High Court

Date: 2009: December 16
2010; May 10

Ms. Jennifer King Attorney-at-Law for the Plaintiff
Mr. Alair Shepherd Q.C., with Albert Pollard Attorney-at-Law for the Defendant

DECISION

Background

[1] The plaintiff is an amalgamated company under the provisions of the **Companies Act, Cap. 308**. It is the result of the amalgamation of **Life of Barbados Limited** and **Sagicor Life Incorporated.** The

defendant is the beneficial owner of some 169.551 square feet of land situated at Mangrove in the parish of Saint Phillip.

[2] A Deed of Charge by way of legal mortgage was entered into between Life of Barbados Limited and the defendant on the 31st day of October 2001. The defendant encountered problems in the payment of instalments and the mortgage fell into arrears.

(3) By way of letter dated the 6th February 2008, the plaintiff wrote to the defendant demanding the payment of arrears owed on the mortgage account by the 20th February 2008. The defendant did not comply with the demand made and by further letter dated the 9th of April, 2008, the plaintiff demanded that the defendant pay the full amount due on the mortgage by the 31st day of May 2008. Again the defendant did not comply.

[4] By letter dated the 12th of June 2008, the plaintiff wrote to the defendant demanding that possession of the mortgaged premises be delivered up to them by the 18th of July 2008. Once again, the plaintiff did not reply. As of 31st of December 2008, the plaintiff owed $703,926.71 inclusive of interest in the amount of $199,762.68.

[5] By originating Summons dated the 25th of February 2009, the plaintiff

Sought *inter alia* an Order for Possession (under Order 83 of the then Rules of the Supreme Court 1982).

[6] In support of the plaintiff's application for possession, Mrs. Charmaine Le Hunte, Manager of the plaintiff's Mortgage Recoveries Unit swore two affidavits, the first on the 25th of February 2009 and the second affidavit on the 21st of May 2009. In her second affidavit, Mrs, Le Hunte gave a history of the dealings between the parties in the matter. She deposed that on the 17th of February 2003, Life of Barbados agreed to lend the defendant an additional principal sum of $110,000.00 bringing the total lent to him to $560,000.00). The monthly instalment due as of the 1st of May 2005 would have been $7,556.36 but Mrs. Le Hunte deposed further that the property was uninsured and that the defendant was always in arrears having not paid a full instalment in many months after repaying the bridging interest in his loan.

COURT ORDERS

[7] On the 22nd day of May 2009, Cornelius J granted an Order which stated that if the defendant did not pay the sum of $689,749.63 on or before he 31st day of July 2009, the defendant was to deliver up possession of the Mangrove property. The defendant was served

with a copy of this Order on the 27th day of July 2009 despite the Order being approved by the Judge on the 22nd of May 2009 and being signed by the Registrar on the 18th of June 2009.

THE INSTANT APPLICATION

[8] By Summons dated 14th day of August 2009, Murray Chandler Jr. Pursuant to Order 15 r ule 6(2)(h) sought to be added as a Defendant or interested party to the action before the court. He sought further to have the order granted on the 22nd of May 2009 stayed pending determination of the issues arising by virtue of his application to be added as an interesting party.

[9] In his supporting affidavit the applicant took issue with the Order of 22nd of May 2009 and deposed that part of the property which the defendant had been ordered to deliver up to the plaintiff was owned by him either in ;law or equity or both. He stated that on the 18th day of January 2001, prior to the defendant entering into an agreement with the plaintiff, the defendant agreed to sell a number of lots, namely lots 5.6 and 9-15 of the land situate at Mangrove in the parish of Saint Philip for some $20,000.00. He deposed further that on the 10th day of January 2001, he paid to the defendant the sum of $20,000.00 for the lots which he agreed to sell and evidenced the

sale by a receipt from the defendant. He deposed further that the defendant wrongfully offered the lots in question to the plaintiff as security for a Deed of Charge by way of Legal Mortgage.

[10] The applicant stated he was the Manager of Polly Septic Service and Equipment Rental Ltd. and that he carried on the business of septic work, construction and transportation of materials on the said lots which the defendant offered as security. He deposed further that one of the lots in question was his dwelling house and that the Orders granted on the 22nd of May 2009 severely prejudiced his business in addition to his family and domestic conveniences.

DISCUSSION AND ISSUES

[11] This matter invites the court to consider whether it is appropriate to allow a party to join proceedings where judgment has already been given and to stay an existing order of possession.

[12] It has long been the law that where there is an objection that the proper parties are not before the court in any given matter, such objection should be taken as soon as possible (***Roberts v Evans (1879) 7 Ch. D 830)*** (the applicant in this matter filed his summons on the 14th of August 2009, almost three months after the orders were granted). It has also long been the law, that after judgment, was too

late for such objection to be made (Bullock v LGO. Co. (1907) 1 KB 264). There has been, however, some development in the law since ***Bullock*** was decided and the current position of the law is readily reflected in the later case of Leicester Permanent Building Society v Shearly (1951) Ch 90.

[13] The facts of Leicester Permanent Building Society v Shearley are somewhat similar to the instant matter. The defendant secured by way of legal charge a mortgage over premises known as 25 E Avenue. The statutory power of leasing was expressly excluded in the agreement except with the consent of the Building Society instituted an action for possession citing only the defendant. After the summons was issued, the Building Society became aware in July 1950 that the defendant had let the property to a couple after the date of the legal charge. The question then arose as to whether the person in possession should be made defendants. The Building society was ordered to give notice of possession and that the order would be given within 14 days unless they (the persons in possession) applied to be added as defendants.

[14] ***Winn-Parry*** J referring to the words of ***Lord Esher*** stated as follows:-

> "If he had taken his point before judgment had been agreed, he would have been treated as though he were a defendant in the action, if he has done so after judgment has gone by default, without his knowing anything of the former proceedings, he must then also be allowed to defend. But the judgment must not be set aside.... it can only be set aside so far as it concerns (those in possession)."

The judge indicated further that judgment was to be set aside only so far as it affected the parties in occupation.

[15] The facts in this matter are distinguishable on the basis that judgment had already been entered, but it appears to me that the case before ***Winn-Parry*** provides some guidance with regard to the proper approach to be taken. The affidavit of Murray Chandler Jr. indicates that he came to be in possession of certain lots for business and personal use. It is difficult to imagine that he would have taken possession unless he was allowed to do so by the defendant or believe that he was within the rights so to do. However, these are not issues that this court can pronounce on at this stage.

[16] In the circumstances therefore, an opportunity ought to be given to Mr. Chandler Jr. to allow him to resist the order or possession if he so desires. Of great use to this court is the case of ***Minet v Johnson***

(1890) 63 LT 507. In that case, the plaintiff issued a writ against the defendant yo recover possession of a house and default judgment was granted in the absence of any appearance. The sheriff ejected an occupier and put in the plaintiff. The occupier applied to have the proceedings set aside on the basis of irregularity and to be restored to possession. ***William J*** granted the order directing the plaintiff to quit possession only if the applicant, within twelve days, elected to be added as a defendant.

[17] If the applicant in the instant manner was simply a tenant then it would be clear that he should vacate the premises. The applicant, however, asserts a proprietary interest which could override that of the plaintiff and in the circumstances there may very well be a miscarriage of justice if the applicant is not allowed to defend. Lord ***Ester in Minet*** stated (and quite rightly rightly in this court's view) that a third party who has a right to be heard is one who says he as some independent right of his own.

[18] The applicant in this matter is clearly saying that at the very least he has an equitable and/or legal right to part of the freehold and in such circumstances it is clearly necessary for that issue to be determined given the serious implications it could have on the mortgage.

DISPOSAL

[19] Having considered the merits of this application in full it is incumbent upon this court to allow the applicant to be heard. The applicant is granted leave to intervene in these proceedings and the order made on the 22nd of May 2009 is stayed so far as it affects the applicant in these proceedings.

[20] Costs to be costs in the cause.

RANDALL WORRELL
Judge of the High Court