BARBADOS

IN THE SURPEME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 396 of 2014

BETWEEN:

CRAIG LAWRENCE WATERMAN **CLAIMANT**

[RECEIVER – MANAGER]

AND

CHRISTOPHER Mc HALE **DEFENDANT**

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

Dates of Hearing: 2015: January 28

February 09

Date of Decision:2015: June 17

Mr. Ramon Alleyne with Mr. Ryan Omari Drakes of Clarke Gittens & Farmer, Attorneys-at-Law for the Claimant

Dr. Lenda Blackman, Attorney-at-law for the Defendant

DECISION

INTRODUCTION

[1] On March 14th 2014, the Claimant filed an application seeking possession of "The Penthouse", Ocean Reed, Worthing, Christ Church (the Property) together with mesne profits and interest on such mense profits. The

Application was filed against the Defendant who was at all material times in possession and resided at the property.

[2] FirstCaribbean International Bank (Barbados) Ltd herein after called the Bank by virtue or power conferred, by a Debenture Mortgage dated the 25th day of September 2006 (the Debenture Mortgage) and a further charge dated 1st day of September 2008 (hereinafter called the Security Documents) made between Woodbank Investments Limited (Woodbank) and ICE Properties Inc. ("ICE) appointed Mr. Craig Waterman, (The Claimant) Receiver-Manager over the Charged Assets and Derivative Assets (the Assets) as defined by the Security Documents. The Claimant was appointed by way of deed of Appointment dated August 24, 2012.

[3] The Defendant occupies the Property pursuant to an alleged agreement made between the Defendant and Woodbank. The property claims the Claimant forms part of the Assets and is therefore in the control of the Claimant by virtue of his deed of Appointment made on 24th August, 2012.

[4] By a Notice to Quit dated October 5th 2012, some approximately 6 weeks after the date of the Deed of Appointment, the Claimant served on the Defendant the said Notice to Quit and deliver up possession of the property to the Claimant, or to whoever he may appoint, on or before October 12th,, 2012. The Claimant therefore claims that the Defendant's tenancy was

determined on October 12th but he has failed to deliver up possession of the property. The Claimant further contends that on or about 12th December, 2012 he became aware of a letter dated 29th June, 2010 which purported to permit the Defendant's occupation of the property. The Claimant further claims that the rental value of the property is the sum of $14,000.00 BDS, furnished and $10,000.00 unfurnished, per month.

[5] The above in essence are the facts stated and relied upon by the Claimant who submits to the Court that as a result of the above, there are in effect two issues to be determined by the Court:

i. whether or not the Claimant is indeed entitled to possession of the property; and

ii. whether or not the Claimant is entitled to mesne profits.

[6] The Defendant on the other hand has a different view of some of the facts in this case. Through his counsel and also by way of his Affidavit evidence, Mr. McHale claims that this Court has to determine whether:

(1) the Claimant was validly and properly appointed as a Receiver.

The Defendant contends that the Claimant was not properly appointed as a Receiver and that as such he is not legally able to exercise any powers conferred upon him under the Security Documents or his Deed of Appointment.

(2) Consequently, the Defendant claims that since the Claimant's appointment as Receiver is indeed invalid, then the Claimant is unlawfully in possession of the charged assets and is indeed trespassing on the property.

(3) The Defendant therefore contends that the Claimant's application should be dismissed. The Defendant submits that the Debenture Mortgage particularly, the Charging Clause 3.0, the Charged Assets are set out in the First Schedule and the Second Schedule.

[7] The Defendant states that as a borrower, Woodbank defaulted in paying the agreed instalment due to the bank on July 31st, 2012. A notice in writing was then given under Section 10(b) 1 of the Bankruptcy and Insolvency Act CAP 303 and dated 9th August 2012 and was duly served on WOODBANK and ICE, the bank thereby advising WOODBANK that the principal amount of the indebtedness and the interest had become due and payable.

[8] The Defendant's position is therefore that pursuant to Clause 12.0 of the Debenture Mortgage, this was a notice of the bank's intention to enforce its rights and appoint a receiver. The Defendant claims that no Demand Notice was served on him prior to the premature appointment of the Claimant as received on the 24th day of August, 2012, some 24 days after the Default and

15 days after serving the notice of intention to enforce and appoint a receiver of the charged assets.

[9] The Defendant therefore remains in occupation of the Penthouse because of what he contends is the Claimant's failure to act in accordance with the provisions of the Security Documents, the provisions of Section 111 of the Property Act and r.664 of the Supreme Court Rules.

[10] This court has been through submission of counsel on behalf of both the Claimant and the Defendant has been made aware of the existence of the Supreme Court Suit 489/2012 between WOODBANK INVESTMENTS LIMITED ICE PROPERITIES INC. the Defendant in this matter, CHRISTOPHER MCHALE AND FIRSTCARIBBEAN INTERNATIONAL LIMITED, CRAIG LAWRENCE WATERMAN (the Claimant in this matter) and PRICE WATERHOUSE COOPERS INC. That action was instituted by the Claimant of which the Defendant in this matter was one and it was contended on behalf of the Claimants 1489/2012 that the appointment of Receiver was invalid. That matter dealing with the validity of CRAIG LAWRENCE WATERMAN, the Claimant in the matter now before me, has not been disposed of. Indeed it is still a live issue before the Court hopefully to be prosecuted to trial by the Claimants in that matter of which the Defendant McHale (in this matter) is one.

[11] Bearing in mind what I have said before, this court to my mind cannot now be asked to pronounce on the validity of appointment of the Receiver in this matter. This matter before me deals with two issues, in my respectful opinion for disposal:

(i) whether the Claimant is entitled to possession of the property;

(ii) whether or not the Claimant is entitled to mense profits.

[12] For this court to deal with the issues of validity of appointment of the Receiver when that is indeed the subject matter of other proceedings before the court would lead to duplication of litigation. If the Defendant has raised that issue before these courts that matter should be prosecuted by the Defendant as Claimant in that matter. It would indeed be disingenuous for this court to be asked to determine the validity of the receiver. As far as this court is concerned, the Receiver has produced a Deed of Appointment and the question of validity is outside the scope of this court as it is being contested in a court of equal jurisdiction. To raise this argument is inappropriate because it is already before another court as a substantive matter. I cannot determine the validity of the appointment of the Receiver if that issue is the subject of a substantive matter, namely 1489/2012 before the court.

[13] I respectfully decline invitation by the Defendant and counsel for the Defendant to do so. Until otherwise decided, and that substantive issue is before the courts, I will have to treat Mr. Waterman as the Receiver. Whether he is validly appointed or not has yet to be decided by another court of concurrent jurisdiction. Only confusion will abound by any other approach.

[14] What am I then left to ask myself? As a Receiver, is the Claimant entitled to possession of the property? I have not been persuaded that the property is an asset that is outside of the ambit of the Receiver. In accordance with the Deed of Appointment, the Claimant took possession of the Assets including the property. I accept that as Receiver-Manager the Claimant is under certain duties established by common law and statute. Reliance is placed on this by reference to:

> "The Law Relating to Receivers, Managers and Administrators
>
> By Hubert Picarda at page 126.
>
> > "It is indeed one of the main duties of a Receiver to get in the assets charged. If anyone prevents him from obtaining possession when obtained, proceedings can be taken to obtain possession or prevent such interference."

[15] I am further buttressed by my conclusions with reference to S.281 (b) of the Companies act 308 which states that a Receiver-Manager is also under a duty to:

> "Deal with any property of the company in his possession or Control in a commercially reasonable manner."

[16] Counsel for the Claimant, Mr. Ramon Alleyne has also cited the case of Palk vs. Mortgage Services Funding PLC (1993) CH 330 at page 338 and I quote:

> …"If he lets the property he must obtain a proper market rent."

[17] In the circumstances, the Claimant in this action is under a duty to get in the Asset Charged, namely the Property and also take reasonable care to minimize his return. If this court were to say that this is not the case, it would mean that the Order of Justice Goodridge (as she then was) pertaining to the existing receivership of the Claimant, and made with reference to this same property would be basically null and void. To me that approach would be most inappropriate, unlawful and contrary to the proper administration of justice.

[18] For emphasis, I now reproduce part of that order which is before this court as part of the Claimant's filed submissions.

> "The Claimant (Woodbank, ICE and Mr. McHale together with their servants and or agents be restrained from interfering with and attempting to frustrate the activities of the second Defendant (Mr.

> Waterman) in his capacity as a Receiver duly appointed by a Deed of appointment made on the 24th day of August 2012."

[19] The learned trial judge (as she then was), delivered a written Decision and at paragraph38 of that Judgment stated:

> "The Receiver should be allowed to carry out his duties as such receiver granted under the terms of the Debenture and as provided for in Section 274 of the Companies Act 274."

Unless that Judgment has been overturned by appeal that order is still in place and I cannot at this stage be asked to pronounce on it.

[20] I now turn to whether the Claimant is entitled to mesne profits. I accept counsel for the Claimants contention that the lease of July 1st 2010 is indeed an encumbrance as set out at Strouds Judicial Dictionary of Words and Phrases. I also accept that such an action of entering into the lease would have required prior consent of the bank involved in this matter. I find as a fact that no such prior consent was obtained contrary to paragraph 4.02 (g) of the Debenture Mortgage.

[21] Accordingly, I have to accept that there was no such permission granted by the mortgage in this lease and accept the authority of **Dudley and District Benefit Building Society v Emerson (1949) 2 AER 252.**

[22] I am further buttressed in this view in relation to the position as set out in Fisher and Lightwood's Law of Mortgages' where it states at 29.18.

> "the mortgagor is unable to confer upon another a greater right than he himself possesses. Thus, in the absence of a statutory or express power of leasing, where, after the mortgage, the mortgagor purports to grant a lease without the privity of the mortgagee, the tenancy will subsist by estoppels between the mortgagor and the tenant, but be VOID against the mortgagee. Such a tenant is liable, like his lessor to be ejected without notice. His only remedy is against the mortgagor."

[23] Accordingly, this lease relied on by the Defendant would be VOID against the mortgagee in this matter.

[24] The Claimant therefore is the agent of the mortgagee (bank) and has the power to assert superior title to the property and to take possession of the property. The Defendant is therefore subject to the Notice to Quit dated October 5th 2012 and which was served personally upon him. He has failed to deliver up possession of the property and therefore remains since October 12, 2012, in occupation as a trespasser. Accordingly, I am of the opinion that as stated in Hill and Redman's Law of Landlord and Tenant "Mesne profits may be claimed from the date on which the landlord came into possession."

[25] The Defendant has occupied the property since October 12th, 2012 and I also find that pursuant to the affidavit of the Claimant the rental value of the property per month is the sum of $14,000.00 furnished or $10,000.00 unfurnished. I shall adopt the lesser figure of $10,000.00 for the calculations

of mesne profits as I am not persuaded that the furnishing are not those of the Defendant.

[26] Accordingly, the Claimant's application for possession of the property and mesne profits are granted. Mesne profits are awarded at $10,000.00 from the 12th day of October, 2012 until such time as the Defendant gives up possession.

[27] The Claimant is entitled to his costs on this application.

RANDALL I. WORRELL
Judge of the High Court