

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 1320 of 2012**

**BETWEEN:**

**REPUBLIC BANK (BARBADOS) LTD**

**CLAIMANT**

**AND**

**CKP INVESTMENTS LIMITED**

**DEFENDANT**

*Before the Hon. Mr. Justice William Chandler, Judge of the High Court*

**Dates of hearing: 2014 November 10<sup>th</sup>,  
2015 January 3<sup>rd</sup>, March 6<sup>th</sup>, March 10<sup>th</sup>, March 24<sup>th</sup>**

**Date of decision: 2016 March 30<sup>th</sup>**

**Appearances:**

**Mr. Kevin Boyce in association with Mr. R. Omari Drakes of Messrs Clarke  
Gittens & Farmer Attorneys-at-Law for the Claimant**

**Mr. Roger C. Forde Q.C. in association with Mr. M. Lennox-Miller  
Attorneys-at-Law for the Defendant**

**Mr. Ralph A. Thorne Q.C. Attorney-at-Law for Ms. Paula Suge-Hunte-Weir**

## **DECISION**

### **Brief Facts**

- [1] The Defendant, a Limited Liability Company, owned property situate at Magazine Lane and Bruce's Alley (the property), which it charged to the Claimant Bank to secure certain loans. Further securities in terms of a guaranty and a demand note were also put in place. Mrs. Paula Suge Hunte-Weir (the third party/Mrs. Hunte-Weir) is a tenant of part of the property and, at all material times carried on business under the name or style "Big Time Bargains". The Defendant is her landlord.
- [2] The Defendant defaulted on the mortgage loan and the Claimant obtained a consent order for possession of the property on 2<sup>nd</sup> October 2012. It was further ordered, by consent, that, there be a stay of execution of the order until the 3<sup>rd</sup> day of June 2013 and that, during the period of the stay of execution, Mr. Randal Belgrave Q.C. Attorney-at-Law for the Defendant, be authorised as sole agent of the Defendant, to collect the rents from the tenants of the property. It was also ordered that the said rents, less reasonable expenses related to the property, be paid over to the Claimant during the stay.
- [3] Notice of the proceedings was served on the tenants (including Mrs. Hunte-Weir). None attended the hearing. On 3<sup>rd</sup> October 2014 the Claimant

applied for permission to issue a writ of possession against the Defendant, supported by an affidavit of Mr. Ryan Omari Drakes, counsel for the Claimant (the Drakes' affidavit). These documents were served on the tenants (including Mrs. Hunte-Weir) on the 5<sup>th</sup> November 2014 at the Court's direction.

[4] Mrs. Hunte-Weir filed an affidavit in response to the Drakes' affidavit on 02 December 2014 in which she requested that the Court protect her interest as a tenant of part of the property on the basis that (1) the purported sale of the property by the mortgagee to a prospective purchaser was not done "at arm's length" and (2) her leasehold interest could not be defeated by the Claimant's claim.

[5] Various affidavits have been filed in support of the Claimant's case. Mr. Kiko Mulchand Chatrani filed two affidavits on 8<sup>th</sup> December 2014 and 8<sup>th</sup> March 2015 respectively.

### **The Issue**

[6] The issue to be determined is whether or not the Court ought to grant the Claimant permission to issue a writ of possession in respect of the property? The resolution of this issue depends on whether or not there is any merit in the 3<sup>rd</sup> party's submission that the Claimant is not entitled so to do.

## **The Submissions**

- [7] The Claimant and Mrs. Hunte-Weir filed written submissions on 23<sup>rd</sup> January 2015 and 16<sup>th</sup> March 2015 respectively. On 4<sup>th</sup> May 2015, the Court ordered all parties to file written submissions on or before 15<sup>th</sup> day of May 2015. The Defendant filed its written submissions on 15 May 2015.
- [8] The Claimant submitted that it is entitled to an order permitting the issuance of a writ of possession in its favour. Mr. Boyce submitted that the Claimant had obtained a money judgment and a demand had been made for satisfaction of it. The Defendant was liable to satisfy the judgment. The Claimant had satisfied the provisions of the **Supreme Court (Civil Procedure) Rules 2008 (CPR) Part 46.1(b)** and **Part 46.3(2)** on which he relied.
- [9] He proffered also that Mrs. Hunte-Weir was aware of the sale to the prospective purchaser by way of the Drakes' affidavit in which the deponent deposed to the fact that there was a proposed sale.
- [10] Counsel further submitted that Mrs. Hunte-Weir, as an occupier of the property under a lease arrangement with the Defendant, could not defeat the Claimant's claim for the following reasons:
- (1) This lease commenced 1<sup>st</sup> August 2011 for a limited 3 year period with an option to review for a further 2 years. That limited period

had now expired and the Claimant was not aware that the lease had been renewed.

(2) A lease created without the mortgagee's consent is void as against the mortgagee (**Dudley and District Benefit Building Society v Emerson [1949] 2 ALL ER 252**). Since the Defendant did not obtain the consent of the mortgagee to let the property nor did it obtain the Claimant/Mortgagees' written permission to renew the lease as required by the mortgage, the lease is void as against the Claimant. Mrs. Hunte-Weir's rights, if any, are against the lessor (the Defendant).

(3) Inaction by the Claimant with knowledge of an unauthorised letting did not amount to recognition by conduct. **Halsbury's Law of England Vol. 77 (2010) 3<sup>rd</sup> Edn. Taylor v Ellis [1960] ALL ER 549 at 55.**

### **The Defendant's Written Submissions**

[11] The Defendant filed its written submissions on the 15<sup>th</sup> of May 2015. Mr. Forde Q.C. submitted that it is trite law that parties to an action and those persons who have notice of the action and Orders of the Court made in respect of that action are bound by the said Orders of the Court.

[12] It is also trite law that those persons claiming rights through a Mortgagor cannot obtain greater rights than the Mortgagor enjoyed. The Claimant, as Mortgagee, is entitled to possession of the mortgaged property by virtue of the Order for possession, which was made on the 2<sup>nd</sup> day of October, 2012.

[13] Counsel further submitted that the contention of Mrs. Hunte-Weir that she

holds an interest in the mortgaged property is misconceived for the following reasons.

- (i) Big Time Bargains as a tenant of the Defendant (as Mortgagor) cannot have greater rights against the Claimant as Mortgagee than the Defendant as Mortgagor had enjoyed. The Defendant could not have granted greater rights than it enjoyed.
- (ii) The Defendant's right to possession of the property was subject to the Mortgagee's right to possession by virtue of the Mortgage and the Property Act and as such Big Time Bargain's right to possession was so limited.
- (iii) The Defendant consented to the Order for possession and, as such any right Big Time Bargains may have had to possession ceased upon the grant of the Order.
- (iv) Big Time Bargains, having been served with the application for possession by the Claimant, did not seek to assert its right or interest at the hearing and, as such, cannot assert such rights at this stage which merely deals with the issue of a Writ for Possession. Big Time Bargains may need to appeal the Order or bring a fresh action against the Claimant. The issue in these proceedings relate to the issuance of a Writ of Possession. The issue does not relate to the right to possession, which was determined by the Order of Possession.

[14] Counsel further submitted that the submission of Big Time Bargains that it

holds a valid lease is misconceived in that the alleged lease was made contrary to the provisions of the Mortgage made between the Claimant and the Defendant and in contravention of **Section 97 (1)(h) of the Property Act**. Further, Big Time Bargains had constructive notice of the terms of the Mortgage made between the Claimant and the Defendant which expressly provided that there should be no letting by the Defendant without the consent of the Claimant. Big Time Bargains has led no evidence that such consent was provided and as such, its letting was invalid.

[15] He further submitted that the Claimant, in exercise of its powers under the mortgage and by virtue of **Section 112 (1) of the Property Act**, is authorised to sell the property and extinguish or discharge all interests, which are not prior to the Mortgage. The Mortgage is dated the 18<sup>th</sup> day of October, 2004 and the alleged lease is dated August 2011 and as such the Mortgage has priority.

[16] In the premises, counsel submitted that the Court should grant permission for the issuance of the Writ for Possession.

### **Submissions on behalf of Mrs. Hunte-Weir**

#### **Preliminary Point**

[17] Mr. Thorne Q.C. submitted that under the **CPR 3.12** a legal practitioner who signs a certificate of truth (the certificate) must certify the reasons why it is impracticable for the Claimant to sign the certificate. The **CPR** did not

intend an Attorney-at-law to qualify as a signatory under **Part 3.12** since the rules did not use the words “including the attorney-at-law representing the litigant in the proceedings”.

### **The Substantive Submissions**

[18] With respect to the challenge to the substantive application, Mr. Thorne Q.C., submitted that his client held a leasehold interest in the property, which defeated the Claimant’s right to possession. Counsel also submitted that his client’s interest did not defeat the Claimant’s right to dispose of the property under its powers in the mortgage. Her interest was good against a purchaser’s for value with notice of her interest. The prospective purchasers could therefore exercise their right to purchase subject only to his client’s rights.

[19] Mr. Thorne Q.C. submitted that the claimant deposed that she held a three year lease with an option to renew for two years, whereas his client deposed, with supporting documentation, that she entered a written lease for five years commencing 1<sup>st</sup> August 2011 with a five year option to renew. He asked the court not to accept Mr. Chatrani’s characterisation of his client’s documentary evidence as “fraudulent”. He invited the court to infer that his client held a five-year lease with an option to renew for five more years.

[20] Mr. Thorne Q.C. submitted further that his client's lease was a legal estate in land within **Section 148 (a) (iv)** of the **Property Act Chapter 236** of the **Laws of Barbados**, which was a right in rem binding on the whole world. In the event that the court found that his client did not have a legal estate in the property then he submitted, she held an equitable interest under the principle in **Walsh v Lonsdale (1882) L.R 21 Ch D 9 (Walsh v Lonsdale)**. The parties, including the Claimant, had notice (actual, constructive or imputed) of that leasehold interest. The word purchaser in **Section 27** of the **Property Act** included a mortgagee.

[21] Finally, he submitted that the prospective purchaser was not a *bona fide* purchaser for value and in any event, the claimant had notice of his client's interest and was bound by it.

On 15 May 2015 the Claimant filed the following additional submissions:

### **The Certificate of Truth**

[22] Mr. Drakes signed the certificate of truth on the Claimant's behalf in the circumstances given by him in his *viva voce* evidence, namely, that the signing of the certificate of truth by him was necessitated by the fact that the Claimant had committed to a sale of the property which was scheduled to close on 15 September 2014, some 4 days after the notice of application and affidavit were executed. It was therefore impracticable for the Claimant to

have the certificate executed by one of its officers. He relied on **CPR Part s. 12(3) and (4)**. Counsel also submitted that the delay was also occasioned by the fact that the Court had asked to review the notice of application prior to it being filed.

### **Challenge to Hearsay Evidence**

[23] It was submitted that Ms. Beverly Skeete, in cross-examination, highlighted that the Claimant had authorised Mr. Drakes to swear an affidavit on its behalf and that Mr. Drakes testified that the information deposed to was true to the best of his knowledge, information and belief. He relied on **s. 51 of the Evidence Act, Cap. 121 of the Laws of Barbados**. The evidence of Mr. Drakes, he posited, fell within the statutory exception to the hearsay rule.

### **The Law**

[24] The **CPR Part 3.12** provides:

“3.12 (1) Every statement of case must be verified by a certificate of truth.

(2) The certificate of truth should be signed

(a) by the claimant, defendant or other litigating party, as the case may be; or

(b) ...

(c) ...

(3) Where it is impracticable for the litigating party to sign the certificate required by sub-rule (1) it may be given by a legal practitioner

(a) a certificate of truth given by a legal practitioner must also certify;

(b) the reasons why it is impracticable for the litigating party or any litigating party, as the case may be, to give the certificate; and

- (c) that the certificate is given on the instructions of the litigating party or of both or all the litigating parties”.

## **Discussion**

[25] This Court saw and heard Mr. Drakes give his evidence in his examination-in-chief and under rigorous cross-examination by Mr. Thorne Q.C. He gave evidence that the Court had required to have sight of the documents. That is true. This was necessitated by a query raised at the Registration Office in relation to writs of execution issued with respect to orders of possession in which a stay had been granted and whether counsel generally were complying with CPR 46.3. This Court also ordered that the application for the writ of possession and supporting documents be served on the tenants in spite of their non-attendance on the application for the order for possession. So that Mr. Drakes’ evidence in that regard is correct. Mr. Drakes was forthright in his responses. No evidence was adduced to throw doubt upon Mr. Drakes’ evidence. I am satisfied that he was a witness of truth and upon whose evidence I could rely. I accept his evidence as true.

## **Disposal**

[26] I am of the opinion and hold that **Part 3.12(3)** of the **CPR** has been satisfied as to why he, as Attorney-at-Law for the Claimant, signed the Certificate of truth.

[27] It should be noted that the issue was not raised by the Defendant, who is the substantive party to the suit. That issue has no real bearing on Mrs. Hunte-Weir's application and is *res inter alios acta* where she is concerned.

[28] I am also of the opinion and hold that the failure to satisfy **Part 3.12 (4) (a) and (b)** of the **CPR** has been cured by the *viva voce* evidence of Mr. Drakes.

## **The Substantive Issues**

### **The Law**

[29] The applicable law is found in the **CPR Parts 45.4 and 46.1 and 46.3** which are now reproduced:

“45.4 (1) A judgment or order for the possession of land may be enforced by a writ of possession of land;”

“46.1 In these Rules a "writ of execution" means any of the following:

- (a) a writ for the seizure and sale of goods (writ of *feri facias*);
- (b) a writ of possession.

46.3 (1) An application for permission may be made without notice unless the court otherwise directs, but must be supported by evidence on affidavit.

(2) On an application for permission, the applicant must satisfy the court that the applicant is entitled to proceed to enforce the judgment or order and in particular

- (a) where the judgment is a money judgment, as to the amount
  - (i) originally due; and
  - (ii) due together with interest at the date of the application;

(b) ...

(c) ...

- (d) where rule 46.2 (d) or (e) apply, that a demand to satisfy the judgment or order has been made on the person holding the assets, and that that person has refused or failed to do so;

(e) that the person against whom enforcement is sought is liable to satisfy the judgment.”

## **Discussion**

[30] The issue to be determined is whether or not the Court ought to grant the Claimant permission to issue a writ of possession in respect of the property?

[31] It is clear law that the mortgagee is entitled to have a writ of possession issued with respect to the recovery of possession of property, which has been charged to it by way of legal mortgage to secure loan facilities. The mortgagee (in this case the Claimant) must satisfy **Parts 46.2 and 46.3** of the **CPR**. This Court is satisfied, and it has not been contended otherwise by or on behalf of Mrs. Hunte-Weir or the Defendant, that these provisions have been satisfied.

[32] The Court must now consider whether or not there are any valid reasons to deny the mortgagee the relief sought. This involves resolving the submissions made by Mr. Thorne Q.C.

### **Allegation that the Sale of Property was not at arm's length**

[33] Mr. Thorne Q.C. submitted that the prospective purchaser was not a *bona fide* purchaser for value without notice and in any event, the claimant had notice of his client's interest and was bound by it.

[34] Mr. Boyce submitted that Mr. Thorne's submission that the Claimant failed to exhibit the agreement for sale so that the Court may properly be guided as

to whether the purchaser was a *bona fide* purchaser for value without notice of his Client's rights was of no consequence since the agreement was made between the Claimant and a third party and was irrelevant to the application for permission to issue the writ of possession.

### **The Evidence**

[35] Mrs. Hunte-Weir deposed at paragraph 6 of her affidavit filed 2<sup>nd</sup> December 2014 that she was not given notice of any sale of the car park and premises and she was unaware of such sale.

[36] At paragraph 6 she said she was prepared to challenge the authenticity of the proposed sale. At paragraph 5 of her further affidavit of 6<sup>th</sup> March 2015, she deposed that it was with her certain knowledge "that the purported purchaser of the property was not a "*bona fide*" purchaser and that the purchaser had knowledge of her (Mrs. Hunte-Weir's) entrenched leasehold interest which the claimant was seeking to defeat. The purchaser was associated with or connected to the Defendant.

[37] The onus is on her to establish the allegation that the sale was not conducted at arm's length. The standard of proof is on a balance of probabilities.

[38] Mr. Thorne Q.C. cross-examined Ms. Skeete with respect to a purported offer to purchase the property by one Mountain Movers Investment Inc. and she stated that she was not aware of any such offer. She also said that she

did not know a Rodney Boxill or Nigel Boxill. She confirmed that the purchasers were a Mr. and Mrs. Bhana (the Bhanas).

[39] Mr. Boyce produced a copy of the agreement for sale dated 8<sup>th</sup> July 2014. It was received in evidence by consent and marked exhibit ‘BPSP’.

[40] Mrs. Hunte-Weir, in her *viva voce* evidence, made no reference to the purported sale to Mountain Movers Inc. She was not asked about, nor did she impugn the integrity of the agreement for sale between the Claimant and Mr. and Mrs. Bhana.

[41] Mr. Thorne Q.C. did not suggest to Mrs. Skeete that the agreement for sale was not *bona fide*. This cross-examination, at its zenith, suggested that an interest was expressed by Mountain Movers Inc. but there was no concluded contract for sale.

### **Disposal**

[42] In this regard, I find as a fact that Mrs. Hunte-Weir has failed to establish that the agreement for sale was not at arm’s length.

**The submission that Mrs. Hunte-Weir held a leasehold interest in the property which defeated the Claimant’s right to possession, and;**

**The submission that the demise was in contravention of the Property Act**

[43] These submissions may conveniently be taken together since they involve similar considerations. They have already been referred to in this decision and will not be repeated here.

## **The Law**

[44] **Section 97 (1) (g) and (h) of the Property Act** provides that:

“There shall be implied in every mortgage, subject to express provisions to the contrary, covenants by the mortgagor with the mortgagee

(g) not to lease the mortgaged land or any part thereof or sub-lease the whole or any part of the land comprised in the mortgaged lease for any period longer than 1 year without the prior consent in writing of the mortgagee which consent shall not be unreasonably withheld;

(h) not to transfer the mortgaged land or mortgaged lease or any part of the land without the prior consent in writing of the mortgagee which consent shall not be unreasonably withheld;”.

[45] **Section 108 of the Property Act Chapter 236 of the Laws of Barbados (the Property Act)** which provides that:

“(1) Subject to subsection (2), a mortgagor in possession has power to make a lease or sublease of the whole or any part of the land for any term exceeding 1 year as against every encumbrancer other than a mortgagee and as against every mortgagee whose consent in writing has been obtained, and for any shorter term without such consent.

(2) ...

(3) ...

(4) A mortgagor shall, within 1 month after making the lease, deliver to the mortgagee, or where there are more than one, to the mortgagee first in priority, a copy of the lease duly executed by the lessee, but the lessee is not concerned to see that this provision is complied with.

(5) A contract to make or accept a lease under this section may be enforced by and against every person on whom the lease, if granted, would be binding.

(6) This section applies only if and so far as a contrary intention is not expressed in the mortgage deed or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing”.

## **The Evidence in Relation to the Lease of the Property**

### **Mr. Drakes’ Affidavit**

[46] Mr. Drakes in his affidavit deposed that around June 2014 the Defendant advised the Claimant that it had leased the car park to Mr. & Mrs. Marvin Weir for a three year period commencing August 1<sup>st</sup> 2011 with an option to renew for a further two years. The Claimant had no knowledge that the lease had been renewed.

[47] No written permission had been obtained from the Claimant for the letting of the car park in 2011 nor was permission given for the Defendant to renew the lease.

[48] Mr. Thorne submitted that his client had a written lease for five years commencing 1<sup>st</sup> August 2011 with a five-year option to renew.

### **Mr. Chatrani’s Affidavit**

[49] Mr. Chatrani, in his affidavit filed 8 December 2014, deposed that a lease had been granted to Mr. and Mrs. Weir of the car park for a period of three years with an option to renew for two years at a renegotiated rental. He exhibited a letter dated 3 August 2011. He also deposed that he was aware

that Big Time Bargains was the Defendant's tenant and had been indebted to the Defendant in the sum of \$874 600.00 for rent. Notice to terminate the lease for non-payment was given but he was unable to locate the send notice. Several demand letters for payment of arrears were also exhibited to the affidavit.

[50] In his affidavit filed 6<sup>th</sup> March 2015, he denied that the Defendant, by letter dated 3<sup>rd</sup> September 2011, gave a lease to Big Time Bargains and reiterated that the last agreement was by letter dated 3<sup>rd</sup> August 2011, exhibited to his first affidavit. (NB signed by Abdulhai Pandor). He further deposed that by notice dated 5<sup>th</sup> May 2010 the Defendant advised all tenants including Big Time Bargains that all lease arrangements should only be negotiated with Dr. Kasi and Mr. A. D. Pandor, who alone were authorised to receive rents from the tenants. A copy of a letter in that effect was attached as exhibit 'KC1'.

**Mrs. Hunte-Weir's Affidavit**

[51] This further affidavit was filed on 4<sup>th</sup> March 2015 in which Mrs. Hunte-Weir deposed that the Claimant had notice of her tenancy and had always been so aware or ought to have been so aware. She averred that the lease was for a term of five years with an option to renew which the Claimant had actual or constructive knowledge of. She attached a photocopy of a letter dated 3<sup>rd</sup>

September 2011 signed by Mr. A. Pandor and Mr. & Mrs. Marvin Weir which at paragraph 4, sets out that the letting shall be for five years with the option to renew for a further five years at a negotiated revised rental rate.

### **Evidence of Ms. Beverly Skeete**

[52] Ms. Skeete, a banker and officer of the Claimant's Bank, gave evidence under cross-examination by Mr. Thorne Q.C. that sometime in 2014, the Bank received correspondence from the Defendant indicating that the Defendant was speaking to Mrs. Hunte-Weir about arrears. That is when she became aware of the lease. No consent had been given in writing by the Bank for the creation of the lease. She also gave evidence that she was unaware whether the bank rented car park spaces from Mrs. Hunte-Weir. She said she was unaware that Mrs. Hunte-Weir had rented buildings adjacent to the car park.

### **Cross-Examination by Mr. Forde Q.C.**

[53] In *viva voce evidence* Mrs. Hunte-Weir said that there were errors on the letter exhibit KC1 namely:

1. There were no initials on the front page,
2. The rental is \$10,000.00 and not \$12,000.00,
3. The term of years is 5 years with an option to renew.

[54] She said that she did not sign the front page only the back page. She said she was in arrears but not in the amount claimed by the Defendant. She paid the rent by writing a cheque, then paying in cash and receiving the cheque back. She admitted some of her cheques had "bounced". Receipts were given by Mr. Chatrani for the Defendant. She stated that she was not aware

that a Court Order was made that Mr. Belgrave Q.C. was to collect the rents.

[55] She said that the Defendant told her, through Mr. Chatrani, to make payment to the Bank. She paid by a manager's cheque. She also said that when the cheque was returned she paid cash and retrieved the returned cheque. She could not recall when she was told of the order of Court. When asked what year she was told by Mr. Chatrani that the cheque was returned, there was no response. She said she did not make any payments to Mr. Belgrave Q.C.

#### **Cross-Examination of Mr. Chatrani**

[56] In cross-examination Mr. Chatrani agreed that he had collected rent from Mrs. Hunte-Weir but denied that he had collected cheques in the amount of \$120,000.00 for the car park. He said that he was aware that Mr. Abdulhai Pandor had signed a lease with Mrs. Hunte-Weir on 3<sup>rd</sup> August 2011 but denied that it was for five years with an option to renew for years, he insisted that the lease was for three years with an option to renew for two further years.

[57] Mr. Chatrani denied that the signature on receipts for rent paid to the Defendant was his.

#### **Discussion**

[58] Mr. Chatrani in his affidavit filed 8 December 2014 deposed that a lease had been granted to Mr. and Mrs. Weir of the car park for a period of three years with an option to renew for two years at a renegotiated rental. He exhibited a

letter dated 3 August 2011. There is contention as to the period of time of this lease and the renewal period. Much ado was made about the validity of several receipts, which were put into evidence by Mrs. Hunte-Weir to show her compliance with the terms of the lease. I do not consider this issue to be relevant to the issue I have to decide.

[59] Mrs. Beverley Skeete gave evidence that she was unaware that any lease of the property had been granted. She was vigorously cross-examined by Mr. Thorne Q.C. who suggested to her that she was so aware. I saw and heard her give evidence in chief and under cross-examination. She was resolute, forthright and confident. I accept her as a witness of truth.

[60] Since the alleged lease is for a period in excess of one year, it must be proven on a balance of probabilities, that:

1. That the Mortgagor's consent in writing had been obtained, and
2. Within 1 month after making the lease, the mortgagor delivered to the mortgagee, a copy of the lease duly executed by the lessee.

[61] **Section 108** of the **Property Act** provides that the lessee is not concerned to see that the section has been complied with, however, there must be evidence before the Court upon which the Court can act. No such evidence has been given by the Mortgagor or Mrs. Hunte-Weir. It has likewise not been contended that this provision was complied with. Accordingly, I find as a fact that this provision has not been complied with.

- [62] Accordingly, I find as a fact that there is no evidence of compliance with this provision.
- [63] It is clear that the lease to Mrs. Hunte-Weir did not receive the prior written consent of the mortgagee. There is no evidence that the option to renew has been exercised. In this case I have accepted the evidence of Mrs. Skeete that she was unaware of the lease and consequently the Bank had no knowledge of its creation. The **Property Act** does not provide that a lease, which is sanctioned, is binding on the mortgagee. The Act simply gives the mortgagee power to sanction the creation of the lease.
- [64] Even if the mortgagee became aware of its creation subsequently, this could not materially affect its right to exercise its powers under the mortgage or the **Property Act** unless it was, in some way, estopped from doing so.
- [65] This Court ordered that the application for possession be served on all the tenants of which Mrs. Hunte-Weir is one. She did not contest it. The order for possession stands. It has not been appealed neither has there been any attack upon its validity. To seek the orders sought now would undermine the order for possession without an appeal. In the interim, the mortgagee entered into the agreement with the Bhanas. Whilst I am of the opinion that she ought to be heard at this stage, her application cannot prejudice the mortgagee's rights or those of the purchasers who proceeded upon the basis

of the mortgage clauses and the order for possession. To that extent, I agree with Mr. Forde Q.C.'s submission.

[66] The lease does not give the lessee the same rights as a fee simple owner. The lessee's rights are those contractual rights contained in the lease or in statute such as the **Property Act**. This Act does not equate a lease with a fee simple.

[67] The **Property Act** does not provide that the lease binds the mortgagee even if he had notice. In other words there is no statutory atornment of tenancy. It is also clear that no lease was created by the mortgagee. In addition, the **Property Act** does not provide that the mere fact that a mortgagee is aware of the creation of a lease or has given permission for the creation of a lease, creates a contractual relationship between the mortgagor and the mortgagee. Certainly there is no privity of contract at common law because the mortgagee is not a party to the lease nor had the mortgagee accepted the lessor's tenancy as binding on itself. See **Dudley and District Benefit Building Society v Emerson and another 1949 2 All. E. R. 252 (Dudley)** per **Sir Raymond Evershed MR and Somervell LJ**.

[68] I see no impediment in the **Property Act** to a mortgagee exercising its power of sale under the mortgage, as mortgagee, (in **Dudley** referred to as the mortgagee's title paramount) or statute, because a lease has been created

by the mortgagor. The lessee's rights are against the lessor/mortgagor for any breach of covenants in the lease. In **Taylor v Ellis [1960] Ch 368**

**Cross J said:**

“Apart from that second point, it does not seem to me that the fact that the tenant of the mortgagor, who could have been treated by the mortgagee as a trespasser, was allowed to remain in possession for a long period could itself in any way preclude the mortgagee from treating him as a trespasser if and when he desired to do so. After all, as long as the mortgage interest is being paid, the mortgagee may perfectly well be content to allow the tenant to remain in possession. The only way in which he can turn him out of possession is by going into possession himself, which is a thing a mortgagee is generally very unwilling to do.

I think that it would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy-there is no doubt in this case, and it is accepted, that Thomas Taylor knew of the tenancy-that the mortgagee consented to take the tenant as his tenant”.

In that connection, I entirely agree with the passage in the judgment of Monroe J. in *In re O'Rourke's Estate*, “quoted by Danckwerts J. in *Parker v. Braithwaite*,” Monroe J. said:

“I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor. The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he chooses to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it afterwards for his interest to repudiate it.”

[69] I agree with **Cross J's** analysis of the law. Consequently, I disagree with Mr. Thorne Q.C.'s submissions on this point and uphold Mr. Boyce's submission.

[70] Having regard to my findings above, I find no merit in the submission in relation to **Section 148** of the **Property Act**, namely Mr. Thorne Q.C.'s submission that his client's lease was a legal estate in land within **Section 148 (a) (iv)** of the **Property Act Chapter 238** of the **Laws of Barbados** which was a right in rem binding on the whole world.

[71] In view of the fact that two leases have been put into evidence, I do not consider that the principle in **Walsh v Lonsdale** is applicable to this matter.

[72] Mr. Thorne Q.C.'s alternative submission is therefore rejected.

**Mrs. Hunte-Weir's conduct and the application of the maxims of equity.**

[73] Mr. Thorne Q.C. invoked the aid of equity. Mrs. Hunte-Weir, on her own admission, paid the rent with cheques, which were returned. She is in arrears of rent on her own admission. Even if she was entitled to assert a right against the mortgagee, she would be bound by the maxim that he who seeks equity must do equity and that he who comes to equity must come with clean hands. I, therefore, find no merit in Mr. Thorne Q.C.'s submission on this point.

**The submission that the Third Party did not seek to assert her right or interest at the hearing and, as such, cannot assert such rights at this stage which merely deals with the issue of a Writ for Possession.**

[74] With reference to Mr. Forde Q.C.'s submissions, I am of the opinion that Mrs. Hunte-Weir could seek to avail herself of any perceived rights at any

time, however, by waiting until the application for issuance of a writ of possession came on for hearing, she created a circumstance in which the mortgagee legitimately exercised its power of sale in favour of a bona fide proposed purchaser for value without notice.

[75] Mrs. Hunte-Weir did not respond when the application for possession was served on her. She did not assert her “right”. Her alleged right must be seen in light of the legal right of the Bhanas under the contract for sale.

[76] Having regard to my findings above, it is unnecessary to rule on Mr. Forde Q.C.’s submission.

### **Disposal**

[77] In the circumstances, the Court denies the application of Mrs. Hunte-Weir and grants the order sought by the Claimant.

[78] It is therefore ordered that:

- (1) The Claimant has permission to issue the writ of possession, and
- (2) The decision with respect to costs is adjourned until 29<sup>th</sup> April, 2016.

**William J. Chandler**  
**Judge of the High Court**