

BARBADOS

CLAIM NO. CV 176 of 2017

SUPREME COURT OF BARABDOS

IN THE HIGH COURT OF JUSTICE

BETWEEN:

SAGICOR LIFE INC.

CLAIMANT

AND

WHITBY INVESTMENTS LIMITED

DEFENDANT

Before: The Hon. Barbara Cooke-Alleyne Judge of the High Court (Acting)

Date of Hearing: January 15, 2018

Appearances:

Ms. Sheena-Anne Ince (Clarke Gittens & Farmer) for the Claimant

Ms. Rashda Lani Daisley (Moore and Daisley) for the Defendant

DECISION

BACKGROUND:

[1] This matter involves a property situate at George Street Belleville, St. Michael owned by the Defendant Whitby Investment Limited. The matter was initiated by a Fixed Date Claim Form, filed on the 9th day of February 2017. The Claimant, Sagicor Life Inc, sought to recover sums due and owing (\$4,804,060.72) under the terms of a facility letter and to enforce the Defendant's covenants to repay in

relation to a Deed of Charge by way of a Legal Mortgage between the Defendant, Whitby Investments Inc. (the Mortgagor), Rupert Spencer (the Guarantor) and the Claimant, Sagicor Life Inc. (the Mortgagee). This deed was recorded in the Land Registry on the 16th of March 2004, as Deed No. 1954 of 2004 and a Further Charge dated the 14th of July 2005, made between Whitby Investments Ltd, Rupert Spencer, and Sagicor Life Inc. was recorded on the 9th of February 2006 as Deed No. 1214 of 2006.

[2] The Claimant in this matter had previously initiated proceedings in relation to the breach of the loan agreement and sought and secured an order for possession against the Defendant under claim CV 947/2014. As a result the Claimant has been in possession of the property since 2016.

[3] The Defendant in this matter does not deny being in breach of the loan agreement. It seeks to resist the claim on the basis that the Claimant had already brought proceedings in relation to this matter and the present claim is therefore an abuse of process.

ISSUES

[4] The issues to be determined are:

- i) Whether the Claimant's previously initiated mortgage enforcement proceedings in Claim No. 947 of 2014 estop the Claimant from continuing in the present claim;
- ii) How the Court should deal with certain procedural breaches in the filing of documents which are detailed below; and

iii) Whether costs ought to be awarded.

CLAIMANT'S SUBMISSIONS

Estoppel

[5] The Claimant filed submissions in this matter on the 17th of July 2017. The Claimant admits that it is in possession of the property, and it has placed evidence of its efforts to secure a sale of the property as well as evidence of the significant expenses it has incurred since its entry into possession. The Claimant has also set out the limited rental income obtained from the property, which has proven insufficient to service the mortgage debt or satisfy the expenses of the property.

[6] The Claimant claims that the remedies available to a mortgagee can be exercised separately or together. The Claimant supports this position by **Part 66.1** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)**, which states:

“66.1 (1) This Part deals with a claim by a mortgagor or mortgagee for any of the following forms of relief:

a) payment of moneys secured by a mortgage;

b) sale of a mortgaged property;

c) foreclosure;

d) possession of a mortgaged property;

e) redemption of a mortgage;

- f) reconveyance of the property or release from the mortgage; and
- g) delivery of possession by the mortgagee.”

[7] The Claimant also supports this position by reference to the **Atkins Court Forms Volume 28 paragraph 39**, which states,

“In the event of default by the borrower, the lender is entitled to pursue each and all of his remedies concurrently or separately. The remedies for non-payment of the loan are: 1) a claim for breach of the covenant to pay in the mortgage or charge; and/or 2) enforcement of the security by way of, 2.1 taking possession; 2.2 appointment of a receiver; 2.3 sale of the property; and/or 2.4 foreclosure. Save for certain limitations, a lender can pursue any or all of his remedies in the same claim form so long as any part of the debt remains unpaid or until the lender takes an action which constitutes an election. Moreover, where a lender has exercised his power of sale and sold a mortgaged property or the property has been sold by order of the court, the lender may thereafter issue proceedings for any amounts still owing under the mortgage.”

[8] It was also submitted that the only remedy which precludes conjunction with other remedies is that of foreclosure, as a lender cannot sue a borrower for breach of his personal covenant to repay once foreclosure has taken place, without in effect, setting aside the foreclosure.

[9] Counsel for the Claimant submitted the case of **Alliance and Leicester plc v Slayford and another [2001] 1 All ER (Comm)**. The Court of Appeal there

dismissed the defendant's allegation of the abuse of process as well as declined to estop the mortgagee's ability to enforce based on arguments of resultant hardship.

- [10] In determining whether the mere fact that the mortgagor was bringing proceedings for a money judgment, which could have been brought as part of the earlier unsuccessful possession proceedings, constituted an abuse of process, the Court stated: "As every textbook on real property or mortgages makes clear, a mortgagee has a number of remedies all designed to enforce payment of what is due to him under the mortgage, which may be pursued concurrently as soon as the mortgagor is in default or successively, until payment in full is recovered or the mortgagee acts in a way which amounts to an election."
- [11] In **UCB Bank plc v Chandler (1999)79 P & CR 270**, Evans LJ stated "the mere fact of a judgment on the possession claim does not give rise as a matter of law to an estoppel with regard to the money claim."
- [12] The Claimant therefore submits that there is no basis for the Defendant's allegations of an abuse of process or inequity, and the Claimant should therefore be permitted to exercise its established rights and recover the sums due and owing to it.
- [13] The Claimant also contends that there is no risk of prejudice to the Defendant if the Claimant is allowed to enforce its remedy. The Claimant further submits that there is no risk of double compensation as the law has clearly established that the mortgagor is under a duty to account for any proceeds of sale. **Part 41 of the CPR** gives scope for the giving of accounts by the Claimant to the Defendant. Further

under **Section 114 of the Property Act Cap 236**, the mortgagee is trustee of any surplus for those interested according to their priorities.

- [14] The Claimant acknowledges the Court's jurisdiction to stay proceedings but submits that the equitable and just considerations lie in favour of the Claimant as the debt increases due to the continuous increase of the requisite expenses for the maintenance of the property, as well as the accumulating interest, and the outstanding principal. The exposure to the market has thus far not yielded a purchaser. It is the Claimant's contention that not to seek to recover the debt by an alternative means would only prejudice the Claimant.

Non-Compliance and Costs

- [15] The Claimant submits that the Defendant did not file a defence within the 28 day stipulated time frame, nor did the defendant seek an extension of time within which to file its defence. On the 6th of April 2017 leave to file a defence was however granted by Justice Beckles, said filing to be done by the 10th of May 2017. The defence was however filed on the 12th of May 2017.
- [16] The Claimant also submits that it filed its affidavit in response after the 14 day time period, and has requested that the Court use its discretion in favour of allowing the Affidavit of Charmaine Slater filed on the 15th of June 2017, as to allow such would not prejudice the matter.
- [17] Counsel also acknowledges that costs should be awarded for the hearing day on the 6th of April, which had to be adjourned because of the Defendant's counsel.

DEFENDANT'S SUBMISSIONS

Estoppel

- [18] The Defendant submits that the claim initiated by the Claimant is an abuse of process on the ground that the cause of action is the same as that of CV 947/2014, and as a result the Claimant is estopped from bringing this action.
- [19] Counsel cited the case of **Heritage Bank (Belize) Ltd. v William Lindo Claim No. 503 of 2011**, where Chief Justice Kenneth Benjamin stated that the mortgagee can “apply to the Court for an order to sell the mortgaged property to recover mortgage money that has become due and payable...he can either seek such an order or alternatively, take out an action for debt on the personal covenant to repay the mortgage money. What he is not allowed to do is to commence separate actions for an order for sale of the mortgage property and for recovery of the mortgage money, although he can rely on each method of recovery as alternative relief sought in the same claim.”
- [20] The Defendant therefore submits that as the March 13, 2015 order was granted, and the Claimant took possession of the property on April 13, 2016, to recover further costs would amount to double recovery of costs.

Non-Compliance and Costs

- [21] The Defendant submits that while the Defendant did not comply with the date set by the Court, there was no undue delay in the matter, which caused prejudice to the Claimant.

[22] Counsel further submitted that the Claimant's Affidavit of the 15th of June 2017 should be struck out on the basis that no leave was granted to the Claimant to reply to the Defence filed by the Defendant, and further that the statement of case was not filed within the specified time periods given by the Rules. It was the submission of the Defendant that costs should not be awarded to the Claimant.

LAW AND ANALYSIS

Estoppel

- [23] The cases submitted by both parties, at first glance are supportive of their divergent positions. With careful analysis however, clear distinctions can be made between the factors existent in the cases, and the matter at hand.
- [24] The Defendant relied on the **Heritage** case where CJ Benjamin utilized **Section 68 of the Belize Property Act** to state that that section allowed a mortgagee to apply for more than one remedy in the alternative. He stated, "you cannot commence separate actions for sale and recovery of debt. But you can apply for both in the alternative in one claim."
- [25] The Claimant relied on **CPR Part 66.1**, which outlines the forms of relief. They also relied on Atkins court forms, which states that these remedies can be pursued concurrently or separately.
- [26] The **Law of Property Act Cap 236 of the Laws of Barbados** does not have a corresponding section, to **section 68 of the Belize Act**, which clearly states that

remedies are to be in the alternative. Therefore the **Heritage** case and its learning are not relevant in this matter.

- [27] The case of **Alliance and Leicester plc v Slayford** supports the principle stated in the Atkins Forms in relation to the concurrent pursuit of remedies. Gibson LJ stated “a mortgagee had a number of remedies available to it to enforce payment, which might be pursued concurrently until payment in full had been recovered or until the mortgagee had acted in a way which amounted to election.”
- [28] In **Alliance**, the bank advanced money on security to Mr. Slayford who fell into arrears and the bank commenced proceedings for possession against him. The Court refused the application. In 1998 the bank was granted leave to amend the particulars of claim to seek a money judgment.
- [29] The Court at first instance found that the second action was an abuse of process as the bank was seeking to obtain possession through the back door. The bank appealed.
- [30] One claim had been brought and an amendment to the particulars was sought to pursue a second remedy. Gibson LJ in **Alliance** quoted Evans LJ in **UCB Bank plc v Chandler**, stating that the “mere fact of a judgment on possession claim does not give rise as a matter of law to an estoppel with regard to the money claim.”
- [31] The law therefore establishes that a party is not estopped from returning to the court to seek another remedy. It is noted that in this referenced case only one action was brought.

- [32] In this instant case there were two separate actions filed; a claim instituted in 2014 seeking possession, which was granted, and subsequently an action brought in 2017 for a money payment of the debt.
- [33] In the **UCB** matter, in 1992 the Plaintiff took the Defendant to court for a writ of possession. Judgment was not given. In 1994, a new action was brought for a writ of possession and for moneys due under the mortgage. Default judgment was given for possession alone, with only an implied reference to a money judgment. The order stated, “Order made for possession and that the Defendant pay the Plaintiff costs for making the application for possession which will be added to the outstanding amount under the mortgage.”
- [34] In 1996, new proceedings were commenced to recover the moneys owing. The Defendant argued that the Plaintiff was estopped from bringing the action and Evans LJ held that the second action was not an abuse of the process. In the instant case the Defendants did not object to the 2014 order for the writ of possession and gave up possession voluntarily. In both **UCB** and the instant case a new action was brought for money judgment.
- [35] The case of **Henderson v Henderson [1843] Hare 100** was discussed by Evans LJ in **UCB**. The principle enunciated there was that “the plaintiff cannot raise in later proceedings a claim or a cause of action which he should have in an earlier action which was taken to judgment.” Evans LJ stated clearly that Henderson “does not apply, as Mr. Ellum accepts, (counsel for the Appellant) so as to make it necessary for a mortgagee to bring both the possession claim and the money claim in one

action”. The learned Judge further stated that the Defendant’s contention was not sensible since it means “that the moment the plaintiffs entered judgment limited to the possession claim, the Defendant was automatically released from all further liability on the money claim.” The court there ruled that the Claimant was allowed to return to court on a fresh application. Similarly, the Claimant, Sagicor Inc., is allowed to bring a fresh application. They can seek the remedies separately. Therefore, the Claimant can either pursue his relief for the amount due on the mortgage debt, either concurrently in one action, or consecutively in a new claim.

[36] In **Bradford & Bingley Building Society v Seddon (Hancock and others, t/a Hancocks (a firm), third parties)** [1999] 4 All ER 217 Auld J, stated that the maintenance of a second claim which could have been part of an earlier one should not of itself be regarded as an abuse of process but an additional element must be found to determine if it was in fact an abuse of the process.

[37] In **Alliance** the question of delay was analysed as an additional element and the Court held that it was not an additional element and therefore there was no abuse of the process. In the instant case the Defendant raised the concern of double compensation, in that the property was valued at more than the debt.

[38] In the instant matter, it is open to the Court to make an order specific to any excess money. Further the **Property Act Section 114** sets out how any excess moneys must be dealt with by the mortgagee. The Court therefore holds that the additional element has not been satisfied and there is therefore no abuse of process.

[39] The Defendant seeks a stay of proceedings so that the property could be sold and then the true liability to the Defendant be ascertained. The evidence before the Court is that the Claimant has sought unsuccessfully to sell the property. The mortgagee company has no control over when or if the property will be sold. As previously determined, both remedies were open to the mortgage company to pursue concurrently or consecutively. There is therefore no justifiable cause for a stay of proceedings. The Defendant remains bound to repay under the covenant between the mortgagor and the mortgagee.

Non-compliance and Costs

[40] The court must at all times exercise its discretion reasonably with a view to ensuring the overriding objective of the **CPR**. In light of the facts as presented, acknowledging a breach of procedure by both the Claimant and the Defendant, it is here submitted that the breaches which occurred caused no prejudice to either parties, and as such the defence filed by the Defendant on the 12th of March 2017, as well as the affidavit filed by the Claimant on the 15th of June 2017 are both allowed.

[41] The application for costs for the 6th of April 2017 which J Beckles reserved her judgement is granted to the claimant. There is adequate information before this Court to rule on the cost.

CONCLUSION

[42] The Court rules that the Claimant can either pursue his relief for the amount due on the mortgage debt, either concurrently in one action, or consecutively in a new

claim. In the event of any excess funds, the Claimant must account to the Defendant and return any difference in accordance with the **Property Act Cap 236** Section 114.

[43] It is further ordered that:

- i. The Defendant pay to the Claimant the sum of \$4,804,060.72, representing the principal, interest and fees outstanding as at the January 19, 2017, and further interest at the rate of 9% per annum until payment, owed to the Claimant under a Deed of Charge by way of Legal Mortgage dated the 16th day of December 2003 made between the Claimant and the defendant and Rupert Spencer (Guarantor) and the Claimant.
- ii. Costs to the claimant to be assessed if not agreed.



BARBARA COOKE ALLEYNE
Judge of the High Court (Ag.)

