

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 1624 of 2015

BETWEEN:

FIRST CITIZENS BANK (BARBADOS) LIMITED CLAIMANT

AND

JENNIFER ROSEANNE HOBBS DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2016: February 09

June 21

2020: March 05

Ms. Richelle M. Nichols, Attorney-at-Law of Clarke Gittens Farmer for the Claimant.

Ms. Sharon Parris, Attorney-at-Law for the Defendant.

DECISION

Introduction

[1] This is an application by the Defendant for costs, arising out of an application by the Claimant, as a mortgagee, for possession of the mortgaged property.

Background

- [2] By a Facility Letter dated 07 March 2008, the Claimant offered the Defendant a demand loan in the sum of \$157,500.00. The loan was repayable over fifteen years by monthly instalments of \$1,736.12, inclusive of interest. The Defendant agreed to the terms in the Facility Letter, and the loan was secured by a deed of charge by way of legal mortgage over land owned by the Defendant. The mortgage deed was executed on 10 July 2008.
- [3] The Defendant fell into arrears with her repayment of the loan. By letter dated 14 February 2014, counsel for the Claimant demanded full payment of the outstanding principal (\$112,772.76); interest (\$5,863.22); late fees (\$989.24); and legal expenses (\$305.00).
- [4] A statutory notice dated 02 June 2014 was issued to the Defendant demanding payment of the outstanding principal, with interest due at the date of payment. The Defendant was given one month from the date of service of the notice to comply, failing which the Claimant would take steps to sell the mortgaged property.
- [5] Counsel for the Claimant forwarded a pre-action protocol letter to the Defendant dated 05 February 2015. The amounts demanded on behalf of the Claimant were principal (\$100,768.84); interest (\$3,829.56); late fees

(1,309.24); legal fees (3,500.00); and additional interest to be calculated at \$23.32 per day from 06 February 2015 until payment.

- [6] Nine months later the Claimant filed its claim for possession of the mortgaged property, further or other relief and costs. The matter came on for hearing before this Court on 09 February 2016. A consent order was made for both parties to file supplemental affidavits.
- [7] At the reconvened hearing on 21 June 2016, the Claimant's counsel informed the Court that the Claimant had instructed counsel to withdraw the application because the Defendant was up to date with her payments. Consequent upon this development, counsel for the Defendant asked for costs.

The Affidavit Evidence

- [8] The claim was accompanied by the affidavit of the Claimant's collections officer Cynthia Cave. This affidavit referred to principal (\$90,753.48); arrears (\$4,364.20); interest (\$1,405.02); and fees (\$1,549.24). The Cave affidavit annexed all the documents referred to at paragraphs [2] to [5] supra.
- [9] The Defendant's first affidavit was filed on 14 January 2016. She admitted defaulting on principal and interest repayments, but asserted that the loan was now up to date. The Defendant also contended that after meeting with counsel for the Plaintiff in March 2015, an agreement was brokered for the Defendant to bring the loan account up to date. That agreement was embodied in

correspondence from counsel to the Defendant dated 26 March 2015. The correspondence stated *inter alia*:

“Our client has reviewed and given consideration to your proposal provided on the 19th day of March 2015. In this regard our client has indicated its willingness to accept your proposal on the following conditions –

1. That payment of the sum of \$5,000.00 shall be made on or before March 31, 2015;
2. That payment of the sum of \$6,111.36 shall be made on or before April 30, 2015 to settle all outstanding arrears;
3. That payment of the sum of [\$1,736.12] be made on or before May 31, 2015 and shall continue each month thereafter;
4. That payments shall be made monthly without any lapses.

Please note that if you should fail to make the payments as agreed above, our client reserves all rights to institute legal proceedings against you without further notice.

Our client’s rights herein are expressly reserved”. (See Exhibit JRH 1).

[10] The Defendant also exhibited receipts for loan repayments made between 18 March 2015 and 28 December 2015. These repayments totaled \$28,600.00 (Exhibit JRH 2). In addition, the Defendant questioned the sum of \$1,549.24

referred to at paragraph 21 of the first Davis affidavit as fees due to the Claimant. The Defendant says that she does not know whether these fees were incurred, and if incurred, whether they are reasonable.

[11] The Claimant responded with its second Davis affidavit filed on 29 February 2016. Davis pleaded that when the claim was filed the arrears on the Defendant's account were \$1,100.00, and that a cheque for \$2,500.00, tendered by the Defendant on 17 October 2015 had to be returned. Davis conceded that the Claimant's counsel had issued the correspondence of 26 March 2015 to the Defendant. (See paragraph [9] supra). However, a follow up letter dated 14 May 2015 was sent to the Defendant.

[12] The letter of 14 May 2015 is in these terms:

“We refer toour letter of March 26, 2015.

As at March 17, 2015 the arrears on your account totalled the sum of \$11,111.36. On March 19, 2015 you attended our office and proposed to clear the arrears by instalments of \$5,000.00 by March 31, 2015 and \$6,111.36 by April 30, 2015. However, your said proposal failed to take into account that your regular monthly payment of \$1,736.12 would be due and owing at the end of both March and April 2015.

Our client acknowledges receipt of the following payments:

- \$5,000.00 on March 19, 2015;
- \$2,500.00 on April 10, 2015;
- \$2,500.00 on April 21, 2015; and
- \$1,700.00 on May 6, 2015.

However, at May 13, 2015 the amount required to clear all arrears was the sum of \$2,883.60. In light of the foregoing you are required to clear the said arrears in the sum of \$2,883.60 on or before May 30, 2015 as well as to pay the agreed monthly payment of \$1,736.12 on or before May 28, 2015. You are also therefore required to maintain monthly payments of \$1,736.12 on or before the 28th day of each and every succeeding month until the facility is liquidated. All payment[s] must be made monthly without lapses.

Please note that should you fail to make the payments as set out above, our client reserves its rights to institute legal proceedings against you without further notice.

Our client's rights herein are expressly reserved". (Exhibit CC1 annexed to affidavit filed on 29 February 2016).

[13] With respect to the fees queried by the Defendant, Davis explained that \$1,549.24 were late fees due to the Claimant "as a result of the Defendant's failure to make payments due under the mortgage in time". (See para.6. of affidavit). Davis added that the Claimant was authorised to charge late fees under clause 3 of the Facility Letter, and clause 1.01 of the mortgage deed. Davis maintained that the Claimant had the right to file its action against the Defendant.

[14] A second and final affidavit was filed by the Defendant on 08 April 2016. The Defendant again admitted default in the repayment of the principal and interest due on the loan. However, she insisted that she was not in default of

the arrangement made between herself and the Claimant's counsel. The demand for her to continue paying the monthly instalments of \$1,736.12, together with the arrears, was communicated in the letter of 14 May 2015. When this letter was posted by counsel for the Claimant, the arrears were \$1,083.60, and not \$2,883.60. She provided evidence of a payment of \$1,800.00 on 15 May 2015, the same days that counsel's letter was posted to her.

[15] The Defendant further alleged that she made a number of payments between 10 June 2015 and 14 September 2015. The cheque returned to her in October 2015 was rectified and returned to the Claimant on 27 October 2015. By this time the arrears were \$128.08

[16] With respect to the fees charged by the Claimant, the Defendant says that these charges were debited from her account. However, she was never made aware of the amount of the late fees, and the receipts she received were neither timely nor adequate. In her own words, "[W]hile I have expressly agreed to indemnify the [Claimant] there is an implied term that if these fees are for my account I should receive timely information regarding the same and that they should be reasonable".

Analysis of Evidence

[17] Counsel for the Claimant confirmed in the letter of 14 May 2015 that at that

date the Defendant's arrears were \$2,883.60. If one adds to this figure the monthly mortgage instalment of \$1,736.12, the total due to the Claimant by the end of May was \$4,619.72. However, an account must be taken of a payment of \$1,800 made on 15 May 2015. Therefore, by May 30th, the Claimant was owed \$2,819.72 and not \$4,619.72.

[18] The loan was still in arrears between 15 June 2015 and the end of September 2015, because no payments were made in July 2015. And three additional payments of \$1,800 during that period appear to have been insufficient to absorb all the arrears. Two payments totalling \$5,000 were made in October 2015 before the claim was filed.

[19] Ms. Davis asserted that at the time of the filing of the claim the Defendant's arrears were \$1,100.32. (Para.5 of second Davis affidavit). This is less than the \$4,364.20 claimed as arrears in her first affidavit. The lesser figure in the second affidavit appears to be based on the assumption that one of the cheques tendered by the Defendant in October was returned to her. The Court accepts that the Defendant tendered a replacement cheque thereafter, and in October, for \$2,500. This was more than the \$1,100.32 now said to be due to the Claimant as at 13 November 2015.

[20] The Claimant offered no additional evidence to establish that between the receipt of the second October payment, and the filing of its claim, the

Defendant continued to be in arrears. There is no cogent explanation as to the amount of the arrears, if any, during this significant period. The Defendant's evidence is that when the claim was filed she was up to date in her payments. The Court accepts this evidence, and that the Defendant continued to be current with her payments up to the time the Claimant withdrew its application for possession.

[21] Section 98 (2) of the Property Act, Cap.236, provides that:

“A mortgagee may apply to the court in a summary manner for possession of the mortgaged property, or any part thereof, and on such application the court may, if it thinks proper to do so, order possession of that property or part to be granted to the applicant, but

(a)....

(b) the right of a legal mortgagee to possession otherwise than in accordance with this subsection is hereby abolished, whether the mortgage was made before or after 1st January, 1980”.

[22] Counsel for the Claimant argued that the Defendant was in breach of both the terms of the mortgage, and the subsequent arrangement between the parties. According to counsel, the consequence of the breach was that the claim for possession was and still remains sustainable. But given the clear terms of Section 98(2) of Cap. 236, it was incumbent upon the Claimant to satisfy the court that it was proper to make the order for possession. The Claimant failed

to do so. There was no credible evidence of arrears.

[23] Moreover, Section 98(2) confers a judicial discretion on the Court. Even if there were arrears of \$1,100.00 as contended by the Claimant, there is evidence of persistent efforts by the Defendant to address the arrears. It is more than likely that the Court would have granted time to pay off the arrears, in view of the small sum involved, and the extent of the Defendant's efforts. But in this scenario, the question whether the Defendant could have sustained an application for costs is moot.

[24] The Defendant convinced the Court that, in the circumstances of this case, an order for possession would not be proper. Her evidence was all part of the Court's record before counsel was authorised to withdraw the case. The Court also considers that the Claimant, as a legal mortgagee, was bound by Section 98(2)(b) of Cap.236. (Supra at para. [21]).

Recovery of Costs

[25] The Claimant did not produced evidence to a standard that could have persuaded the Court, on a balance of probabilities, that it was proper to make an order for possession of the mortgaged property. The corollary to this is that the Defendant incurred costs in defending a claim that was not viable from the outset. Therefore, she is entitled to recover costs in circumstances where the Claimant commenced proceedings when there was no prospect of

an order for possession of the mortgaged property.

[26] The case of **The Co-Operative Bank Plc v. Phillips [2014] EWHC 2862 (Ch)** is instructive. In that case the defendant owned two residential properties that were mortgaged to Barclays Bank. He took two further second mortgages from the claimant bank after receiving a substantial loan for one of his companies. It was a term of the loan and the second charges that the sums due were payable on demand. Another term in the second mortgages was that all costs charges and expenses incurred by the claimant bank, in connection with the charge or the charged property, were recoverable from the defendant and/or the company as a debt, and were to be charged on the properties.

[27] The claimant bank subsequently called in the loan, but the money owed was not paid. The claimant bank brought a claim for possession knowing that there was insufficient equity in the properties to repay the debt after the charges to Barclays Bank were paid. The claimant bank subsequently discontinued the claim for possession. However, it conceded that it was liable to pay the defendant's costs for defending the claim. The claimant bank intended to recover its own costs, and the costs paid to the defendant, from the defendant under the abovementioned term to the second mortgages, and to add them to the outstanding balance. Understandably, the defendant objected to such a proposal.

[28] Morgan J. found that the claimant bank had brought the claim to pressure the defendant or his company to repay the money owed. However, the learned Judge found that this was not an abuse of process, as the claimant bank was trying to collect the outstanding debt. But the claimant bank was not entitled to recover either its own or the defendant's costs under the term in the mortgages. Morgan J. opined that the claimant bank had:

“...got absolutely nothing out of these proceedings, which have been a waste of time and expenses from its point of view. The [claimant bank] appears to have recognised this by discontinuing the proceedings”. (Para. 75 of judgment).

[29] The claimant bank's costs were held to be unreasonably incurred. So too the defendant's costs because they were incurred when the claimant bank brought a claim that it discontinued. (At paras.74-77, applying the **Gomba** case (infra at para.[35])). This Court has determined that on the facts of the case before it, the Claimant would not have succeeded in its application for possession of the mortgaged property. Having withdrawn its application, the Claimant cannot charge its costs to the Defendant. If any such costs were recovered from the Defendant those costs are to be refunded. The Claimant must also pay the Defendant the costs she incurred in defending its action for possession.

Late Fees

[30] The Claimant is entitled to recover the reasonable costs, fees and other

expenses incurred in the collection of the arrears, prior to the filing of the claim for possession. But the Defendant objects to the payment of late fees on the basis that she had no opportunity to determine whether such fees were reasonable. Paragraph 6 of the second Davis affidavit contends that the terms of the Facility Letter and the Mortgage Deed required the Claimant to be fully indemnified for all its fees and charges.

[31] Condition 3 of the Facility Letter states that:

“Fees and Expenses

You will pay on demand, on a full indemnity basis whether or not the loan is disbursed, all costs and expenses (including the [Claimant’s] charges, legal fees and related disbursements, Land Surveyor’s and valuation fees, VAT stamp duties, registration fees) which the [Claimant] incurs in connection with this letter or the security documents in contemplation or otherwise in connection with the enforcement or preservation of any rights under this letter and/or the security documents. The [Claimant] may, and you hereby authorise us, to effect payment of all fees and expenses and other sums payable by you out of and by deduction from the loan”.

[32] And Clause 1:01 of the Mortgage Deed provides that:

“The [Defendant] hereby covenants on demand to pay to the [Claimant] all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the [Claimant] by the [Defendant] in whatever currency denominated whether on any banking or other account or otherwise in any manner

whatsoever (whether alone or jointly and in whatever style name or form and whether as principal or surety) including all liabilities in connection with foreign exchange transactions, accepting endorsing or discounting any note or bills or under bonds guarantees indemnities documentary or other credits or any instruments whatsoever from time to time entered into by the [Claimant] for or at the request of the [Defendant] together with interest to the date of payment at such rate and upon such terms as may from time to time be agreed commission fees and other charges and all legal and other costs charges and expenses incurred by the [Claimant] in relation to the [Defendant] or the property hereby mortgaged on a full indemnity basis”.

- [33] The combined effect of these provisions in the two documents is that the Claimant is entitled to call in the loan on demand, and is entitled also to recover all outstanding principal, interest and other costs associated with the calling in of the debt, on an indemnity basis. Noticeable, neither provision specifically mentions late fees. The Court’s understanding, from paragraph 6 of the second David affidavit, is that these are fees charged by the Claimant in connection with the late payment of mortgage instalments.
- [34] Both Davis affidavits laid claim to late fees in the sum of \$1,549.24. These fees are in addition to the interest payable on arrears, which is calculated at \$21.01 per day. However, unlike the interest rate, the Claimant offered no explanation as to how late fees are calculated. Therefore, the Defendant was in no position to assess or determine the reasonableness of the late fees

charged, or whether they were reasonably incurred.

[35] Counsel for the Claimant drew the Court's attention to the case of **Gomba Holdings (U.K.) Ltd and others v. Minorities Finance Ltd and others (No.2)** [1992] 3WLR 723. In that case the U.K. Court of Appeal considered a term in mortgage deeds that required the mortgagor to pay on demand, and on a full indemnity basis, all costs, charges and expenses however incurred by the mortgagee or by a receiver under the mortgage or in enforcing the security. The mortgagor disputed the defendants' costs, charges and expenses.

[36] A unanimous Court of Appeal agreed with the mortgagor, holding that under the terms of the various deeds, the defendants were entitled to recover their actual costs, charges and expenses except for any costs that had not been reasonably incurred or were unreasonable in amount. Speaking for the court, Scott L.J opined that:

“It is difficult to contemplate that a mortgage deed would ever be construed as entitling a mortgagee to charge against the mortgaged property, or to require the mortgagor to pay, all costs charges and expenses even if improperly or unreasonably incurred or improper or unreasonable in amount unless the mortgage deed had expressly in terms so provided. But if a mortgage deed did expressly so provide, the enforceability of such a provision would, in our opinion, be open to serious question on public policy grounds”. (Pages 187-188).

[37] The Defendant has the burden of showing that the fees charged were un-

reasonable. (See **Gomba**, supra para.[35] at p.187B; and **Co-operative Bank**, supra para. [26] at para.73). The Defendant's evidence is that she was not made aware of the late charges or the amount thereof. (Para.11 of her second affidavit). But the Defendant never denied receiving correspondence from the Claimant's counsel in which late fees were quoted. A letter of 14 February 2014 refers to late fees of \$989.24. (Exhibit CC3 to the first Davis Affidavit). Another letter of 05 February 2015 gives a total for late fees as \$1,309.24. Therefore, the late fees mentioned in the claim should not have surprised the Defendant.

[38] There is no evidence that, prior to the filing of the Claimant's action for possession, the Defendant even queried the basis for the imposition of late fees, or the method of calculation of such fees. It was, and still is open to her to do so. Her objection is contained in her affidavit responses to the claim. But the Claimant having withdrawn the proceedings, the question of late fees does not arise for resolution by the Court. Indeed, the Court reminds itself that the claim is for possession of property in circumstances where the existence of arrears was not properly substantiated.

[39] There is a word of caution to the Claimant. It is not enough to hide behind the indemnity clauses in the contract documents. Any charges to be added to a mortgage debt must be reasonably incurred and reasonable in amount. A

mortgagor may challenge additional charges where a reasonable basis for their imposition or calculation is not readily apparent to the mortgagee.

The Correspondence of 26 March 2015

[40] There is an aspect of this claim that has caused the Court some concern, although not determinative of the issue between the parties. It is the correspondence issued to the Defendant dated 26 March 2015. (See para.[9] supra). In that correspondence, counsel for the Claimant outlined the conditions under which the Claimant would accept the Defendant's proposal for payment of the arrears.

[41] According to the document, payment of the mortgage instalments was to resume by 31 May, 2015 **after** two lump sum payments in March and April 2015. The Claimant, perhaps unwittingly, in effect agreed to a waiver of mortgage instalments until 31 May, 2015. There is no condition in this letter that the mortgage instalments were to be paid in March and April of 2015. There is nothing in the letter reminding the Defendant of an ongoing contractual obligation to continue her monthly instalments in addition to paying the other lump sums. Therefore, it was not unreasonable for the Defendant to assume that the Claimant had agreed to a temporary moratorium on her mortgage instalments.

[42] Having accepted the Defendant's proposal, without reference to mortgage

instalments payable in March and April of 2015, counsel for the Claimant sought to correct the mistake by issuing the letter of 14 May 2015. It was in this letter that the Defendant was informed that her March proposal “failed to take into account that your regular monthly payment of \$1,736.12 would be due and owing at the end of both March and April 2015”.

[43] Despite accepting the Defendant’s proposal, counsel as agent for the Claimant, resiled from an agreement which in effect waived two mortgage instalments. The Court takes a dim view of this manoeuvre. The Defendant did not raise this as an issue in these proceedings. To her credit she ensured that all the arrears, including instalments for March and April 2015, were paid off. The Court’s observations in this regard are merely *obiter*, and offered for future guidance.

Disposal

[44] Costs are awarded to the Defendant to be agreed or determined by the Court.

[45] The Claimant is not entitled to add its costs for this claim, or the costs paid to the Defendant, to the mortgage debt.

Sonia L. Richards
Judge of the High Court