IN THE SUPREME COURT
TURKS & CAICOS ISLANDS

Action No. CL 2/03

IN THE MATTER OF SECTIONS 72, 75 AND 77 OF THE REGISTERED LAND ORDINANCE

BETWEEN:

TEMPLE MORTGAGE FUND LTD.

Plaintiff

- and -

FRANCES GLORIA RIGBY McKENZIE

Defendant

Mr Stephen Wilson for the Plaintiff; and
Mr Ariel Misick QC for the Defendant

RULING

1. The plaintiff is in the business of, *inter alia*, lending money on mortgage. The defendant is a borrower from the plaintiff, who charged certain property to secure her indebtedness. The defendant has now defaulted and the plaintiff seeks to enforce the charge. In order to do so it has applied to this court, by Originating Summons, for various orders concerning the sale of the property.

BACKGROUND

2. The property is a hotel building off Airport Road in Providenciales. It comprises a ground and 2 upper floors. The upper (3rd) floor is incomplete, and there is a valuation before me putting the cost of completion at US $230,000[1]. The remainder of the premises is complete, and it comprises 20 rooms with ensuite bath. It has now been let to Government for a term of 7 years at a monthly rental of $10,000 ($500 per room) for use as police accommodation. By the lease the term is to commence on 1st April 2003. The defendant has agreed to make over $9,000 of the monthly rental to the Plaintiff, but at the date of hearing nothing had been paid, the defendant saying that she has not yet received the money from government.

[1] This is a valuation by BCQS of November 2002. Although it was obtained by the plaintiff, it is not accepted by them, and was put in by the defendant.

3. The sum now charged was borrowed in 3 tranches, and there is an original charge and two subsequent variations. The eventual principal was $690,000. By the terms of the final variation the defendant was to make blended payments of principal and interest following full draw-down of the facility in the amount of $8,735 per month[2]. Full draw down occurred in May 2000. The defendant paid the full monthly payment for June, July and August, but then began to fall into arrears, and on 17th June 2002 the plaintiff made demand for payment. I deal with the terms of that demand in paragraph 19 below.

4. Despite the demand the defendant did not pay off the arrears, and indeed the arrears continued to mount. There were only two payments thereafter, totalling $7,500, which were attributed to earlier arrears. There have been no payments at all since 19th August 2002 and as at the date of the proceedings (17th January 2003) the amount due, with accumulated interest, was $864,852.42. By the date of hearing that had increased to $906,485.70.

5. Following the demand, an auction was set for 15th November 2002. The defendant makes various complaints about the conduct of the auction, none of which I find to be made out. The highest bid at the auction was $900,000. It was made by the defendant herself, in a self-confessed attempt to stop the proceedings and without any real intention of paying that sum. The next highest bid was $800,000. Although the plaintiff was minded to accept that, the defendant's attorney argued that that was not open to them, but in any event the plaintiff eventually negotiated a sale by private treaty in the sum of $949,000. The plaintiff then offered to cap the defendant's indebtedness at $849,000 if she would acquiesce in this sale (leaving her $100,000 clear), but she refused, alleging that it would be a sale at a substantial undervalue.

6. The plaintiff now, therefore, seeks the leave of the court to make that sale by private treaty. This is required because the Registered Land Ordinance ("the RLO") mandates

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[2] The blended payment was composed of interest on the principal at 13% compounded monthly, and principal repayments amortised over 15 years.

sale by auction, but provides that that may be varied by the charge. However, any such variation may only be acted upon with the leave of the court: see RLO, s. 77.

7. The defendant opposes the grant of leave, arguing:

(i) as a preliminary point, that the Notice of Hearing is bad to the extent it seeks to expand the relief specified in the Originating summons;

(ii) that the plaintiff has failed to comply with s. 64(2) of the RLO;

(iii) that the notice served on 17th June 2002 was not sufficient for the purposes of s. 72 of the RLO; and

(iv) that the plaintiff has failed to have regard to the defendant's interests.

PROCEDURAL HISTORY

8. As appears from the title to the action, the Originating Summons is headed:

"In the matter of sections 72, 75 and 77 of the Registered Land Ordinance."

It sought the following specific relief, namely that:

"The Plaintiff have leave to sell the land comprised in parcel number 60602/84 ("the Property") by private treaty pursuant to the contract for sale dated 19th November 2002 (as amended) and made between the Plaintiff on the one part and Post Properties Ltd., of the other part, ("the Sale Contract") whereby the Plaintiff has agreed to sell and Post Properties Ltd. agreed to purchase the Property for the consideration of US$949,000."

9. The summons was in the "expedited" form. That form is not properly available for this type of proceeding, but the case is now beyond that. The summons specified 24th January 2003 as the date for the hearing. However, it was stood out by consent to 31st

January, and on that date it was adjourned generally with a liberty to restore. This course seems to have been adopted because of the pending government lease and the hope that that would facilitate re-financing. That hope was not realised, and on 26th February the plaintiff issued a notice of appointment to hear the summons under Ord. 28, r. 3. In that notice of appointment to hear the plaintiff added a claim for further relief, being:

> "An order pursuant to section 77 of the Registered Land Ordinance permitting Temple Mortgage Fund Ltd. to exercise its power of sale and/or right to appoint a receiver in accordance with clauses 5(a) and 5(b) of the Charge which clauses amend sections 72 and 75 of the said Ordinance."

10. Clause 5(a) of the Charge amends s. 72 to shorten the period of default required before notice may be given, from one month to 7 days. It also shortens the period of notice required from 3 months to 7 days. Clause 5(b) permits sale by "private contract upon such terms and for such consideration and security (if any) as the chargee may think fit."

The Preliminary Point on the Additional Relief

11. The defendant takes a preliminary point on the additional relief claimed in the notice of appointment to hear the summons, arguing that it is not permissible to enlarge the relief sought in this way. The plaintiff relies on Ord. 28, r. 3(4), which provides,

> "If the hearing of an Originating Summons . . . is adjourned and any party to the proceedings desires to apply at the resumed hearing for any order or direction not previously asked for he must not less than 7 days before the resumed hearing of the summons serve on every other party a notice specifying those orders and directions."

12. That is a corollary of the provisions governing the setting down of the Summons for a first hearing, which is governed by Ord 28 r. 3(3), which requires the plaintiff to serve a

notice of the day fixed for the hearing of the Originating Summons[3]. Rule 3(3) governs the contents of such notice, and says:

> "Where notice in Form No. 12 in Appendix A is served in accordance with paragraph (1), such notice shall specify what orders or directions the party serving the notice intends to seek at the hearing;"

13. The plaintiff contends that those provisions allow him to add further relief not claimed in the original Originating Summons. In my judgment any additional orders or directions sought must be contained within the cause of action or claim for relief made in the Originating Summons. Otherwise, the notice of hearing could amend the Originating Summons without leave having been sought. But leave is required to amend an Originating Summons: see Ord. 20, r. 7. To the extent, therefore, that a notice of hearing purports to go beyond the original relief sought, it is strictly bad.

14. Does the additional relief claimed go beyond that sought in the Originating Summons? In my view it does not. In particular I note that the Summons was headed in the matter of each of the relevant sections - namely s. 72 (notice), s. 75 (manner of exercising power of sale), and s. 77 (variation in the charge). I therefore consider the relief now claimed to have been encompassed in the original form of the Summons. In coming to that conclusion I am guided by Paradise Manor Ltd. (in liquidation) Becker and Becker -v- Bank of Nova Scotia [1985] CILR 437 CA. A similar issue arose there, and the Court of Appeal of the Cayman Islands upheld the Judge's ruling that the extended relief was within an application for sale by private treaty: see Zacca P at p. 450, ll. 18 - 31. The instant case is, however, stronger as all the relevant sections were listed in the Summons.

[3] That was not in fact done here as the plaintiff had used the expedited form, which allows the date to be included in the Originating Summons itself.

THE POWER OF SALE AND NOTICE

15. The real issue is whether a power of sale had arisen under the terms of the charge, when read together with the RLO. I will deal first with the terms of the Charge and the demand, and then with the law.

(a) The Terms of the Charge and the Demand

16. There was an original Charge and then two variations to increase the sum secured and lengthen the repayment date. In each case the Charge or variation has a schedule which sets out detailed provisions. Many of those are otiose, being implied by the statute in any event. As to repayment the provisions are as follows:

> (i) 1st Charge (dated 18th March 1999)
>
> The 'term of this Charge' is to be 36 months from its date, and all amounts owing are to be paid on or before the expiry of that period. Starting 30 days from the date of the Charge the chargor is to make monthly payments of interest at 13% of the whole sum compounded annually, and following completion of construction or full draw down on the loan, shall make blended monthly payments of interest and principal, the principal element being amortised over 15 years.
>
> (ii) 2nd Charge (dated 10th September 1999)
>
> Everything to be repaid 36 months from the date of the Charge. Interest only until full draw-down and thereafter blended, as above.
>
> (iii) 3rd Charge (dated 31st January 2000)
>
> Everything to be repaid "on 18th March 1999" [the date of the first charge]. Instalments of interest and principal as above.

17. The plaintiff concedes that the repayment date in the 3rd charge is an obvious error. It relies on the commitment letter of 18th January 2000, which shows the term of the loan to be 36 months. In addition, I am asked to take judicial notice of the fact that Temple are in the business of lending on 3 year mortgages. I do not in fact know that. However, I think it is quite clear that the intention was for everything to be repaid within 36

months, as provided in the commitment letter. I take that to be 36 months from the date of the charge, in keeping with the pattern of the previous charges. I therefore hold that the repayment date was 31st January 2003, and I would rectify the document accordingly if asked to do so.

18. I find the form of the charges difficult. They appear to be a hybrid of a mortgage for the purchase of property, repayable over a term of years by amortised instalments, and a security for a fixed sum repayable on a fixed date. In this respect, the usual form for a mortgage fixes an early repayment date, with actual payment being postponed thereafter on condition of the payment of instalments: see Halsbury's Laws, Vol. 32, paras 499 501. One corollary of that form is that, during the postponement period, the whole debt will become due in the event of default, as explained in Ibid, para 501. However, a prolonged postponement does not seem to be what was intended in this case, and these Charges contain no mechanism to provide that in case of a default in payment of any one instalment the whole debt is to become immediately payable.

19. Nor is the demand of 17th June 2002 straightforward. It contained no reference to the RLO or any specific provisions thereof, nor to any specific provision of the charge. It simply stated the balance as $793,201.28, and the arrears as $103,201.28, and said:

> "We regret to inform you that due to your non-payment of the above amount, Debt Recovery Action has been commenced against you.
>
> This letter is a "Formal Demand" for repayment of all due amounts. In the event of a judicial proceeding, this letter will form part of our case against you.
>
> You now have (31) thirty-one days from the date of this letter in which to send full payment to Temple Mortgage Fund Ltd. to avoid this serious action. After the above-mentioned period we will proceed accordingly."

20. That letter is somewhat ambiguous: what does "all due amounts" mean? Is it a demand for payment of the arrears or for the whole? There was also a covering letter of the same date, which says:

> "It has now come to a point where we can no longer carry the abovementioned facility as we are under tremendous pressure from our auditors to have this facility *brought up to date* or repaid in full. There we as that you proceed to seek alternative financing in an effort to payout our mortgage in due course." (my emphasis)

Although that is not much better, it does indicate that bringing the facility up to date is one option. In context, therefore, I think that the demand was a demand for payment of the arrears in the contractual payments, being monthly payments of interest until full draw-down, and the blended monthly payments thereafter..

(b) The Law

21 The plaintiff relies upon s. 72(1) of the RLO, which provides:

> "If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be."

22. The defendant argues that before the plaintiff can rely on s. 72, it must first comply with s. 64(2). That provides:

> "A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee."

23. Section 64, as the side-note indicates, is concerned with the form and effect of charges. I appreciate that the side-notes are not part of the section, nor an aid to interpreting it, but the substance demonstrates the same thing. Subsection (2) permits a date for repayment to be specified in the charge. That will be the normal case. It then goes on to deal with what happens when (i) no such date is specified, or (ii) the money is not demanded on the date specified (as will be the case where it is intended that payment is to be postponed on payment of instalments). In either such case the money is to be deemed repayable three months after a demand in writing.

24. The notice provision in s. 64(2) is plainly a safety net or last resort. It is to deal with the case where the parties make no provision for when the principal is to become due, or where, having done so, the chargee has waived his right to payment on the due date by failing to require it on that date. In either such case there has to be a mechanism for fixing a new due date, and that is what the notice provisions in s. 64(2) are for. Those provisions have no application if there is a date for repayment and demand is made on that date. Nor does it apply where there is a fixed date for repayment which has not yet arrived. Nor is it concerned with default: s. 64 is concerned with determining when money is due, while s. 72 is concerned with the remedies for default.

25. The defendant argues that the section also applies to the payment of instalments. He relies upon the judgment of the Cayman Court of Appeal in Paradise Manor (*supra*) to the effect that it applied to payment of interest. I think that that case is distinguishable as there the charges did not in fact specify the date on which the interest was payable, but merely provided by reference to the debenture that it "shall be charged to the borrower's loan account on a monthly basis[4]." Here the charge provided for monthly payments, "the first such payment to be made on the first day of the month next following the date above written" (which I take to be a reference to the date of the charge). There was, therefore, a fixed date for the payment of instalments, and I do not think that the passage of time after any of the defaults was such that the plaintiff can be said to have waived his entitlement to prompt payment when due.

26. In any event, if necessary I would have held that s. 64(2) did not apply to instalment payments due on fixed dates under a charge, so as to require a separate demand for each if it was not paid when it became due. If that were the case it would render such mortgages commercially unworkable. In order to preserve his rights the mortgagee would have to serve a separate notice of demand for each instalment which missed its due date, or find itself disqualified from collecting it for 3 months. On the other hand, s. 72 already provides adequate safeguards of the mortgagor's rights in such a case by requiring notice of default after 30 days and a power of sale being then postponed a further 3 months. Indeed, to apply s. 64(2) to instalment payments would bring it into conflict with s. 72, which obviously contemplates an instalment payment not being met, there being no further demand at the time, and then, after the passage of 30 days, the mortgagee giving his notice.

27. It would require very clear words to demonstrate that the legislature intended such an unworkable and unnecessary provision. There are, however, no clear words to require it. The wording of s. 64(2), when it refers to "the money secured by the charge" is consistent with the overall scheme of the section, which refers to the securing of an "existing or a future or a contingent debt or other money or money's worth". It is markedly different from s. 72, which refers to default in the payment of "the principal sum or of any interest *or any other periodical payment* or of any part thereof". If the draftsman had wished to apply s. 64(2) to periodical payments he could have done so by using the same clear wording as s. 72, but he did not do so.

28. I find, therefore, that the notice of 17th June 2002 was a demand for payment of the then arrears, which it particularized. I find that those arrears were then due and outstanding, and there was no requirement that the mortgagee first give notice under s. 64(2) in order to make them due. I further find that that notice complied sufficiently with s. 72 of the RLO. The power of sale had, therefore, arisen at the time of the attempted auction. Because the whole has now become due by effluxion of time, I do not have to go on and consider the different question whether s. 72 is capable of accelerating payment of the whole in the absence of an appropriate provision in the charge.

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[5] See p. 484, per Henry JA at ll. 15 – 18

SALE BY PRIVATE TREATY

29. That leaves the question whether to permit sale by private treaty. It is argued that I have to approve the specific sale and see if the price is right. I do not accept that - I considered the point at length in Barclays Bank PLC -v- James Robert Henry & Anor. (CI -80/99, 15th December 1999) a copy of which I will append to this ruling. I still consider that to be correct, and to the extent that Malone CJ held otherwise in the Cayman case of Cayman National Bank Ltd. -v- Smith & Pierson [1992 - 93] CILR 235, I respectfully disagree.

30. The question then simply is whether I should, in my discretion under s. 77, allow the plaintiff to act on the variation of s. 75 contained in the charge, and sell by private treaty? I think I should. The defendant is in substantial arrears. An auction has failed. I am not satisfied that there was anything improper in its conduct. The plaintiff has not produced a better offer, nor obtained refinancing, despite having had almost a year to do so. For the reasons given in the Barclays Bank case (*supra*), I am not in a position to go into the question of price in any detailed way. However, the transaction proposed by the plaintiff is not so obviously at an under value as to cause me to refuse to exercise my discretion in its favour.

31. There is only one thing that gives me pause. At the hearing the plaintiff produced a letter from TCInvest, saying that she has made an application to them for refinancing of $907,000, which will go before the Board on the last Tuesday of this month. That would be 27th May. I think that I should see the outcome of that before lifting the roadblock on the plaintiff proceeding to sell by private treaty. Although I have no power to adjourn for a long period to allow attempts to be made to repay, I think that the court does have the power to allow a short adjournment to afford a final chance of payment to the mortgagor, by analogy with the common law power to do so in possession actions, where there is a reasonable prospect of repayment: see: Birmingham Citizens Permanent Building Society -v- Caunt [1962] 1 All ER 163. I am, therefore, going to grant a short, final adjournment to see if the defendant can re-finance.

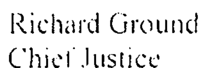
32. The plaintiff asks me to allow them to appoint a receiver in the interim before sale. Given the shortness of the adjournment, I consider that unnecessary, although I also think that such an appointment is incompatible with the immediate exercise of the power of sale: see s. 72(2) of the RLO, which is expressed in the alternative.

33. Finally, had I come to a different conclusion in respect of the application of s.64(2), I would have had no hesitation in allowing the plaintiff to now act upon the variation of s. 72 contained in clause 5(a) of the charge. The full principal sum is now due, and in the circumstances there has plainly been an implicit demand for repayment of the whole, which has not been met. The default has continued for more than 7 days. I would, therefore, have sanctioned the plaintiff giving 7 days notice of default and then proceeding to exercise its power of sale.

SUMMARY

34. In summary, for the reasons given above, I find that the notice of 17th June 2002 was good. The plaintiff's power of sale has, therefore, arisen. I am also minded to allow the plaintiff to sell by private treaty. However, before I finally decide that question, I would like to know the outcome of the TCInvest application. I therefore adjourn this matter to Thursday 5th June. That is the only live point which I am reserving, so the application should be short. I will hear it at 8.30 a.m. that day, as I have a criminal trial proceeding that morning. If both parties agree, I will take it by telephone conference call. I will also hear the parties as to costs at that time.

Dated this 20th day of May 2003



Richard Ground
Chief Justice