

IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS



Appeal No. CL-AP 1/22
from CL 82/21

BETWEEN:

TURTLE COVE HOTEL AND RESIDENCES LTD

Appellant

-and-

TIDES DEVELOPMENT PROJECT, INC.

Respondent



Appeal No. CL-AP 2/22
From CL 79/21

BETWEEN:

PHOENIX DEVELOPMENT LTD.

Appellant

-and-

TIDES DEVELOPMENT PROJECT, INC.

Respondent

BEFORE: The Hon. Mr. Justice C. Dennis Morrison P
The Hon. Mr. Justice K. Neville Adderley JA
The Hon. Mr. Justice Stanley John JA

APPEARANCES: Mr George C. Missick instructed by Geordins for the Appellants
Mr Tony Gruchot instructed by Graham Thompson for the
Respondents

Date Heard: 20 May 2022

Date Delivered: 13 July 2022

JUDGMENT

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ADDERLEY, JA

[1] After hearing this matter on 20 May 2022, we gave our oral decision allowing the appeal and promised to give our reasons later. These are our reasons.

[2] It is an appeal from Orders of the Supreme Court:

A. In Action No. CL 79/21 Tides Development Project Inc (“Tides”) v Phoenix Developments Ltd (“Phoenix”). The Orders made on 4 February were as follows:

“1. The Plaintiff [Respondent] shall have leave to exercise its powers as chargee as varied by the terms of the Charge dated 30 November 2015 entered into between Equity Ltd., (as Trustee) and the defendant [Appellant], as transferred to the Plaintiff pursuant to a Transfer of Charge dated 6 July 2020 (‘the 169 Charge’), including but not limited to, the power of sale of Parcel 60804/169, the Bight and Thomas Stubbs, Providenciales by private treaty and/or to appoint a receiver in accordance with clauses 5(c), (d), (e), (f), and (g) and 13 of the 169 Charge.

2. The Plaintiff shall have leave to exercise its powers as chargee as varied by the terms of the Charge dated 30 November 2015 entered into between Equity Ltd. (as Trustee) and the Defendant as transferred to the Plaintiff pursuant to the Transfer of Charge dated 6 July 2020 (‘the 170 Charge’) including, but not limited to, the power of sale of Parcel 60804/170, The Bight and Thomas Stubbs, Providenciales by private treaty and/or to appoint a receiver in accordance with clauses 5(c), (d), (e), (f), (g) and 13 of the 170 Charge.

3. The Defendant shall forthwith deliver vacant possession of the Property to the Plaintiff.”

B. In Action No. CL 82/21 Tides Development Project Inc. v Turtle Cove Hotel and Residences Ltd (“Turtle Cove”). The following Orders were made on 2 February 2022:

“1. The Plaintiff [Respondent] shall have leave to exercise its power of sale over the Property by private treaty and/or to appoint a Receiver

pursuant to clauses 6(c), 8(a), and (b) and 9(d), and (e) of the Charge dated 21 June 2013 entered into between Meridian Mortgage Corporation Ltd. and the Defendant [Appellant] as transferred to the Plaintiff pursuant to Transfers of Charge dated 2 August 2019 in respect of each of the parcels comprised in the Property.

2. the Defendant shall forthwith deliver up vacant possession of the Property to the Plaintiff”.

[3] The Respondent commenced action to enforce the default in payment of money secured by the Charges being \$435,942.30 in respect of Parcel 169, \$483,178.01 on lot 170 and \$1,342,862.06 on the Cove Property. The appeal involves disagreement on the enforcement measures taken and the conduct of the proceedings as set out in the grounds of appeal¹.

[4] The loans involved the financing of the Tides Condominium, a 4 storey development and a separate condo hotel development consisting of 34 units located in the Turtle Cove area of Providenciales. Following the transfers to the Respondent and the consolidation of all registered securities, the Appellants’ total indebtedness to the Respondent as of 15 September 2021 according to a witness was \$16,330,391.25 made up of \$5,900,204.29 principal plus interests and fees with the latter continuing to accrue at \$14,224.02 per day ².

THE BACKGROUND

[5] Phoenix is the registered proprietor of the land comprised in parcel numbers 60804/169 (“Parcel 169”) and 60804/170 (“Parcel 170”) of The Bight and Thomas Stubbs, Providenciales (together called “the Properties”). The Tides development located on Parcel 170 is completed and operational and parcel 169 has ODP approval for 40 units.

¹ Transcript 1/2/2022 page 12 Line 3-4

² Paragraph 30 affidavit of Claire Elizabeth McAvinchey filed 23 September 2021

- [6] By Loan Agreement dated 12 August 2015 Equity Ltd. (“Equity”) agreed to lend Phoenix \$350,000.00 repayable on 31 August 2017 and interest only by quarterly installments in the meantime. The loan was secured by a first legal charge on Parcel 169. By another loan agreement dated 6 November 2015 Equity agreed to lend to Turtle Cove \$400,000 payable on 30 November 2017 and in the meantime interest at the rate of 13%. It was secured by a first priority legal charge over the freehold title to Parcel 170.
- [7] The loans fell into default and Notices of Default were served by Equity via letters dated 21 March 2019. The Notices of Default demanded repayment in full and gave the Appellant notice that unless the entire amount then due and owing was repaid in full within three (3) Months, Equity would sell the Property in accordance with the RLO and the terms of the charges without further notice.
- [8] The Appellants defaulted under that notice.
- [9] The charges were transferred to Tides from Equity by Transfers of Charge dated 16 July 2020 which were duly registered. Hence, Tides became the registered proprietor of the Charges.
- [10] In the second action, No. CL 82/21 Turtle Cove is the registered proprietor of land comprised in parcel number 60713/218 K2, K3, K14, K20, K21, K23, K24, K28, K31, K32, K33 and K34, of Cheshire Hall and Richmond Hill, Providenciales (“the Cove Property”)
- [11] Meridian Mortgage Corporation Ltd agreed to lend \$1,000,000 on security of a first priority legal charge on the Cove Property dated 21 June 2013 and duly registered.
- [12] Following considerable damage by the 2017 hurricane the existing mortgage on the development was paid off. The Charge was transferred to Blue Hills Condos Ltd on 14 March 2018 and registered.

- [13] On 2 August 2019 there were three Variations of Charge made and duly registered in the encumbrances section of each of the registers of the strata lots in the Cove Property.
- [14] The Charges were transferred to the Respondent on the same date securing the monies already advanced.
- [15] The Appellant defaulted on the payment.
- [16] A Default Notice and then a Demand Notice were served for a principal amount of \$1,000,000 plus Interest, which continued to accrue at a fixed sum each day. In addition to the 3 months given in the Default Notice and the Demand Notice, a further 14 days' grace period was given so that the notice period ended 1 May 2021.
- [17] There was default. The Appellant subsequently applied to the court for sanction of the variations. The originating summons was filed 1 Oct 2021.
- [18] Several sections of the RLO deal with Charges including s.70 (2) and (3), which deal with redemption by the chargor, s.73 which deals with the appointment, powers, remuneration and duties of a receiver, s.74 which deals with the chargee's power of leasing (which does not arise in this case), s.72 which deals with the procedure and remedies of the chargee in the event of default by the chargor and the notices that must be given, and s.75 which deals with the power of sale and in particular s.75(1) which provides only for a chargee to sell by public auction.
- [19] By s.77 the chargee can modify the statutory provisions of the RLO in the Charge document but those modifications cannot be acted upon without a court order. S.77 reads as follows:

“The provisions of sections 70 (2) and (3), 72, 73, 74 and 75 of this Ordinance may in their application to a charge be varied or added to in the charge:

Provided that any such variation or addition **shall not be acted upon** unless the court, having regard to the proceedings and conduct of the parties and to the circumstances of the case so orders.” [emphasis added]

[20] Several modifications to the statutory provisions were agreed by the parties to the 169 Charge and the 170 Charge and the Charge dated 21 June 2013 relating to the Cove Property (“the Cove Charge”).

[21] For the 169 Charge and the 170 Charge these comprised the clauses referred to in the Orders, which I would summarize as follows:

5(c) provides for the Principal Sum and interest and all other moneys payable, to become immediately due and payable and the Charge immediately enforceable and the chargee’s powers and remedies, including the power of sale and/or of appointing a receiver, to immediately arise and be exercisable upon the happening of events set out therein including, among others, if the charger stops payment.

5(d) provides that at any time after the chargee’s security becomes enforceable as in 5(c) it can appoint a receiver.

5(e) confers additional powers on the receiver beyond those set out in the RLO.

5(f) modifies the terms of the statute to provide that at any time after the security becomes enforceable and the chargee’s powers and remedies have arisen, in addition to the remedies contained in s.72, the chargee shall have the right to foreclose or enter into possession under the same circumstances that would allow the chargee to exercise its power of sale or appoint a receiver and would be able to do so without further notice and can sell the charged premises by private treaty as well as by public auction.

5(g) gives a grace period of 14 days after default. and

13. provides that where a modification requires the sanction of the Court before it is acted on the chargee can waive the modification or seek the sanction. If it fails to obtain the sanction, then the original provisions of the RLO shall apply.

[22] Similar modifications were also made to clauses 6(c), 8(a) and (b), and 9(d) and (e) in the Cove Charge.

[23] The Respondent made application under s.77 to seek the Court's approval to act on those modifications and the Court made the Orders now on appeal.

[24] The parties agree that s.77 of the RLO grants a discretion to be exercised by the judge. The Appellant complains that the judge failed to give reasons for the exercise of his discretion in the manner which he did. Failure to give reasons is a ground of appeal as of right³ and was the first Ground of Appeal. Although every single issue taken might not be mentioned the grounds may be grouped under the main headings below.

THE GROUNDS OF APPEAL

[25] The first head was "Failure to give reasons, denial of fair hearing, due process and justice". Under this head Mr Missick argued that the judge had a duty to give reasons for his decision. Further, that he failed to allow him to introduce an affidavit of his client Douglas Crawley, which he attempted to introduce for the first time at the hearing, or alternatively to allow Mr Crawley to give oral evidence.

[26] He also argued that granting an order to sell and/or to appoint a receiver in the same Order was wrong in law because they were alternate remedies under s.70 of the RLO.

[27] The second head was "Defective Notices". The Appellant claimed that the s.64 notice served in 2019 by Equity before this action, was invalid for the purpose of taking action

³ Flannery and Anr v Halifax Estate Agencies Ltd [2000] 1 WLR 377 per Henry, LJ as affirmed by Lord Phillips in English v Emery Reimbold & Streick Ltd [2002] EWCA Civ 605, [2002] EWCA WLR 2409

against his clients, the assignees. He argued that the notice had been waived because after Equity commenced a sale by auction Phoenix commenced proceedings against Equity. A settlement was reached whereby Equity withdrew the sale by auction and accepted payments from a third party. This all occurred before making the assignment to the Respondent. Furthermore, there was a consolidation of all of the loans in March 2021. Therefore, a new notice under s.72 was required to be served not less than one month after the sums became due, but on the evidence it was served prematurely, after only 6 days of default. Therefore, he argued that no power of sale had arisen at the time of the hearing.

- [28] He further argued that when it did arise the chargee would have to wait another 3 months before exercising the power of sale.
- [29] The third head was “abuse of exercise of discretion”. Mr Missick claimed that the judge failed to take into account and have regard to the proceedings and conduct of the parties and the circumstances of the case as required by s.77. These, he stated, included not consenting to his application for an adjournment to allow other unit owners, who could be affected by an Order to attend before the Court, and the judge ought to have acceded to the request for an adjournment.
- [30] Additionally, he claimed that by failing to consider whether granting the adjournment would have given the appellant more time to make the payments the court did not carry out proper case management.

THE RESPONENTS’ RESPONSE

- [31] Mr Gruchot, both in oral and written arguments spanning 43 paragraphs, set out comprehensive arguments dealing with each submission of the Appellant in respect of the Turtle Cove Property and I will attempt to summarize them.

- [32] On Ground 1, “failure to give reasons”, he contended that the learned judge gave reasons by essentially stating that there was no good reason to disallow the Respondent from relying on the modifications, and he stated that such reasons need not be in writing.
- [33] On Ground 2, “that it is wrong in law to grant both the power to sell by private treaty and to appoint a receiver in the same Order”, Mr Gruchot submitted that clause 5(f) of the 169 Charge and clause 6(c) of the 170 Charge varied that provision, and furthermore on a true reading of the section, the Ordinance contemplates that both remedies can be applied for and granted simultaneously in the same Order. There is no indication in the transcripts whether or not the judge made a reasoned decision on this issue.
- [34] The Appellants withdrew Ground 3, “Charge defective not signed”.
- [35] On Ground 4, “section 72 notice defective”, Mr Gruchot replied that the statutory provision had been varied to provide that no notice at all had to be given and this variation had been agreed by the parties. The s.64 notice was to simply fix the date when the monies were due⁴ and since the transfers took place after the s.64 notice the monies were already due and payable by the transferee. He relied on **Paradise Manor Limited (in Liquidation) & ors v Bank of Nova Scotia** (1985 CILR).
- [36] On Ground 5, “failure to have regard to the proceedings and conduct of the parties and the circumstances of the case” as required by s. 77, he stated that the Respondent was relying on the terms that varied the strict notice provisions of s. 72. This had been varied as agreed by the parties in the Charge documents, and the Court could sanction it. As authority he relied on the of **Paradise Manor Limited (in Liquidation) & ors v Bank of Nova Scotia** where Zacca P (and Kerr and Henry JJA) dealing with the same issue set out the principles upon and circumstances in which such variations are sanctioned by the Court under s. 77.

⁴ Per Zacca JA in **Paradise Manor Limited (in Liquidation) & ors v Bank of Nova Scotia** (1985) CILR

[37] It is instructive, though, that in that case the judge at first instance, Hull J, had given detailed reasons for his decision. This is discerned from the passage of Kerr JA, which Mr Gruchot lifted from his speech where he stated:

“...the pivotal point is, was the exercise of the jurisdiction [sanctioning the variation] unfair to the appellants. I am constrained to answer in the negative. **The reasons advanced by Hull J, are compelling...**” (words in square bracket and emphasis added)

[38] Mr Gruchot set out similar detailed rebuttals in paragraph 44-60 of his submissions relating to the Cove proceedings.

[39] In light of how the Court disposes of this appeal it is not necessary and probably not appropriate to comment on all the matters raised as they may have to be considered by the judge at the rehearing, so I shall proceed to the disposal of the application.

DISCUSSION

[40] The reasons for the judge’s decision were probably clear to him, but were not communicated in any oral or written judgment. There were some issues that had to be decided upon before he could exercise his discretion judicially such as, for example, which relevant authorities he accepted on points in issue, whether or not it was wrong in law to order both a sale and appointment of a Receiver in the same Order, whether reliance could be placed on Equity’s 2019 notice, whether the s.72 notice could be abridged before the sanction application was made, whether or not an order for sale and the appointment of a receiver could be made in the same Order or whether they are alternative remedies, whether or not it was necessary to adjourn to allow other unit owners who might be affected by the Orders to be joined, and possibly other issues raised. As stated by Rowe JA in **Hansen v Shangai Links Executive Community Ltd**⁵ adopting the comments of Henry LJ in **Flannery**⁶

“...the judge must enter into the issues canvassed before him and explain why he prefers one case over the other.”

⁵ CL/AP 16/01 in the Turks and Caicos Court of Appeal

⁶ See footnote 3 above

- [41] Even though the judge's exercise of discretion is within the narrow ambit of s.77, while the Court can speculate it cannot definitely decide on his reasons, and consequently is not able to perform its appellate function by determining whether the judge took matters into consideration that he ought not to have, failed to consider matters that he ought to have, or made errors of law in exercising his discretion under s.77.
- [42] All parties accept the principles supporting the need for judges to give reasons and in their combined authorities rely on **Flannery** and **Hansen**. The Judicial Committee of the Privy Council, per Lord Hope, gives further supportive guidance in **Laing v the Queen** [2013] UKPC 14 on appeal from Bermuda where he states at paragraph 14:
- “14. Once again it must be stressed that an appellant has a constitutional right to be given the reasons for the court's decision if his appeal is dismissed. The more serious the offence of which he has been convicted and the more severe the sentence that has resulted from it, the more important it is that this right should be given effect. This should be done by giving written reasons for the decision or, where they have been given orally, for them to be recorded so that they can be transcribed into written form as soon as possible. Only then can one be certain that the constitutional right has been satisfied.
15. It will always be a matter at the court's discretion how much need be said, and whether it should deal with every point that has been raised in the course of argument. But the guiding principle is fairness. The appellant is entitled to be assured that his case has been properly considered and to know why his appeal did not succeed.”
- [43] While **Laing** specifically deals with a criminal appeal, in my judgment, having regard to the principles espoused in such cases as **Flannery** and **Hansen**, the principle has similar applicability to first instance civil cases such as this one, which is circumscribed by the same right of fairness guaranteed by the constitution.

CONCLUSION

- [44] The authorities support the view, contrary to the Respondents' case, that judges should give reasons in writing or if given orally they should be reduced to writing as soon as

possible. Such reasons were not given in this case and the Appellants had a right to challenge the omission. We therefore allowed the appeal.

[45] The judge has since demitted office on 31 March this year. In such a case, instead of remitting the case to the Supreme Court for him to give his reasons, we must remit it for rehearing by another judge. Accordingly, we remit the case to the Supreme Court for rehearing.

[46] Costs will be paid by the Respondents to the Appellant to be taxed if not agreed.

/s/ Adderley JA

I agree

/s/ Morrison P



I also agree

/s/ John JA