



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2014 No: 390**

**BETWEEN:**

**BERMUDA LIFE INSURANCE COMPANY LIMITED**

**Plaintiff**

**And**

**JUNE SANDRA LOUISE ROBINSON**

**First Defendant**

**RALPH ROBINSON**

**Second Defendant**

## **JUDGMENT**

*Mortgage Action (RSC O.88)*

Date of Hearing: Thursday 22 February 2018

Date of Ruling: Wednesday 28 February 2018

Plaintiff: Matthew Godfrey, Appleby (Bermuda) Limited

Defendants: Michael Scott, Browne, Scott for the

JUDGMENT of S. Subair Williams A/J

## **Introductory**

1. This is a mortgage action commenced by a generally indorsed writ of summons which has come before the Court for the determination of the final disputed portion on the Plaintiff's claim for relief under Order 88 of the Rules of the Supreme Court.
2. Somers Isles is the lender in this case. The First Defendant is the borrower and the Second Defendant is the guarantor. Somers Isles, a subsidiary of Argus Group Holdings Limited, amalgamated with the Plaintiff on 31 March 2013 thereby vesting the mortgage and further charges in the Plaintiff pursuant to section 109 of the Companies Act 1981.
3. On a contested application for summary judgment, under Order 14 Rule 1 and Order 88 Rule 6, a ruling was made by this Court in chambers on 1 June 2017 granting the Plaintiff possession of the mortgaged property situate in Sandy's Parish and consisting of a main house and an apartment ("the property"). Additionally, an Order for the sale of the property was made in the same ruling. (*See Bermuda Life Insurance Company v J Robinson et al [2017] SC (Bda) 44 Civ (1 June 2017)*)
4. The Plaintiff now seeks judgment on the full sum of payments owed under the mortgage loans:
  - (i) Legal Mortgage dated 21 December 2005;
  - (ii) Further Charge dated 23 March 2007; and
  - (iii) Second Further Charge dated 11 August 2011
5. Collectively, I refer to these documents as the mortgage loans or mortgage agreements.
6. The aggregate sum owing to date is alleged to be in the sum of \$2,182,387.67. The Defendant, however, does not accept liability for the claimed amount.

## **Background on Proceedings**

7. The Plaintiff's generally indorsed writ of summons together with the statement of claim were filed over three and a half years ago on 12 November 2014. The Defendants entered an appearance on 1 December 2014 and filed a joint Defence on 8 January 2015. The action was dormant for two consecutive periods collectively exceeding a year until the application for summary judgment was filed with the Court on 13 January 2017. A hearing on the summons was fixed for 4 May 2017 which culminated in the 1 June 2017 written ruling.

8. On 1 June 2017, the said ruling was delivered to the parties in a chambers hearing and the following orders were made<sup>1</sup>:
  - (i) Possession of the property was ordered to be delivered to the Plaintiff;
  - (ii) Application for summary judgment on the claim for mortgage payments was refused;
  - (iii) Hearing to be fixed for 5 September 2017 at 9:30am to determine the correct sum owed by the Defendant in mortgage payments;
  - (iv) Leave to exchange expert accounting evidence within 28 days; and
  - (v) Mention for Thursday 22 June 2017 at 11:00am
9. On 22 June 2017 the parties re-appeared before me in Chambers. I confirmed the trial fixture of 5 September 2017 for the determination of the total sum owing under the mortgage agreements and adjourned the application for the enforcement of the mortgage by sale under private treaty. I gave liberty to the parties to apply for any further directions by filing the appropriate listing form<sup>2</sup> in the Registry and costs were reserved.
10. The 5 September 2017 trial date was vacated administratively by the Court and relisted to 5 October 2017, following email correspondence with the parties on their availability and a formal Notice of Hearing.
11. On 5 October 2017, however, the trial was again delisted. On this occasion, the First Defendant, June Robinson, wrote to the Court on the same day to advise that she would be unable to attend due to illness and requested a new date for the matter to be heard. A Notice of Hearing was sent to the parties to confirm the new trial fixture for 7 December 2017.
12. On 6 December 2017, on the eve of the trial, Mr. Michael Scott filed a Notice with the Court that he would be appearing as the First Defendant's new Counsel of record.
13. At the 7 December 2017 trial date, Counsel for both sides appeared. Mr. Scott sought an adjournment and Mr. Godfrey did not oppose the application. Mr. Scott stated that his Client may still be desirous of filing expert accounting evidence by way of challenge to the Plaintiff's claim on the quantum owed for the mortgage arrears. Mr. Godfrey, however, reminded the Court that the timeframe for the filing of expert evidence had passed and objected to Mr. Scott's proposal for further time to exchange expert witness statements.
14. In efforts to encourage the parties to obtain an agreed position or a clear position on the issues for dispute and the applications that would be made, I adjourned the matter for mention in Chambers to Thursday 14 December 2017.

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<sup>1</sup> The outstanding draft copy of the Order made on 1 June 2017 is to be filed by the Plaintiff for Court signature

<sup>2</sup> Form 27As have since which been replaced by Form 31s. See Court Circular 31 of 2017.

15. On the 14 December return date, Mr. Scott made an application for leave to file expert evidence of an audit report on the mortgage payments made and outstanding within an extended timeframe. Mr. Godfrey, advanced forceful objections to rolling the clock backwards to directions on expert evidence at such a belated stage in the proceedings. The Court urged Mr. Scott to be guided by the Overriding Objective and not to incur expert costs unnecessarily or avoidably. I also prodded Mr. Scott to take fuller instructions from his Client on the estimate sum disputed before engaging costly expert reports. I further encouraged Counsel to liaise with one another to see if an agreed position could be obtained as the issue for resolve at this stage was purely mathematical and fact-based on the payments made.
16. While Counsel for both sides expressed their agreement and willingness to engage in settlement discussions, I fixed a trial date for 22 February 2018 as an end-date for resolve. Mr. Scott agreed not to further pursue his request for expert reports until after he obtained fuller instructions and partook in more detailed discussions with opposing Counsel to identify the disputed estimate sum. I also gave the parties liberty to apply to the Court prior to the trial date if settlement discussions proved unfruitful and in the event that further directions would be needed prior to the fixed trial on 22 February 2018 at 2:30pm. The parties were further warned that the trial would not likely adjourn on an opposed application.

### **The 22 February 2018 Hearing**

17. On 22 February 2018 at 2:30pm the parties appeared before me for the trial of the mortgage arrears. Mr. Scott, although unrobed in traditional open court attire, was heard to make a summons application to set aside the order for possession and to stay or adjourn the trial. Mr. Scott also made an application for the admission of what he described to be an expert audit report prepared in support of his client's case.
18. Mr. Scott's application to adjourn was foreshadowed by 5-10 minutes prior to the hearing; having filed his summons at 2:17pm and served it on opposing Counsel in the Court precincts. The supporting affidavit, perhaps still warm from the printer, was sworn by the First Defendant on the same day, 22 February 2018.
19. In the main body of the affidavit, is it stated as follows:

*“2. That I make (a) formal application to this Honourable Court for leave to exercise its inherent jurisdiction to stay or suspend the order for possession of my property located at 1 Cedars Lane Sandys and to adjourn the hearing for a period of time to allow the Plaintiff to determine the implications of the opinion on their reputational risk and further to enter*

*settlement talks on the disputed amount claimed as owing to the Plaintiff in the sum of \$1,723,667(. )76 dollars and interest, based on the finding contained in the opinion(. )*

*3. That I verily believe that actions filed to foreclose on the Mortgage dated December 21 2005 and the first Further Charge 23 Mach 2007 and a Second Further Charge date 11 August 2011 ought in the Court(')s inherent discretion is properly engaged in the circumstances of the opinions and accounting and soft audit of the Plaintiff(')s said claim, which opinion of BEMS Group has assessed the following: The Lending Framework under the mortgage and further charges was Unsafe and Unsound, the Project Management of the \$200K loan was Mis Managaed (sic) causing the Defendant economic loss. There was a lack of Useful or Effective Mediation and or Exit Strategies;*

*4. That arising from the analysis of the information disclosed the Defendants in the opinion of the BEMS is that I be given the opportunity to refinance at a reduced debt balance of \$563,067.24 and I be given an additional \$40,000. (sic) to complete the renovation of the main house which would produce the required rental income to service the debt. The rational for the reduction of the debt is predicated upon the following; 1) Structure, Purpose and Qualifying Criterion for the Loan; the lender(')s loan terms appear to be predatory; the qualifying conditions were not met by the burrowers and the loan terms were unconventional; 2) there was Mis-Management (sic) the \$200K resulting in significant opportunity cost for the Defendants; There was Inadequate Use of traditional Loss mitigation Strategies for Primary Residence.*

*There is attached and marked JSLR#1 the BEMS Opinion and attachments.*

*5. That the BEMS opinion posits the professional basis for significant reduction of the debt and is directly responsive to the Courts Order that there be a hearing to determine the amount of owing on this disputed debt, and it further makes a professional finding that the amount owing is \$563, 067.26 which is a sum that immediately in all of the circumstances renders the Order for possession of the Primary Home unnecessary and shows exceptional circumstances which render it inexpedient for my Primary Home to be foreclosed on and sold to meet what it is accepted and shown to be substantially reduced indebtedness that can be met without sale of the property (See Order 47 r 1 RSC.)*

*6. Accordingly I respectfully seek an order from this Honourable Court in terms of the Summons, that the Order for Possession be Stayed or suspended for a period of 90 days to afford the parties a period of time to assess the opinion and its implications including reputational risk to the Plaintiff, the avoidance of a hard audit, agreeing a set aside of the order for possession agreeing a settlement amount due and owing.”*

20. Exhibit JSLR #1 of Ms. Robinson’s affidavit is an unsigned report entitled “Certified Management Accountant Opinion” by BEMS Group (“the Opinion”).

Application for an Adjournment and the admission of the Opinion

21. Mr. Scott's attempt to have the Opinion admitted into evidence was refused on the basis that it would unfairly provoke another adjournment of the proceedings without sufficient justification. I found that the Opinion did not present as an audit of the (non)payments but rather took the form of an informal plea for the refinancing of the mortgage loan.
22. On the basis that the proposed Opinion report was irrelevant to the calculation of the sums currently owed under the mortgage agreements, I refused its admission. Notably, had the Defendants belatedly produced an actual audit of the payments made to challenge the claimed sum of mortgage payments, I would have been more minded to allow such evidence, albeit without prior leave of the Court.

**Evidence on the Outstanding Sum owed in Mortgage Arrears**

23. The evidence in this trial is confined to the affidavits filed by the parties. No witnesses were cross-examined and no application was made to the Court for the production of witnesses to be cross-examined. Indeed, the only point for determination at this stage was the calculation of the outstanding payments under the mortgage agreements.
24. The Defendants have long accepted that a substantial sum in mortgage payments is outstanding. As stated in my earlier ruling, it has been common ground between the parties that there was a Further Charge and a Second Further Charge on the mortgage which came to the aggregate sum of \$1,313,936.18 plus interest at 8% per annum. The parties also agreed that the mortgage was refinanced and a new monthly sum for repayment was established between them.
25. The factual dispute, previously identified in these proceedings, related to the actual figure decided for monthly repayments. On the Plaintiff's evidence, the monthly sum for repayment was \$13,025.29. The Defendants, on the other hand, previously maintained that the agreed monthly sum for repayment was \$6,500.00.
26. Mr. Scott, when asked by the Court for the minimum sum which the First Defendant would accept liability, stated that the First Defendant accepted that she owed approximately \$650,000.00 and would concede to judgment in that sum.

27. However, the Plaintiff's claim is for \$2,182,387.67. This calculated by the application of the borrowed aggregate principal sum of \$1,313,936.18 to annual 8% interest. The Defendants have never disputed the stated burrowed sum or the agreed 8% annual interest.
28. The Plaintiff's affidavit evidence from George Jones, the Group Company Secretary and Legal Advisor of Argus Group was accompanied by an exhibit of an amortization table which reports that the actual balance as at 22 January 2017 was \$2,024,352.09. Mr. Jones states in his affidavit that the same sum was outstanding as at 10 February 2017 with a daily interest rate of 0.022% accruing on the balance of the outstanding principal and interest sums. At no point was it ever suggested by the Defendants that a particular payment made by either of them was not accounted for in the amortization table.
29. Mr. Jones exhibited a copy of a letter he wrote to the First Defendant dated 1 May 2014 wherein notice of the payment defaults was given with a request for payment in satisfaction of the arrears in the sum of \$1, 656,550.08 with interest accruing.
30. Earlier on in these proceedings, the Defendants (then acting in person) challenged the Plaintiff to account for the inconsistencies between the stated outstanding sums owed in the amortization chart as at 22 May 2014 (\$1,667,743.74) and in Mr. Jones' letter of 1 May 2014 (\$1, 656,550.08) both on the one hand and the outstanding sum of \$1,324,576.18 stated in a letter to the Defendants dated 2 April 2014 from the Plaintiff company's Vice President of Finance on the other hand.
31. However, Mr. Scott gave no real attention in his oral submissions to those discrepancies. Mr. Godfrey argued that the evidence before the Court was clear. He submitted that a mis-statement on a previous balance would make no difference to the burrowed sum or the annual interest owed. Counsel for the Plaintiff relied on the amortization chart as the evidential foundation for his client's claim to \$2,182,387.67 which includes the 8% annual interest which accrued from 22 January 2017 to present together with the outstanding principal owed with no further interest accruing.

### **The Law:**

32. In my earlier ruling I referred to the Court of Appeal's judgment in *Junos v Bank of Bermuda (HSBC) [2011] Bda LR 38* where the mortgagor complained that the mortgagee bank's figures on the outstanding totals were inadequate and inaccurate. In that case the mortgagor failed to file evidence of her own counter figures as to the level and make-up of her indebtedness. Thus the Court of Appeal dismissed the appeal.

## **Findings of the Court**

33. Similarly, in this case, there is no evidential basis upon which I would find myself sufficiently doubtful of the accuracy of the Plaintiff's evidence of the outstanding sums owed.
34. Having regard to the affidavit evidence of George Jones, who was not cross-examined, I find that the amortization chart supports proves the outstanding sum to be \$2,024,352.09 owed as at 22 January 2017. The contractual annual interest calculation of 8% (\$161,948.167) is to be applied to that sum up until the date of this Judgment in order to calculate the current sum owed.

## **Conclusion**

35. The First Defendant's application to adjourn the trial and to set aside the Order of Possession was refused.
36. Judgment is to be entered for the Plaintiff against both Defendants in the sum of \$2,024,352.09 + 8% per annum interest to the date of this Judgment.
37. Unless either party files a Form 31D in the next 14 days, I make the following orders:
- (i) A stay of execution of the Writ of Possession is made for 90 days to allow the Plaintiff a final extended period to deliver possession;
  - (ii) The order of enforcement of the mortgage by sale of the property may be carried out by private treaty;
  - (iii) Judgment Interest at the statutory rate; and
  - (iv) Costs against both Defendants are awarded to the Plaintiff on a standard basis, to be taxed if not agreed.

Dated this 28<sup>th</sup> day of February 2018

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**SHADE SUBAIR WILLIAMS**  
**ACTING PUISNE JUDGE OF THE SUPREME COURT**