In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 373

IN THE MATTER OF THE PREMISES SITUATE AT GROUND AND BASEMENT FLOOR UNITS, 42 ANGLE STREET, CITY OF HAMILTON 10, BERMUDA

BETWEEN:

HSBC BANK OF BERMUDA LIMITED
(Acting by Court appointed Receivers of the Mortgaged Property)

Plaintiff

- and -

AMBIANCE HOLDINGS LTD

First Defendant

CARLTON SIMMONS

Second Defendant

JUDGMENT

Mortgage, Application for Possession, Entering leases without consent in writing of Mortgagee, Quantum Meruit, Conveyancing Act 1983

Date of Hearing: **23, 24 February, 6 March 2023**
Date of Judgment: **20 April 2023**

Appearances: **Jennifer Haworth, Dan Griffin, MJM Limited, for Plaintiff**

Cameron Hill, Spencer West, for First Defendant

Carlton Simmons, Litigant in Person

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff (the "**Bank**") granted the Second Defendant ("**Mr. Simmons**") a mortgage dated 9 January 2004 (the "**Mortgage**") over the property situated at 42 Angle Street, Hamilton (the "**Mortgaged Property**").

2. The First Defendant ("**Ambiance**") is a wholly owned corporate vehicle of the Second Defendant.

Background

3. In the period leading up to June 2017, the Bank and Mr. Simmons were in negotiations in respect of the indebtedness of Mr. Simmons to the Bank pursuant to the Mortgage. Those negotiations failed and shortly thereafter, Mr. Simmons granted leases to Ambiance dated 16 June 2017 (the "**Leases**") of units of the Mortgaged Property in respect of a ground floor barbershop "Fresh Clips" (the "**Fresh Clips Lease**") for 15 years and in respect of the basement bar/restaurant/lounge "Ambiance Lounge" (the "**Ambiance Lounge Lease**") for 30 years, (those two units together the "**Premises**").

4. The Bank obtained an order dated 5 September 2019 (the "**2019 Receivership Order**") for the appointment of receivers, possession and sale of the Mortgaged Property. The joint receivers are Ms. Rachelle Frisby and Mr. John Johnston of Deloitte (the "**Receivers**"). Subsequent to that order, despite being served with notices to quit, Ambiance remained in occupation of the Premises. Further, Ambiance failed to pay rent to the Receivers since

April 2021. The 2019 Receivership Order granted specific powers to the Receivers including:

a. To exercise and execute the order for possession and sale;
b. To take immediate possession;
c. To receive the rents;
d. To enforce on behalf of the Plaintiff directly or indirectly, all and any rights under all agreements etc. entered into by the Second Defendant;
e. To employ and remunerate such agents and advisors as the Joint Receivers shall deem fit and necessary for the specific purposes of carrying out their duties and exercising their powers;
f. To appoint managers, officers, agents, accountants, servants, workmen and others for the purposes of the Order upon such terms as to remuneration or otherwise as the Joint Receivers may think proper; and
g. To bring any proceeding in relation to the Mortgaged Property.

5. By an Originating Summons dated 22 November 2021 the Bank commenced the present action for the following relief:
    a. A declaration that the purported Ambiance Lounge Lease is void;
    b. A declaration that the purported Fresh Clips Lease is void;
    c. An order for possession of the Premises; and
    d. Judgment against Ambiance in respect of rental arrears in the sum of $18,200, apportioned as $7,000 owing by Fresh Clips and $11,000 owing by Ambiance Lounge.

The Trial - Evidence

6. The hearing of the matter took place with evidence given by witnesses for the Bank and for the Defendants. For the Bank's case, there was the affidavit evidence of Ms. Frisby and her colleague Mr. Barnaby Davies, a manager at Deloitte.

7. For Ambiance's case, there was the affidavit evidence of Shaylee Trott, director of Ambiance.

8. Mr. Simmons filed affidavit evidence ("**Simmons 1**") in support of his own case. Prior to the hearing I had ruled an extensive part of Simmons 1 to be inadmissible. At the start of the hearing, I ruled that witnesses would not be allowed to be referred to documents in the Simmons 1 exhibit which corresponded to the inadmissible paragraphs of Simmons 1 but would be allowed to be referred to the documents that corresponded with paragraphs that were not struck out.

Evidence not in dispute

9. There was evidence that generally was not in dispute as set out below.

The Mortgage

10. The Mortgage was signed by Mr. Simmons. Clause 2(k) of the Mortgage provided as follows:

> "*Not to assign, underlet or part possession of the Property or any part thereof, including the grant of an easement, tenancy or lease, without first having obtained the written consent of the Lender which may be withheld without reason given.*" (emphasis added)

11. A Bank Facility Letter dated 4 September 2007 (the "**2007 Facility Letter**") to Mr. Simmons for the 2007 Fourth Further Charge (defined below), and signed by him, included various terms:
    a. A series of remedies;
    b. A "Waivers" clause which set out essentially that no failure or delay in exercising on the part of the Bank any right or remedy under the 2007 Facility Letter shall operate as a waiver of such right or remedy (the "**Waiver Clause**"); and
    c. No amendment of the 2007 Facility Letter shall be effective unless it is in writing and signed by duly authorized representatives of the Bank and the borrowers.

12. A Fourth Further Charge dated 4 September 2007 (the "**2007 Fourth Further Charge**") signed by Mr. Simmons included a clause 2(b) whereby Mr. Simmons agreed to observe and perform all covenants and conditions relating to the Mortgaged Property.

The Negotiations

13. The Bank and Mr. Simmons were in negotiations for the repayment of Mr. Simmons' indebtedness. Those negotiations broke down in June 2017. On 15 June 2017, by email, the Bank withdrew the 2017 Counter Proposal and indicated that proceedings would be issued (the "**2017 Revocation Email**").

Ambiance

14. Mr. Simmons established Ambiance in May 2017 as evidenced by the company search documents. He was and the sole shareholder at incorporation and remained so according to the register of members dated 9 March 2022.

The claim for rental arrears

15. Ambiance is in significant arrears under the Leases having not paid rent since April 2021. A notice to quit was sent on 1 July 2021 and demand for rental arrears was made on 18 August 2021 but was ignored. In its correspondence, the Receivers' position was that demands for rent were made without prejudice to their position that the Leases are void. Thus, the Bank claimed rent arrears from Ambiance on a *quantum meruit* basis from April 2021 equivalent to the rents provided for in the Leases.

Evidence in Dispute

16. There were various main areas of evidence that were in dispute as set out below.

The consent of the Bank

17. Mr. Simmons stated that he was not aware of any clause in the 7 May 2004 contract requiring him to obtain prior written consent before entering a lease. Also, he stated that the Bank permitted him on numerous occasions in practice and by consent to enter into

lease agreements with multiple tenants without prior written consent. Further, he stated that the Bank did waive any such clause through its own actions and practices. The Defendants drew reference to three emails in the Simmons 1 exhibit (the "**Three Emails**"), as set out below as evidence of the consent of the Bank.

a. An email dated 28 July 2015 from Ms. Carmichael of the Bank to Mr. Simmons (the "**2015 Email**");
b. An email dated 6 July 2016 from Ms. Carmichael of the Bank to Mr. Simmons (the "**2016 Email**"); and
c. An email with attached letter from MJM Limited dated 17 May 2017 from Ms. Haworth on behalf of the Bank to Mr. Simmons (the "**2017 Email**"). I note here that the Bank declined a proposal from Mr. Simmons but then offered a counter proposal (the "**2017 Counter Proposal**") which they expressed in the terms that it was '*proposed as a full package and acceptance of these terms can only be on the basis of accepting each and every term.*'

18. Mr. Davies maintained that the Three Emails were not evidence of any consent by the Bank to the Leases. The 2015 Email did not mention consent to enter a lease and the other emails were requesting information documents but not granting consent. Further, based on all the information that was provided to him he was not aware of any written consent granted by the Bank to Mr. Simmons.

19. Ms. Frisby and Mr. Davies explained that as Receivers their role was to maximize the returns to the secured creditors which included the potential of selling the Mortgaged Property. They were not party to the correspondence between the Bank and Mr. Simmons before they were appointed as Receivers, thus they could not provide explanations about the content of the correspondence. They noted that the Mortgaged Property was a multi-unit development consisting of apartments and two businesses. They agreed that rental income would be a reasonable way to pay off the mortgage although rent could be paid without a lease. Ms. Frisby noted that clause 2(k) did not require the Bank to consent to the terms of the Lease.

20. Mr. Simmons' evidence on cross-examination by Mr. Griffin was that during the period 2017 – 2022 he was the sole shareholder of Ambiance and he was the person dealing with the Bank. He stated that he was not the sole director at some point. I note here that in the exhibit of Ms. Trott, the Register of Ambiance's Directors shows that Joseph Smith and Ms. Trott were appointed as directors on 9 May 2017. Mr. Simmons stated that he was aware of Clause 2(k) in the Mortgage, clause 2(b) of the 2007 Fourth Further Charge which obliged him to observe and perform all covenants under the Mortgage, the term in the 2007 Facility Letter recommending that he seek independent legal advice and that any amendments must be in writing, and the Bank's letter to him dated 24 September 2008 in respect of an amendment which set out that all the terms of the Facility Letter remain unchanged.

21. Mr. Simmons' evidence on cross-examination by Mr. Hill was that he was advised to enter into the Leases on advice of his counsel and Ms. Carmichael of the Bank as part of the restructuring of the Mortgage. Thus, the Bank had consented into the entering of the Leases as it was the only way to consider the restructuring. Also, the Bank insisted on having leases of a long duration.

The Timing of the Leases

22. Mr. Davies' evidence was that the timing of when the Leases were entered into was evidence of efforts by Mr. Simmons to frustrate the Bank enforcing its security.

23. Mr. Simmons' evidence on cross-examination by Mr. Griffin was that in his affidavit evidence he described himself as 'the shareholder' of Ambiance in the first sentence, making the point that he was the only shareholder. He accepted that he had seen the Bank's demand letter of 29 March 2017 after which he had further discussions with the Bank. He also accepted that he signed Ambiance's Memorandum of Association document dated 3 May 2017. He also accepted that the Certified Resolution dated 22 March 2022 set out that Ambiance made a resolution dated 16 June 2017 approving the Leases when he was the only shareholder. Further, he agreed that the 2017 Revocation Email informed him that the proposal of 17 May 2017 was now revoked and no longer open for him to accept and that

that they were instructed to issue proceedings. He agreed that one day later he entered into the Leases.

24. On cross-examination by Mr. Hill, Mr. Simmons stated that Ms. Trott and Kevin Warner became shareholders and Ms. Trott participated in the negotiations for the Leases for Ambiance whilst he negotiated for himself as the landlord. He then treated the Receivers as the landlords, paying rent and requesting maintenance.

25. Further on cross-examination by Mr. Hill, Mr. Simmons stated that he had no reason to believe that the Bank had revoked the proposal and he felt that he could have further discussions. He had retained Chancery Law whose attorneys worked on the Leases for some months with various drafts and changes. He stated that he could not get an appointment in one day with Chancery Law or get them to create the Leases in one day. In any event, he stated that it seemed weird that the Bank would have the clause requiring consent to enter into a lease but would be asking him for leases beforehand. He recalled that he did not have any leases before the Bank asked for them, so he obtained the Leases for the purposes of his finances being reconsidered. Thus, in his view, he had consent to enter the Leases.

The amount and terms of the Leases

26. As stated above, the Leases were created on 16 June 2017 the day after the Bank had indicated that proceedings would be issued.
    a. The Ambiance Lounge Lease rent was $1,600 per month. The Receivers obtained an opinion of a professional valuer who advised that the appropriate rental sum for the Mortgaged Property is $2,250 - $2,500 per month. Therefore the Bank argued that the undervalue of 29% - 36% was significant from the outset with regard to the Ambiance Lease.
    b. The Fresh Clips Lease rent was $1,000 per month. The Receivers obtained an opinion of a professional valuer who advised that the appropriate rental sum on standard market terms is $800 per month. The Receivers provided Fresh Clips with a draft lease with rent of $800 but Fresh Clips has refused to sign it. The Fresh Clips

Lease also calls for rent reviews every five years based on the previous 12 months increase in the consumer price index meaning that the tenant has four years in between each rent review date without any increase in rent. The Bank argued that by the end of the term the rent would still likely represent a significant discount.

27. In their affidavit evidence and on cross-examination, Ms. Frisby and Mr. Davies between them explained that they received copies of the Leases in 2020. They reviewed the Leases to see if the maximum amounts of rental incomes were being received. They had received advice from experts Coldwell Banker Bermuda Realty about the suggested commercial rents for the Premises but did not get expert advice on the Water Clause. The advice was that the total rents for the Premises were below the recommended market rent although Fresh Clips actual rent was higher than the recommended commercial rent. Also, they stated that they had been advised that the terms of the Leases were unusual, they were not experts, they were not aware if their counsel were experts and they had not obtained leave of the Court to admit expert evidence. However, Mr. Davies stated that paragraphs 6(d) and (j) of the 2019 Receivership Order provided them with the specific powers to employ agents and advisors, which in his view included valuers, for the purposes of carrying out their duties as the Receivers shall deem fit and necessary or as they may think proper.

28. Mr. Davies stated that he had not reviewed other pub leases in Bermuda although he had done so in the UK. The Receivers still collected rent, firstly on the information that there were tenants in place, and then on the basis of the Leases although they had always objected to the Leases.

<u>The Water Clause of the Ambiance Lounge Lease and other maintenance</u>

29. The Ambiance Lounge Lease included a clause as follows:

"5(f) In the event that the Landlord fails to provide fresh water to the Premises by reason of the Landlord's actions or omissions to properly maintain and repair the water system equipment then the Landlord shall pay to the tenant $3,000.00 per day until fresh water is supplied to the Premises."

30. Mr. Simmons stated on cross-examination by Mr. Hill that the Water Clause was a commercial clause and it was inserted to be a threat to the landlord or potential landlord as to the seriousness of the business. It was not put there to be invoked every time there was an issue with the water. He stated that he believed the Bank deprived him of the supply of water.

31. Mr. Davies explained that the Water Clause was unreasonable and uneconomical when you compared the annual rental income of approximately $30,000 against the potential liquidated damages of approximately $1 million for a year. On cross-examination, Ms. Frisby and Mr. Davies between them explained that they had to secure the water pump equipment as people were interfering with it. They had engaged a property manager and third party contractor to assist them to fix any problems with the Property and they denied that it ever took 100 days to fix a water issue. On occasion, the tenants delayed reporting issues with the water supply, however, they took immediate steps to remedy any issues. Further, they ensured the BELCO and water bills were paid and they took steps to ensure a proper water supply. Also, they recognised that water was an important part of operating a pub. In general, there were difficulties in dealing with the Defendants which included the Receivers changing locks which were changed again by others.

32. Ms. Frisby and Mr. Davies stated between them that that they carried out repairs at the property as they were the Receivers as well as landlords under the Leases and they had informed Mr. Simmons that they objected to the Leases, provided him with a new draft lease, but it was never signed. Ms. Frisby explained that the Receivers decided not to re-rent the premises as repairs were needed which required funds. However, they carried out limited repairs with the limited amount of cash available as generated from the Mortgaged Property. .

Delay in starting proceedings

33. On cross-examination, Mr. Frisby explained that the defendants were difficult to deal with. Also, the Defendants had different law firms acting for them at different times which

contributed to the delay in commencing proceedings. However, she referred to the Waiver Clause which set out that delay was not a waiver of the rights of the Bank.

34. Mr. Simmons, on cross-examination by Mr. Hill, stated that when he was presented with the alternate leases by the Receivers, he refused to sign them on the advice of his lawyers as he already had a lease for 30 years and any successor landlord was bound by such lease.

The Issues

35. The Bank took the hotly contested position that the Leases were void *ab initio* for several reasons as set out below:
    a. Prior written consent to the Leases was not obtained;
    b. The Leases were made with the requisite intent of frustrating the Bank from enforcing its security under the Mortgage and at an undervalue contrary to section 36A – 36C of the Conveyancing Act 1983 (the "**1983 Act**"); and
    c. The Leases are between related parties.

The Law

36. Section 36A(1) of the Conveyancing Act 1983 (the "**1983 Act**") states as follows:

    ""disposition" means any disposition or series of dispositions of property of any nature whatsoever and however effected, and, without limiting the generality of the foregoing, includes any exercise of a power of appointment, any trust, gift, transfer, sale, exchange, demise, assignment, assurance, grant, lease, surrender, conveyance, reconveyance, release, reservation, any purchase or other acquisition, any covenant, contract or option and any compromise or other dealing or arrangement;"

    ""requisite intention" means an intention of a transferor to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him;"

"undervalue", in relation to a disposition of property, means a disposition in respect of which—

"(a) no consideration is given; or

"(b) the value of the consideration given is, in money or money's worth, significantly less than the value, in money or money's worth, of the property.

37. Section 36C(1) of the Conveyancing Act 1983 states as follows:

Avoidance of dispositions made with the requisite intention, etc

"36C (1) Subject to subsection (2) and the provisions of this Part, every disposition of property made with the requisite intention and at an undervalue shall be voidable at the instance of an eligible creditor thereby prejudiced."

38. In respect of determining the meaning of "value", in *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143, Lord Scott stated as follows:

"The value of an asset that is being offered for sale is, prima facie, not less than the amount that a reasonably well informed purchaser is prepared, in arms' length negotiations, to pay for it."

39. In *John Rowe v (1) Cameron Hill (2) HSBC Bank of Bermuda Limited* [2022] SC (Bda) 74 Civ an identical clause 2(k) in a Bank mortgage resulted in a lease granted without the consent of the Bank being deemed void. Hargun CJ stated as follows:

"21. Additionally, Mr Hill was aware that there was a prohibition against subletting of the Property under the Mortgage Deed entered into between the Trustee and the Bank. Mr Hill was aware of the Mortgage Deed since he had signed the Guarantee dated 9 July 2010 whereby he personally guaranteed the Trustee's obligations, up to an amount of $600,000. In this regard, it is to be noted that by the Facility Letter from the Bank addressed to the Trustee dated 2 July 2010, the Bank offered to lend to the Trustee $600,000 and as security required (i) Legal Mortgage over the Property; and (ii) a guarantee from Mr Hill in the amount of $600,000. The terms of the facility letter were accepted by Mr Hill when he signed that letter on 9 July 2010.

22. By Clause 2(k) of the Mortgage Deed the Trustee, as the borrower, covenanted with the Bank: "Not to assign, underlet or part with possession of the Property or of any part thereof, including the grant of any easement, tenancy or lease, without first having obtained the written consent of the Lender which may be withheld without reasons given." Mr Hill accepted during the hearing that any attempt by him to sublet the property would be in breach of Clause 2(k) of the Mortgage Deed. However, Mr Hill contends that the sublease creates binding obligations between him and the Tenant and he is entitled to the Rental Payments even though such an arrangement constitutes a clear breach of the covenant in the Mortgage Deed.

23. It is also to be noted that under the Lease Agreement, Mr Hill undertook to be responsible for the land tax, ground maintenance and pool maintenance relating to the Property. In an email to Mr Ben Adamson of Conyers dated 18 December 2019, Mr Hill states that he has fulfilled his obligations under the lease between himself and the Tenant and in the circumstances, it is appropriate that the Rental Payments should be made to him. However, it is the sworn evidence of Ms Brown of the Bank that Mr Hill failed to fulfil his obligations under the Leasing Agreement. It is the evidence of Ms Brown that in June 2020, the Bank had to make a payment in the amount of $31,675 on account of the maintenance payments. Ms Brown also states that, as at 27 January 2021, despite the terms of the Leasing Agreement requiring Mr Hill to pay the land tax in relation to the Property, the land tax had not been paid for a period of three years.

24. In all the circumstances of this case, the Court is satisfied that Mr Hill had no authority to enter into the Lease Agreement with the Tenant. Specifically, he had no general authority from the Trustee allowing them to enter into the Lease Agreement and there was no relevant lease in existence between himself and the Trustee so as to allow him to sublet the Property. Further, the entry into the Lease Agreement by Mr Hill was in breach of Clause 2 (k) of the Mortgage Deed. Mr Hill accepts that if the Court finds that he had no relevant authority to enter into the Leasing Agreement he could not maintain that the Rental Payments should be made to him. He accepted,

absent any claim by the Bank, the rents would be payable to the Trustee. Accordingly, the Court concludes that Mr Hill is not entitled to the Rental Payments held by Conyers representing the rents paid by the Tenant under the Lease Agreement."

40. In the case of *Stroud Building Society v Delamont and Others* [1960] 1 W.L.R. Cross J stated as follows:

"When a mortgagor has granted a tenancy which is not binding on the mortgagee, since he has not given his consent, the mortgagee can, instead of treating the tenant as a trespasser, consent to treat him as his tenant or, at all events, act in such a way as precludes him from saying that he has not consented to take him as his tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between a mortgagor and a tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee; and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy."

41. In respect of the law of restitution and the principle of *quantum meruit*, in *Butterfield v Brangman and Others* [2015] SC (Bda) 66 Civ Hellman J cited the case of *Benedetti v Sawiris* [2014] AC 938 where Lord Clarke set out the relevant considerations as follows:

"(1) The correct approach to the amount to be paid by way of quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. Per Lord Clarke at para 9.

(2) A court must ask itself four questions when faced with a claim for unjust enrichment. (i) Has the defendant been enriched? (ii) Was the enrichment at the claimant's expense? (iii) Was the enrichment unjust? (iv) Are there any defences available to the defendant? Per Lord Clarke at para 10.

(3) A claim for unjust enrichment is not a claim for compensation for loss, but for recovery of a benefit unjustly gained by a defendant at the expense of the claimant. Per Lord Clarke at para 13.

(4) The enrichment is to be valued at the time when it was received by the defendant. Per Lord Clarke at para 14.

(5) What is to be valued are the services provided, not endpoint or subsequent profit made by the defendant. Per Lord Clarke at para 14.

(6) The starting point in valuing the enrichment is the objective market value, or market price, of the services performed by the claimant. Per Lord Clarke at para 15.

(7) However it is permissible to reduce the objective market value in order to reflect the subjective value of the services to the defendant. Per Lord Clarke at para 18."

Submissions

The Bank's Submissions

42. Mrs Haworth for the Bank made a number of submissions in support of its case.

a. That consent, written or otherwise was not obtained from the Bank in accordance with terms of the Mortgage. This was particularly egregious because the date of the Leases was the day after the Bank indicated that proceedings would be issued. Mrs Haworth rejected Mr. Simmons' position of relying on emails from the Bank as she argued that there are no emails which ask for written consent and consent was not provided by the Bank. Mrs Haworth also argued that despite Mr. Simmons asserting that the Bank's practice was to permit leases, the Waiver Clause precluded his reliance on such conduct.

b. That the Leases are void because they were made with the requisite intent of frustrating the Bank from enforcing its security under the Mortgage and at an undervalue contrary to sections 36A to 36C of the 1983 Act. They argue that this was apparent as the Leases were entered into the day after the Bank had withdrawn a proposal and indicated that proceedings would be issued. Further, Mrs Haworth argued that the rents payable pursuant to the Leases were not commercial rental

rates in terms of the amount and the discount the Leases will provide over their excessively long duration given the unusual rent review clauses.

c. That the timing of Ambiance's incorporation was striking, coming in May 2017 during the midst of negotiations for the repayment of Mr. Simmons' indebtedness which broke down in June 2017. Mrs Haworth argued that Ambiance is entirely in control of Mr. Simmons as he is a director and sole shareholder at incorporation and remained so according to the register of members dated 9 March 2022. Thus, Mr. Simmons entered into the Leases with his own corporate vehicle for the purpose of frustrating the Bank's recovery. Further, as seen throughout his evidence, Mr. Simmons considers himself and Ambiance one and the same, even claiming relief on behalf of Ambiance in his affidavit.

d. That the terms of 15 years and 30 years for the Leases are unusual in a commercial tenancy context. Also, the Water Clause is unusual, ostensibly included in the Lease as Mr. Simmons was aware of challenges with the water system relating to Ambiance Lounge, which he fully expected the Bank and/or Receivers to have trouble with on taking possession.

e. That Ambiance is in significant arrears under the Leases, having not paid rent since April 2021. Thus, the Bank is entitled to take action on behalf of Mr. Simmons to terminate the Leases pursuant to paragraph 6(p) of the 2019 Receivership Order and receive an order for payment on those arrears. In the absence of a valid Lease, the Bank claims rent arrears from Ambiance on a *quantum meruit* basis from April 2021 equivalent to the rents provided for in the Leases. The requirements for a claim in unjust enrichment have been met.

Ambiance's Submissions

43. Mr. Hill made a number of submissions in support of Ambiance's case.

a. The Bank, by their conduct has accepted the terms of the Leases. That is, the Bank consented to the entering into the Leases and the entire business model of the development was predicated on the entering into the Leases by Ambiance. The documentation showed that the Bank had agreed to the entering into the Leases.

b. By acting as the landlord, the Bank has placed itself in the shoes of the landlord and is thereby bound by the terms of the Existing Lease, in particular as: (i) the Receivers collected rent knowing those sums to represent rental payments pursuant to a lease, and in doing so they acted on behalf of the Bank; (ii) in fulfilling the repairing covenants of the landlord, the Bank adopted the role of the landlord and affirmed the Leases; (iii) the relationship between the Bank and the Receivers indicates the Receivers were acting on behalf of the Bank in more ways than simply gathering in the assets; (iv) the Receivers stood in the shoes of the landlord, treating Mr. Simmons as a tenant for years before any proceedings were brought seeking to have the Leases declared void, creating an estoppel to attempts to enforce any legal right to have the leases declared void.

c. The opinion of the Receivers is inadmissible in respect of their view that the Leases were entered into containing unusual clauses, namely that the Water Clause is unusual and the term of the Leases are too long. Also, there is no admissible expert evidence from individuals with knowledge of commercial leases or leases for the rental of public houses where water provision is important. Further, the Court did not grant leave for expert evidence. Thus, there is no basis for ruling certain of the clauses unenforceable.

d. The Leases stand or fall on whether or not the Bank can be said to have consented to their creation by express reference to the evidence or by necessary implication.

Mr. Simmons' Submissions

44. Mr. Simmons made a number of submissions in support of his case.

a. The Leases were valid, reasonable and appropriate. Further, they were a part of the normal course of business decisions and transactions for specific business objectives.

b. The rent and terms of the Leases were reasonable.

c. The Bank and the Receivers had aimed to sabotage his businesses by locking off access to water and failing to repair the Premises as required for health and safety;

d. He denied that any of his actions were designed to thwart the Bank's activities under Receivership to recoup the funds owing;

Analysis

45. In my judgment, the Bank's claims are valid for several reasons.

Whether Mr. Simmons had obtained prior written consent to the Leases

46. First, in my view, the Leases are a disposition of the Mortgaged Property pursuant to section 36A(1) of the 1983 Act.

47. Second, I do not accept Mr. Simmons' evidence that he was not aware that he required the written consent of the Bank to enter into the Leases. In my view, it is compelling that several documents from the Bank, all signed by Mr. Simmons, stated and reinforced the requirement for consent for a disposition of the Mortgaged Property to be in writing. Further, I find it significant that Mr. Simmons admitted on cross-examination that he was aware of Clause 2(k) in the Mortgage, clause 2(b) of the 2007 Fourth Further Charge which obliged him to observe and perform all covenants under the Mortgage, the term in the 2007 Facility Letter recommending that he seek independent legal advice and any amendments must be in writing, and the Bank's letter to him dated 24 September 2008 in respect of an amendment which set out that all the terms of the Facility Letter remain unchanged. Therefore, I am satisfied that Mr. Simmons was aware of the requirement that the Bank needed to give its approval to enter into the Leases in writing.

48. Third, I am satisfied that the Three Emails were not granting any approval in writing by the Bank to Mr. Simmons to enter into the Leases. In respect of the 2015 Email and the 2016 Email, those emails make reference to rental income and financial performance but they do not make reference to a lease or any approval by the Bank of a lease.

49. In respect of the 2017 Email and the attached MJM Letter, it is clear that the Bank had rejected a proposal from Mr. Simmons but then offered a counter proposal which they expressed in the terms that it was '*... proposed as a full package and acceptance of these terms can only be on the basis of accepting each and every term.*' The MJM letter set out that '*after the successful completion of 6 months period of consistent payments*', the Bank would then be prepared to consider entering into a restructuring arrangement, which amongst other things, Mr. Simmons would '*provide copies of all the lease agreements in place in respect of the property.*'

50. In my view, the MJM letter does not amount to a consent in writing by the Bank to enter into the Leases. All the letter was doing was to set out the terms of the 2017 Counter Proposal. To be precise, I reject the argument that "*provide copies of all the lease agreements*' means that consent in writing was granted by the Bank. In my view, the highest that could mean in the context, is that at the point 6 months hence from the date of any agreed Counter Proposal, there would be further consideration about a restructuring arrangement for which copies of any lease agreements which would be in existence were to be provided. It seems clear to me that further discussion was anticipated no doubt involving specific written approval for any potential leases. Further, if all the documentation required consent to a lease, meaning for a specific lease, then Mr. Simmons' construction would have allowed him to enter into any lease whatsoever. I do not agree with that construction. Thus, I am satisfied that in the Third Email, the Bank did not provide written consent to enter into the Leases.

51. Fourth, on the evidence before me, I am satisfied that the Bank did not provide Mr. Simmons with written consent in any other document to enter into the Leases. The starting point is that I accept that there were ongoing negotiations between Mr. Simmons and the Bank about restructuring the Mortgage. I also accept the evidence of Mr. Simmons and Ms. Trott that the Directors of Ambiance had instructed their own counsel to draft the Leases and that work was done on the drafts and amendments. However, the crucial factor is that MJM had sent Mr. Simmons the 2017 Revocation Email withdrawing the 2017 Counter Proposal. Up to that point, the Leases were not executed with Fresh Clips and

Ambiance. In my view, the terms of the 2017 Revocation Email were pellucid and as Mr. Simmons was aware of that email, it would have been obviously pellucid to him that the 2017 Counter Proposal was revoked and it was no longer open to him to accept. To that point, I reject Mr. Simmons' evidence that based on his prior conduct with officials of the Bank, he thought that there could be further negotiations. In my view, MJM was clear in its email that it had been instructed to issue proceedings. In light of the 2017 Counter Proposal being withdrawn, then it is inconceivable that Mr. Simmons would consider that whatever had transpired before, there was on 16 or 17 June 2017 written consent for him to enter into the Leases, contingent as it was on the successful completion of 6 months of consistent payments. In my judgment, it would have been abundantly clear to Mr. Simmons that based on the 2017 Revocation Email, he was never going to get to that point 6 months down the road.

52. Fifth, I reject the Defendants' complaint that the Bank has waived its rights to challenge the validity of the Leases on the basis of the Receivers' conduct including delay in commencing proceedings, acting as landlords, collecting rents and effecting repairs. Primarily, I rely on the Waiver Clause that no delay in exercising its rights could operate as a waiver of such right. To that point, I accept the Receivers' evidence that there was difficulty in dealing with Mr. Simmons who had retained at least three law firms consecutively to represent him. I also accept there were delays as a result of the Covid-19 pandemic. Secondarily, I rely on the fact that the Receivers were operating under the authority of the 2019 Receivership Order which granted them specific powers to collect rents, hire workmen and effect repairs. I accept the evidence of the Receivers that their role was in essence to maintain the Mortgaged Property, with a power of sale and therefore they were bound to maintain the Mortgaged Property. I also accept the unchallenged evidence that the Receivers had made it clear that they had objected to the validity of the Leases once they had the opportunity to review them and take advice. I do not agree with Mr. Hill that the case of *Stroud Building Society v Delamont and Others* supports his case because in the present case, the Receivers had at all times expressly refused to accept the Leases as valid leases, they never waived their right to avoid the Leases and they were operating under the 2019 Receivership Order.

53. In light of these reasons, and similar to the reasoning in *John Rowe v (1) Cameron Hill (2) HSBC Bank of Bermuda Limited*, it is overwhelmingly compelling to me, so that I am satisfied on the balance of probabilities, that the Bank did not grant its consent in writing to Mr. Simmons at any point to enter into the Leases. Thus, I am satisfied that I should grant the declaration that the Leases are void.

54. Having reached the decisions as set out above, there is no need for me to consider the additional ground argued by the Plaintiff that Mr. Simmons held the requisite intention to frustrate the Bank from enforcing it security and at an undervalue.

Claim for rental arrears on a *quantum meruit* basis

55. In my view, on the basis that I have found that the Leases were entered into without the consent of the Bank and are thus void, I am of the view that the Plaintiff is entitled to an order for the payment of rental arrears from Ambiance from April 2021. This is on the basis that the requirements for unjust enrichment have been met as follows: (a) Ambiance has been enriched by occupation of the Premises; (b) the enrichment is unjust in that Ambiance has occupied the Mortgaged Property in breach of the Mortgage terms and the 2019 Receivership Order; (c) the enrichment was at the expense of the Bank, Ambiance having operated a business from the Mortgaged Property which has generated income; and (d) there are no reasonable defences that Ambiance can rely on against the claim of unjust enrichment.

Conclusion

56. In conclusion, I make the following orders:
    a. A declaration that the Leases are void;
    b. Possession to the Bank of the Mortgaged Property occupied by Ambiance; and
    c. The Defendants pay to the Bank on a *quantum meruit* basis the sum of $37,966 for the occupation of the Mortgaged Property.

57. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendants on a standard basis to be taxed by the Registrar if not agreed.

Dated 20 April 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT