In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 116

CLARIEN BANK LIMITED

Plaintiff

and

(1) BCB PARAGON TRUST LTD (AS TRUSTEE OF THE REGINA TRUST)
(2) VICTORIA REGINA PEARMAN

Defendants

REASONS FOR DECISION AND ORDER
(In Chambers)

Hearing Dates:	**9 October 2024 and 11 October 2024**
Date of Decision	**11 October 2024**
Date of Reasons:	**14 October 2024**
Appearances:	**John McSweeney of Walkers Limited for the Plaintiff** **No appearance for the First Defendant** **Victoria Pearman, Second Defendant, in person**

REASONS of Martin, J

Introduction

1. On 9 October 2024 an application was made by the Plaintiff to lift a stay of execution of an Order of Mrs. Justice Subair Williams dated 25 January 2024 (hereafter "the January 2024 Order") giving judgment to the Plaintiff in the amount of BD$485,354.62 plus

interest at a rate of BD$60.83 per day against both the First Defendant and the Second Defendant and granting permission to the Plaintiff to enforce the debt by the exercise of the power of sale under a mortgage dated 12 October 2006 ("the Mortgage").

2. At the same hearing, the Second Defendant applied to set aside the January 2024 Order on the grounds that there were mistakes in the calculation of the interest and an apparent attempt to recover the principal debt twice.

3. The Court granted the application to lift the stay and dismissed the application to set aside the January 2024 Order. These are the reasons that support those decisions.

4. However, in the course of preparing these reasons, it became apparent that the January 2024 Order had been incorrectly drawn, and I have set out below the adjustments that need to be made to that Order, along with the reasons that support those adjustments.

Background

5. The brief factual background is that in November 2006 the First Defendant (acting in its capacity as trustee of the Regina Trust of which the Second Defendant is a beneficiary) borrowed the principal sum of BD$325,000 in relation to the acquisition of a leasehold interest in a floor of office space at Vision House, 44 Court Street, Hamilton ("the Lease"). This borrowing was secured by a mortgage over (i) the Lease and (ii) a collateral mortgage over property owned by the First Defendant in Warwick Parish in its capacity as trustee of the Playhouse Trust. The borrowing was also guaranteed by the Second Defendant. The Mortgage contained a guarantee by the Second Defendant ("the Guarantee"). The premises that were the subject of the Lease at Vision House were occupied by the Second Defendant in her capacity as the principal of a law practice which conducted business from those premises.

6. Although the Credit Facility was offered in March and April 2006, the Mortgage was not in fact completed until 12 October 2006. Regular payments of rent were then made commencing on 12 November 2006 (the "first payment date" specified in the Mortgage) and continued until June 2011 when payments became sporadic and interrupted. Thereafter many payments fell below the agreed monthly repayment schedule set out in the Mortgage.

7. A further Credit Facility was arranged to assist the Second Defendant in July 2013 under which the payments on the Mortgage were reduced to interest only payments for a period of three months. Then a further period of payments of interest only was agreed for five months in 2014, followed by a further loan in October 2013 to assist the Second Defendant to restructure the loan in order to assist the Second Defendant with managing cash-flow issues in her legal practice. Payments under the Mortgage became sporadic and varied, and eventually ceased altogether in January 2015.

8. In order to assist the Second Defendant, the Plaintiff agreed to refinance the debt on terms formalized by a Deed of Variation dated 13 October 2015 by which the term of the loan and mortgage was extended for a further period of 15 years and the outstanding amounts were combined into blended payments of principal and interest over that period to absorb the accrued arrears of principal and interest that had accumulated and to reduce the monthly payment amount. However, no payments were made under the Deed of Variation, except for three payments of BD$2499.01 in May 2018, BD$4500 in August 2018, and BD$1500 in February 2019.

9. As a result of the chronic defaults under the Mortgage, the Plaintiff issued these proceedings by Originating Summons on 19 April 2018 to obtain judgment for the outstanding principal and interest, costs and expenses under the mortgage and for permission to enforce the mortgage by way of exercise of the mortgagee's power of sale under the Mortgage.

10. The Plaintiff's application eventually came on for hearing on 28 February 2019 before Mrs. Justice Subair-Williams. An Order was made in terms against both Defendants, but because the Order was made in the absence of the Second Defendant, who was unable to attend on that occasion, the learned judge granted a stay of execution for 14 days to enable the Second Defendant to apply to the Court for relief (the "February 2019 Order").

11. The Second Defendant subsequently applied to set aside the February 2019 Order on the grounds that mistakes had been made in the calculation of the debt. As a result of that application the matter was delisted in order for the parties to work out the discrepancies. The Plaintiff's application to enforce the February 2019 Order and the Second Defendant's application to set that Order aside did not proceed further.

The January 2024 Order

12. The whole matter appears to have fallen dormant for several years (for reasons that were not explained) until the Plaintiff issued a Notice of Intention to Proceed in September 2023. The matter came before Mrs. Justice Subair-Williams on 25 January 2024, at which time a second Order was presented in terms that were said to reflect the updated amounts due from the Second Defendant. Over the period since the February 2019 Order the outstanding obligation had grown from BD$305,616.33 to BD$485,354.62 when the accumulated default interest, legal costs and the expenses of enforcement were all added together. An Order was made in terms of the draft Order presented to the Court (i.e. the January 2024 Order). However, because the Second Defendant was again not present, the learned judge again made provision for a stay of execution for 28 days.

The application to set aside the January 2024 Order

13. On 26 February 2024 the Second Defendant applied to set aside the January 2024 Order. The Second Defendant said the January 2024 Order would have the effect of giving

judgment against her twice, because she said the same claim was being made in separate proceedings (2018 No 117) against the First Defendant in its capacity as Trustee of the Playhouse Trust and herself as guarantor (see paragraph 5 above). She said there was only one debt, not two[1].

14. The Plaintiff had also issued proceedings (2018 No 117) against the same parties for judgment and permission to enforce against the secondary security held over the property in Warwick Parish referred to in paragraph 5 above[2].

15. The hearing of the Second Defendant's application to set aside was adjourned indefinitely. After some time, the Plaintiff applied to re-list the matter in order to apply to lift the stay on execution of the January 2024 Order. The application to lift the stay and the Second Defendant's application to set aside the January 2024 Order came on for hearing before me on 9 October 2024.

No double recovery

16. At the hearing counsel for the Plaintiff submitted that any misunderstanding about that had already been clarified, and that there is no intention. The 2018 No 117 proceedings are no longer being pursued. Further, the January 2024 Order makes it clear in paragraph 2 that the Order against the First Defendant is limited to the extent of the assets held by the Regina Trust[3]. The Second Defendant is a guarantor of the First Defendant's liability under the loan and is jointly and severally liable for the underlying debt and interest and any obligations arising under the terms of the Mortgage. I agree with that reading of the January 2024 Order. I am satisfied that the terms of the January 2024 Order do not attempt to make double recovery for the same principal debt. Any recovery made from one Defendant will reduce the liability of the other *pro tanto*.

Inaccurate records

17. The Second Defendant also submitted that she was not satisfied that the Plaintiff had provided a proper accounting for the principal and interest payments she had made, and pointed to the fact that the figures set out in the first affidavit of Ms. James did not tally with the amount claimed in the Originating Summons and conflicted with her recollection of the payments she had made. This same criticism had initially been made in 2018, even before the Second Defendant issued her first application to set aside the Order giving judgment.

---

[1] See paragraphs 3 and 4 of the Second Defendant's affidavit dated 26 February 2024.

[2] The Court was informed by the Plaintiff's counsel in the course of the hearing in this matter that as a result of the enforcement of security by another financial institution which held a first mortgage in priority to the Plaintiff, there was an insufficiency of recovery to apply to the Second Defendant's debt. Therefore, the Plaintiff has therefore not pursued the relief it sought in those related proceedings.

[3] It is noted that the February 2019 Order lumped the two Defendants together as jointly liable for the debt rather than separating their liability.

18. In response to that criticism, which was rightly made, Ms. James filed a second affidavit[4] correcting her first affidavit and supplying the missing information. As a result of that original mistake, the Second Defendant said she did not have confidence that the second set of figures (or any figures) provided by the Plaintiff were complete or correct and said the Plaintiff had to "show their workings", i.e. provide her with the supporting details which were relied upon.

19. However, the Second Defendant does not dispute that she owes the Plaintiff the monies that were borrowed to purchase the Lease, and she has not filed evidence that supports her skepticism about the accuracy of the figures contained in the affidavits filed on behalf of the Plaintiff.

20. This Court can only act upon the evidence presented to it, and in the absence of any evidence that contradicts or calls the Plaintiff's evidence into question, this Court is bound to accept the Plaintiff's evidence at face value. Moreover, the Plaintiff's evidence is consistent with the documentation that surrounds the lending facility, and the historic records of payment are consistent with those documents. There is nothing in the evidence to suggest that the corrected version of the Second Defendant's payment history is not accurate or reliable. Therefore, I must reject these criticisms.

21. The sole exception relates to a sum of BD$5,726.10 relating to expenses incurred in the enforcement of the mortgage. Counsel for the Plaintiff has frankly acknowledged that the Plaintiff is unsure what this charge relates to. It may relate to some expense of which track has been lost, but unless the Plaintiff can show that it is an expense that is recoverable under the Mortgage, the Plaintiff accepts that it cannot claim recovery of that sum from the Second Defendant as Guarantor[5].

Other issues

22. The Second Defendant also raised a number of complaints about the conduct of the Plaintiff in the course of her relationship as a customer of the Plaintiff which she asked the Court to take into account. These issues were not set out in the affidavit in support of her application, but I have taken them into account as if they had been.

23. The first objection was that at one stage of the restructuring of her obligations in 2014 the Second Defendant had understood that her obligation had been reduced to an interest only payment (see paragraph 7 above), when it emerged later that because she had not provided confirmation that she had listed a property called "Little Ed-Marg" on the market for rent, the agreed reduction in payments had not been processed. She

[4] dated 15 June 2018
[5] This adjustment has been rendered academic by the Court's analysis of the documents set out below.

complained that the Plaintiff should have notified her sooner. As a result, the Second Defendant says she "lost" BD$12,000[6].

24. The Court does not find any sound legal basis for this complaint because it is clear from the record of payments that no payments were ever made by either of the Defendants at this time. The Second Defendant might have been on stronger ground if payments had been made in accordance with the revised payment arrangement. But they were not. It is therefore unsurprising that the Plaintiff did not adjust the payment schedule. In light of that, the failure of the Plaintiff to implement the restructuring did not "cost" the Second Defendant anything and there is nothing in those circumstances that affects the Second Defendant's liability under the Guarantee.

25. The second more serious complaint was that the Second Defendant says she had received two offers to purchase the Lease, one for BD$90,000 in 2018 and one for BD$100,000 in 2020[7]. The Second Defendant says that, had she been able to sell the Lease, her liability under the Guarantee would have been reduced, albeit not extinguished. She says that her requests for a response to these offers went ignored by the Plaintiff. She says furthermore the Plaintiff had a duty to respond to these proposals so that she could reduce the principal debt and thereby reduce the rate at which interest was racking up against her. She says that she could not proceed to sell the Lease herself without the consent of the Plaintiff because it was the subject of the Mortgage. She says that the Plaintiff just ignored her with the result that she could not proceed with selling the Lease.

26. The Court has considerable sympathy with the predicament the Second Defendant. If true, it may well be that this was an argument that could have been raised as a defence to the claim for judgment on the principal debt and interest or some part thereof. But it was not raised at any time in the proceedings.

27. It is not possible on the evidence before the Court to speculate now on what the position might have been had the Second Defendant raised this defence. Nor was any evidence put in to raise this as an argument to reduce the Second Defendant' s liability, and obviously no evidence was put in to rebut or contradict this argument by the Plaintiff.

28. There may very well have been good reasons why the Plaintiff did not consider these offers to be serious or credible, but the Court cannot make any finding one way or the other, or guess as to the reasons why the offers were not pursued or responded to, or make any assessment of whether, or to what extent (if at all), the Second Defendant's position was prejudiced by the Plaintiff's refusal to respond to her about these offers.

---

[6] There was no evidence or explanation of how this was calculated. However, the 'interest only' arrangement did not waive the principal repayment obligation, it simply postponed it, so the idea that the Second Defendant had "lost" those funds is misconceived.

[7] No evidence for these offers or their terms was provided to support these facts.

29. This is unfortunate, but it is a matter which the Second Defendant could have raised at any point in the long history of this matter, but for her own reasons, chose not to do so until the hearing on 9 October 2024, and then only in the course of argument, and with no supporting evidence. I note that the Second Defendant is herself an experienced attorney and, although she represented herself in person at the hearing on 9 October 2024, she has had the benefit of independent legal counsel at earlier stages of the proceedings. This is a matter that could and should have been raised at the outset of the proceedings and supported by evidence if it was to form the basis of a partial defence to the claim or a foundation on which to make a collateral attack on the January 2024 Order.

30. For these reasons I am unable to accede to setting aside the January 2024 Order on those grounds.

31. Finally, the Second Defendant argued that the proceedings have been protracted and that she had always agreed that the Plaintiff could proceed to sell the property, and that she should not be held responsible for the delay. These complaints are not very persuasive because the Second Defendant had the opportunity to progress matters at any time herself by (i) conceding liability and co-operating with the Plaintiff in giving possession of the premises and (ii) agreeing the extent of her liability under the Guarantee. It is true that this matter seems to have been protracted, but it seems to me that the Second Defendant herself contributed to these delays.

32. The Second Defendant chose to apply to set aside the February 2019 Order and the January 2024 Order on unmeritorious grounds. The delays that taking those objections incurred meant that the amount of interest on the principal debt increased as every month passed. It is the Second Defendant's debt obligation, and she had the responsibility to take steps to resolve it as soon as she could.

33. Although the Second Defendant urged the Court to take into account the Plaintiff's long delay in enforcement as a matter of equity and "fairness", her liability to pay interest on the debt is governed by the terms of her Guarantee, not by the exercise of any power or discretion vested in the Court.

Lifting the stay of execution of the January 2024 Order

34. It was for these reasons at the hearing on 9 October 2024 that I found that the Plaintiff is entitled to judgment in respect of the unpaid principal and accumulated unpaid interest on the Mortgage and is entitled to exercise the power of sale under the Mortgage to enforce the debt and I made those Orders accordingly.

Adjustments to the amount of the Judgment against the Second Defendant

35. However, in cross-checking the provisions of the Mortgage[8] (which incorporates the Guarantee) to match the heads of claim and the terms of the Order, I noticed that the Guarantee is *not* in the standard form.

36. On closer inspection, clause 2 of the Mortgage[9] only makes provision for the payment of principal and simple interest at a rate of 8%. No provision is made for the payment of default rate interest at 10% or for late fees, collection fees, appraisal fees, or the recovery of legal costs on an indemnity basis. These "ancillary" enforcement expenses were nonetheless added to the computation of the Second Defendant's liability by the Plaintiff in the January 2024Order[10].

37. Although the *First* Defendant did undertake to pay these additional categories of charge under the terms of the Facility Letter dated 14 March 2006[11], the guarantee provisions that were in incorporated into the Mortgage which bound the Second Defendant only extended to the payment of principal and interest at 8% (and to pay for the insurance coverage of the Mortgaged premises). Therefore, the Second Defendant's liability to the Plaintiff is *not* co-extensive with the First Defendant's liability to the Plaintiff.

38. Normally the obligations of the Mortgagor are contained in the Mortgage, which usually repeats the terms of the offer of finance made by the bank in its Facility Letter. In this case the borrower's obligation to pay default interest, indemnity legal costs, other enforcement costs, late fees, and appraisal fees were set out in the Facility Letter, but they were not included in the Mortgage.

39. The Second Defendant's obligation to guarantee the borrower's repayment obligations was set out in the Mortgage. This is also unusual. The guarantor's liability is usually contained in a separate guarantee which tracks the borrower's obligations under the Mortgage (which normally includes all the other "ancillary" enforcement expenses referred to in paragraph 36 above). In this case the Second Defendant's obligations were limited to the obligations in the Mortgage which only went as far as repayment of principal and standard interest (and any insurance cost--which is not relevant here).

40. It seems that those responsible for preparing the claim documents in this case assumed that the terms of this financing were in a more modern and standard form and calculated the Second Defendant's liability on the basis that she was equally liable with the First Defendant for everything, without checking the actual terms of the Mortgage.

---

[8] I was not taken to the relevant documents by either side in the course of argument.
[9] HB-1/030 of the Hearing Bundle
[10] Late Fees BD$8,100; Collection Fees BD$56,701.05; Appraisal Fees BD$2,200; Legal Fees BD$27,207.50
[11] HB-1/017

41. It therefore follows from this analysis that the Plaintiff cannot add these additional charges to the Judgment against the Second Defendant, and paragraph 3 of the January 2024 Order must be adjusted in order to reflect the Second Defendant's true liability under the Guarantee.

42. It seemed to me that the additional ancillary expenses claimed in the categories of claim that are not expressly covered by the Guarantee must be removed from paragraph 3 of the January 2024 Order (totalling BD$98,208.55) and the debt owed by the Second Defendant reduced accordingly. Further the interest on the principal debt must be recalculated at a rate of 8% per annum instead of 10% per annum (i.e. the default interest rate provided for in the Facility Letter).

43. In light of this analysis, I called Counsel for the Plaintiff and the Second Defendant back to examine this aspect of the matter before I issued my reasons so that they could go through the documents and make any comments or submissions on the points that had emerged from my review.

44. Counsel for the Plaintiff did not advance any submissions that a different interpretation could be given to the documents than the analysis I have described above. The Second Defendant accepted the narrower interpretation of the documents that I have given. Therefore, I now make a formal adjudication and declaration that the Second Defendant's liability under the Guarantee is limited to the unpaid principal and accumulated unpaid interest at the contractual rate of 8% per annum, calculated on a non-compounded basis.

45. I should note that different counsel had appeared for the Plaintiff before Mrs. Justice Subair Williams on 25 January 2024. It is apparent that the learned judge was not referred to the underlying Mortgage and Guarantee or the Credit Facility Letter in explaining the history. The learned judge was entitled to assume that the figures that had been put before her in the draft Order correctly tracked the Second Defendant's contractual obligations. Unfortunately, they did not.

46. The Plaintiff's Counsel has properly agreed to prepare a fresh calculation of the amounts due from the Second Defendant under the Guarantee according to the interpretation set out above in paragraphs 36-7 and 44 above. The terms of a revised Judgment and Order will be submitted reflecting the reduction of the amounts due under the Guarantee, which are limited to the unpaid principal and the accumulated interest only[12]. It would be preferable if the parties can agree the terms of that Order, but liberty to apply is granted in the event that agreement cannot be reached.

---

[12] Interest at 10% per annum on the unpaid principal of BD$239, 279.97 would be BD$23,928 whereas interest at 8% per annum would be BD$19,142 (calculated to the nearest whole dollar). The difference would therefore be approximately BD$4,786 per annum. Therefore, the accrued interest calculation will be reduced, calculated from the date when default interest commenced until 25 January 2024, and will run at a per diem rate of BD$52.44 (approximately). These figures are to be recalculated by the Plaintiff using the precise dates and paragraph 3 of the 25 January 2024 Order is to be adjusted accordingly.

Costs

47. In order to avoid returning to Court to address the question of costs, the parties have agreed that they would prefer to make written submissions on costs and that the Court will deliver its ruling on costs in writing thereafter. I therefore direct that the parties shall make their submissions on costs within 14 days of the date of this Ruling.

Dated this 14 October 2024

THE HON. ANDREW MARTIN
PUISNE JUDGE