



# 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**

## **CHAMBERS RULING**

Date of Hearing: Thursday 4 May 2017

Date of Ruling: Thursday 1 June 2017

Plaintiff: Marc Godfrey, Appleby (Bermuda) Limited for the Plaintiff Mortgagee

Defendants: In persons

*Application for Summary Judgment (RSC O.14)*

*Mortgage Action (RSC O.88)*

RULING of Registrar S. Subair Williams

## **Introductory**

1. This is a writ action which has come before the Court on the Plaintiff's summons dated 13 January 2017 for Summary Judgment pursuant to Order 14 Rule 1 and Order 88 Rule 6. The Plaintiff seeks leave to enter judgment against the Defendants for possession of the mortgaged property and for payment of the sum of \$2,024,352.09 together with interest, representing mortgage arrears. The Plaintiffs further seek an Order for the sale of the mortgaged property and costs.
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 by virtue of section 109 of the Companies Act 1981.
3. The Defendants also filed a summons for a 'stay of execution' which was presented and heard as an application to strike out the Plaintiff's application for summary judgment.
4. The mortgaged property in this case consists of an apartment and a main house, all of which were at some stage of construction or renovation aided by a project manager assigned by the Plaintiff mortgagee.

## **Background**

5. By a Generally Indorsed Writ of Summons and a Statement of Claim filed on 12 November 2014, the Plaintiff claimed possession of the property and for the liquidated sum of \$1,723,677.76 plus interest for unpaid arrears due under the mortgage.
6. A Memorandum of Appearance in respect of both Defendants was filed on 1 December 2014. This was followed by a joint statement of Defence filed on 8 January 2015.
7. Approximately one year passed without any further pursuit of this action. However, on 11 February 2016, the Plaintiff filed of Notice of Intention to proceed pursuant to RSC O. 3/6. However, this case was met with another dormant phase which continued up until the Plaintiff filed the subject summons for summary judgment only one day shy of a full year later.

## **The Issues**

8. The Defendants accept that as a starting point they have accrued substantial arrears under their mortgage. It is 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 agree that the mortgage was refinanced and a new monthly sum for repayment was established between them.
9. The factual dispute which arises, however, relates 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, say that the agreed monthly sum for repayment was \$6500.00.
10. When queried by the Court on the minimum sum which the Defendants accept liability, the Defendants informed the Court that they would require the services of an accounting expert to identify any such sum.
11. In relation to the claim for possession of the mortgaged property, the First Defendant emotively seeks another opportunity refinance the loan and satisfy her arrears or to purchase the property at the current market value.

## **The Plaintiff's Case:**

12. The Plaintiff's claim is essentially a breach of contract arising out of the following loan agreements:
  - (i) Legal Mortgage dated 21 December 2005;
  - (ii) Further Charge dated 23 March 2007; and
  - (iii) Second Further Charge dated 11 August 2011
13. The claim for \$2,024,352.09 together with interest is based on the borrowed aggregate principal sum of \$1,313,936.18 in addition to interest at 8% per annum.
14. The Plaintiff filed affidavit evidence from George Jones, the Group Company Secretary and Legal Advisor of Argus Group. Copies of the three agreements were exhibited under Mr. Jones' affidavit.
15. Mr. Jones in his affidavit stated that the Defendant defaulted on the monthly payments of \$13,025.29 which were to be made under the Mortgage, Further Charge and Second Further

Charge. On the Plaintiff's case, a power of sale arises under Clause 3 (a) of the Mortgage and under section 31 of the Conveyancing Act 1983.

16. Clause 3 (a) of the 21 December 2005 Legal Mortgage reads:

*“3. IT IS HEREBY AGREED AND DECLARED as follows:*

*(a) It shall be lawful for the Mortgagee at any time or times after the date of these presents and without any further consent on the part of the Mortgagor or of any other person or persons whomsoever TO SELL the Property in the event that the Mortgagor and/or the Guarantor fail to comply with all or any of the terms and conditions contained in this Deed...”*

17. Section 31 of the Conveyancing Act 1983 provides as follows:

*“31(1) A mortgage shall not exercise a power of sale unless and until-*

- (i) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or*
- (ii) some interest under the mortgage is in arrears and unpaid for one month after becoming due; or*
- (iii) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.*

*(1A) For the purposes of subsection (1)(i) notice may be served-*

- (a) by delivering it to the mortgagor;*
- (b) by leaving it at the usual or last known place of abode of the mortgagor;*
- (c) by sending it by prepaid registered post addressed to the mortgagor at his usual or last known place of abode; or*
- (d) by affixing it to some conspicuous part of the mortgaged land.*

*(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.”*

18. Mr. Jones also produced a copy of a letter he wrote to the First Defendant dated 1 May 2014 wherein notice of payment default was given with a request for payment in satisfaction of the arrears accrued. The letter in its material part reads:

*“TAKE NOTICE that unless the arrears on your mortgage (“the Mortgage”) in respect of the Mortgaged Property are satisfied within 30 days, an action shall be commenced against you in the Supreme Court of Bermuda by Bermuda Life Insurance Company Limited of 14 Wesley Street Hamilton, Bermuda (“the Mortgagee”) in which the Mortgagee’s claim shall be for possession of the Mortgaged Property and payment in the sum of \$1, 656, 550.08 with interest accruing daily and costs.”*

19. An amortization table was also produced under the Mr. Jones’ affidavit evidence as exhibit “GNHJ5”. The actual balance showing in the amortization table as at 22 January 2017 is \$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.

### **The Defence:**

20. The Defendants, through the pleadings before the Court, take no issue with the validity of the mortgage agreement or any of the further charges. The Defendants also accept that the aggregate principal sum owed thereunder was \$1,313,936.18 in addition to interest at 8% per annum. Moreover, the Defendants agree that they have failed to pay the outstanding sum and that they are, therefore, in arrears. The Defendants further accept that a power of sale has arisen contractually and under the Conveyancing Act 1983.
21. The first point of contention from the Defendants goes against the Plaintiff’s assertion that monthly payments in the sum of \$13,025.29 were payable under the mortgage. At paragraph 3 of the Defence, the Defendants say:

*“Paragraph 3 of the statement of claim is denied. We do not remember being advised that my monthly installments would be \$13,025.29. We agree that my payments have always been the 21<sup>st</sup> day of each month. We have reviewed the Further Charge and mortgage documents provided by the Plaintiff, neither document references the payment amount of \$13,025.29 monthly.”*

22. To further refute the Plaintiff’s assertion that there was an agreement on monthly payments in the sum of \$13,025.29, the Defendant put before the Court a letter from David Pugh, the Chief Financial Officer of Argus, dated 28 September 2006. The letter in substance reads:

*“Dear Ms. Robinson and Mr. Robinson,*

*Following our discussion with Ms. Robinson on September 19 2006, I write to advise you that Somers Isles Insurance Company Limited is willing to increase the original mortgage loan by \$200,000.00 to a maximum of \$950,000.00.*

*Payment terms were also discussed and agreed that \$6,500.0 was to be paid monthly effective September 30, 2006 until the project has been completed. Upon completion the payment terms and amount will be revisited.*

*The property was surveyed for insurance purposes on September 21, 2006, and as discussed and agreed the premium will be added to your mortgage loan.*

*Please signify your agreement with the contents of this letter by signing and returning the attached copy letter to Deborah Leseur.*

*Yours sincerely,*

*David W. Pugh  
Chief Financial Officer*

23. It follows that the Defendants also take issue with the figures provided by the Plaintiff in evidence through the exhibited amortization chart. The Defendants in their Defence dispute the accuracy of the Plaintiff's evidence that as at 31 October 2014 the total balance outstanding in mortgage arrears was \$1,723,677.76. Paragraph 6 of the Defence reads:

*“Paragraph 6 of the statement of claim is denied save that it is agreed that the annual interest rate is 8%. While it is agreed that we are in arrears of my mortgage it is not agreed that we owe the sum outlined in the Plaintiff(s) statement of claim. By way of letter dated 2 April 2014 KPMG advised that the outstanding account for the mortgage and the arrears as of March 31, 2014 was \$1,324,576.18. By way of a letter dated May 1, 2014 we were advised that my outstanding mortgage and arrears amounted to \$656,550.08. We do not understand how the mortgage and the arrears could have increased by the sum of \$332,000.00 in the space of thirty days. We would like for the Plaintiff to provide an accounting of all my payments from the inception of my mortgage.”*

24. The Defendants placed before the Court a letter from The Argus Group's Vice President of Finance dated 2 April 2014. The letter was addressed to the Defendants and read in substance:

*“Dear Sir,*

*In connection with the audit of the financial statements of Somers Isles Insurance Company Ltd as of March 31 2014 and for the year then ended, our independent auditors wish to determine whether you are in agreement with our records of your mortgage as of March 31, 2014. According to our records, your mortgage as at March 31, 2014 was as follows:*

*Amount unpaid: \$1, 324,576.18*

*Payments made during the year: \$0.00*

*Interest rate: 8%*

*Maturity date: December 21, 2025*

*Please compare the above information to your records, complete the statement below and send this directly to our independent auditors by emailing or faxing a copy to Travis Stringer at [travisstringer@kpmg.bm](mailto:travisstringer@kpmg.bm) or fax no. 2959132 and mailing the confirmation directly to our independent auditors, (KPMG), Chartered Accountants, P.O. Box HM 906, Hamilton, Bermuda HM DX to the attention of Travis Stringer.*

*Should you wish to discuss any details of this letter please contact Sheen Smith at (441)2980823.*

*Yours faithfully*

*Sheena Smith*

*Vice President, Finance*

*The information stated above is:*

*[correct]*

*[incorrect]*

*(Please give details of differences, if any)*

*Name/Company: \_\_\_\_\_ Title: \_\_\_\_\_*

*Signature: \_\_\_\_\_ Dated: \_\_\_\_\_”*

25. There is no evidence or suggestion before the Court that the Defendants completed and resubmitted this form or otherwise advised the Plaintiff in writing that they were at discord with the stated calculation. However, the amortization record produced by Mr. Jones shows an (outstanding) ‘actual balance’ of \$1,645,579.55 as at 22 March 2014 and an (outstanding)

‘actual balance’ of \$1,656,550.08 as at 22 April 2014. This appears to be inconsistent with the lower balance stated in the above letter (\$1,324,576.18 as at 31 March 2014).

26. At Tab 5 of the hearing bundle behind the statement of Defence, there is another letter from Sheena Smith in the same format dated 25 April 2013. The unpaid amount stated in that letter is \$876,375.00 as of 31 March 2013. It is perhaps arguable that this lower balance is inconsistent with the amortization table which records an (outstanding) ‘actual balance’ of \$1, 514,522.44 as at 22 March 2013 and an (outstanding) ‘actual balance’ of \$1, 524,649.46 as at 22 April 2013.

27. The Defendants in brief written outline<sup>1</sup> of their arguments stated as follows:

*“3. Throughout, we have received conflicting financial statements through audited financial documents from Argus Ins in regard to the amounts owed. (see attached) Also received through a statement of claim from Argus that my payments were \$13,025.29 per month. We do not see any document indicating that amount on the mortgage deed. The agreed payment was \$6500.00*

*Therefore we request a full detailed accounting of my mortgage account including all fees since the mortgage inception.*

*4. An Argus Ins appointed project manager was in control of all finances during the last phase of the construction of the premises and was negligent in accomplishing the completion of the main house to a rentable condition with the said funds, thereby putting me in an extremely adverse financial situation being unable to rent the premises. Therefore we request a reduction in accumulated interest to be determined after we receive financial accounting of the mortgage.”*

28. Ms Robinson, the First Defendant, referred the Court to an exhibit of her 24 March 2016 letter to the Argus Group principals which in its material parts reads as follows:

*“I write to you concerning the mortgage currently held with yourselves for the abovementioned property and request a meeting to discuss this proposal. Please note I am open to any reasonable arrangement with you that would be satisfactory to both parties involved.*

*I ask that you please consider the following proposal.*

*That I pay \$5000.00 to yourselves per month commencing in April (to be reviewed in 6 months with a view to increase the payment to \$6000.00- my original payment amount)*

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<sup>1</sup> See Tab 9 of the hearing bundle (behind the Defendant’s affidavit) at paragraph 3



*The 2 apts are now rented and the rents totaling \$3000.00 can be paid directly to your account monthly as well as my financial situation has just begun to turn around based on the following....*

*Please also consider that I had an agreement with Argus to pay \$3000.00 per month and even after Argus initiated proceeding against me I have not ignored my responsibility to you and have managed to pay over \$30,000.00 to you over the last year under very stressful conditions.*

*While I know that I initially agreed to the terms of the mortgage and am bound by them, I would implore you, if at all possible, to forgive some of the interest that has accumulated and accumulated and compounded and compounded to such a great extent and at such an excessive rate of 8% that it has become unmanageable, as almost half of what is owed is the interest. I had spoken with Mr. Pugh on several occasions regarding this and he seemed in favour of a decrease in the rate and accumulated interest and therefore bringing the debt more in line with the value of the property and the amount borrowed.*

*Another factor was that the main house was never completed to a rentable condition even though an Argus appointed project manager handled the final phase of the money and oversaw the finish work. He insisted on completing the apts even though I asked for the main house to be finished first, as it would bring the most income. I therefore now live in the unfinished portion of the house while the apts are rented. I have been slowly doing some finish work and hope to have the main house finished and rented by the end of the year and I can live in the apt thereby increasing the income of the property for yourselves. Once the property is completed this will at least serve to increase the value to some degree...*

29. Ms. Robinson's 24 March 2016 letter appears to have gone without written reply by the Plaintiff. A year later Ms. Robinson sent another letter to the Argus Group dated 7 March 2017. In the final portion of that letter it reads:

*"I implore you to exercise a stay of execution and halt proceedings against me for at least 90 days on this matter and again propose that you allow me to buy out the property at the current market value, the price of which to be determined by an up to date appraisal or work with me to refinance with yourselves. The last appraisal was conducted in 2015 and the property was valued at \$775,000.00. I would estimate that the current value would likely be between \$650,000.00 to \$700,000.0 (sic)*

*I ask that you afford me the same opportunity that you would extend to a stranger who would try to swoop in and get a bargain on the back of the work and efforts poured into my home by me and my family.*

*Please note that I have continued to make the payments that I could, right up until last month. February 2017, even during difficult tenant conditions and a delay in acquiring my real estate license mentioned in my previous letter to you. (I just got it in Dec 2016) I also now have a stable tenant that I just acquired in Feb 1, 2017.*

*As mentioned in my previous proposal to you, please also know that there are 4 school age children in my household. If you could possibly consider any avenue that could keep from displacing my family, I would be most appreciative. I implore you to help me save my house and keep my family together. While I understand that you may have the legal right to the property, I appeal to your sense of decency to allow me, a mother and her children, the same opportunity pricewise that you would extend to any other potential buyer of my home in this current real estate climate.*

*I therefore again appeal to you to cause the proceeding against me to be halted at this time, so that we can arrange, should you choose to, refinancing through yourselves or so that I can have a fair chance at obtaining financing with another lending institution. (It makes it very difficult to get financing with court proceeding in progress) and be given a meeting with yourselves so that we may come to an agreement that is satisfactory to both parties.*

*I look forward to your reply. If you could contact me on the number listed below as soon as possible and before any court proceedings, I would be most grateful..."*

## **The Law:**

### Summary Judgment

30. Order 14/1(1) of the Rules of the Supreme Court 1985:

*"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."*

31. RSC Order 14/3(1) reads as follows:

*“Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates **that there is an issue or question in dispute which ought to be tried** or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”*

18. Hellman J in *Pearman v Fray [2015] Bda LR 48* held as follows: “A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit”.

32. Summary judgment is reserved for cases where it is clear that there is no real substantial question to be tried (*Codd v Delap (1905) 92 LT 519 HL*) and there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (*Jones v Stone [1894] AC 122*).

33. In my view, a meritorious defence is available if the Court accepts the Defendant’s version of the disputed facts.

## **Decision**

*The Claim for \$2,024,352.09 plus interest:*

34. The Defendants accept that they have failed to pay sums outstanding under the mortgage and that they are, therefore, in arrears. However, there is a dispute as to the sum owing which ought to be tried.

35. In *Junos v Bank of Bermuda (HSBC) [2011] Bda LR 38* the Court of Appeal considered the complaints made by a mortgagor 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 there was no evidential basis before the Court to explain why the mortgagor disagreed with the bank’s figures.

36. While I am dubious as to whether the Defendants in this case will follow through in obtaining an independent accounting of their arrears (not having done so thus far) I ought not to deprive them of the opportunity to do so.
37. I will also allow the Defendants the opportunity to satisfy the Court that the monthly sums agreed for repayment were \$6500.00 and not \$13,025.29. This would ultimately impact on the total sum owing and the accuracy of the sum of interest owing.
38. This issue is to be tried.

*The Claim for Possession of the Property and Power of Sale:*

39. The Defendants accepted in the pleadings that they have allowed mortgage arrears to accrue and that a power of sale has arisen contractually and under the Conveyancing Act 1983. While Ms. Robinson has appealed to the mercy of the Courts and to the Plaintiff not to displace her and her children from the mortgaged property which has been their home, the Defendants did not raise a triable issue or defence to the possession claim.
40. For this reason I grant the Plaintiffs application for summary judgment for possession and a power of sale on the property effective as of 2 October 2017 unless the Defendant voluntarily delivers possession before then.
41. The issue of the outstanding mortgage sums should be tried expeditiously and in any event prior to 2 October 2017.
42. In the event of judgment, the Plaintiff requested an order of the Court permitting the sale of the property by private treaty rather than by public auction. I will hear the parties on this.
43. I will also hear the parties as to costs.

Dated this 1<sup>st</sup> day of June 2017

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**SHADE SUBAIR WILLIAMS**  
**REGISTRAR OF THE SUPREME COURT**