BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0112

Between:

SONIA O'NEAL

Claimant

and

FIRST BANK PUERTO RICO

Defendant

Appearances:
Mr. Robert Nader of Forbes Hare for the Claimant
Mrs. Hazelann Hannaway-Boreland of Harney Westwood & Riegels for First Bank

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2007: August 20th, 24th and 28th

JUDGMENT

(Practice and Procedure – Setting aside consent order – Application to restrain bank from exercising or purporting to exercise power of sale under section 72 of Registered Land Ordinance - Application in substance an application to vary or set aside consent orders – Principles involved in setting aside or varying consent orders - Consent order can be varied or set aside on the ground that new credible evidence has been discovered which would have a material effect upon the decision of the court and was not available at the time – Consent order amounts to a contract between the parties and may be set aside on any ground which would invalidate a compromise which was not contained in an order.)

[1] **Joseph Olivetti J.:** The applicant, Mrs. Sonia O'Neal is bent on saving her home from what she perceives as the improper action of a bank to deprive her of it. The Bank is seeking to exercise an express power of sale given in a charge/charges as well as the statutory power of sale granted by section 72 of the Registered Land Ordinance ("RLO"). She has applied for an interim injunction. The application was heard on Monday 20th August and the court reserved its ruling. An oral decision was given on the 24th August and these are my written reasons.

The Background

[2] The background facts and the history of this matter are highly pertinent. Mrs. O'Neal is an English lecturer at the H. Lavity Stoutt Community College on Tortola in the British Virgin Islands ("the BVI"). She is also a businesswoman and the owner of a not insubstantial property at Cane Garden Bay, Tortola of Jimmy Buffet fame. She uses the property partly as a residence for herself, her adult disabled daughter and her two infant grandchildren and partly as rental accommodation.

[3] It appears that Mrs. O'Neal is a long standing customer of First Bank Puerto Rico ("the Bank"). In 2006 she obtained a loan of $470,000.00 from the Bank to develop the property. This loan was secured by a promissory note dated 16th March, 2006 and a charge over the said property dated 15th March, 2006. This charge it appears was the third charge on the property to the Bank. From about May, 2006 Mrs. O'Neal began defaulting on her installment payments as the projected rental income did not materialize on time. By letter of 24th October 2006, the Bank's lawyers by way of what they termed "a formal demand" wrote to her advising her that she was in default and asking that she contact the Bank within the next 10 days with a view to paying off the arrears, late charges and other fees. They also advised that if she failed to make arrangements as requested, the Bank reserved the right to pursue the powers conferred on it by law and by the charge and they made it clear that this demand was without prejudice to all and should not be construed as a waiver of any other rights and remedies which the Bank may have.

[4] Subsequently, Mrs. O'Neal not having attended and made arrangements as requested, the Bank's lawyers issued, a Notice dated 15th January, 2007 advising her that the Bank intended to exercise its statutory power of sale under the three instruments of charge unless "**the sums secured by the Instruments of Charge and Transfer of Charge amounting – as at the 28th day of November 2006 to US $469,282.54, together with continuing interest as from such date is paid in full by not later than three months from the date of service hereof.**"[1]

[1] See Exhibit SO5.

[5] It is not disputed[2] that at the date of the notice of 15th January 2007 the only monies owing to the Bank were the arrears and associated charges and fees that had been said to be due as at 26th October 2006 plus such further installments charges, arrears, fees and interest as had accrued due in the interim.

[6] Needless to say Mrs. O'Neal did not comply and the next event of significance for the purposes of this application is that the Bank in May 2007 advertised the property for sale by public auction on 22nd of May 2007. The Bank was said to be acting in exercise of the power of sale conferred by sections 72 and 75 of the Registered Land Act and the powers vested in it under the said instruments of charge.

[7] Mrs. O'Neal acted immediately on learning of the advertisement. She issued an urgent application on 18th May for an order (i) to extend the time for the exercise of the Bank's right of sale of her property for a minimum period of three months, (ii) to restrain the Bank during the said three months from entering into any contract of sale of the property and (iii) an order that she continue to pay the monthly installments for the said three months period or such shorter period by which time the principal and interest due to the Bank would have been cleared.

[8] The matter came on for hearing on 21st May. Contrary to the tenor of paras. 3 and 4 of Forbes Hare's written submissions, there was no hearing of the matter as such. This inaccurate impression may perhaps be accounted for by the fact that Forbes Hare were not instructed by Mrs. O'Neal at the time, she being represented by another firm of lawyers. The parties attended and the court encouraged them to attempt to seek an amicable solution. The parties held discussions outside court and then returned to report that a consent position had been arrived at. No legal submissions were made. Mrs. O'Neal through her then counsel reported that Mrs. O'Neal had made an application for financing to the Development Bank and that they anticipated a response within a few days. (That the application had been made was deposed to by Mrs. O'Neal in her first affidavit of 18 May paras. 17 and 20.) The Bank in reliance on this entered into the consent order of 21 May, the effect of which was to postpone the exercise of the power of sale for one month subject to conditions and in default the Bank was at liberty to sell on 19th June. These conditions were that Mrs. O'Neal should file and serve a letter of commitment from

[2] See para. 10 (j) of Forbes Hare's skeleton arguments.

the Development Bank within 7 days and within 14 days thereafter pay into court the mortgage debt in full with costs. The matter was adjourned for mention on 13th June.

[9] It transpired that Mrs. O'Neal had not disclosed either to the court or to the Bank that she had simultaneously with that application on the 18th May issued proceedings against the Bank in the US Virgin Islands in respect of the same debt and power of sale. The Bank learnt of this after the hearing and informed the court on 13th June.

[10] Mrs. O'Neal did not comply with the provisions of the consent order. On the return date a further consent order was made on Mrs. O'Neal's representations that the processing of her application had been delayed by the Development Bank. This time Mrs. O'Neal had two lawyers present as reflected in the order. The effect of that second consent order further postponed the exercise of the power of sale for one month (13th July), subject to the conditions that Mrs. O'Neal must provide a copy of her instructions to her USVI lawyers to stay the USVI action, file and serve the commitment letter by 6th July and pay the Bank's costs of $650.00. This matter was again adjourned to 10th July.

[11] On the morning of the hearing on 10th July the Bank was advised by Mrs. O'Neal and her counsel that First Caribbean International Bank had agreed to refinance the loan by way of a purchase by Mrs. O'Neal's son and to make a payout on 27th July. The parties then entered into another consent order for the conclusion of the matter by way of the transfer and payout and costs on 27th July. It was expressly agreed by para. 2 of the order:-

> "In any event, should the Applicant fail to liquidate the loan with the Respondent by the 27th July 2007, the Respondent shall be at liberty to proceed with the exercise of the powers of sale without further recourse to the Court."

[12] This then ought to have concluded the matter. However, Mrs. O'Neal retained new lawyers, Messrs. Forbes Hare who on 24th July contacted the Bank's lawyers indicating that Mrs. O'Neal was objecting to the exercise of the power of sale. This gave rise to an exchange of correspondence and I must say in very guarded terms on the part of Messrs Forbes Hare something, not to be encouraged in the spirit of CPR 2000. Eventually, it became apparent that Mrs. O'Neal did not intend to abide by the consent orders and was seeking to challenge the Bank's exercise of its powers of sale.

[13] On 26th July Mrs. O'Neal made this urgent application for an interim injunction. She attempted to have it heard ex parte on the basis that it was urgent having regard to the looming expiry of the postponement period. Subsequently, however, it would appear that upon a prudent undertaking having been given by the Bank's lawyers that the Bank would not take any action to sell the property until the hearing of the application, the parties agreed that the matter should not proceed ex parte but should be heard inter parties.

[14] The matter came on for hearing on the 13th August but was adjourned to the 20th August. This was due to the late service of the Bank's affidavit in response resulting in Mrs. O'Neal's lawyers not having an opportunity to take instructions. The application was finally heard on 20th August.

The Application and Submissions

[15] By this second application Mrs. O'Neal seeks an order under CPR rule 17.3 (1)(a) to restrain the Bank until further order from exercising or purporting to exercise a power of sale under section 72 of the RLO, (b) a declaration that the Bank is not entitled to exercise a power of sale under the said section and (c) costs, **"to include all costs that the Applicant previously has paid or been ordered to pay to the Respondent to be assessed if not agreed"**.

[16] The gravamen of the application is contained in para. 8-9 of the application:

> **"The Consent Order of 10/07/07 and a prior Consent Order in this Claim were made without reference to the Promissory Note and were premised on the assumption that the Respondent had become entitled to exercise the statutory power of sale arising under section 72 of the RLO."** …
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> **"Had the Court been shown the Promissory Note when it heard the parties on 10.07.07 and before then, it would, or should, have been apparent that there had been no relevant default under either the Promissory Note or the Charge that entitled the Respondent to exercise the power of sale arising under section 72 of the RLO. In that event, the learned judge would not have**

countenanced the making [of] an Order premised on the exercise of that power of sale, whether by consent or not."

[17] The argument of Mr. Nader based on the written submissions prepared by Ms. Troy-Davis (who unfortunately was indisposed and could not attend) in a nutshell, is as follows. Counsel submitted that this was a fit case for the grant of an interim injunction pending the hearing of a substantive claim for a declaration that the Bank is not entitled to exercise a power of sale under section 72 of the RLO as Mrs. O'Neal had met the criteria established by **American Cyanamid Co. (No. 1) v Ethicon Ltd**[3] for the grant of an interim injunction. Principally, that Mrs. O'Neal had established that there was a serious issue to be tried as to whether the Bank in the circumstances could properly exercise a power of sale over the charged property.

[18] Counsel contended that on the evidence there was no default on Mrs. O'Neal's part that triggered the statutory power of sale as the Bank did not comply with the provisions of para. 2 of the promissory note. (This was exhibited for the first time in Mrs. O'Neal's affidavit of 26 July.) In short, this provision makes the full amount of the loan payable at the option of the Bank if the borrower is in arrears of a monthly installment and fails to rectify this within thirty days of delivery of a notice to that effect given by the Bank. If the letter of 26th October were such a notice then it is patently defective as it only gave Mrs. O'Neal 10 days to make good her default and therefore failure to comply with it did not render the entire principal amount outstanding under para. 2 of promissory note.

[19] Further, Mr. Nader submitted that the second notice was also defective having regard to clause 3 of the Charge which mirrors in the material part section 72 of the RLO.

[20] Clause 3 so far as is material provides, "… it shall be lawful for the Chargee **to sell** the Charged Property without the consent of Chargor … if default is made in payment of the Principal Sum or of any interest or any other periodical payment or any part thereof … and such default has continued for one month, and the Chargee has served on the Chargor a notice in writing **to pay the money owing** … and the Chargor has not complied within three months of the date of such service on her of the said notice."

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[3] (1975) 1 All ER 504

[21] Mr. Nader also submitted that when the second notice was served the only money then due to the Bank was the arrears and associated charges owing as at 26th October and any such arrears and charges as had accrued in the interim. The principal monies were not then due and payable and therefore the Bank was not then entitled to demand payment of the principal moneys within three months or at all as it purported to do by the second notice. Accordingly, the second notice was also defective and could not trigger the powers granted by section 72 of the RLO or by the charge.

[22] Mr. Nader submitted further that if Mrs. O'Neal were to succeed in her claim an award of damages would not be an adequate remedy as if the property is sold prior to the hearing of the substantive issue Mrs. O'Neal and her family would be deprived of their home and that the balance of convenience favoured the grant of an injunction as all arrears had been paid to date and in any event the loan was secured by a charge on the property. At this juncture I am compelled to say that it appears from the explanation given by Mr. Allen in his affidavit of 8th August and as elucidated upon by his counsel that Mrs. O'Neal still owes for one month more than she recognized. To my mind Mrs. O'Neal was labouring under the impression that she had paid as her letter of 4th May[4] to the Bank as to the application of payments apparently went unanswered until this action. This apparent failure to respond is inexcusable. A customer might appear 'troublesome' in our parlance but banks can have no business without customers and apart from that, simple courtesy demands that customers' queries be dealt with, not just placed on file.

[23] Ms. Hannaway in response argued in essence that Mrs. O'Neal by this second application, "**framed in the form of an injunction to further restrain the bank is effectively seeking the discharge or variation of the consent order of 10th July 2007**," and that she had not satisfied the legal requirements for so doing. Counsel relied in the main on **Halsburys Laws of England Vol. 37 para. 1210**, **Chanel Ltd v. FW Woolworth and Company et al**[5] and **Tibbs v Dick**[6].

[24] Counsel argued that the only inference to be drawn based on the submissions advanced is that Mrs. O'Neal's previous solicitors did not put the matters raised by her current solicitors before the court and that the consent orders were made on an erroneous basis. The

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[4] See Exhibit SO4.
[5] 1979 c. 20107 (unreported) Judgment delivered on 4th November 1980
[6] [1998] 2 FLR 1118

promissory note says counsel was always available to Mrs. O'Neal from the outset and therefore her failure to bring its provisions to the court's attention at the first application was not a vitiating factor to set aside or vary the consent order. Further, Mrs. O'Neal has advanced no reason for not having done so.

[25] Counsel noted, as did Mr. Nader although he did not develop any argument on that point, that the final paragraph of the promissory note defers to the provisions of the charge on the rights of acceleration of indebtedness in any event.

[26] Alternatively, counsel argued that in any event the power of sale was validly exercised as what is important from the evidence is that Mrs. O'Neal received not one but several notices to pay her arrears and that by the time of the first notice she was not one but two months in arrears and that even after receiving a further notice she continued in a state of arrears for more than three months.

[27] The provisions of the charges say counsel are clear as to the period of notice and the events which would trigger the exercise of the statutory power of sale and that in effect the Bank had met those requirements. What is instructive is that the effect of the notice was that Mrs. O'Neal in all the circumstances has been given sufficient notice of the default and was allowed the statutory period for payment as the evidence shows that she was given up to five months warning to pay. Counsel relied on **Halsburys Law of England Vol. 32 para. 656**; "… **under an express power the notice is good if in effect it gives the mortgagor the prescribed period of warning."**

Court's Analysis

[28] I am of the opinion that the point is well made by the Bank that this second application is in substance an application by Mrs. O'Neal to vary or set aside the consent orders on the basis of negligent legal advice although it is made under the guise of a second application for an injunction to further restrain the Bank and for a declaration that the Bank has not validly exercised its statutory power of sale. (In passing I note from the court's file that no claim form has been filed for any substantive relief). One must therefore first consider the authorities on setting aside of consent orders but the Court makes it clear that it is assuming **without deciding the point** that the advice to enter into the consent order was negligent.

[29] The law is well settled as is clear from **Chanel**. In that case, Chanel issued a writ against the defendants for alleged infringement of trademarks and alleged passing-off. They obtained ex parte interlocutory relief by way of an Anton Pillar Order and injunction. Before the motion came on inter partes, the second defendant **believing that the only defence available to it was one under European Community Law felt constrained to give an undertaking until judgment or further order**. And so it tendered the undertaking when the motion came on inter partes and the motion was disposed of by consent without its being opened to the court and without the evidence being read.

[30] Subsequently, the defendant made certain company searches which disclosed certain apparent organizational links between the plaintiff and the other foreign companies through whom the defendant had acquired the goods the subject matter of the alleged infringements and passings-off. This suggested a group structure between **Chanel** and the foreign companies. The defendant also discovered other evidence supporting the existence of a group structure.

[31] The Court of Appeal also gave a decision in another case subsequent to the undertaking which according to the defendant threw a new light on the legal position of the parties. The defendant therefore sought to have the undertaking discharged on the basis of the new evidence and the perceived change in the law which it contended amounted to a new state of affairs entitling it to discharge the undertaking. The High Court refused to discharge the undertaking and the defendant appealed. The appeal was dismissed.

[32] Lord Justice Buckley observed at p. 5:-

> **"They, the defendants, are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."**

[33] And, **Tibbs v. Dick** was an appeal against a consent order. Mrs. Tibbs and her son applied for reasonable financial provision out of the estate of the deceased under the Inheritance (Provision for Family and Dependents) Act 1975. Mrs. Tibbs alleged that she was the deceased's mistress and that he was the father of her son and that they were both financially dependent on him. **They settled their claim at the door of the court on the day the case was listed for hearing and the parties signed a consent order**. Subsequently, they appealed on the basis that they had not been advised that the settlement was in full and final satisfaction of the claim and that the deceased's properties were undervalued at the time of the consent order. Her appeal was dismissed.

[34] Swinton-Thomas L.J. at pages 5 and 6 referred to **Harris v. Manahan (1997) 1 FLR 205**, a case concerned with a consent order, and quoted with approval, Ward L.J. with whom Sir Thomas Bingham MR and Evans L.J. agreed:-

> **"Where the vitiating factor is said to be bad advice, then I can imagine circumstances where the bad advice gives rise to a mistaken belief which, if shared by the other side, may enable the underlying agreement to be attacked on the ground of mistake. <u>I find it very difficult to envisage a cause of action in which the negligence of one's own solicitor justifies the setting aside of an agreement made with a third party. I do not find this route at all attractive."</u>**
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> … Like Connell J, I conclude, not without sympathy for the wife and **not without regret that a wronged individual is again to be sacrificed on the high altar of policy, that justice demands that there may be finality to this litigation and that bad legal advice should not be a ground for interfering."** (Emphasis added)

[35] The authorities establish that a consent order is first and foremost an order of the court which can only be varied or set aside on the ground of the discovery of new evidence which would have a material effect upon the decision of the court. The applicant must show (1) that the evidence could not have been obtained with reasonable diligence for use at the trial (2) the evidence given would have an important albeit not decisive influence on

the decision and (3) the evidence is credible. Further, a consent order amounts to a contract between the parties and may be set aside on any ground which would invalidate a compromise not contained in an order, such as illegality, against public policy, fraud, misrepresentation or non-disclosure of a material fact where there was an obligation to disclose, duress, material mistake of fact or law, ignorance of a material fact or without authority.

[36] It is pertinent that Mrs. O'Neal had not given any explanation about her "discovery" of the promissory note. No other allegations have been made which would bring her within the scope of the law which would enable her to be relieved of the consent orders. The only ground relied on is the failure of her first lawyers and that without more is not enough.

[37] Accordingly, Mrs. O'Neal's application falls at the first hurdle. It is therefore not necessary for the court to go on to determine whether or not she has an arguable case having regard to provisions of the promissory note and to the notices relied on by the Bank. Suffice it to say that the statutory power of sale and an express power of sale in a charge are strictly construed and that the Bank should in any event be astute to re-visit the notices relied on and the relevant law on the subject as it can be taken to have full knowledge that invariably properties sold by compulsion attract a lower market price than their real value and the resulting injustice which could follow if a customer's property is sold pre-maturely.

Conclusion

[38] For the aforesaid reasons the application is dismissed with costs to the Bank to be assessed if not agreed.

[39] By way of postscript I must thank Mr. Leslie Allen, the Bank's representative for his assistance at the Court's suggestion, for a way forward for the parties to mend their relationship. On delivery of my oral decision I indicated that the proposal contained in the Bank's lawyer's letter of 23rd August to the Deputy Registrar which was copied to Messrs. Forbes Hare which I had just had sight of was not unreasonable in all the circumstances. However, on further consideration I do believe that the condition relating to Flamboyance is harsh as strictly speaking the debt of Flamboyance is not a charge on the property and although one recognizes the Bank's wish to sort out all its affairs with Mrs. O'Neal, the time frame for repayment of that debt clearly cannot be met. I recall too that reference to

Flamboyance in these proceedings was objected to by Mr. Nader and that that was conceded. I trust that the final resort to sale may be avoided and that the parties will utilize the proposal as a way forward to re-engage.

[40] I thank both counsel for their diligence which was reflected in their written submissions.

Rita Joseph –Olivetti
High Court Judge
British Virgin Islands