

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0181

BETWEEN

ST. VINCENT CO-OPERATIVE BANK LIMITED

CLAIMANT

and

BRIAN MCDOWALL

DEFENDANT

Appearances:

Mrs. Zhinga Horne-Edwards of counsel for the claimant.

Defendant absent, unrepresented.

2019: Jan. 22
Jan. 24

JUDGMENT

BACKGROUND

[1] **Henry, J.:** By this claim¹, St. Vincent Co-operative Bank Limited ('the bank') an order for possession of property situated at Camden Park, Saint Vincent and the Grenadines. The bank alleged that the property was provided as security in respect of \$56,000.00 which it lent to Mr. McDowall that he has failed to repay. The Bank also sought an order of sale of the property and costs.

¹ By Fixed Date Claim Form filed on 6th October, 2016.

- [2] The bank filed an affidavit of service in which Mr. Len Grant averred that he served Mr. McDowall with the Fixed Date Claim Form and other supporting documents on 11th October 2016 at Kingstown. Mr. McDowall appeared in court on 16th November 2016 for the first hearing. He attended court again on 7th December 2016, 12th July 2018 and 19th September 2018 2018. Mr. McDowall has represented himself throughout the proceedings. He filed no pleadings, witness statements or affidavits.
- [3] The Registrar fixed the trial date to 1.00 p.m. on 22nd January 2019 for summary trial. Mr. McDowall was absent on that date and at that time. Notice of the trial date was served on him on January 7th 2019 as attested to by Mr. Rolton Bobb Bailiff of the High Court. By affidavit filed on 22nd January 2019, Mr. Bobb deposed that he served the notice hearing on Mr. McDowall personally. In the absence of explanation or excuse from Mr. McDowall for his absence, the trial proceeded without him.
- [4] The bank's Assistant Recoveries Officer Ms. Shadia Joseph supplied details of the referenced loan and the history of Mr. McDowall's payments. The bank has established that Mr. McDowall failed to repay the sums that he borrowed. He is therefore liable to satisfy the debt.

ISSUES

- [5] The issues are:
- (1) Whether Mr. McDowall is liable to the bank for the debt? and
 - (2) To what remedies is the bank entitled?

ANALYSIS

Issue 1 – Is Mr. McDowall liable to the bank for the debt?

- [6] Ms. Joseph's affidavits² and the exhibits attached to them were admitted as her evidence in chief. She gave a comprehensive account of how Mr. McDowall secured three loans from the bank and his dealings with the bank in respect of repayment.

² Filed on 19th October, 2017.

- [7] Ms. Joseph averred that the bank lent Mr. McDowall a total of \$56,000.00, in three tranches of \$25,000.00, \$10,000.00 and \$21,000.00 respectively. As security for the three loans, Mr. McDowall surrendered title to his property at Ottley Hall. To this end, he executed a Deed of Mortgage and two Deeds of Further Charges respectively on June 22nd 2004, 29th July 2004 and 19th October 2005. Ms. Joseph tendered copies of those Deeds to the court. She also produced a copy of Deed of Conveyance No. 2392 Of 2004 naming Mr. McDowall as fee simple owner of the subject property. The bank requested and obtained leave of the court to submit certified copies to the court on 23rd January 2019, which it did.
- [8] The Deed of Mortgage was registered on 28th June 2004 as Deed No. 2393 of 2004; the Deeds of Further Charges were respectively registered on 5th August 2004 and 26th October 2005 and assigned Deed Nos. 2680 of 2004 and 3615 of 2005. They confirmed Ms. Joseph's testimony that Mr. McDowall borrowed the sums and agreed to repay them. They also set out the terms of repayment and provided that the bank may exercise its power of sale over the referenced property in the event that Mr. McDowall reneged on his agreement to repay.
- [9] Ms. Joseph explained that Mr. McDowall was required to repay the loans by equal monthly installments of \$672.00. The agreed rate of interest was 10% per annum. Ms. Joseph testified that Mr. McDowall failed to make regular monthly payments as agreed and has repaid a total of only \$7,411.33. Of that amount, \$5,671.62 was towards the principal and \$1,739.71 towards the interest. She added that the balance outstanding as at January 22nd 2019 is \$127,663.83 which continues to attract interest at the daily rate of \$17.02. She indicated that the outstanding debt is comprised of the principal amount of \$62,111.75 and interest of \$65,552.07.
- [10] Ms. Joseph has provided overwhelming evidence that Mr. McDowall borrowed \$56,000.00 which he has failed to repay in full with the applicable interest. I accept her account and find that the bank has proved its case on a balance of probabilities. Judgment is therefore entered for the bank.

Issue 2 – To what remedies is the bank entitled?

- [11] The bank did not expressly claim a sum of money in its Fixed Date Claim Form. Notwithstanding, it has advanced evidence which established that Mr. McDowall is indebted to it for the sum of \$127,663.83 with interest at the rate of 10% per annum. In determining what remedies to grant the

bank the court must be mindful of its duty to give effect to every legal claim and to grant all remedies which a party appear to be entitled so that 'as far as possible, all matters in controversy' between them may be 'completely and finally determined and multiplicity of legal proceedings' avoided³. The justice of this case demands that judgment be entered for the full amount of that debt with interest as agreed by the parties in the mortgage. It is so ordered.

Possession and power of sale

[12] The power of sale in the mortgage⁴ and further charges imposed pre-conditions to its exercise by the bank. Before taking that ultimate step:

1. the bank was mandated to issue notice to Mr. McDowall demanding that he pay the outstanding debt. (Only if his default exceeded one month after such notice could the bank invoke the power of sale);
2. the interest must have been in arrears and unpaid for at least 4 weeks; or
3. Mr. McDowall must have refused or failed to comply with some other mortgage condition.

[13] Ms. Joseph explained that Mr. McDowall did not service the loan as agreed and the bank issued a letter to him on 24th May 2012 demanding repayment. She said that he did not make any payments from that date up to 20th December 2016⁵. She stated that he was living on the property with his wife and daughter during that time. I find that Mr. Joseph made no payment within the 30 day timeframe stipulated in the mortgage.

[14] Having activated the first of the three referenced pre-conditions, the bank is entitled to invoke its power of sale under the terms of the mortgage. Vacant possession usually precedes such action. Ms. Joseph admitted that she did not know if the subject property is still occupied by Mr. McDowall and his family or by others. This hampers the court in assessing the practicalities surrounding making any proposed order for possession.

³ The Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009, sections 19 and 20.

⁴ At paragraph 6.

⁵ The date of filing of that affidavit.

[15] I am mindful that Mr. McDowall might have leased the property or granted permission to third parties to occupy it. Any occupant must be afforded a reasonable period of time to vacate. In the absence of such specifics, I consider that a six month period would be adequate to enable Mr. McDowall and any servants, agents, tenants or licensees of his to vacate the premises. He is therefore directed to deliver vacant possession of the subject property to the bank on or before 31st July 2019 and to take all necessary steps to cause his family, servants, agents, tenants or licensees to do so.

[16] The bank submitted that there is no need for the bank to obtain an order of the court to exercise its power of sale. It cited the case of **Leonora Louisa Walwyn v Royal Bank of Canada and Illingworth Dexter Bowrin**⁶ in which it was held that this was unnecessary. That case is however distinguishable from the one at bar because the court was there considering section 45 of the Title by Registration Act Cap. 10.49 which provides:

‘The specific sum lent upon the pledge of the land shall be payable at any date which may be fixed in the Memorandum of Mortgage and if not repaid at that date, the mortgagee may at any time thereafter take steps for the sale of the land in manner hereinafter provided.’

[17] The bank has not pointed to any similar provision in Saint Vincent and the Grenadines law which makes an exercise of such power of sale automatic on breach of the mortgage terms. It accepted that the position in the jurisdiction of Saint Vincent and the Grenadines is not governed by legislation but by the common law. The position at common law is outlined in the case of **Cuckmere Brick Co. v. Mutual Finance Ltd.**⁷ and is considered below.

[18] While pursuing its recourse of sale, the bank must take all reasonable steps to protect Mr. McDowall’s interests in the subject property. This contemplates that it acts in good faith. It must have regard to his interests and take reasonable precaution to obtain a price for the mortgaged property which reflects its true market value at the date of sale.⁸ The bank must also act honestly

⁶ NEVHCV2013/0121 (unreported).

⁷ [1971] Ch. D. 949.

⁸ Cuckmere Brick Co. v. Mutual Finance Ltd. case per Salmon LJ at pg. 646.

and without reckless disregard for Mr. McDowall's interest. Acting in good faith also encompasses the obligations to obtain a current valuation of the property and to widely advertise the sale. The bank has urged nothing on this court which would compel a departure from these principles.

[19] In light of the foregoing, it is just to make an order authorizing the bank to exercise its power of sale provided that these duties are fully observed. It is therefore ordered that the bank shall be at liberty to exercise its power of sale over the referenced property which is the subject of Deed of Conveyance No. 2392 of 2004, to recover the judgment debt.

[20] Before such sale, the bank shall advertise the said property for sale by public auction or private treaty in three consecutive issues of at least two weekly newspapers circulating in Saint Vincent and the Grenadines, the last such advertisement to be published not less than six months prior to such sale; the bank shall be at liberty to sell the said property by public auction or private contract to the bidder or offeror who makes the highest reasonable offer, provided that the sale price is not less than 80% of the valuation ascribed to the property by a licensed valuator agreed to by the bank and Mr. McDowall. The parties shall each pay $\frac{1}{2}$ of the charge for such valuation.

[21] Mr. McDowall is entitled to any excess sums received by the bank as the purchase price for the sale of the house, after all expenses associated with the sale have been deducted. The parties are at liberty to apply for any consequential orders. For the avoidance of doubt, the bank may recover the outstanding debt by direct repayment by Mr. McDowall or by exercise of its power of sale or a combination of both.

Costs

[22] Having prevailed in its claim, the bank is entitled to recover its costs. The CPR provides for prescribed costs to be paid. Mr. McDowall shall accordingly pay the bank prescribed costs of \$18,457.98 pursuant CPR 65.5(2) (a).

ORDERS

[23] It is accordingly ordered:

1. Judgment is entered for St. Vincent Co-operative Bank Limited in the sum of \$127,663.83

2. Mr. Brian McDowall shall pay to the St. Vincent Co-operative Bank Limited, interest on the judgment sum at the rate of 10% per annum from the date of judgment to full satisfaction.
3. Mr. Brian McDowall is directed to, on or before 31st July, 2019:
 - (a) deliver to the St. Vincent Co-operative Bank Limited, vacant possession of the mortgaged property registered by Deed of Conveyance No. 2392/2004; and
 - (b) take all necessary steps to cause his family members, servants, agents, tenants and/or licensees to vacate the subject property, taking all belongings with them.
4.
 - a) The bank shall obtain a valuation of the subject property from a licensed valuator agreed to by Mr. McDowall and it.
 - b) Mr. Brian McDowall shall on receiving at least 48 hours' advanced notice grant access to St. Vincent Co-operative Bank Limited access to conduct a valuation of the mortgaged property.
 - c) The bank and Mr. McDowall shall equally share the charges associated with such valuation.
5. St. Vincent Co-operative Bank Limited:
 - a) shall be at liberty to exercise its power of sale over the referenced property to recover the principal sum and interest due and owing under paragraphs 1 and 2 of this Order; and
 - b) may sell the said property by public auction or private contract to the bidder or offeror who makes the highest reasonable offer; provided that the sale price is not less than 80% of the valuation ascribed to the property by the licensed valuator agreed to by the parties.
6. The St. Vincent Co-operative Bank Limited shall advertise the said property for sale by public auction or private treaty in three consecutive issues of at least two weekly newspapers circulating in Saint Vincent and the Grenadines; the last such advertisement to be published not less than six months prior to such sale.
7. The parties are at liberty to apply to the court for any consequential orders.
8. Mr. Brian McDowall shall pay to the St. Vincent Co-operative Bank Limited, prescribed costs of

\$18,457.98 pursuant to CPR 65.5(2) (a).

[24] I thank counsel for her written submissions.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar