IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G 0090/2018

BETWEEN:

RBC ROYAL BANK (CAYMAN) LTD

Plaintiff

AND:

STEPHEN MCDERMOTT

First Defendant

AND:

MARCIA MCDERMOTT

Second Defendant

Appearances:	**Mr. James Austin-Smith of Campbells for the Plaintiff**
	Mr. Anthony Akiwumi of Etienne Blake, Attorneys at Law for the First Defendant
	Second Defendant in person
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**11th October 2019**
Written Submissions:	**4th December 2019**

HEADNOTE

Abuse of process - Whether mortgagee bank can bring action arising out of mortgage contract where possible inconsistency with matrimonial arrangements in place by virtue of Consent Order.

JUDGMENT

1. In the course of the scheduled hearing for Examination of Judgment Debtor, the First Defendant submitted that these proceedings against him are an abuse of process. Counsel on his behalf prays in aid the underlying fact that the outstanding debt arises from a mortgage on the former matrimonial home of the First and Second Defendants, Stephen and Marcia McDermott at Registration Section, Savannah, Block 27 D, Parcel 71 ("the Property"). This home was the subject of a Consent Order issued by this Court on the 12th October 2010. By the terms of that Order, the First Defendant relinquished his interest in the home to his former wife, the Second Defendant.

2. The proceedings in this matter began on the 17th May 2018, when the Plaintiff, RBC Royal Bank (Cayman) Ltd. issued a Writ of Summons against the two Defendants. The Statement of Claim attached to the Writ states that following upon foreclosure proceedings in relation to the Defendants' defaulted mortgage account number 3317035, the Plaintiff sold the Property. The sale thereof left a shortfall in the amount owing to the Bank under the loan agreement of $189,779.35. Together with interest of $26,930.40 the total amount owed was then $216,709.75. On the 18th January 2018, the Bank made a formal demand for payment through its attorneys.

3. The Writ was served on both Defendants on the 24th and 30th May 2018 respectively.[1] On the 31st May 2018, the Second Defendant, filed an Acknowledgement of Service.

4. On the 11th July 2018, the Plaintiff applied for Default Judgment in the absence of the filing of any defence by the Defendants.

[1] Affidavit of Service of Sheldon Williams dated 31st May 2018

5. The Default Judgment was granted on the 18th July 2018 and was served on both Defendants on the 16th August and 25th July 2018 respectively.[2] In addition to the above sums, the Judgment provides for continuing interest from 15th May 2018 at the daily rate of $27.48, filing fees of $1, 683.55 and costs of $610.00.

6. On the 4th June 2019, the Plaintiff filed an Application for Examination of Judgment Debtor. This was supported by the Affidavit of Bergie McLean, Credit Administrative Officer at the Bank. This attested *inter alia*, that no payments had been made to the loan account since the 20th February2015 when a payment of $2,000.00 was made. The Property was sold in September 2015 and the sale proceeds applied to the mortgage.

7. An Order for Examination was made on the 13th June 2019. The Defendants were served on the 18th July and 15th July 2019 respectively[3]. The initial date set for the Examination was the 26th July 2019. On that date, the hearing was adjourned as the Defendants had failed to complete the statement of means forms which had been provided to them. The new date set was the 20th September 2019. On that date the hearing was again adjourned, the Second Defendant having produced documentation as to means only on the morning of the hearing and given her indication that she wished to obtain the assistance of Counsel.

8. Among the documents she produced is a copy of the Land Register in relation to the Property. This indicates at entries Nos. 16 and 18 dated the 24th April 2012, by instruments 3448/12, and 3451/12 the charge of the Plaintiff's and that the First, Second and Third charges on the Property were consolidated. At the time of the Consent Order

[2] Affidavit of Service of Dwight Whyte dated 22nd August 2018
[3] Affidavit of Service of Sheldon Williams dated 23rd July 2019

in 2010, it was accepted by the Defendants that the Bank had an existing charge on the Property.

9. On the 11th October 2019, the matter proceeded to the extent that newly retained Counsel on behalf of the First Defendant made arguments as to abuse of process. Counsel for the Bank was given an opportunity to provide written submissions given that no notice had been provided to him as to the points which were to be raised.

10. This Court was of the view that an application to set aside the Default Judgment which had been briefly contemplated at the hearing had in fact proceeded which would have rendered this judgment otiose. I have since been advised that this is not the case and therefore provide this short decision.

The Consent Order

11. The Consent Order to which the First Defendant refers was made on the 12th July 2010 in Matrimonial proceedings, Cause No Fam. 0071 of 2010. In so far as it is material to the submissions of the First Defendant in this matter, the Order provided that in full settlement of all claims available to the parties under the Matrimonial Causes Law it was ordered by consent:

> *"8. That subject to the consent of the Chargee Bank, the former matrimonial home located at Registration Section Savannah, Block 27 D Parcel 71 which is in the both names of the Parties shall be transferred into the name of the Petitioner solely.*
>
> *9. That subject to the consent of the Chargee Bank, the vacant lot of land located at Registration Section, Breakers Block 55A Parcel 61, which is in*

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the both names of the Parties shall be transferred into the name of the Respondent solely.

...

12. That the mortgage held at Royal Bank of Canada for Registration Section Savannah Block 27 D Parcel 71 shall be transferred into the sole name of the Petitioner and the loan at the Credit Union for Registration Section Breakers Block 55A Parcel 61 shall be transferred to the Respondents' sole name. That both parties shall thereupon assume full responsibilities for all present and future liabilities in respect of the transferred property and ensure that the other Party is forthwith released and relieved from the said mortgage payments and shall indemnify the other party from any liabilities relating to the same.

13. The parties further undertake to bring about the transfer of the said properties hereinbefore referred and each Party shall be responsible for any costs or government fees which may be required to effect the transfer of the properties into their name."

The Submissions

12. On the adjourned hearing date of the 11th October 2019, Counsel on behalf of the First Defendant submitted that in light of the Consent Order, the Court should consider whether or not enforcement proceedings for the debt should be stayed on the ground of an abuse of process.

13. Counsel detailed that the Order had been made in divorce proceedings on a clean break basis and that the Property which gave rise to the Bank's claim was part of the matrimonial estate and was to be transferred into the sole name of the Petitioner/Second Defendant. She was then to assume ownership and liabilities. He argued that for the

First Defendant to be fixed with responsibilities and liabilities beyond the date of the Order would be entirely unfair given what was contemplated by the Court by its Order.

14. Counsel's primary point was that while paragraph 8 of the Order was qualified by the words, "subject to the consent of the Chargee Bank", paragraph 12 which referred to transfer of liabilities was not and that the wording of the latter paragraph was imperative. He submitted that the Court had clearly taken the view that ownership and contractual obligations are two different things. He questioned whether it could now be said some nine years on, that the First Defendant is liable for the outstanding debts resulting from the mortgage, when at the point that the Order was made by the Court it was understood and indeed contemplated that his liability would cease. It was also understood at that time that there would be a clear division between property transfer and mortgage obligation.

15. He submitted that it is an abuse of process for the Bank now to have taken the step to enforce the mortgage contract as against the First Defendant given that it is contrary to what the Court contemplated.

16. Counsel referred to GCR O.18 r.19 and to the Court's power to stay proceedings on grounds that they are vexatious or otherwise an abuse of process. This provides as follows:

"Striking out pleadings and indorsements (O.18, r.19)

19. *(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -*

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

17. Counsel relied on the case of ***TIC v. TID***[4], two decisions of the High Court and Court of Appeal of Singapore as supportive of his argument. The decision of the Court of Appeal was delivered on the 8th November 2018. The primary issue in that case was determining which party in matrimonial proceedings should bear ongoing liabilities between the date of a Court order and the date of completion of the transfer of property. The Court held that the *prima facie* position is that interim responsibility for ongoing liabilities such as a mortgage (as distinct from other liabilities such as property taxes) should be borne by the eventual owner of the property. The basis for this is that the servicing of an outstanding mortgage will increase the net equity of property during the interim period which will benefit the eventual owner. The Court said that this *prima facie* position can be displaced in appropriate circumstances for example where it would be unjust to order the eventual owner to meet mortgage liabilities having regard to the distribution of other matrimonial assets and or the eventual owner's ability to pay. Such circumstances would serve to displace the *prima facie* position and a Court's order could be tailored to reflect those circumstances.

[4] 2018 SGCA 75, 2017 SGHCF 30

18. Counsel submitted that there would be an injustice to the First Defendant for this Court, having made an Order in matrimonial proceedings ending his obligation to pay the mortgage, to now be invited to enforce the terms of the mortgage and for him to be held liable for the debt arising from the non-servicing of the mortgage on the Property. Counsel submitted that whether or not the Bank was aware of the situation, there is a Court Order which is imperative in nature. Alternatively that if the Bank was on notice, given the imperative nature of paragraph 12, then they ought not to have brought these proceedings or should have sought permission to bring proceedings or brought to the Court's attention this material issue.

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19. Finally Counsel submitted that as a subsidiary point, equity would and should intervene in light of the fact that there are two competing orders of the Court, the Consent Order and the Default Judgment. He submitted that the equitable position derives from the interpretation of the Order which the Court made, the effect of which was to provide a clean break as to ownership and liability.

20. Counsel also foreshadowed that there would likely be an application for the Default Judgment to be set aside and further arguments would be made. Counsel submitted that, however, in the interim, these proceedings ought to be stayed.

21. The Second Defendant appeared in person and raised issues of fact unsupported by an Affidavit as to inability to obtain the consent of the Bank.

22. Counsel on behalf of the Bank in oral response described the submissions made on behalf of Counsel for the First Defendant as surprising. He noted that despite service of foreclosure proceedings and the issue of the Writ, the Defendants at no stage sought to

raise any challenge. He submitted that the Consent Order made could not bind the Bank which was not a party to the Matrimonial proceedings and that the Court has no power to eviscerate a third party's contractual rights. The Bank had not been informed or put on notice and had no opportunity to make submissions. He submitted that if the First Defendant has any cause of action arising out of the Consent Order it is perhaps as against the Second Defendant and not the Bank.

23. In written submissions, Counsel on behalf of the Bank further submitted that notwithstanding the Consent Order, the Defendants remain jointly and severally liable to the Plaintiff for the mortgage shortfall amount which is the basis for the Default Judgment. Counsel makes three primary submissions.

(a) The Law in relation to charges of Land is set out in sections 67 and 68 of the ***Registered Land Law*** (2018 Revision) and requires the consent of Chargees before land transfers can be effected.

(b) The Consent Order specifically required the consent of the Chargee Bank for the transfer to be effected.

(c) The Plaintiff was not a party to the Matrimonial proceedings. It had no opportunity to be heard. It is trite law that a third party will not be bound by a Court order made in proceedings to which it is not a party and the Court has no power to bind third parties by orders made in proceedings to which they are not joined.

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24. Counsel relies on general principles of banking, land and contract law and submits that the First Defendant/Judgment Debtor is seeking to "*rid himself of his liability under the covenant for payment of the mortgage debt by transferring the property and 'disappearing leaving the lender' exposed to a loss.*" He drew the Court's attention to the following excerpt in *Halsbury's Laws of England /Mortgage*[5] under the heading 'Mortgagor and his surety' which states in part:-

> *"The claim on the covenant for payment may be brought against the mortgagor and against any person who has joined with him in the covenant or has given a separate covenant as surety. The mortgagor cannot without the mortgage's consent rid himself of his liability under the covenant for payment of the mortgage debt by transferring the equity of redemption."*

25. Counsel also referred to *Fisher and Lightwoods' Law of Mortgage*[6] as setting out the following general principles:

> *"The mortgagor will, upon the grant of the mortgage, have given a personal covenant to pay, and he cannot, without the mortgagees' consent, relieve himself of his liability under the covenant by assigning the equity of redemption. Since the burden of the covenant for payment does not run with the equity of redemption the mortgagee cannot use the assignee of that equity either for principal or interest nor prove for them in his bankruptcy.*[7]

Further:

> *"However under most institutional mortgages the mortgagor is restrained from transferring the land without the lender's consent... The reason for the restraint is that (the) burden of the covenant for payment does not run with the equity of redemption (or the mortgagor's legal estate). There is, therefore, a danger from the lender's point of view on a long term mortgage that if the borrower could freely dispose of the property, he might disappear leaving the lender to his security rights alone. In a falling market this would expose the lender to a loss."*[8]

[5] Volume 77(2016)/9
[6] Thirteenth Edition
[7] Paragraph 27.8
[8] Paragraph 47.3

26. The Authors cite the case of ***West Bromwich Building Society v. Bullock***[9] in which the defendant in that case had conveyed the mortgaged property to another. In the transfer was a covenant to discharge the liability under the mortgage and to indemnify the defendant. Everything had been done in connection with the transfer of the shares in the plaintiff's building society and with the assignment of the equity except that the defendant had not obtained the release of the building society/mortgagor. It was held, on the proper construction of the covenant that the defendant was liable as the original mortgagor to pay all sums due and, having failed to obtain a release from the board in accordance with the rules, the liability for the covenant remained with him and the building society could maintain an action against him.

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Discussion and Conclusion

27. By the ***Registered Land Law*** there is implicit in every charge the binding agreement of the chargor to pay the principal and interest and not to transfer the land without the previous written consent of the Chargee.

28. Section 67 of the ***Registered Land Law***, provides *inter alia* as follows:

> *"There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the charger:*
>
> *(a) to pay the principal money on the day therein appointed and, so long as the principal money or any part thereof remains unpaid, to pay interest thereon, or on so much thereof as for the time being remains unpaid, at the rate and on the days and in manner therein specified;*
> *(b) to pay all rates, taxes and other outgoings*
> *(c) ...*
> *(d) ...*

[9] 1936 1 ALL ER 887

(e) ...

(f) ...

(g) *not to transfer the land, lease or charge charged or any part thereof without the previous written consent of the chargee but such consent shall not be unreasonably withheld;"*

29. Section 68 provides that:

> *"Where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge charged or any part thereof without the written consent of the chargee, the agreement shall be noted in the register and no transfer by the chargor shall be registered until the written consent of the chargee, verified in accordance with section 107, has been produced to the Registrar."*

30. The Court on making the Consent Order specifically adverted to the requirement for the consent of the Chargees. The Orders in respect of the sharing of real property were thus made *subject to* the consent of the respective Chargees.

31. Counsel on behalf of the First Defendant argued that paragraphs 8 and 12 of the Order are to be read separately as dealing with different aspects, to wit ownership and liability and that the Court had ordered that the liability for the mortgage going forward from the date of the Order was to be borne by the Second Defendant only.

32. As I read paragraph 12, it is dealing with what was to happen *after* the transfers had occurred. This was that both parties "*shall **thereupon** assume the sole responsibilities for all present and future liabilities in respect of the transferred property and ensure that the other party is forthwith released and relieved from the said mortgage payments....*" (emphasis added)

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33. Paragraph 10 of the Order is also noted. This required the First Defendant to assume all responsibility for two loans which were then charged on the matrimonial home *after* transfer of the matrimonial business into his sole name.

34. I do not see how paragraph 12 can be read as anything other than following on from or supplemental to paragraph 8 which made it clear that such transfers were subject to the consent of the Chargee Banks.

35. In my view it was plain on the face of the Order that the Court was not purporting to override any contractual arrangements or to vary the terms of the mortgage contract in the absence of the Bank and Credit Union. The Order was imperative only in so far as to the position if consent was in fact obtained and the transfer effected.

36. There is no evidence that the consent of the Bank was obtained and it is agreed that the transfer did not occur.

37. The issue in this case is different from that in the cited case of ***TIC v. TID***. This is not a determination at this stage as to who had responsibility for interim payments. The issue is whether the mortgagee has rights of enforcement of a contract in circumstances where no consent was given for alteration of that contract, and where the Consent Order made by the Court was specifically subject to that consent.

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38. The first issue as in ***TIC v. TID*** may arise in another context but in my view it does not arise herein.

39. In considering whether the bringing of these proceedings constitute an abuse of process or are unfair: In my view, the onus was not on the Bank to act. It was on the First and

Second Defendants to seek the consent of the Bank to the proposed transfer. By paragraph 13 of the Order, they gave an undertaking to bring about the transfer of the said properties. It appears that they were not able to do so.

40. I find it surprising and inexplicable that the First and Second Defendants would not have returned to Court either to indicate any difficulties in obtaining the consent of the Bank or to advise as to the position and seek further direction. Instead, it appears that they both allowed a state of uncertainty to persist for an extended period, for which they each must take responsibility. In particular the First Defendant had a responsibility to ensure that either the consent of the Bank was obtained or if it was not and could not have been obtained to return to Court to seek further orders. For example an alternative order could have been made for the property to be sold and any proceeds after payment of the mortgage loan to be divided between them in such ratios as agreed or deemed fit by the Court.

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41. Having failed to seek further orders, or to abide by the undertaking given to the Court, it lies ill in the mouth of the First Defendant to now claim that these proceedings are an abuse of process and that he is being treated unfairly. It appears to me that perhaps his own negligent approach has led to this. Surely after the making of the Consent Order he would or should have been alert to inquire:-

i) Whether the bank had given its consent.

ii) If it had, whether the transfer into the Second Defendant's sole name had been made.

iii) If the bank had not given consent or would not give consent, to consider the alternative action which needed to be taken by him.

42. Counsel on behalf of the First Defendant submitted that when the First Defendant walked out of Court following upon the making of the Consent Order, he expected that his liability in respect of the mortgaged property had come to an end. This cannot be correct. From the terms of the Order, the First Defendant would have known and understood that there was a precondition. In addition Counsel submitted that it may well be that as the First Defendant is not a sophisticated man, he buried his head in the sand. Even if it is the case that he is unsophisticated, I do not consider that this is an excuse of merit. The single fact that the Bank needed to agree to the transfer before it could take place is not a complex one. I do not consider that equitable principles assist the First Defendant in this case.

43. I also do not accept as submitted by Counsel on behalf of the First Defendant that if the Bank was on notice of the Order, there was a duty on the Bank to seek the Court's permission before bringing these proceedings and to seek repayment of the mortgage from the Second Defendant solely. Given the words "*subject to consent*" in the terms of Order, it cannot be said that the Order imposed any such an obligation on the Bank.

44. Counsel on behalf of the Bank rightly submitted that the other option, in cases where consent is not obtained for a mortgagor to transfer property, is to redeem the mortgage by paying all money due and owing and fulfilling any conditions of security. This did not happen in this case.

45. It is for the mortgagee Bank to assess lending risks and determine to whom it will grant a mortgage and to whom a mortgage may properly be transferred. It is for mortgagors to

abide by the terms of the signed mortgage contract unless and until the loan is fully repaid and or the Bank consents to a transfer of obligations. The legal principles espoused in the texts referenced by Counsel for the Bank are sound ones. To conclude that a mortgage contract can be altered unilaterally would be to ignore the provisions of the ***Registered Land Law*** and to drive a coach and horses through the law of mortgage. The Bank in this case is doing no more than seeking to enforce its contractual rights. This cannot be an abuse of process or be unfair *vis a vis* the Bank and the mortgagees.

46. Given the terms of the Consent Order, the applicable law and legal principles and the circumstances of this case there would be no basis for a conclusion that these proceedings are an abuse of process or are unfair to the First Defendant. Equitable principles cannot assist given the terms of the Order.

47. Having reviewed and considered the factual circumstances and all the submissions made by the parties, the submissions of Counsel on behalf of the Bank are accepted in their entirety. The application on behalf of the First Defendant to stay these proceedings is refused.

Dated this the 7th August 2020

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Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court