



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2017: No. 81

IN THE MATTER OF VARIOUS MORTGAGES BETWEEN THE PLAINTIFF OF THE ONE PART, AND THE DEFENDANT OF THE SECOND PART

**BETWEEN:**

**HSBC BANK OF BERMUDA LIMITED**

**Plaintiff**

- and -

**JOHN PERCIVAL WHITE**  
**(formerly JOHN PERCIVAL SIMMONS)**

**Defendant**

## RULING

*Mortgage, Application to set aside default judgment of judgment sum,*

*Whether Defendant can show that he has a defence which has a real prospect of success*

**Date of Hearing:** 9 February, 2, 22 March 2023

**Date of Judgment:** 24 April 2023

**Appearances:** Dan Griffin, MJM Limited, for Plaintiff

9 February 2023 - Stephanie Burrows Trott, Smith Bean & Co. for Defendant

2, 22 March 2023 - Litigant in Person

## **RULING of Mussenden J**

### **Introduction**

1. This matter came before me by the Defendant Mr. White's Summons dated 12 May 2022 which sought the following:
  - a. The order dated 24 March 2022 giving judgment to the Plaintiff (the "**Bank**") in the sum of \$1,029,732.79 (the "**Judgment Sum**") be set aside; and
  - b. Disclosure of the sale price of the three properties, the subject of this matter, and all other costs related to the calculation of the judgment debt against him. The mortgaged properties (the "**Mortgaged Properties**") are:
    - i. 37 Spice Hill, Warwick;
    - ii. 13 Marsh Folly Road, Pembroke; and
    - iii. 23 Marsh Folly Road, Pembroke.
2. Mr. White's Summons is supported by his affidavit sworn 29 April 2022 ("**White 1**").
3. The Bank in response filed the third affidavit of counsel Dan Griffin sworn 30 June 2022 ("**Griffin 3**"). Mr. White filed an affidavit in reply sworn 27 July 2022 ("**White 2**").
4. There was a hearing before me on 9 February 2023 when I heard submissions. On Mr. White's application, I adjourned the hearing to 2 March 2023 in order to allow him to obtain various relevant records about the Mortgaged Properties from his former counsel, Cox Hallett Wilkinson Limited ("**CHW**"), and to file and serve them with any submissions.
5. On 28 February 2023 Mr. White filed an affidavit sworn that same date ("**White 3**") along with exhibits. Some of those exhibits showed documents obtained from CHW including email correspondence between Mr. White and Ms. Adenike Carmichael of the Bank.
6. On 2 March 2023, in my Chambers list, Mr. White appeared as a litigant person. After some short submissions I adjourned the matter to 22 March 2023 for further submissions.

7. On 22 March 2023, I refused Mr. White's application for Mr. Gordon Woolridge to represent him in any capacity as Mr. Woolridge informed me that the Bermuda Bar Council had refused to extend to him a practising certificate. I heard final submissions then reserved my Ruling.

## **Background**

8. By Originating Summons dated 9 March 2017 the Bank commenced proceedings for the possession and sale of the Mortgaged Properties securing lending to Mr. White of approximately \$1,600,000. The Bank obtained an order for possession and sale of the Mortgaged Properties on 16 June 2017 albeit with matters left unresolved by the Judgment of Hellman J relating to a credit for rental income and the total sum due from Mr. White to the Bank.
9. The Bank issued a summons on 15 February 2022 for a judgment sum in order to resolve those matters. Alison Phillips first affidavit sworn 9 March 2022 ("**Phillips 1**") gave evidence for the Bank in relation to the rental income Mr. White may have received had the Bank not taken possession of 37 Spice Hill prior to obtaining the necessary authority of the Court. She calculated that for the Lower North Apartment, in respect of a tenancy terminated by eviction, the loss of rental income amounted to eight months at the leased monthly rental amount of \$1,300 for a total credit of \$10,400 to Mr. White. In respect of the Lower South Apartment, the tenant had failed to pay the rent and a judgment was obtained against that tenant. As rent was never received from this tenant during the relevant period, no credit could be given.
10. Phillips 1 also provided a detailed breakdown of the sale prices obtained by the Bank and the shortfall on the proceeds of sale of the Mortgaged Properties. The details of the sale of the Mortgaged Properties are as set out below.
  - a. The gross sale of 37 Spice Hill was \$495,000. The net proceeds to the Bank were \$446,109.30. The sum of \$257,415.97 was applied to principal, \$130,681.21 was

applied to interest, and \$58,012.12 was applied to the general ledger to pay off the enforcement costs through to 22 September 2017.

- b. The gross sale price of 13 Marsh Folly was \$220,000. The net proceeds to the Bank were \$192,335.34. The sum of \$83,623.19 was applied to principal and \$108,712.03 was applied to the general ledger to pay off the enforcement costs.
  - c. The gross sale price of 23 Marsh Folly was \$250,000. The net proceeds to the Bank were \$211,857.98. The sum of \$172,088.98 was applied to principal and \$39,769 was applied to the general ledger to pay off the enforcement costs.
  - d. The amount outstanding and owed by Mr. White to the Bank following the sale of the Mortgaged Properties as at January 2022 was \$1,032,467.79 which comprised of \$1,021,982.79 being principal and \$10,485.00 being costs of enforcement.
11. The Bank obtained an order for substituted service on 15 February 2022 by newspaper advertisement as they had unsuccessfully attempted to serve Mr. White personally. An advertisement appeared in the Royal Gazette on 14 March 2022 and 18 March 2022 serving Mr. White. The Bank obtained default judgment on 24 March 2022.

#### **Evidence for the application to set aside default judgment**

12. The thrust of the White 1 evidence was as follows:
- a. Mr. White was in Jamaica on business from 24 December 2021 and eventually returned to Bermuda. The Bank's attorneys had knowledge that he would travel to Jamaica from time to time as he had a construction company there as well as in Bermuda.
  - b. The Bank's attorneys had corresponded with him by email previously. They also had his telephone numbers. He exhibited two letters from MJM: (i) dated 21 September 2016 which was copied to Mr. White by email and mail; and (ii) dated 12 April 2022 entitled in bold uppercase "BY EMAIL ONLY TO: jandmbermuda@gmail.com" informing him of the Judgment Sum and the reasons for substituted service.

- c. The Bank's process server had served him at 1 Factory Lane, Pembroke previously in relation to this matter and other matters. That is where his son and ex-wife lived. His habitual residence has always been in Bermuda and it was not lawful to say that he could not be found in Bermuda.
- d. The reason he was seeking to set aside the judgment was because he had understood the amount outstanding to be approximately \$1,600,000. Thus he could not understand that after the sale of the three Mortgaged Properties, he was still said to be owing to the Bank the sum of \$1,029,732.79. He complained that he had never received a breakdown of the sale prices and he needed such information for his understanding as to the amount still outstanding.

13. The thrust of the White 2 evidence was as follows:

- a. Some repeat of White 1.
- b. A summary of Mr. White's travel itineraries for the period 31 March 2021 to 30 September 2021 when he departed and returned to Bermuda on three trips. I note here that there is no itinerary for the March 2022 period.
- c. Submissions in relation to the defence to the application for possession.
- d. That there was a potential sale of 37 Spice Hill for \$550,000 that would have extinguished its debt and paid a significant portion of the arrears of 13 Marsh Folly and 23 Marsh Folly.
- e. That the Judgment of Hellman J ordered that some rents for a specific period of unlawful possession by the Bank was to be credited to Mr. White.
- f. That his counsel failed to submit to the Court that the Bank had evicted various tenants of 23 Marsh Folly thus denying him the benefit of that associated rental income. In respect of one tenant at 37 Spice Hill, the Bank had failed to enforce a judgment against the tenant for unpaid rent.

14. The thrust of the Griffin 3 evidence was as follows:

- a. No application had been made by Mr. White to set aside the order dated 10 March 2022 granting substituted service.

- b. The two letters exhibited by Mr. White showing email correspondence did not involve serving proceedings on Mr. White. Further, the letter dated 12 April 2022 was in response to a letter from Mr. White dated 3 April 2022 wherein he provided his email address.
- c. Mr. White had had several counsel on record. Thus it was appropriate for the Bank to serve him by way of a newspaper advertisement in circumstances where he instructed various counsel, he was no longer resident at the Mortgaged Properties, had difficulty corresponding by email and was overseas without informing the Plaintiff.
- d. Mr. White did not deny having seen the advertisements having attended the office of MJM Limited and informed the receptionist that he had seen them.
- e. That Mr. White had been provided with the information about the Judgment Sum. It was contained in Phillips 1 and provided the breakdown of the amounts obtained for sale and credited for potential lost rental income in accordance with the Judgment of Hellman J.

## **Submissions**

### **Defendant's Submissions**

- 15. Counsel for Mr. White and then Mr. White made a number of submissions in support of his application.
  - a. The judgment in default should be set aside out of fairness to Mr. White as it was obtained in his absence, the Bank having misled the Court as to his whereabouts and their inability to communicate with him.
  - b. The Bank's process server was informed that Mr. White was out of the island on business. However, the Bank obtained leave for substituted service by way of advertisement in the newspaper after which possession was granted on the bases that the Defendant did not appear on the return date.
  - c. The Bank took advantage of Mr. White's absence in the knowledge that they were in possession of his email address, he had a construction business in Jamaica and counsel for the Bank had not tried to contact him at all.

- d. That Hellman J, in his judgment of 16 June 2017, had not granted possession of 37 Spice Hill. Thus, Mr. White could have sold that property under a Sales and Purchase Agreement drafted by attorney Kim White of CHW, with Mr. White taking a second mortgage for the intended buyer for the difference of her borrowing limit of \$470,000 and the proposed list price of \$550,000. I note here that Mr. White's position in respect of possession of 37 Spice Hill is incorrect as Hellman J at paragraph 28 made an order for the possession and sale of the three Mortgaged Properties. Thus the proceeds of the sale would have extinguished the loan that was secured on 37 Spice Hill, and the balance would have been used to pay the arrears on the mortgages of 13 Marsh Folly and 23 Marsh Folly.
- e. The rent of the units from the date of the unlawful possession to the date of the possession order should be deducted from any shortfall.

#### Plaintiff's Submissions

16. Counsel for the Bank invited the Court to refuse Mr. White's application to set aside judgment in default. Mr. Griffin made a number of submissions in support of its case.
  - a. That in order for the Court to set aside judgment, Mr. White must show that he has a defence which has a real prospect of success. Thus, he must show that he does not owe the Judgment Sum or at least that he owes some other amount.
  - b. That it was reasonable for the Bank to conclude that Mr. White was unable to be served because he moved abroad, that he did in fact see the newspaper advertisements and that if he had objected to the order then he should have sought to have it set aside and he has not.
  - c. The principle set out in *Smith v Stoneham and Stoneham* [2015] Bda LR 64, set out more fully below, should be applied, in particular at paragraph 11, that "*the court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence*". This made it clear that the alleged irregularity in relation to the order for substituted service is not determinative, the main issue on an application to set aside default judgment is the merits of the defence.

- d. In respect of his defence, Mr. White refers to defences to the Bank's order for possession obtained on 16 June 2017 rather than defences to the judgment sum. This includes an allegation that the Bank did not pursue a sale to Karla Parfitt and that he was not properly advised by his attorney in relation to that sale. Those issues have already been determined by the Court when the order for possession and sale was made by Hellman J. Mr. White's course of action would have been to appeal. Thus, it is not open to Mr. White to seek to revisit them by way of an application to set aside default judgment years later.
- e. That Mr. White claims that had the sale to Ms. Parfitt proceeded, the Bank would have obtained a better price and that in any event it sold various properties at an undervalue. However, the evidence of Phillips 1 for the Bank showed that the Bank sold the properties for a reasonable price given their condition and provided a careful breakdown of the proceeds of sale and costs of enforcement which resulted in the Judgment Sum.
- f. That Hellman J, citing *Lusher v King*, Civil Appeal No 14 of 1997, CA, made it clear that while the Bank was under a duty to act fairly when selling the mortgaged properties the Court will not interfere in a sale save exceptional circumstances and Mr. White's remedy in those circumstances would be for an action in damages. Mr. White has not made that claim, nor has he provided any expert valuation evidence in relation to the sale prices obtained by the Bank which might suggest the Bank breached its duty.

### **The Law**

17. In the case of *Smith v Stoneham and Stoneham* [2015] Bda LR 64 Kawaley CJ set out the legal test for the set aside of a default judgment. He summarised the English case of *Alphine Bulk Transport Inc v Saudi Eagle Shipping Co. Inc* ("*The Saudi Eagle*") [1986] 2 Lloyd's LR 221 derived from the principles set out in *Evans v Bartlam* [1937] AC 473 and where he added underlined emphasis as follows:



*'The relevant principles are set out in the judgment of Sir Roger Ormond at page 223 where he says this:*

*'The following 'general indications to help the Court in exercising the discretion" (per Lord Wright at page 488) can be extracted from the speeches in Evans v Bartlam (1937) A.C. 473 , bearing in mind that 'in matters of discretion no one case can be authority for another' (ibid, page 488):*

*(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;*

*(ii) the Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the court should not 'lay down rigid rules which deprive it of jurisdiction' (per Lord Atkin at page 486);*

*(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;*

*(iv) the primary consideration is whether the defendant 'has merits to which the Court should pay heed' (per Lord Wright at page 489), not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown 'merits' the Court will not, prima facie, desire to let a judgment pass on which there has 'been no proper adjudication' (ibid. page 489 and per Lord Russell of Killowen at page 482*

*(v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant 'found himself bound by a judgment regularly obtained to which he could have set up some serious defence' (per Lord Russell of Killowen at page 482).'*

*In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In the course of his argument Mr Clarke Q.C. used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v Kendel (1977) 1 Ll.L.R. 554 and Vann v Awford). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their lordships in Evans v Bartlam. All of them clearly contemplated that a defendant who is*

asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. (In Evans v Bartlam there was an obvious defence under the Gaming Act and in Vann v Awford a reasonable prospect of reducing the quantum of the claim). Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction.'" [Emphasis added]

18. In the case of *M&M Construction Ltd. V Claudio Vigilante* [2012] SC (Bda) 6 Com Kawaley ACJ stated as follows:

*"4. Mr. Harshaw correctly submitted that the Defendant had to demonstrate more than an arguable defence and was required to make out a defence with a "real prospect of success": Dobie-v-Interinvest (Bermuda) Ltd. and Black [2009] Bda LR 31 (at paragraph 14), citing Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's LR 221 at 223. While the explanation as to how the default occurred is a subsidiary factor, Sir Roger Ormrod in the Saudi Eagle case (at page 225) concluded the English Court of Appeal's judgment with the following words:*

*"The conduct of the defendants ...in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case. While it does not amount to an estoppel in law, the Court can and must consider it. The principle of election and the maxim about approbating and reprobating are, in origin, rules of equity and as such give some indication of where the justice of a case may lie."*

## Analysis

19. In my view, the judgement in default should not be set aside for several reasons.
20. First, I am guided by *The Saudi Eagle case* which sets out five general indicia to consider in deciding whether or not to set aside a default judgment regularly obtained. In relation to service, I accept that as the service was for proceedings, then correspondence by email, in the absence of an order for substituted service by email, was not the proper method of service. It may have been that notice of the proceedings by email may have been a courtesy in addition to proper service. Thus, I am of the view that service by newspaper advertisement was proper in the circumstances and was effective and in accordance with the substituted service as ordered by the Court, such order which has not been set aside. Further, I note that Mr. White has not expressly stated that he did not see or was not aware of the advertisement in the newspaper. Significantly, he did become aware of the proceedings at some point as he did write a letter to MJM about a hearing date, albeit after the date of the order for the Judgment Sum.
21. Second, I am bound to consider “*the primary consideration which is whether the defendant ‘has merits to which the Court should pay heed’... not as a rule of law but as a matter of common sense.*” Mr. White’s submissions about the defence to the application to the possession order have no merit whatsoever as in his Judgment, Hellman J granted possession of all three Mortgaged Properties to the Bank.
22. Third, one request in Mr. White’s Summons has been for the breakdown of the sale prices of the Mortgaged Properties and any amounts credited to him. I accept that Phillips 1 satisfies this request as it sets out a detailed breakdown of the amounts. Therefore, I need not make any order in respect of this issue notwithstanding that it was not a proper basis to set aside the Judgment Sum in any event.
23. Fourth, Hellman J left a sole issue to be determined at a subsequent hearing, namely the determination of the potential rent to be credited to Mr. White for the period of time when the Bank held unlawful possession of 37 Spice Hill and evicted the tenant until when he

granted possession himself on 16 June 2017. Mr. White complains that no credit for that period has been granted to him. However, I am satisfied on the evidence that Phillips 1 sets out that such credit was indeed given to Mr. White. In my view, applying *M&M Construction Ltd. v Claudio Vigilante*, there is no real prospect of success on this point because the rent credited was for the amount set out in the lease of the evicted tenant. Therefore, Mr. White will have a significant challenge to show that some other rent amount should have been used. Similarly, I am of the view that Mr. White lacks any real prospect of success for the aspect of the tenant who failed to pay rent albeit a judgment for unpaid rent was obtained. Simply put, as no rent was paid by the tenant during the relevant period the Bank had unlawful possession, no credit for that period can be given to Mr. White.

24. Fifth, Mr. White's claim about the potential sale price of 37 Spice Valley carry no weight in this application. I rely on *Lusher and King* as cited by Hellman J in that the Court will not interfere in a sale except in exceptional circumstances and that would be by way of an action in damages. In any event, Phillips 1 sets out that the Bank sold 37 Spice Hill for a reasonable price given its condition. Other than Mr. White's own views, there has been no expert evidence filed to support any claim that the sale price was not reasonable in all the circumstances. Thus, in my view, there is no reasonable prospect of success on this point.
25. Sixth, Mr. White claims that in respect of 23 Marsh Folly, his counsel failed to draw to the attention of the Court that the Bank had evicted tenants of the several units thus causing him to lose the benefit of rental income of \$103,200 that could be credited to him. In my view, there is no evidence of such eviction, such circumstances only being identified in White 2 sworn 27 July 2022. Further there is no evidence of such instructions or such failure by his counsel or any comment by his counsel on this issue. On that basis, on the evidence, there is no real prospect of success on this point. Additionally, in my view, any allegations of incompetence of counsel would have to be challenged in some other proceedings taken by Mr. White against his counsel at the time wherein he could seek damages. Thus, such allegations would not be a proper basis to set aside the default judgment.

26. Seventh, in following *The Saudi Eagle* in respect of forming a provisional view of the probable outcome if the judgment were to be set aside and the ‘defence’ developed, my provisional view is that the defence would fail on the basis of the strong evidence set out in Phillips 1. In my view, whilst the defence carries some enthusiasm, it fails to carry some degree of conviction.

27. In light of the above reasons, in taking a commonsense approach to the ‘defence’ and all the circumstances, I am of the view that the judgment in default should not be set aside.

### **Conclusion**

28. For the reasons above, I deny Mr. White’s application to set aside the judgment in default.

29. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Bank against Mr. White on a standard basis to be taxed by the Registrar if not agreed.

Dated 24 April 2023



**HON. MR. JUSTICE LARRY MUSSENDEN  
PUISNE JUDGE OF THE SUPREME COURT**

