

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA**

APPLICATION NO COA2022APP00129

BETWEEN	RHESHAN CAPITAL MANAGEMENT LIMITED	APPLICANT
AND	FIRST GLOBAL BANK LIMITED	RESPONDENT

Christopher Dunkley and Ms Tiffany Sinclair instructed by Phillipson Partners for the applicant

Litrow Hickson instructed by Myers, Fletcher & Gordon for the respondent

23 and 27 January 2023

ORAL JUDGMENT

BROOKS P

[1] The applicant, Rheshan Capital Management Limited ('Rheshan'), has filed a re-listed application for this court to order the respondent, First Global Bank Limited ('First Global'), to deliver up two duplicate certificates of title ('the titles') to Rheshan or Rheshan's attorneys-at-law. The titles are for two parcels of real estate ('units') that Rheshan owns at Bogue Estate, in the parish of Saint James.

[2] First Global holds the titles as part of its powers as a mortgagee. Rheshan contends that it has redeemed the mortgage, having satisfied all its obligations to First Global, and therefore First Global has no authority to retain the titles. First Global's attorneys-at-law, by letter dated 29 October 2021 accepted Rheshan's payment "in full and final settlement

of all [Rheshan's] mortgage account obligations to [First Global]" but demanded that Rheshan withdraws its appeal in this court, to which First Global is the respondent, before First Global will deliver up the titles.

[3] Mr Dunkley, on behalf of Rheshan, contended that First Global was not entitled to retain the security since it had acknowledged that it had received payment in full. He submitted that First Global is in effect attempting to obtain security for costs but it could only do so by an application to the court and it had made no such application.

[4] First Global has not filed any affidavit evidence refuting Rheshan's assertions that all obligations have been satisfied.

[5] However, counsel for First Global, Mr Hickson, has relied on clauses 2.01, 2.04 and 3.16 of Rheshan's mortgage and stated that the mortgage document authorises First Global to retain the titles in connection with any liability, whether substantive or contingent, presently existing or to come about in the future. He argued that Rheshan is contingently liable for the costs which First Global has incurred and is likely to incur in the appeal. Accordingly, he submits, First Global is not obliged to return the titles until the appeal has been terminated, since, in light of the pending appeal, First Global continues to incur expenses while defending the claim and Rheshan will need to satisfy the costs of a related application, namely, an application to vary the decision of a single judge of appeal.

[6] Learned counsel also argued that the titles which are the subject of this application are not included in the grounds of appeal. He contended that there is no appeal before the court relating to those titles and therefore the court has no jurisdiction to make orders relating to them.

[7] This latter assertion by Mr Hickson is, however, misplaced. One of the orders of the judge below that Rheshan seeks to appeal is an order for summary judgment. The claim in the court below includes the titles for the two units mentioned above and Rheshan asserted that there is a refusal to deliver the discharge of the mortgage thus fettering Rheshan's "equitable right of redemption" in respect of those titles (see paragraphs 35 and

36 of the particulars of claim). Those units are the subject of this application. Additionally, at ground 7c of the amended notice and grounds of appeal, Rheshan complained that the claim for damages related to units other than 17 and 29, which the court's summary judgment has denied. Accordingly, there is an appeal relating to the relevant units and this court is empowered to make orders relating to them.

[8] The issue, therefore, is whether it is permissible for First Global to retain the titles, despite Rheshan having settled the debt principal and interest.

[9] An examination of the mortgage is relevant to determine the issue between the parties. Clause 2.01 of the mortgage, so far as is relevant in this matter, provides that Rheshan must pay First Global all monies and settle all liabilities, actual and contingent that are due owing or incurred to First Global by Rheshan, including legal and other costs and expenses First Global incurs, relating to Rheshan. Similar terms are also outlined in First Global's commitment letter dated 29 February 2016.

[10] Clause 2.04 of the mortgage reads that Rheshan should pay, on demand, all of First Global's expenses relating to the units, along with interest. The clause also defines its expenses which include liabilities that First Global incurs such as "legal costs, charges and expenses paid and all liabilities incurred by [First Global] (including legal costs, charges and expenses as ascertained between Attorneys-at-Law)". The clause goes further to provide examples of the situations in which First Global may incur expenses, which largely are expenses associated with First Global protecting its interests as a mortgagee.

[11] Clause 3.16 of the mortgage states that the intent of the mortgage is that the mortgaged premises would be a continuing security for the debt, "notwithstanding any settlement of account or other matter or thing whatsoever and this security **shall not be considered as satisfied or discharged by any intermediate payment of the whole or part of the monies secured...**" (emphasis supplied).

[12] This court recognises Rheshan's contention that it has paid the principal sum along with interest to First Global in connection with the mortgage of the properties. It is settled

that a mortgagor has an equitable right to redeem the mortgage. This can only be done, however, when the mortgagor settles all outstanding monies, including the interest, attendant costs, charges and expenses (see paragraph [41] of **Franz Fletcher (Executor of the Estate of Ruby Fletcher who died on 7 July 2000 and in whose Estate probate was granted on 13 September 2006) v Jamaica Redevelopment Foundation** [2010] JMCA App 31). This court, in **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes, deceased) and Another v Miller's Liquor Store (Dist) Limited** [2016] JMCA Civ 1, also distilled the nature of equity of redemption. Paragraph [35] states as follows:

“...Equity, however allowed the mortgagor, upon repayment of **all monies due under the mortgage**, to redeem the property and regain ownership of it. The mortgagor was therefore said to have, an ‘equity of redemption’...” (Emphasis supplied)

[13] Despite the fact that Rhesan has settled the principal sum along with interest, in filing an appeal and applications relating to the units, First Global will continue to incur expenses in defending the proceedings, which expenses constitute a contingent liability that Rhesan will owe under the mortgage.

[14] Mr Dunkley, in support of Rhesan’s position, relied on **Re Industrial North West LLP (in administration) Kendall and another (administrators of Industrial North West LLP) v Morley and others** [2020] EWHC 3052 (Ch) (‘**Industrial North West**’). In that case, Mark Anderson QC, sitting as a deputy judge of the English High Court, explored a similar situation.

[15] The debtor in that case, Industrial North West LLP (‘INW’) entered into a Facility Agreement secured by a Security Agreement with Fairfield, a commercial lender. The Security Agreement between the parties was such that Fairfield was not obliged to release the securities merely upon payment of the capital and interest, where secured liabilities were outstanding. Fairfield was not satisfied that INW had settled its obligations and it terminated the Facility Agreement and successfully applied to have an administrator of INW

appointed. The administrator sold some of the securities. The sale enabled INW to repay its debt to Fairfield. Mr Morley, the owner of INW threatened to bring an action against Fairfield for its termination of the Facility Agreement. As a result of Mr Morley's threatened litigation, Fairfield refused to release the security on the basis that the litigation amounted to a contingent liability within the meaning of the agreements and the agreements continue to provide security for that liability. The administrator sought directions from the court as to whether they should continue to treat Fairfield as a secured creditor of INW.

[16] The deputy judge found that it was very likely that Mr Morley would bring a claim against Fairfield and also that there was a real prospect that Fairfield would succeed in proving that it correctly terminated the Facility Agreement. In the result, the deputy judge determined that the costs of the threatened litigation would have been incurred because Fairfield was exercising its rights under the agreements. He found that the potential liability of costs amounted to a contingent liability. He went further to note that withholding the security in those circumstances was not an affront to the right to redeem. He said, in this context, in paragraph 64 of his judgment:

"In my judgment there is nothing in these [Security agreement] provisions, or in the Facility Agreement, which is repugnant to the right to redeem. The cases cited by Mr Pomfret demonstrate that a mortgagee cannot refuse redemption if the full amount owing is tendered, but that must include adequate provision for contingent liabilities. There is no authority which suggests that it is somehow oppressive to insist on continuance of the security if no provision for contingent liabilities is made."

[17] The deputy judge relied on **Re Rudd and Son Ltd; Re Fosters and Rudd Ltd** (1986) 2 BCC 98955 ('**Re Rudd and Son Ltd**').

[18] **Industrial North West** does not support Rheshan's position.

[19] In **Re Rudd and Son Ltd**, upon which First Global relies, two companies, in partnership, granted mortgages to a bank over property they owned. The mortgages protected the bank against contingent liabilities. The contingent liabilities that the bank

sought to rely upon, were counter-indemnities that the mortgagors gave to indemnify the bank for the performance of bonds/suretyship bonds the bank gave to a local authority for works the partnership should carry out. Under the bonds, the bank was required to make payments to the local authority in the event of default. Both companies eventually went into creditors' voluntary liquidation. The liquidator requested that the bank remove the mortgages because all monies that the companies owed had been settled. The bank however refused to do so because contingent liabilities remained outstanding. The bank later had to pay the local authority in connection with the bonds. The question was whether the liquidator was to treat the bank as a secured (by the mortgages) or unsecured creditor, for the money it paid under the bonds.

[20] In that case, the Court of Appeal held that the mortgagor cannot redeem the mortgage if there are outstanding contingent liabilities owing to the mortgagee, unless there are provisions in place, to the mortgagee's satisfaction to settle the liabilities. In his judgment Dillon, LJ held that:

"I would take the view that it is implicit in the scheme of this mortgage that the bank can only demand payment from the mortgagor of moneys for which the bank could demand payment at that time from the firm; because the mortgage is to secure the firm's indebtedness, in essence. **That, however, does not prevent the security also extending to contingent liabilities and therefore, in my judgment - and with every respect to the learned judge, who took a different view - the liquidator was not entitled to redeem this security as he claimed to do.**" (Emphasis supplied) (page 98,960)

[21] Nicholls J, in his judgment, held that, based on the construction of the mortgage, the mortgagee may retain the security despite the contingent liability not yet becoming a present liability. He said, in part, on page 98,961:

"So construed, the security created by this mortgage will extend to contingent liabilities, notwithstanding that the provision at the beginning of the proviso refers only to payment to the bank of 'all and every the sum and sums of

money which shall for the time being be owing to the Bank by the Firm anywhere on the current account of the Firm or any other account'

The consequence of this construction is that the mortgagor may find itself unable to redeem its property for an indefinite period, until it becomes known whether a contingent liability will become a present liability or not. So be it. I can see nothing surprising about such a conclusion."

[22] Applying the reasoning in those decisions to this case, it must be held that Rheshan, having filed an appeal relating to the security, First Global will likely incur costs in the litigation. Those costs amount to a contingent liability within the contemplation of the mortgage and commitment letters between the parties. Accordingly, First Global may withhold the titles until the contingent liabilities have been satisfied, or until they have made provision, to First Global's satisfaction, to settle the contingent liability.

[23] This approach does not offend the right of redemption, as that right only accrues once the mortgagor settles all the outstanding attendant costs, charges and expenses, including contingent liabilities, which Rheshan has not yet done. The reasoning, although set in the context of the English land law, is applicable to the Torrens system, which applies to these titles and to the mortgage. Despite the differences in the systems, the Registration of Titles Act, at sections 109 and 111, does recognise the concept of redemption of mortgages. Indeed, the principles assessed above were considered in the Australian case of **Estoril Investments v Westpac** (1993) 6 BPR NSW (SC) 13146, which was cited in **Industrial North West**. Australia uses the Torrens system of registration of titles.

[24] In light of the foregoing, Rheshan cannot succeed in this application. The order of the court is as follows:

1. The re-listed application for court orders filed on 12 January 2023 is refused.
2. Costs to the respondent to be agreed or taxed.