

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1989] SGCA 2

CA 23/1988

Between

Rimmon Watch Pte Ltd

... Appellant

And

Great Pacific Finance Ltd

... Respondent

GROUND OF DECISION

Credit and Security — Mortgage of real property — Mortgagee's rights;
Landlord and Tenant — Covenants — Implied

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Rimmon Watch Pte Ltd v Great Pacific Finance Ltd

[1989] SGCA 2

CA 23/1988

Sinnathuray J; L P Thean J; Wee Chong Jin CJ

20 January 1989

1 Cur Adv Vult

2 (delivering the judgment of the court):The respondents, Great Pacific Finance Ltd, are the mortgagees of #01-86, 87 and 88 Lucky Plaza Shopping Centre, Orchard Road, Singapore, `the mortgaged properties` of which Rimmon Watch Pte Ltd (then known as Eastern Watch Co Pte Ltd) are the proprietors. The mortgaged properties are registered land under the Land Titles Act (Cap 157). The instrument of mortgage dated 27 December 1984 was duly registered in the Land Titles Registry, cl 5(i) of which provides:

The mortgagor will not sell, transfer, lease, agree to lease, let, license or part with possession of the mortgaged property or any part thereof or accept a surrender of any lease or tenancy without the prior written consent of the mortgagee which may be refused without any reason being assigned therefor or given either absolutely or on such terms and conditions as the mortgagee may deem fit and the decision of the mortgagee shall be final and conclusive for all purposes.

3 The appellants, Rimmon Trading Pte Ltd, are the tenants of the mortgaged properties under a tenancy agreement dated 22 January 1985 whereby the mortgaged premises were let by the mortgagors (then known as

Eastern Watch Co Pte Ltd) to the appellants for a term of 36 months from 23 March 1985. The tenancy agreement contained a term, cl 4(v), which purports to give the appellants an option of renewal for a further term of five years subject to the same terms and conditions of the tenancy agreement. The appellants have on 22 December 1987 exercised the option of renewal in accordance with the provisions of cl 4(v).

4 The respondents commenced proceedings in Originating Summons 1256 of 1987 against the mortgagors and the appellants seeking, inter alia, the following declarations:

(1) a declaration that the purported option contained in cl 4(v) of the tenancy agreement dated 22 January 1985 and made between Eastern Watch Co Pte Ltd (In Liquidation) and the defendants is not binding on the plaintiffs as mortgagees of #01-86, 87 and 88 Lucky Plaza Shopping Centre, Orchard Road, Singapore (the mortgaged properties);

(2) a declaration that the plaintiffs are entitled to exercise their rights as mortgagees, including the right to obtain possession of the mortgaged properties upon the expiry of the said tenancy agreement on 22 March 1988.

5 The application was heard before AP Rajah J who found in favour of the respondents and the appellants now appeal against the judgment of the learned judge.

6 Counsel for the appellants advanced two main propositions in support of their contention that the judge was wrong in granting the declaration that the purported option contained in cl 4(v) of the tenancy agreement was not binding on the respondents, as mortgagees.

7 The first proposition is that the grant of the tenancy including the option to renew, was consistent with the consent given. It was argued that when the

respondents consented to the grant they did not ask to see a copy of it and must, therefore, be taken to have accepted all the covenants and conditions contained within it. In our view, however, this fact, without more, does not necessarily give rise to the inference that they impliedly consented to the whole of the terms of the tenancy. **King v Bird** [1989] 1 KB 837, cited by the appellants, is not a direct authority for the proposition advanced by the appellants. In **King v Bird**, no question arose as to the consent of the mortgagee. The issue was whether the lease by the mortgagor, which contained an option to renew, was a proper exercise of his power as mortgagor to lease. The power to grant a lease (for 21 years) was statutory and was not restricted in any way by the requirement of consent by the mortgagee. In holding that the option to renew did not invalidate the lease, Bucknill J said (at p 845):

... I think this proviso does not invalidate the lease, because it does not affect the original term of seven years.

8 It is to be observed that the decision in that case was concerned entirely with the question whether the lease was void for containing an option to renew.

9 That however, is not the question in the present case. The question for determination is not whether the covenant to renew invalidated the lease (it is common ground that the three-year grant was valid), but whether the option to renew was within the terms of the initial consent - the leasing power contained in cl 5(1) being expressed to be subject to the mortgagees' consent, the power to lease, in order to be binding on the mortgagees, must necessarily be derived from the terms of the consent.

10 To determine this question, it is necessary to consider what constituted the authorized tenancy within the terms of the consent. For this purpose, the correspondence between the parties are important and these are as follows:

11 On 23 January 1985, the mortgagors wrote to the respondents as follows:

This is to inform that we are renting the above premises to Rimmon Trading Pte Ltd with effect from 22 January 1985 for a period of three years.

12 It would be appreciated if you could let us have your consent.

13 The request for the consent was replied to by the respondents on 25 January 1985 in the following terms:

We have no objection to your letting out the above premises to Rimmon Trading Pte Ltd for three years on condition that the monthly rental be paid direct to us. Please let us have a copy of the lease agreement for our record.

14 On 29 January 1985, the mortgagors wrote to the appellants:

We enclose a xeroxed copy of letter of 25 January 1985 from the Great Pacific Finance Ltd, our mortgagee, giving consent to us to let out the above premises to you for three years.

15 On 30 January 1985, the mortgagors replied to the respondents' letter of 25 January 1985 as follows:

Thank you for your letter Ref 050/85/FBT/pc dated 25 January 1985 on the above matter and its contents have been noted.

16 A copy of the lease agreement will be forwarded to you in due course.

17 It was common ground that the respondents did not receive a copy of the tenancy agreement until 5 December 1985.

18 In our opinion, the terms of the correspondence show that the consent given by the respondents on 25 January 1985 was for the grant of a tenancy to the appellants for a term of three years. The consent granted by the respondents was a not a blanket consent and could not be construed as such. In our view, the

terms of the correspondence do not justify an inference that the tenancy, which the mortgagor was authorized by the respondents to create, was a tenancy for a term of 36 months which contained no further term conferring on the appellants an option to renew and the respondents were not under any legal obligation to inquire what the other conditions and covenants were.

19 The next question is whether upon exercising of their rights under s 69 of the Land Titles Act and accepting the rents from the appellants for the period as from April 1985 the respondents had agreed to the option for renewal. It was not in dispute that the respondents received a copy of the tenancy agreement in December 1985, but there was no evidence that the respondents had expressly accepted the option for renewal for a term of five years. The respondents said that though they had received a copy of the tenancy agreement they were not aware of the option until the second half of 1987 when they were contemplating a sale of the property. On the material before us, it cannot be said that, by necessary implication, the respondents had accepted the option. Such an implication would be inconsistent with their consent for the grant of the tenancy for a term of three years; their consent was not for a tenancy for a term of three years capable of being extended by way of an option to a further term of five years.

20 The second proposition advanced by the appellants is that the respondents, by their acceptance of rent from the appellants under the agreement, with knowledge of its terms, adopted or otherwise became bound by those terms, including the option to renew. It was argued that when the respondents took possession as mortgagees, they thereupon become the holders of the reversion immediately expectant upon the termination of the appellants' tenancy and subject to the burden of the covenant to renew, which runs with the reversion.

21 In our opinion this argument is fallacious. It is based on the premise that a mortgage under the Land Titles Act (which, by s 63(3), operates only as a security for payment of a debt) is placed on the same footing as a legal mortgage of land held under common law title and that when the mortgagee takes possession, he inherits the reversionary estate. This argument overlooks the fact that although the expression used in s 63(3) of the Land Titles Act is `mortgage` and that by s 64(1) of the Land Titles Act, Part IV of the Conveyancing and Law of Property Act which deals with `Mortgages` is to apply to registered mortgages, there is no transfer of the legal estate to the mortgagee as in the case of a mortgage at common law. Thus, unlike the position under common law, where the entitlement to take possession goes with the legal estate as of right, the entitlement of the mortgagee under the Land Titles Act to take possession is statutory and is expressly given in s 69. Section 69(1) provides as follows:

69(1) If default is made in payment of the interest, principal or other money, secured by a mortgage or charge, or in payment of any part thereof, the mortgagee or chargee shall, as against the mortgagor or chargor and those claiming through or under him, be entitled to enter into possession of the mortgaged or charged land and to receive the rents and profits thereof.

22 In exercising his statutory power of entering into possession, a mortgagee under the Land Titles Act remains aloof from the legal estate. His right derives its force entirely from s 69 and is of a wholly different character from the legal mortgagee`s right under common law title. The section makes no attempt to equate the position enjoyed by a mortgagee of Torrens title land with that of a mortgagee of land under common law title. This contrasts, significantly, with s 60 of the New South Wales Real Property Act 1900, which effects a notional conveyance of the legal estate for the limited purpose of entry into possession. Section 60 of the New South Wales Act provides as follows:

60 The mortgagee or encumbrancee upon default in payment of the principal sum or any part thereof, or of any interest, annuity, or rent-charge secured by any mortgage or encumbrance may -

(a) enter into possession of the mortgaged or encumbered land by receiving the rents and profits therefor; or

*in the **same manner in which he might have made such entry or brought such proceedings or action if the principal sum or annuity were secured to him by a conveyance of the legal estate in the land so mortgaged or encumbered.** (Emphasis added.)*

*(See Baalman, **The Torrens System in New South Wales**(2nd Ed) p 285.)*

23 Some indirect support for this view may also be found in s 70 of Land Titles Act (which provides for the right of foreclosure of mortgages). Under s 70(1) 'a mortgagor of registered land who is in default shall be deemed to have an equity of redemption, and a mortgagee of registered land shall have the same right to apply ... for an order of foreclosure as if the land were not under the provisions of this Act and the mortgagee held a legal estate therein.' Thus, where the Land Titles Act seeks to incorporate any common law concept applicable to a legal mortgage of land held under common law title, it does so by express provisions.

24 In our judgment, the conclusion of the learned judge was right and the appeal is dismissed with costs.

25 Appeal dismissed.

Sinnathuray J
L P Thean J
Wee Chong Jin CJ

Derek Wood QC and Liu Yuen Ming (Lim Ganesh & Liu) for the
appellant
Scott Thillagaratnam (Khattar Wong & Partners) for the respondent
