

IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO. 220 OF 2013

BETWEEN:

(ATLANTIC BANK LTD.	CLAIMANT
(AND	
(W & S ENGINEERING CO. LTD.	FIRST DEFENDANT
(MINISTER OF FINANCE	SECOND DEFENDANT
(ATTORNEY GENERAL OF BELIZE	THIRD DEFENDANT
(COURTENAY COYE LLP	FOURTH DEFENDANT
(DEAN LINDO	FIFTH DEFENDANT
(MUSA & BALDERAMOS	SIXTH DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. E. A. Marshalleck, S.C., of Barrow and Co. for the Claimant

Ms. Pricilla Banner of Courtenay Coye LLP for the First and Fourth Defendant

Mr. Nigel Hawke for the Second and Third Defendant

Mrs. Tricia Pitts Anderson for the Fifth Defendant

Mr. Said Musa, S.C., for the Sixth Defendant

D E C I S I O N

Facts

1. W & S Engineering Company Ltd. (W & S) owned a parcel of land measuring 4.98 acres at Mile 4 on the Northern Highway situate along the Sea Coast and the South Side of the Western Highway near Port Loyola in Belize City by virtue of a Minister's Fiat No. 848 of 2002 dated 14th October, 2002 ("the Property"). On February 14th, 2003 Atlantic Bank

Ltd. ("ABL") executed a mortgage with W & S Engineering Ltd ("W & S") to secure the repayment to the bank of the balance which on the account of the company was due or owing in respect of all monies from time to time owed by W & S to Atlantic Bank. The mortgage was duly registered as a deed in accordance with the General Registry Act Part VI. The mortgage was originally stamped to secure payment of up to \$10,000 but the bank claims that on the 22nd March, 2010 the mortgage was upstamped to secure BZ\$600,000. There is a major dispute ongoing as to the exact balance of the commercial loan which remains owing by W & S to Atlantic Bank Ltd. The bank says that despite repeated demands, W & S has failed to pay the sums outstanding. On August 2nd, 2008 the Government of Belize compulsorily acquired the interest of W & S in the property. The lawyers who assisted W & S in securing compensation from the Government for the compulsory acquisition (the 4th, 5th and 6th Defendants) were not paid as W & S had no funds with which to pay them. These lawyers therefore sued W & S and obtained judgment on admissions for their legal fees. With judgments in hand, these lawyers then obtained from this Court orders that the Government be restrained from paying W & S its compensation monies but instead pay the sums to them, as they had liens on the sum awarded as compensation for legal services provided to W & S. Upon learning that the lawyers had been paid the compensation monies owed to W & S by the Government, Atlantic Bank Ltd. brought this action to enforce its rights under its mortgage which the bank claims has priority over all other debts of W & S (including the company's debts owed to the attorneys for their legal fees). The parties agreed to trial by written submissions to be filed by August 31st, 2015. The Court received written

submissions filed by Barrow and Co. on behalf of the Claimant on 8th July, 2015, from Pitts and Elrington on behalf of the Fifth Defendant on 6th August, 2015, from Courtenay Coye LLP on behalf of the First and Fourth Defendants on 2nd September, 2015 and from Musa and Balderamos on 24th February, 2016, from the Attorney General on behalf of the Second and Third Defendant on 15th April, 2016.

Issues

2. 1) Whether or not the acquisition of the Property by the Crown operated to acquire or extinguish the security interest of the Claimant over the Property?
- 2) Whether or not the compensation monies paid and payable for the Property are charged with payment of the debt due to the Claimant by virtue of the mortgage and so were and are held on constructive trust for the benefit of the Claimant?
- 3) Whether the portion of compensation monies paid over to any of the Defendants are traceable into the hands of such Defendant and recoverable by the Claimant?
- 4) In the alternative, whether or not the Second or Third Defendants are liable in damages for breach of trust in the amount of compensation payable to the Claimant paid to third parties?
- 5) Whether CCLP (and the other attorneys/law firms named as Defendants who are owed legal fees by W & S) is entitled to a lien on the compensation awarded by the Board of Assessment to W & S in respect of its legal fees for services rendered?

6) Whether CCLP's lien (as well as the liens of the other Defendant attorneys/law firms) rank in priority to any claim which the Bank may have in respect of the compensation monies?

7) Whether the Bank's mortgage was validly up stamped from \$10,000 to \$600,000 in favor of the Bank?

3. **Issue No. 1 Whether or not the acquisition of the Property by the Crown operated to acquire or extinguish the security interest of the Claimant over the Property?**

Mr. Marshalleck, S.C., on behalf of the Claimant bank states that by way of letter dated 21st March, 2013 addressed to the Minister of Finance (the Second Defendant) and copied to Mr. Eamon Courtenay, S.C., as attorney for W & S, the bank informed the government of the mortgage held in its favor over the land which had been compulsorily acquired, and laid claim to payment of the compensation monies pursuant to the terms of the mortgage ("Exhibit SB 11").

"Barrow & Co. LLP
Attorneys At Law

Our Ref: 503/1810

21st March, 2013

Minister of Finance
Ministry of Finance
Belmopan, Cayo District
Belize

Dear Sir,

W & S Engineering Company Limited

We act for Atlantic Bank Limited.

We have been made aware of the award granted by the Board of Assessment convened pursuant to the Land Acquisition (Public Purposes) Act, Chapter 184 to determine the value of compensation to be awarded to W & S Engineering Co. Ltd. for property being 4.98 acres of land situate along the Sea Coast and the South Side of the Western Highway near Mile 4, Port Loyola,

Belize City, Belize.

We are to advise that the property for which compensation was sought in that arbitration is mortgaged to our client by way of deed of mortgage dated the 14th February, 2003 as security for the repayment of \$600,000.00 together with interest at the rate of 16 percent per annum, which is still due and owing by Messrs. W & S Engineering Co. Ltd. to our client.

Therefore as mortgagees of the property our client is entitled to payment of the amount owing and hereby requires that it be paid the amount of the award to be given to Messrs. W & S Engineering Co. Ltd. pursuant to the mortgage.

We await your response.

Yours faithfully,

Liesje Barrow Chung

CC: Mr. Eamon Courtenay, S.C.”

On the 9th April, 2013 the Ministry of Finance responded to that letter by denying that the mortgage subsisted over the acquired property and advising that a garnishee order be sought before the compensation monies could be paid over to Atlantic Bank Ltd. (“Exhibit SB12”).

“Ministry of Finance
Legal Department

LC/77/132/13

9 April 2013

Barrow & Co. LLP
Attorneys At Law
1440 Coney Drive
P. O. Box 63
BELIZE CITY

Dear Sirs,

Re: W & S Engineering Company Limited

We refer to your letter No. 503/1810, dated 21st March 2013, addressed to the Hon. Minister of Finance, stating that W & S Engineering Co. Ltd. (“the Company”) owes your client, Atlantic Bank Ltd., the sum of \$600,000.00 plus interest, and that the compensation awarded by the Board of Assessment for the acquisition of the property in question be paid to your client instead of to the Company.

2. In the first place, we should point out that the acquired property is no longer mortgaged to Atlantic Bank Ltd., as implied in your letter. When the Government compulsorily acquires land under the Land Acquisition (Public Purposes) Act, the land vest absolutely in the Crown free from any encumbrances. [Section 3(4)]. Any prior mortgages or charges of the acquired land can, however, put in their claims for compensation in response to the Notice of Acquisition which is issued soon after the acquisition.

3. In the instant case, a Notice of Acquisition was issued on 12 December 2008, and published in the Gazette, inviting all persons who may have claims for compensation, to submit their claims to the authorized officer by the specified date. The records of the Ministry of Natural Resources show that no claim was received from your client, Atlantic Bank Ltd., in response to the Notice of Acquisition, or otherwise.

4. Under section 31 of the Land Acquisition Act, the authorized officer may deduct from any compensation payable, such sums as may be due to the government by way of land tax or other taxes. But the authorized officer has no power to deduct any money payable to a third party without a court order.

5. You are therefore advised to obtain a garnishee order from the Supreme Court, ordering the Government of Belize to pay the compensation awarded by the Board of Assessment, to your client, in satisfaction of the debt owed by the Company to your client. Meanwhile, we would be prepared to withhold payments to the Company provided that your client gives an undertaking that it will be responsible for the extra interest that will accrue by reason of the delay in making the payment. You may be aware that the Board had awarded interest to the Company at 8.5% on the sum of \$575,000.00 from the 27th September 2008 until payment.

6. Grateful if you would consult your client and advise us urgently what you intend to do, so that the payment of compensation awarded by the Board is not unduly delayed.

Gian C. Gandhi
Legal Advisor"

On April 16th, 2013 the Claimant bank responded to the letter from the Ministry of Finance disputing the allegation that the mortgage no longer subsisted and informing the Ministry that Claim No. 220 of 2013 (the present Claim) had been filed in the Supreme Court ("Exhibit SB 13").

"Barrow & Co. LLP
Attorneys At Law

Our Ref: 102/86

16th April, 2013

Mr. Gian Gandhi
Legal Advisor
Ministry of Finance
Belmopan City

Cayo District, Belize

Dear Sir,

Re: W& S Engineering Company Ltd.

We hereby acknowledge receipt of your letter dated 9th April, 2013.

We take issue with the position set forth in the letter that the land is no longer mortgaged to Atlantic Bank Limited. Section 3(4) of the Land Acquisition (Public Purposes) Act indeed provides that the land vests absolutely in the Crown but manifestly does not go on to anywhere provide that it vests free from any existing encumbrances as you readily assert. An absolute vesting of title to land does not extinguish existing encumbrances particularly where the encumbrance is not in the nature of a proprietary claim to the land. The absolute vesting means merely that the title of the Government to the land is not subject to legal challenge.

This accords with section 41(4) of the Law of Property Act which defines “absolute and indefeasible” to imply that a Certificate of Title issued by the Registrar cannot be challenged in any court of law on the ground that some other person is the legal owner of the land. The immunity from legal challenge is what makes the title absolute not the absence of encumbrances otherwise than claims of proprietary interests in the land.

Our client’s security interest under the legal charge created by the mortgage has not been acquired nor can it be acquired pursuant to the provisions of the Land Acquisition (Public Purposes) Act. There is accordingly no acquisition of any property of our client in respect of which our client can properly claim compensation pursuant to the provisions of the Act. This becomes readily apparent when it is recognized, as it must, that our client cannot be entitled to compensation over and above that to which the owner is entitled. The compensation awarded to W & S Engineering is the same compensation to which our client must have recourse. It is not that the Government must pay the owner and also pay the mortgagee where the mortgagee is entitled to no more than a legal charge on the property. Of course the position would be otherwise if a mortgage was still created by conveyance of title to the mortgagee with a provision for re-conveyance upon payment of the debt. In such a case the proprietary interests of the mortgagee and that arising from the equity of redemption are separately identifiable and quantifiable.

In any event, we advise that we have filed a mortgage claim in the Supreme Court pursuant to Part 65 of the Civil Procedure Rules seeking an order for the payment of the amount of compensation awarded to W & S for the acquisition to our client in part satisfaction of the debt secured by our client’s mortgage.

Certainly the acquisition can have no impact upon the enforceability of W & S Engineering’s covenant to pay in the mortgage nor should the Government have objections to satisfying the obligation to pay compensation to W & S by way of payment in part discharge of the debt due to our client under the mortgage.

We enclose a copy of the claim for your information. While what is sought is not a garnishee order per se we expect that the order sought will suffice for present purposes.

Yours faithfully,

E. Andrew Marshalleck, S.C.

C: Financial Secretary
CEO, Ministry of Natural Resources & Agriculture
Ms. Rondine Twist”

Nature and Effect of the Claimant’s Security Interest

4. Mr. Marshalleck, S.C., submits that under Section 64(1)(b) of the Law of Property Act Chapter 190 Revised Edition 2000 of the Laws of Belize a legal charge over unregistered land (such as “the Property”) is created by Deed expressed to be by way of legal mortgage executed and registered in accordance with Part VI of the General Registry Act Chapter 327 of the Laws of Belize Revised Edition 2000. The deed of mortgage is expressed to be continuing security for the indebtedness of W & S Engineering Ltd. to Atlantic Bank Ltd. By Clause 1, 2, 4(4) and 6 of the Deed of Mortgage, Atlantic Bank Ltd. is expressly empowered to upstamp the mortgage to cover the amount that is owed to it by W& S Ltd. from time to time. The deed of mortgage therefore created a legal charge over the Property to secure W & S Ltd.’s debts to ABL to the extent of its stamped value. Learned Counsel argues that by the provisions of section 67(1) of the Law of Property Act, the bank took no estate in the Property by virtue of the mortgage. He cites Section 67(1) of the Law of Property Act as follows:

67(1) “The legal estate, right, or interest of the mortgagor in any property shall, notwithstanding a mortgage thereon, continue to be vested in him. And the mortgagee shall take no estate in the property mortgaged, but shall have as his security a charge on the property...”

Mr. Marshalleck, S.C., contends that this section abolished mortgages in Belize in the traditional sense and replaced them with legal charges. Mortgages in the traditional sense were created by way of the conveyance of a legal estate in land with a provision of re-conveyance on satisfaction of the debt. In the event the debt was not paid, then the

right to redeem the mortgage was foreclosed, and the legal estate in the property remained vested in the mortgagee. He relies on ***Goode on Problems of Credit and Security*** Sweet & Maxwell 4th Ed. for definitions of a mortgage and of a charge.

Para 1-50: ***“A mortgage is a transfer of ownership of the asset (or of any lesser interest held by the transferor) by way of security upon the express or implied condition that ownership will be re-transferred to the debtor on discharge of his obligation. A mortgage thus involves the acquisition of an existing interest, not the creation of a new one, a fact which distinguishes it from an equitable charge. It does not require the delivery of possession so that any kind of asset, tangible or intangible, is capable of being mortgaged. Since a mortgage constitutes a form of appropriation of the asset to the discharge of the debt it encompasses a charge. A mortgage may be legal or equitable.”***

Para 1-51: ***“A good description of the nature of a charge is to be found in the judgment of Atkin L. J. in National Provincial and Union Bank of England v Charnley [1924] K.B. 431 at 449:***

‘The first question that arises is whether or not this document does create a mortgage or a charge, and to determine that it is necessary to form an idea of what is meant by a ‘charge.’ It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right in the property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge. If, on the other hand, the parties do not intend that

there should be a present right to have the security made available, but only that there should be a right in the future by agreement, such as a licence, to seize the goods, there will be no charge.’ ”

5. Mr. Marshalleck, S.C., further argues that the Claimant could not by virtue of the mortgage have acquired any proprietary interest in the Property so that no such interest could have been acquired from it whether compulsorily or otherwise. He says that the position would have been different if the mortgage in the traditional sense remained possible and had in fact been created. In such a hypothetical case the fee simple estate would have been acquired from the mortgagee in whom it would have vested by virtue of the mortgage. The legal charge created by the deed of mortgage conferred no proprietary interest in the Property so none could be acquired by the Crown from the Claimant. He then cites section 64(3) of the Law of Property Act :

*“Subject to the provisions of Part III of the General Registry Act, a legal charge shall remain attached to and shall accompany the property income or crops on which it is imposed or charged notwithstanding any transfer of the land, and shall bind the property, income or crops with the payment of the sum secured by the mortgage **in priority** to all unsecured debts and other legal charges subsequent to the date of registration or recording.”*

Learned Counsel submits that given that title to and the right of possession of land passes on a compulsory acquisition, such acquisition of land is but a compulsory sale and transfer of land so that in accordance with section 64(3) of the Law of Property Act, the legal charge in favour of the Claimant remains attached to and continues to accompany the Property notwithstanding its compulsory acquisition by the Crown.

Defendants' Arguments On Issue No. 1 Whether or not the acquisition by the Crown operated to acquire or extinguish the Claimant's right to security interest over the property?

6. Mr. Eamon Courtenay, S.C., on behalf of W & S Engineering Ltd (W & S Ltd.) and Courtenay Coye LLP, the First and Fourth Defendants, argues that there is no conveyance of property from the proprietor to some other person in the case of a compulsory acquisition. Section 3(4) of the Land Acquisition (Public Purposes) Act provides that:

"Upon the second publication of the declaration in the Gazette as required by subsection (2), the land shall vest absolutely in the Crown and the authorized officer, and his agents, assistants and workmen may enter and take possession of the land accordingly."

The vesting of the title is therefore accomplished by the publication of declaration by the Minister in the Gazette. Pursuant to Section 36(a) of the Land Acquisition (Public Purposes) Act registration of title would have been completed on the receipt by the Registrar of a memorandum signed by the Minister signifying the acquisition. Learned Counsel submits that the action of the Government is unilateral, as there is no "transfer" from W & S to the Government; the Government has taken the property, ownership has vested in the Government, and through unilateral action of the Minister, title is registered in the name of the Crown. He says that there is no reference in the Law of Property Act to acquisition, notwithstanding that the Land Acquisition (Public Purposes) Act (LAPPA) predates the Law of Property Act (LPA) by some 7 years. If the Legislature intended for property to remain subject to a mortgage in the case of a compulsory acquisition, specific provision could have and would have been made for this possibility in the Law of Property Act. He submits that the intention of the legislature as

manifested in section 3(4) of the Land Acquisition (Public Purposes) Act is to vest title to the land absolutely in the Crown following an acquisition.

7. Mr. Courtenay, S.C., relies on Section 7(2)(c) of the Land Acquisition (Public Purposes) Act which mandates that every notice of acquisition must:

“require all persons interested, as soon as is reasonably practicable, either-

- (i) To appear personally or by attorney before the authorized officer to state the nature of their respective interests in the land and the amounts and full particulars of their claims to compensation in respect of those interests, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated; or*
- (ii) To render to the authorized officer a statement in writing, signed by them or their attorneys or agents, setting forth the like matters.”*

He submits that the Bank would have made a claim in respect to its interest in or right over the Property, and refers to ***Cousins on The Law of Mortgages*** Second Edition as follows:

Para 6-06 *“Where land subject to a mortgage is to be compulsorily acquired both the mortgagor and the mortgagee are entitled to **notice to treat.**”*

Learned Counsel agrees that the Bank’s security interest is affected by the compulsory acquisition so the Bank was entitled to make a claim in respect of its interest. However, he argues that section 33 of the Land Acquisition (Public Purposes) Act provides a limitation period during which such claims must be made and thereafter, except with the approval of the Minister the claim is barred. Mr. Courtenay, S.C., further states that there is no evidence that the Bank made any claim to the Minister in respect of its mortgage, or that it took advantage of section 3(5) of the Land Acquisition (Public Purposes) Act which reserves a right of access to the Court to challenge acquisition to any person

“claiming an interest or right over the land”. On the contrary, there is evidence that the Bank was invited by Mr. Dean Lindo, S.C., to participate in the proceedings before the Board of Assessment, and the Bank chose not to participate.

8. Mr. Nigel Hawke on behalf of the Minister of Finance and the Attorney General, the Second and Third Defendants, submits that if a Deed of Mortgage was executed, when the property was acquired by Government of Belize, the charge would remain and it is the obligation of the First Defendant to meet its obligations of that security or charge and (not) that of the Second or Third Defendants. He cites section 64(1) and (2) of the Law of Property Act Chapter 190 of the Laws of Belize Revised Edition as follows:

“A legal charge on an estate in fee simple or a term of years or an easement right or privilege or on any other interest in or over land shall only be created –

(a) In the case of registered land by a deed expressed to be by way of legal mortgage or a rent charge or a lien on crops executed and registered under and in accordance with Part III, IV or V of the General Registry Act; or

(b) In the case of unregistered land by a deed expressed to be by way of legal mortgage or a rent charge or a lien on crops executed and recorded under and in accordance with Part VI of the General Registry Act.”

“A deed creating a charge by way of a legal mortgage shall –

(a) In the case of registered land be in such form as may be prescribed under the General Registry Act; and

(b) In the case of unregistered land shall be in a similar form with such modification as in any case may be necessary.”

9. The Learned Deputy Solicitor General submits that the Second and Third Defendants have no obligation to the Bank unless and until an order is made that the award made by

the Board of Assessment should be made to the Claimant. He further submits that when the land was acquired, Government by operation of law acquired the legal estate, right and interest in the property, but not any charge in relation to the property created by the mortgage deed. The charge created by mortgage deed will continue to be a charge for which the First Defendant is liable. He says that this submission is buttressed by the clear language of section 67 of the Law of Property Act:

Section 67 (1) provides:

“The legal estate, right or interest of the mortgagor in any property shall, notwithstanding a mortgage thereon, continue to be vested in him, and the mortgagee shall have no estate in the property mortgaged, but shall have as his security a charge on the property and a right to an order for sale of the property in order to recover the mortgage money together with all costs, charges and expenses of the application for that order.”

Mr. Hawke argues that what can be gleaned from this section is that where there is a mortgage deed, the legal estate remains with the mortgagee and not the mortgagor, but the mortgagor retains a security or charge over the property and a right of sale over the property in order to recover the mortgage money and any other costs. In the case at bar, the legal estate cannot be sold because it no longer resides with the First named Defendant. He submits that the Claimant ought to have brought garnishee proceedings in order to secure the amount of the mortgage money owed by the First Defendant. The Second and Third Defendant acted at all material times on the faith of the award by the Assessment Board and all subsequent orders to pay. The Second and Third Defendants are prepared to discharge its obligation once directed to do so.

10. Mrs. Tricia Pitts-Anderson on behalf of the Fifth Defendant, Dean Lindo, S.C., contends that it is a general principle that a mortgagee has a right to accretions and to substitutions for the mortgaged property. Learned Counsel cites Arden J. in **Buhr v. Barclays Bank** [2001] EWCA Civ 1223 at paragraph 40:

*“... Equity has for a long time taken the view that the mortgagee is entitled to a security interest in the fruits of the mortgaged property. Thus if (for example) a mortgagor grants security over a lease and he then surrenders the lease and takes a new lease, the mortgagee has security interest in the new lease (**Hughes v Howard (1858 25 Beav 575)**). Where a mortgagor renews a lease the mortgagee obtains a security interest in the new lease without express mention in the mortgage deed (**Leigh v Burnett (1885) 29 Ch D 231**). In all these cases, the mortgagee is entitled to the fruits of the mortgaged property...”*

“Likewise a mortgagee has been held entitled to a security interest in compensation monies received on compulsory acquisition of part of the mortgaged property without express mention in the deed... They are founded on the simple and eminently fair proposition that the mortgagee should be entitled to accretions to the mortgaged property or property received in substitution for it, as on renewal or further grant of a lease...”

Learned Counsel Mrs. Pitts Anderson submits that this principle is not sacrosanct and that a mortgagee’s entitlement to security interest in compensation monies received on compulsory acquisition of the mortgaged property may be affected by the rights and interests of other persons or creditors of the mortgagor. The language of the Land Acquisition (Public Purposes) Act (LAPPA) contemplates that there may be other persons with interests in the acquired property. She contends that section 8(1) of the LAPPA which provides that after the intention to acquire property is gazetted under section 3 or 4 of the Act, the authorized officer may require the owner or occupier of the property to deliver to him a statement in writing containing the name of every person possessing an

interest in the land, or any part thereof, whether as partner, **mortgagee**, lessee, tenant or otherwise, and the nature of such interest. (emphasis added)

11. Mrs. Pitts Anderson submits that a solicitor is one such person whose interest affects a mortgagee's entitlement to compensation awarded. It was incumbent on the Claimant to have asserted its interest in the Property and by extension to the compensation awardable which the Board of Assessment might have apportioned, provided that the Claimant made its claim within 12 months after the date on which entry has been made on the land or after the second publication of the declaration to acquire the land.

Land Acquisition (Public Purposes) Act:

"PART III

Appointment and Powers of Board of Assessment

11(1) All questions and claims relating to the payment of compensation under this Act and to the apportionment of such compensation shall, except as is provided in section 18, be submitted to a Board of Assessment to be appointed in each case in accordance with section 12.

(2) A Board of Assessment shall have full power to assess, award and apportion compensation in such cases, in accordance with this Act."

"33. Except with the approval of the Minister, in any case in which he considers that injustice may otherwise be done, no claim for compensation which may be made under this Act shall be admitted or entertained unless the claim is made within twelve months after the date on which entry has been made on the land under section 4 or, if a declaration has been made under section 3, within a similar period after the date of the second publication of such declaration."

12. Mr. Musa, S.C., on behalf of the Fifth Defendant, Musa and Balderamos, says that this case is not one speaking to a mortgage interest in property, but rather to a mortgagee's pursuit of mortgage funds from a compulsory acquisition of property, the mortgage interest in that property having been effectively extinguished by way of the same

compulsory acquisition. He says that while the priority of the mortgagee may automatically pass in some circumstances, that priority does not automatically pass in all circumstances. He says that the facts surrounding the transfer of property in question gives rise to such a situation in which the priority interest does not automatically pass to the transfer proceeds.

13. Learned Counsel Mr. Musa, S.C., cites section 7(1)(2)(c) & (d) of the LAPP (Chapter 184) which requires that every person claiming or entitled to claim, compensation under this Act. The Act specifically provides that persons interested should:

“Appear personally or by attorney or agent before the authorized officer to state the nature of their respective interests in the land and the amounts and full particulars of their claims to compensation in respect of those interests, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated or render to the authorized officer a statement in writing, signed by them or by their attorneys or agents, setting forth the like matters. Where a mortgage interest is acquired by compulsory process, the mortgagee retains, in respect of so much of the mortgage debt as is not discharged... any rights and remedies that the mortgagee may have:

(a) ***Against the mortgagor; or***

(b) *In respect of any interest in land that is still subject to the mortgage” (emphasis added)*

He argues that the Claimant failed to take any such actions as provided for under the Act. The Claimant also failed to take any action with regard to the repeated requests by the Fifth Defendant Mr. Lindo, S.C., made on January 14th, 2009 and August 4th, 2009 requesting that as interested parties they not only seek to resist the compulsory acquisition, but also that the Claimant take part in the assessment hearing to protect its interest in the property. Mr. Musa, S.C., further argues that despite having every opportunity to ensure that the compulsory acquisition was a disposition on behalf of the

creditor, rather than on the debtor's own account, the Claimant failed to exercise its rights under the Act, or to exercise its rights as invited to do by the 5th Defendant on behalf of the 1st Defendant. He also contends that having failed and/or neglected to exercise such rights the Claimant is estopped in law and in equity from now some five years later, after third parties have exercised their rights through the courts, from seeking now to rely on those abandoned rights.

Decision

Issue No. 1 Whether or not the acquisition of the Property by the Crown operated to acquire or extinguish the security interest of the Claimant over the Property?

14. I find for the Defendants on this first issue. A mortgagee cannot just sit back and relax on those rights when property is taken by the Crown for public purposes under the Land Acquisition (Public Purposes) Act (LAPPA). Such a mortgagee is obligated under the terms of the LAPPA to take statutorily prescribed steps to protect its interest under the mortgage. The acquisition of private property by the Government is not a voluntary conveyance of property; it is a unilateral seizure of property authorized by the LAPPA. The LAPPA expressly provides for the fact that this acquisition may often affect the rights of others including mortgagees such as Atlantic Bank Ltd in this case. In contemplation of such a scenario, the Act requires that all persons including mortgagees such as Atlantic Bank Ltd. who have an interest in the acquired property must make its interest known to those persons who are authorized to carry out the acquisition. That is the nature and import of sections 7(1) and (2) of the LAPPA.

Section 7(1) Land Acquisition (Public Purposes) Act:

“As soon as may be after any land has been acquired compulsorily, the authorized officer shall, if the boundaries of the land have not been set out or if they cannot be identified by reference to any plan, cause them to be set out, and he shall also issue a notice of acquisition in accordance with this section.

(2) Every notice of acquisition under this section shall -

(a) state the decision of the Minister to acquire and take possession of the land compulsorily;

(b) contain the particulars which, in relation to the land, were included in the declaration provided for by section 3; and

(c) require all persons interested, as soon as is reasonably practicable, either -

(i) To appear personally or by attorney or agent before the authorized officer to state the nature of their respective interests in the land and the amounts and full particulars of their claims to compensation in respect of those interests, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated; or

(ii) To render to the authorized officer a statement in writing, signed by them or by their attorneys or agents, setting forth the like matters.” (emphasis added)

15. While the evidence shows that the Claimant did seek to alert the government of its mortgage interest in the property via letter dated 21st March, 2013 sent to the Minister of Finance and copied to Mr. Eamon Courtenay, S.C., that was not enough. The Bank failed to take steps as set out in the Land Acquisition Act by notifying the authorized person of its mortgage as required by section 7 at the time the property was acquired. The Property was compulsorily acquired by the government on February 2nd, 2008. The letter sent by the 5th Defendant Mr. Dean Lindo SC (attorney for the First Defendant at

that time) to the Claimant Bank on January 14th, 2009 addressed to the General Manager, Atlantic Bank is set out below:

"14th January, 2009

General Manager
Atlantic Bank Ltd.
Freetown Road
Belize City,
Belize

Dear Madam,

Re: Land Acquisition-W&S Engineering Co.Ltd (LS 7505/241)

I understand from my client that your bank holds a mortgage on the property under reference and it would appear to me that it is an interested person.

I write to inquire whether you will participate in the proceedings hereto. It is of course a matter for you but it does seem to me that your bank would be entitled to nominate a person to the Board of Assessment. Will (With) all the advantages appertaining thereto.

Yours faithfully,

Dean R. Lindo SC
Attorney-at-law"

Mr. Lindo, S.C., wrote the Claimant Bank on behalf of the First Defendant company again in 2009, and the relevant part of that letter is reproduced below:

"4th August, 2009

Atlantic Bank Ltd.
Freetown Rd/Cleghorn Rd
Belize City,
Belize

Attention: Mr. Hector Rivero

Dear Sir,

Re: W &S Engineering Company Ltd

I write you on behalf of the above- company in connection with as alleged loan owing by them to your bank...

Part of your claim derives from your refusal to act in the compulsory acquisition of property at the Belizean Beach, Belize City, belonging to my clients but mortgaged to you.

He reported to you because your bank held a mortgage on this property. He requested your intervention in order to prevent GOB from acquiring the said property. Had your bank acted with due diligence, it would have mitigated your claim by some 2.5 million dollars, a fair market value of this valuable seafront property. GOB could hardly have acquired this property had you taken action to prevent them by asserting your rights which you held under mortgage. Indeed your bank, in my view, is still capable of action to forestall the deleterious effects of the acquisition.

I trust you appreciate the difficulties which have arisen in this matter and that you will take the necessary steps to bring this matter to a just and amicable solution. I am still convinced, that action on your part as an interested party could bring some sanity to this situation.

Yours faithfully,

Dean R. Lindo SC
Attorney-at-law"

In spite of these letters inviting and pleading with the Claimant to participate in the Acquisition proceedings, the Claimant did nothing and refused to take any action to defend its rights under the mortgage. In my respectful view, this clearly amounted to laches by the Claimant bank in that it slept on its rights and refused to avail itself of the procedure set out in the LAPPA. The bank therefore does not have the right to claim monies paid to the First Defendant by the Board of Assessment in 2013. The Act set out clearly in section 33 that claims must be made within a specific time frame of 12 months, which has long since passed.

Section 33 "Except with the approval of the Minister, in any case in which he considers that injustice may otherwise be done, no claim for compensation which may be made under this Act shall be admitted or entertained unless the claim is made within twelve months after the date on which entry has been made on the land under section 4 or, if a

declaration has been made under section 3, within a similar period after the date of the second publication of such declaration.”

The bank may still have a claim against the First Defendant personally to recover its monies as a debt but any claim to the monies paid by the government to W & S as compensation for land acquisition has long since been extinguished by virtue of the bank's deliberate inactivity.

Issue No. 2

- 16. Whether or not the compensation monies paid and payable for the Property are charged with payment of the debt due to the Claimant by virtue of the mortgage and so were and are held on constructive trust for the benefit of the Claimant?**

I agree with the Defendants on this issue. There is no constructive trust arising in favor of the bank on the funds secured from the acquisition of the property. The Claimant was obligated to make its interest known to the Board of Assessment under the LAPPA. It failed to do so. I agree with Learned Counsel Mr. Courtenay, S.C., that this is not a case of voluntary transfer, and compulsory acquisition is a specific process with its own set of regulations that govern how competing claims to property will be dealt with once government seizes the property of a private citizen. There is a time frame set out in the LAPPA which obligates a citizen whose rights might be affected to make its claim known to the authorized body within a certain time, I believe for this very reason to prevent citizens coming so many years later and making endless claims in relation to the acquired property. Hence the gazetting of the process as notice to the world that the property has been acquired for a public purpose and the steps to be taken by affected

parties as set out in the LAPP.

17. **Issues 3 and 4**

3) Whether the portion of compensation monies paid over to any of the Defendants are traceable into the hands of such Defendant and recoverable by the Claimant?

4) In the alternative, whether or not the Second or Third Defendants are liable in damages for breach of trust in the amount of compensation payable to the Claimant paid to third parties?

Having found in favor of the Defendants on the first two issues, it also follows that I also find that the answer to issues three and four is a resounding No. As the learned authors Richard Edwards and Nigel Stockwell of *Trusts and Equity* 6th Ed state on page 260 the distinction between institutional and remedial constructive trusts was spelled out by Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington London* BC [1996] 2 All ER 961 at 997:

“Under the institutional constructive trust, the trust arises by operation of law as from the date when the circumstances give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences which flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim receive trust property) are also determined by rules of law, not under discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation; the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the courts.”

It is very clear that in the case at bar the Claimant deliberately decided not to take part in the acquisition proceedings in 2009 or in Board of Assessment hearings in 2012 and therefore it failed to protect its own interest which arose under the mortgage. No constructive trust arises on these facts. There is no liability of the Second or Third

Defendants as there is no trust. What the Bank should have done was take part in the Board of Assessment proceedings to comply with the LAPP requirements and thereby ensure that its interest would have been addressed and protected. It refused to do so and must therefore bear the costs of such failure. On the facts before the Court, there is a period of time of almost 5 years which elapsed between the date of acquisition of the property by the Government of Belize in 2008 and the date of compensation by the Board of Assessment in 2013. Compensation monies were finally awarded to the First Defendant W & S Engineering solely through the efforts of the Defendant law firms Courtenay Coye & Co., Dean Lindo, S.C., and Musa & Balderamos. After the funds were secured as compensation through the diligent efforts of these attorneys in advocating for the convening of the Board of Assessment and representing the First Defendant at the Board of Assessment hearings, the Claimant bank then sought to assert its claim under the mortgage in priority to the various liens held by the attorneys for their fees, claiming that the attorneys as well as the government are fixed with notice of its mortgage by virtue of its letter dated 2013 and that the compensation monies should be paid to it. Such a position is clearly untenable both in law and in equity.

18. The Claimant bank has failed to comply with the order of Hafiz J (as she then was) to carry out a proper accounting in Claim No. 26 of 2011 and appears to now be relying on admissions made in submissions filed by the First Defendant in that matter to substantiate its claim in this case. As rightly pointed out by Mr. Musa, S.C., in his submissions before this court, such a course of action is in flagrant disregard of part 65 of the Civil Procedure Rules which clearly set out the requirements on a claim for

payment of a mortgage debt. In addition to exhibiting the mortgage and any other documents setting out the terms of the mortgage, Part 65 requires that particulars of

- (i) The amount of the advance
- (ii) The interest payable under the mortgage;
- (iii) The amount of any periodic payments required to be made stating whether such payments include interest;
- (iv) The amount of repayments that have been made;
- (v) The amount of any repayments or interest due but unpaid at the date of the claim and the date of the affidavit;
- (vi) The amount remaining due under the mortgage; and
- (vii) The daily rate at which such interest accrues.

While the Claimant has attached a copy of the mortgage, the other details such as the amount paid, interest paid, payments required, payments made, amount remaining due and daily rate of interest are not provided to the court. I agree with Mr. Musa's, S.C., submission that this is yet another flaw in the Claimant's case as due to this non-compliance by the bank, the court is left in doubt as to the exact level of the First Defendant's indebtedness to the Claimant. I respectfully disagree with the Claimant, and I find in favour of the Defendants on these two issues as well.

19. **Issue No. 5 and Issue No. 6**

Whether CCLP (and the other attorneys/law firms named as Defendants who are owed legal fees by W & S) is entitled to a lien on the compensation awarded by the Board of Assessment to W & S in respect of its legal fees for services rendered?

Whether CCLP's lien (as well as the liens of the other Defendant attorneys/law firms) rank in priority to any claim which the Bank may have in respect of the compensation

monies?

I have decided both issues 5 and 6 of this matter in favour of the Defendants. As to the question whether the attorneys are entitled to a lien for their legal fees on the compensation awarded, the case of **Re Born** [1900] 2 Ch 433 established that the Solicitor's Act 1860 conferred no new right as it was the most convenient way of enforcing a common law lien. As cited by both Mr. Courtenay, S.C., and Mrs. Pitts Anderson in their submissions, Farwell J reasoned as follows:

*"It is ... contended that having regard to the winding up I ought not now to give the applicants a charge under the statute. But though this application is under statute, it is very immaterial to consider whether, if I am making a charging order, I am thereby giving the applicants a new right, or merely enabling them more cheaply and speedily to enforce a right they already possess... it is plain that they have a common law lien in the company's share of the funds in court for the amount of their costs. **It would be monstrous if it were not so as the company would never have recovered its money without their exertions.** It resembles the case of debenture holders who have to allow a liquidator's costs when they take the benefit of his exertions, and it is clear justice calls for such a lien."*(Emphasis mine)

The case of **Newport and Pougher** [1963] 3 All ER was also cited in Mrs. Pitts Anderson's submissions where partnership funds were paid into court and creditors of the partnership obtained a charging order on the fund. Solicitors for the plaintiff and defendant also obtained charging orders by virtue of the Solicitors' Act 1932 for their costs out of the fund. The question for the court's determination was whether the judgment creditor who had obtained a charging order was entitled to priority over the general body of creditors including the solicitors who held liens. The court held that subject to the payment of costs of the application before the court, the charging orders obtained by Solicitors ranked in priority to the judgment creditors and the balance of

funds were to be distributed pro rata among creditors.

The facts of the case at bar are very clear. The Claimant bank, despite being implored by Mr. Lindo, S.C., to take an active role, refused to participate in the proceedings to stake their claim under the mortgage at the time the property was acquired in 2008 by the government. The Claimant bank, despite being invited by Mr. Lindo, S.C., to participate in the hearing, refused to take any part in the Board of Assessment hearing in 2013 to advise the Board of its claim under the mortgage. To my mind it is incomprehensible how the Claimant bank slept on its rights, being fully aware of what was at stake, and being fully aware of what the LAPPA mandated should be done to protect its interest, *vigilantibus et non dormientibus jura subveniunt*. I find that not only do the defendant law firms hold individual liens on the funds which were the proceeds paid to the First Defendant as compensation for the acquisition, but I also find that those liens take priority over all the other creditors of the First Defendant because the attorneys did all the necessary work to secure the compensation and there would not have been any funds paid had it not been for their efforts as attorneys for and on behalf of the First Defendant.

20. **Issue 7 Whether the Bank's mortgage was validly up stamped from \$10,000 to \$600,000 in favor of the Bank?**

I have already commented on the poor state of the evidence in relation to the quantum of the debt claimed by the bank. I have already held that the Bank is not entitled to claim the compensation monies because it did not act in accordance with the LAPPA. I will not pronounce on the validity of the upstamp at this time, and I reserve my views on

that point as it is not essential to the fair disposition of this case. Suffice it to say that I believe that the bank is left with pursuing the balance owed by W & S after conducting a proper accounting as ordered by Hafiz J (as she then was) in a personal action against the company.

Judgment is in favour of the Defendants. Costs awarded to the Defendants to be paid by the Claimant to be taxed or agreed.

Dated this Wednesday, 11th day of May, 2016

Michelle Arana
Supreme Court Judge