

**IN THE SUPREME COURT OF BELIZE A.D. 2017
(CIVIL)**

**CLAIM NO. 237 OF 2017
BETWEEN**

(THE BELIZE BANK LIMITED

CLAIMANT

AND

**(GARRY YOUNG
GLENDA ROSE YOUNG**

**1st DEFENDANT
2nd DEFENDANT**

Before: Madame Justice Shona Griffith
Date of Hearing: 10th October, 2017; 27th November, 2017 (Oral Decision)
Appearances: Mr. Andrew Marshelleck S.C., Barrow & Co. LLP for the Claimant; Ms. Stacey Grinage, Chebat & Co. for the 1st Defendant; and Mr. Douglas Carr for the 2nd Defendant.

DECISION

Introduction

1. This is a fixed date claim pursuant to CPR Part 65.1(1)(d) for possession of mortgaged premises by a mortgagee (chargee). The Claimant, Belize Bank Ltd. filed this claim in the first instance, as chargee of the subject property - Parcel 673, Block 23, Santa Elena/Cayo Registration Section, (herein after called 'the property') – in respect of a charge registered on the 19th July, 2011. The Bank had exercised its power of sale against the charged property pursuant to section 78 of the Registered Lands Act, Cap. 194. The claim for possession was initially filed against only the 1st Defendant, Mr. Garry Young, as chargor of the said property. However, the 1st Defendant responded to the claim by asserting that he'd sold the property to his mother Glenda Rosa Young since June, 2011 and as such he was no longer the owner of the property, nor in possession thereof.
2. In light of that assertion by the 1st Defendant, the Claimant added the 2nd Defendant Ms. Glenda Young as a party to the claim, who appeared and asserted ownership of the property as against the Bank, by virtue of a transfer to her by the 1st Defendant.

That transfer however was never registered, thus on the face of the Register of the property, the Bank stood entitled as chargee, to pursue its claim for recovery of possession against the 1st Defendant as chargor. Besides the disputes surrounding the issue of possession and ownership of the property, the 1st Defendant asserted that the Bank was not entitled to bring the claim for possession given that the property had been sold and the action was one for the new owners. A summary trial of the claim was directed by the Court, which was heard on the 10th October, 2017. Evidence was taken from representatives of the Claimant, the 1st Defendant (the 2nd Defendant declined to give evidence) followed by submissions of Counsel. The Court by oral decision on the 27th November, 2017, held that the chargee was not entitled to recover possession of the property by reason of the registration of title in favour of the new owners. These are the Court's written reasons.

Issues

3. The issues upon the summary trial of the claim were as follows: –
 - (i) Given the transfer and registration of the property to a new owner, did the Bank have the standing to bring the action for recovery of possession?
 - (ii) If the Bank is found to have the standing to bring or maintain the action for recovery of possession, has the possession of either or both defendants been established to enable an order to be made against them?

Issue (i) – The Claimant's standing to bring the claim for recovery of possession

4. As a matter of law, a chargee's entitlement to bring an action for possession of the charged land is not in doubt. As put forward by learned senior counsel for the Claimant, the claim is grounded in section 78(2) of the Registered Land Act, Cap. 194 ('the Act') which provides as follows:-

78.-(1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the charge thinks fit, with power to buy in at the auction.

(2) Where the chargor is in possession of the charged land or the land comprised in the charged lease, the chargee shall become entitled to recover possession of the land upon a bid being accepted at the auction sale.

The combined effect of these two subsections is clear – the power of sale of a chargee is exercisable by way of sale by public auction and upon the acceptance of a bid at the auction, if the chargor is in possession of the charged land, the chargee is entitled to recover possession of the land. The issue in this case however is as to the effect if any, of the chargee’s entitlement to seek recovery of possession of the land, given the registration of ownership in favour of the new owners who purchased the land via auction.

Submissions

5. As a result of the completion of the transfer in favour of the new owners who purchased the property via auction, counsel for the 1st Defendant asserted that the Claimant lacked standing to seek the order of possession of the property. There were no substantive submissions put forward in this regard by counsel for the 1st Defendant. Senior Counsel for the Claimant refuted this assertion and in so doing, sought to explain the nature of the order for possession sought under section 78(2) of Cap. 194. In this regard, the first point made was that the nature of the security created by the charge must be differentiated from the nature of a mortgage previously created prior to the UK’s Law of Property Act 1925 as enacted in Belize¹. The Court’s understanding of the submissions is firstly that the pre 1926 mortgage created an estate in the land mortgaged by virtue of the conveyance of the mortgagor’s legal interest², and along therewith, the right to possession of the property mortgaged. The mortgagor was then (by reason of the intervention of equity), entitled to a right of redemption by re-conveyance of the legal estate upon repayment of the mortgage, and typically also contractually, to a right to possession of the mortgaged property.

¹ The Law of Property Act Cap. 190.

² R v Judge Dutton Briant, Ex parte Abbey National Building Society - [1957] 2 All ER 625 @ 626

6. The mortgagor's possession of the mortgaged property would be defined by the terms of the mortgage deed and correspondingly, so would the mortgagee's right to enter into possession. If not so defined however, the law was that upon execution of the mortgage, the mortgagee was entitled at any time to enter into possession or receive the rents or profits of the mortgaged property³. The mortgagee's right to possession was supported by an entitlement to sue for recovery of possession or ejectment as applicable. Post the LPA 1925, the creation of a mortgage by way of conveyance of the legal estate was abolished and in the UK, mortgages were instead created by way of a demise for a term of years or a legal charge on the property⁴. In either case, the chargee's right to enter into possession (or to sue for recovery of possession) was preserved by statute.⁵ In Belize, the position differs somewhat from the UK LPA 1925 in that a mortgage could be created only by way of legal charge whether in respect of registered or unregistered land⁶ and a chargee's right to enter into possession could be obtained by special provision in the mortgage deed.⁷
7. With respect to the entry into possession of mortgaged property as referred to above, learned senior counsel for the Claimant submits that this remedy concerns the exercise of the mortgagee's rights for its own benefit – i.e., for the direct purpose of asserting the security thereby created. For example, by exercising its right to possession, the mortgagee could take control of rents or profits from the mortgaged property; or physically enter the property as the first step towards foreclosure. This is of course a quite simplistic account of the very complicated principles and processes engaged in respect of the operation of a mortgage transaction which existed under the old system of conveyancing and thereafter continued with modifications in relation to registered conveyancing.

³ Halsbury's Laws of England, 3rd Ed. Vol. 27 paras 511 et seq.

⁴ UK LPA 1925 s. 85 & 86

⁵ UK LPA 1925 s. 87.

⁶ Belize LPA Cap. 190 ss. 64 & 65.

⁷ LPA Cap. 90 s. 67(2) and The Registered Land Act, Cap. 194 ss. 80(1&2) & 81.

It is neither necessary nor the intention of this Court in resolving this claim, to embark upon any substantive inquiry or explanation of such principles and processes. The approach herein is merely to illustrate and contextualise the right to possession which is sought by the Claimant.

8. As distinct from the concept of the mortgagee's entry into possession of mortgaged premises as a remedy arising upon default by the mortgagor, learned senior counsel submits that the order for possession sought in the instant claim is merely an aid to the chargee's power of sale already exercised pursuant to section 78(1) of Cap. 194. The nature of the order of possession as an aid to the exercise of the chargee's power of sale, it was submitted, is evident by virtue of the fact that it arises only where the chargor is in possession of the property and upon acceptance of a bid at an auction sale⁸. It was also submitted by learned senior counsel that his position is further supported by section 78(4) which specifies that the effect of registration of a transfer made pursuant to the power of sale as vesting the charger's interest to the purchaser, subject only to overriding interests pre-dating the registration of the charge or made thereafter with the chargee's consent.
9. The argument concluded in terms that given that the chargee's claim was not one of enforcement of the security per se, but in aid of completing its contractual obligation with the purchaser to deliver the property with vacant possession – the fact that the property had already been transferred to the purchasers was of no significance. To deny the existence of this right it was submitted, would affect the ability of a chargee to obtain the best possible price upon sale, as no potential purchaser would be willing to purchase property not being sold with vacant possession. One difficulty which learned senior counsel readily admitted to, was a dearth of authorities to offer to the court in support of his submission of the subsistence of the chargee's right to seek possession even after the property has been transferred to the new owner.

⁸ (Upon acceptance of a bid at an auction, a sale is concluded between the auctioneer as agent for the vendor and the successful bidder as purchaser).

The lack of authority was attributed to the fact that Belize's section 78(2) bears no similar provision in the UK and whilst the Australian Land Transfer Act did contain a somewhat similar but not identical provision, there was no relevant authority unearthed, to place before the Court.

Analysis

10. The difficulty regarding authorities is acknowledged by the Court as an unfortunate but accurate depiction of the vacuum within which the Court will be obliged to determine the matter. Despite the absence of any directly applicable authorities, the Court has nonetheless found assistance in a few cases from which general principles can be extracted, which in the final analysis, will have to form the basis of the Court's decision. In the first instance, the Court acknowledges and fully appreciates the difference in the nature of what was typically a mortgagee's right of entry into possession and the chargee's order for possession now sought by the Claimant under section 78(2) of Cap. 194. In this regard, reference is made to **In Re O'Neill, A Bankrupt**⁹ an authority from the Supreme Court of Ireland nonetheless helpful for purposes of illustration. The Court therein was called upon to determine its jurisdiction in bankruptcy proceedings, to make an order for possession in favour of an applicant declared as mortgagee in respect of an interest held in premises by an adjudged bankrupt. The applicant had already been granted an order for sale and subsequently applied for the order of possession, as was stated, 'to enable the sale of the premises to be with vacant possession'.
11. On its way to finding that it did have an inherent jurisdiction to make such an order for possession in bankruptcy proceedings, the Court explained precisely what learned senior counsel had been asserting as the nature of the order sought. Lowry J said thus¹⁰:-

⁹ [1969] NI 129

¹⁰ Ibid @130

“This application is for an order that the bankrupt deliver possession of the premises to the applicant, a necessary step, since clearly it will be difficult or impossible to sell the premises which consist of a dwelling-house, otherwise than with vacant possession’. In general, if premises have to be sold, it is in the interest of both secured and unsecured creditors (and even the bankrupt himself...) that the sale should be conducted to the best advantage...”

“Courts in the past have been reluctant to make orders for possession before sale, and have required evidence to satisfy them of what is today an obvious fact, that vacant possession is nearly always necessary in order to obtain the best price from a purchaser...”

In this light, the rationale for the existence of the order for possession, as a necessary adjunct to an order for sale can be said to be clear from the above excerpt. It does have to be noted, that notwithstanding that the proceedings in the above case were bankruptcy proceedings, the applicant’s entitlement to seek the order of possession arose from the fact that he had been adjudged a mortgagee in relation to the bankrupt’s interest in the property. Moreover, throughout the decision, the exercise of the Court’s discretion was referenced to the corresponding exercise of discretion (in Ireland and in England) in relation to mortgage proceedings.

12. In fully illustrating the application of the principles derived from this case however, a few points need to be highlighted as relates to the interpretation of section 78(2) herein. First, it was clear from the Court’s discussions in **Re O’Neill**, that upon an application by a mortgagee, an order for possession (where sought in pursuance of the exercise or intended exercise of a power of sale), was usually sought prior to sale, in order to ensure the best possible price upon sale. On the other hand, it was stated that the Court is usually reluctant to order possession before sale, unless in receipt of evidence that vacant possession is necessary in order to facilitate the sale. Given that Lowry J. recognized that vacant possession is generally necessary in facilitating the sale, it was stated that the order for sale if granted by the Court, or when exercised by the mortgagee, should as far as possible be at the same time. With respect to the timing of the application, section 78(2) of Cap. 194 is quite clear, in that the right to seek possession does not arise until a sale is concluded (which occurs by acceptance of a bid at the auction).

For completeness, in order to illustrate the Court's process of deliberation, the significance of this difference in the time when the entitlement (to seek the order for possession) arises, is explained.

13. The land in question is registered land and as explained earlier in the onset of this decision, post 1925, the legal mechanism by which mortgages were created was altered. In the UK, there was still a conveyance of an estate in land (the term of years) as one of the two ways in which mortgage security was created, whilst in Belize, the legal charge secured by the remedy of the power of sale became the only means of creating security against land. It was also earlier stated that in the old system of mortgage, because of the conveyance of the legal estate, the mortgagee became entitled to the right to possession of the mortgaged property. Given that the creature of mortgage that exists in Belize is only by way of legal charge and no longer conveyance of the legal estate, the fact that the law provides the right to an order of possession only after a concluded sale of the property appears to be consistent with the corresponding legal position that the chargor, still being the legal owner of the land, is entitled to possess it. Reference is made to the Irish decision of **The Governor and Company of the Bank of Ireland v Michael Feeney**¹¹ in which the Supreme Court dismissed an application for an order of possession made by the plaintiff bank on the basis that the bank held a legal charge only thus there had been no conveyance, assignment or other disposition in its favour in the legal estate of the defendant's property.
14. This view is also buttressed by additional provisions of Cap. 194. Section 80(1) of Cap. 194 provides for variation to be made to the rights of the chargor and chargee, so that it is contemplated that a chargee may inter alia, become entitled by the terms of the charge, to possession independently of section 78(2). However, section 80(1) precludes the parties to the charge from acting upon any such variation unless the court so orders and the court is obliged to consider the circumstances and conduct of the parties in so ordering.

¹¹ [1930] IR 457

Additionally, section 81 goes on to expressly state that for the avoidance of doubt, no order of foreclosure, entry into possession, or receipt of rents or profits, may be made in favour of a chargee, by reason only of a chargor's default in payment under the charge. The cumulative effect of these provisions in the Court's view is clear. The default entitlement is for a chargor to be able to seek an order of possession after sale, thus clearly as an aid to facilitating the sale and if otherwise entitled by the terms of the charge, an order of court is required to be able to exercise such a right, which must be found to be justified by the court in the circumstances.

15. At this point, with reference to the discussion above, the Court is in agreement with senior counsel for the Claimant that the order sought under section 78(2) is in the nature of an aid to the chargee's exercise of power of sale. This position is solidified by the Court's interpretation that unlike a former mortgagee holding the legal estate, the chargee does not have a right to possession of the charged property by virtue of the charge. The question of the life of that entitlement to seek the order of possession however, now falls to be considered. Learned senior counsel contended that there was no temporal restriction on the right of the chargee to seek the order for possession. With respect to section 78(2), clearly it is the express legal position in the first instance, that the chargee cannot seek the order for possession before the sale is concluded. But for how long is the chargee entitled to seek the order in aid of its power of sale thereafter? No authority at all has been located on this issue thus the Court has to be satisfied with the consideration and application of relevant legal principles.
16. The land in question is registered land – known as the Torrens system of registration of title, originating in Australia. There can be no issue taken as to the nature of indefeasibility of title occasioned by the act of registration, however judicial pronouncement on this point would not be superfluous. This Torrens system of registration of title is of limited use in England, thus a Privy Council decision originating from Malaysia offers a highly persuasive authority for reference by the Court.

In **Damodaran s/oP.V Raman v Choe Kuan Him**¹², Lord Diplock expressed the following (referring to an authority from New Zealand):-

“The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.

As alluded to earlier, no exception could or was attempted to be taken to this statement of law. The application of this principle to the circumstances of the instant claim however, requires that it be positively stated by the Court.

17. The Torrens system of registration of title is such that the conclusion of a sale by execution of a transfer or execution along with payment of consideration, is not what gives rise to the indefeasible title in favour of the registered proprietor. The following excerpt¹³ as unearthed in the limited material available to the Court, is helpful:-

“The key factor that breathes life into the Torrens system of registered conveyancing is the administrative act of registration by the State’s appointed registering authority;...”

The State’s ‘*magical act of registration*’, once complete, is said to ‘*bind the whole Torrens world, as well as the contractual parties to a land transaction*’¹⁴. Under s. 78(1) of Cap. 194, the chargee is entitled to exercise its power of sale, only by way of public auction. The acceptance of the bid at the auction as stated earlier results in a sale between the bidder as purchaser and the auctioneer as agent of the chargee as vendor. The conclusion of the sale by auction and subsequent transfer is unlikely to ever be contemporaneous with the process of registration of such a transfer. Indeed, in the instant case, by the evidence given by the Claimant’s employees, the sale via auction was effected on 6th December, 2016¹⁵ and the transfer executed and lodged for registration on 15th March, 2017¹⁶.

¹² [1980] AC 496 @ 502-503

¹³ The Torrens System and Equitable Principles, SY Kok, 1st Ed. 2010 pg. 290, para [3.06]

¹⁴ Ibid.

¹⁵ Affidavit of Tyrone Burns filed on 21/4/17, exhibit T.B. 9

¹⁶ Affidavit of Roman Cuellar filed on 9/6/17, exhibit R.C.1

18. The Affidavit of the Bank's recovery officer advising the Court that the transfer has since been registered, was filed on the 9th June, 2017, approximately two months after the date of filing of the claim on 21st April, 2017. The certificate of title issued by the Land Registry in favour of the purchasers is dated the 15th March, 2017. In light of that date of the certificate, the Court infers that the formal act of registration of the transfer to the purchasers by means of entry in the land register, must have been completed on or before the 15th March, 2017. Consequently, the registration of the property in favour of the purchasers was completed before the institution of the claim. In this regard, whilst the Court considers that the chargee's right to seek the order of possession against the chargor by virtue of the express terms of section 78(2) arises and is intended to arise only upon the conclusion of a sale of the charged property, the consequence of registration of the transfer effecting such sale is an entirely different consideration. The effect of registration of title in favour of a proprietor, is first generally provided in section 26(1) and specifically thereafter in relation to transfers effected by virtue of a chargee's exercise of power of sale, in section 78(4) of Cap. 194.
19. These sections provide in the case of s. 26(1) that upon registration the proprietor becomes entitled to absolute ownership of the parcel and to all the rights and privileges belonging or appurtenant thereto. Section 78(4) provides that upon registration of the transfer effected in the exercise of the chargee's power of sale, the transferee becomes vested with all the right and interest of the chargor except for pre-existing interests as therein defined. As already stated, along with the right of ownership, moreso absolute ownership arising out of registration, the right of possession also becomes vested in the transferee. This is not the position upon conclusion of a sale upon exercise of the chargee's power of sale. Notwithstanding the sale, the chargor remains the registered owner until the register is altered to reflect a new owner and as such entitled to possession. In this context the express right to seek to recover possession afforded to the chargee upon conclusion of a sale is consistent with that position.

20. With reference to the Claimant's position in this matter, its right to seek an order of possession arose in December, 2016 upon conclusion of the sale by way of public auction in favour of the purchasers. The transfer was registered the latest by the 15th March, 2017 as evidenced by issuance of the certificate of title in favour of the purchasers. In the Court's view, the right afforded to the chargee under section 78(2) was extinguished upon registration of the transfer in favour of the purchasers. As a consequence, at the time the instant claim was instituted in April, 2017, the Claimant was no longer entitled to maintain the action for possession unless authorised by the new registered owners to do so. There being no such authority evidenced as given by the new registered proprietors, it is the Court's position that the Claimant Bank lacked necessary legal standing to seek the order of possession against the chargor. As a result of this finding, the second issue regarding who was in actual possession of the property no longer arises for consideration.

Disposition

21. The claim is disposed of as follows:-
- (i) The Claimant, Belize Bank Limited lacks standing to bring the claim for possession against the Defendants and the claim is accordingly dismissed.
 - (ii) There is no order as to costs.

Dated this 18th day of January, 2018.

Shona O. Griffith
Supreme Court Judge.