

**THE SUPREME COURT OF BELIZE, A.D. 2011**

**CLAIM NO. 503 OF 2011**

**BETWEEN:**

**HERITAGE BANK (BELIZE) LIMITED**

**Claimant**

**AND**

**WILLIAM LINDO**

**Defendant**

**November 22 and 29, 2011.**

**Appearances:** Ms. Naima Barrow for the Claimant.  
Mr. Anthony Sylvester for the Defendant.

**BEFORE THE HON. CHIEF JUSTICE KENNETH BENJAMIN**

**JUDGMENT**

[1] The Claimant Bank commenced suit by Claim Form filed on August 2, 2011 against the Defendant for payment of the sum of \$397,659.86 together with interest from July 25, 2011 at the rate of 16%. The amount is claimed pursuant to loan facilities granted to the Defendant on August 7, 2009 for \$200,200.00 and for a further sum of \$139,000.00 on May 6, 2010. Demand has been made to no avail and there is no demur that the debt remains unpaid.

[2] The said loans were secured by promissory notes as well as by a Deed of Mortgage executed on May 10, 2010 in favour of the Claimant Bank in respect of certain property in the ownership of the Defendant. It is not disputed that the Claimant has caused the said mortgaged property to be advertised for sale to recover the moneys due under the mortgage. To date, there has been no sale.

[3] The Defendant has filed an acknowledgement of service and a Defence on August 16, 2011 and September 7, 2011 respectively. The crux of the Defence is set out in paragraph 1 as follows:

- “1. The claim is an abuse of the process of the Court. The Claimant Bank is already exercising the power of sale under and by virtue of a Mortgage which the Claimant holds over the Defendant’s property.”

Reference was made in the Defence to a valuation of the said property and to the fact of publication of the sale of the property. The Defendant averred that the Claimant is acting in bad faith by failing to disclose that it is concurrently taking action pursuant to the mortgage. Further, there is a bald denial by the Defendant as to indebtedness for the bank charges set out in the Statement of Claim.

[4] The Claimant applied by Notice of Application filed on October 4, 2011 for the Defence to be struck out as an abuse of the process of the Court and for judgment to be entered for the sum claimed with interest and costs. In essence, the application asserted that the facts alleged do not amount to an abuse of process and consequently the Statement of Case ought to be struck out pursuant to Rule 26.3(1)(b) of the Supreme Court (Civil Procedure) Rules, 2005. The said Rule is included among the case management powers of the Court and provides that:

“In addition to any other powers under these Rules, the Court may strike out a statement of case if it appears to the court –

- (a) ...
- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.”

The Notice of Application referred in its grounds to a facility letter addressed to and signed by the Defendant on May 5, 2010 and a promissory note of even date for the

sum of \$139,000.00. These documents were exhibited in an affidavit of November 7, 2011.

[5] The affidavit in support of the application relied upon the said facility letter as the basis for the Claim in respect of the sums due. Further, it was deposed that by the promissory note the Defendant agreed to repay \$139,000.00 together with any costs, charges and expenses incurred in the enforcement or protection of the Claimant's rights in the event of court action.

[6] In answer to the application, the Defendant exhibited the mortgage deed and the publication notices of the sale of the mortgaged property as set out in the Gazette. The Defendant's affidavit alleged that by bringing the claim the Claimant was acting unreasonably by concurrently instituting of a civil action while advertising the sale of the mortgaged property. It was sworn that the appraised value of the property far exceeded the sum being claimed.

[7] At the hearing of the application, both sides addressed their arguments substantially to the purport of section 68 of the Law of Property Act, Chapter 190. The issue was raised by paras. 7 and 8 of the Defendant's Affidavit in response which read:

"7. ... by virtue of Section 68(1) of the Law of Property Act, Chapter 190 of the Laws of Belize, that the claimant does not have the right to commence the instant Claim and that the right is one that is in the alternative after disposing of the mortgaged property. The mortgage deed entered into between the Claimant and the Defendant does not entitle the Claimant to concomitantly exercise its power of sale and pursue an action for debt against the mortgagor.

8. ... the restriction of section 68 of the Law of Property Act can only be relaxed or varied by the mortgage deed which was not done in the instant case."

It is to be noted that Clause 5(10) of the mortgage deed empowers the Bank without any order of the Court to sell or concur with any other person in selling the mortgaged property without the restrictions set out in section 82 of the Law of Property Act.

[8] So far as relevant, section 68 enacts the following:

68.(1) A Mortgagee shall by virtue of this Act have the following rights, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely -

(a) a right, where the mortgage money has become due and has remained unpaid, to apply to the Court for an order for the sale of the mortgaged freehold or leasehold; and

(b) a right in the alternative, notwithstanding anything contained in this part, to obtain in an action for debt a judgment against the mortgagor on the personal covenant contained in the deed to pay the mortgage money which has become due and remained unpaid, which judgment shall be exigible against any property, real or personal, of the mortgagor under the Supreme Court Rules, although that property is not mortgaged under the deed;

(c) ...

(d) ...

(e) ...

(2) Notwithstanding anything contained in paragraph (b) of subsection (1), a sale of the mortgaged property shall only be effected by or under an order for sale obtained in accordance with this Part.

- (3) The provisions of this Part relating to the foregoing rights, comprised either in this section, or in any other section regulating the exercise of those rights, may be varied or extended by the mortgagee deed and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in this Act.
- (4) This section shall apply only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions contained therein.

[9] As I see it, section 68(1)(a) and (b) provides for there to be implied in every mortgage deed a right to apply to the Court for an order for the sale of the mortgaged property and alternatively to sue for recovery of the mortgage debt upon the personal covenant contained in the mortgagee deed. In other words, in the absence of specific provision conferring the power on the mortgagee to apply to the Court for an order to sell the mortgaged property to recover mortgagee money that has become due and payable, the mortgagee enjoys the statutory power to do so. However, he can either seek such an order or alternatively, take out an action for debt on the personal covenant to repay the mortgage money. What he is not allowed to do is to commence separate actions for an order for sale of the mortgage property and for recovery of the mortgage money, although he can rely on each method of recovery as alternative relief sought in the same claim.

[10] Learned Counsel for the Claimant argued that section 68(1)(a) is specific in its reference to an application to the Court for an order for the sale of mortgaged property. It was pointed out that by the publication of the sale of the mortgaged property the Claimant was exercising its power to sell as conferred by the mortgage deed, hence no order was being sought from the Court as indeed none was required having regard to Clause 5(10) of the mortgage deed.

[11] Learned Counsel for the Defendant countered that the mortgagee's rights have been circumscribed by Parliament. The Court was taken to section 68(3) and it was cleverly submitted that any variation of subsection (1) paragraph (a) resulted in

a substitution of that variation. Regrettably, I am unable to accept this interpretation of the effect of section 68(3), as section 68(1) purports to confer implied rights which must be read into the mortgagee deed in the absence of such provision.

[12] In any event, it is plain that in the present action, the Claimant does not seek to enforce the personal covenant under the mortgage deed; but rather, the cause of action is founded upon the promissory note and facility letter signed by the defendant. These documents provide security that is separate and apart from the security under the mortgage deed which embraces the personal covenant of the mortgagor to repay the mortgage debt when due and payable to the mortgagee.

[13] The position at common law is embodied in the ratio decidendi of **Lockhart v Hardy (1846) 9 Beav. 349; 50 ER 378**. It was held that the mortgagee is free to pursue his remedies concurrently in the same action. Such remedies included action for payment on the covenant to pay the mortgage principal with interest, foreclosure and action for possession of the mortgaged property and these could be brought in the same action. Should the mortgagee receive full payment on the covenant, it follows that the property was no longer open to foreclosure or to possession by the mortgagee. If there was part-payment, foreclosure was available to the mortgagee. However, if upon sale after foreclosure, the mortgagee recovers less than the mortgage debt due and payable, he was precluded from afterwards seeking to recover the outstanding amount upon the collateral personal covenant.

[14] There exists a power vested in the Court to sell mortgaged property in addition to foreclosure. This power is provided for by statute in section 68(1)(a). This provision was enacted to protect the mortgagor from the potentially unjust effect of foreclosure, for example, in situations where the value of the property exceeds the mortgage debt. This allows for other mortgagees to be paid and, in any event, for the balance to be paid to the mortgagor (see: **Re McHenry, McDermott v Boyd, Baker's Claim [1894] 3 Ch. 290, C.A.**). Equally, the mortgagee can sue for any of the mortgage debt that remains owing after the sale of the mortgaged property (**Rudge v Richens (1873) LR 8 CP 358**).

[15] In the present case, the Claimant has taken steps to exercise its power to sell the mortgaged property without the Court's order being sought. Such power is conferred by the mortgage deed which is permissible having regard to section 69(1) of the Law of Property Act. However, the Claimant has concurrently sought to obtain judgment for the mortgage debt on the basis of other forms of security outside of the mortgage. It, therefore, follows that there is no statutory prohibition created by section 68(1). The Claimant as mortgagee is free to pursue the present action as well as seek to exercise his contractual power of sale under the mortgage deed. The overarching limitation is that the mortgagee is precluded from recovering more than the mortgage debt due and owing.

[16] In the premises, paragraphs 1 through 4 of the Defence are struck out as an abuse of the process of the Court.

[17] There remains only the Defendant's denial that he owes the additional bank charges claimed by the Claimant Bank in the Statement of Claim. The promissory note dated May 5, 2010 for \$139,000.00 expressly provides for costs, charges and expenses incurred in an action to recover such debt whether or not the same were demanded. The original crop-loan of \$200,200.00 evidenced by the facility agreement does not contain such a provision save for late payment fees. Accordingly, leave is granted to defend as to the bank charges in respect of the loan of \$200,200.00 other than late payment fees.

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KENNETH A. BEJAMIN  
Chief Justice