IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 479 of 2010

SCOTIA BANK (BELIZE) LTD.	**CLAIMANT**
AND	
DELROY FAIRWEATHER	**1st DEFENDANT**
CAROL GENTLE	**2nd DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2016
24th February
7th April
Written Submissions
22nd March

Mr. Yohhahnseh Cave for the Claimant.
Mrs. Robertha Magnus-Usher for the 1st Defendant.
Mr. Philip Zuniga, SC for the 2nd Defendant.

Keywords: Bills of Exchange – Promissory Note – Enforcement of Debt – The Effects of Jointly and Severally – Loan Secured by Promissory Note And Mortgage Deed – Misrepresentations made by Bank – Presumed Undue Influence – Bank's Duty to Mortgagor – Best Price/Fair Market Value – Service of Demand in Accordance with Deed and Statute – Notice of Sale – Non-disclosure in Claim of Prior Exercise of Power of Sale – Effect on Claim – Delay in Prosecuting (before and after filing of claim) – Parties' Equal Duty to Assist Court to Further the Overriding Objective – Limitation –

Calculation of Interest where Claim for Same is Badly Pleaded – No Term for Contractual Interest after Judgment – Covenant for Payment of Interest Merging in Judgment – Statutory Rate of Interest after Judgment – Bills of Exchange Act Cap 245 –Supreme Court of Judicature Act Cap 91 – Law of Property Act Cap 190 –Civil Procedure Rules (CPR)

JUDGMENT

1. In 2001Scotia Bank (Belize) Ltd. (The Bank) issued a loan for $81,750 at the rate of 12% interest per annum to (the then couple) Mr. Fairweather and Ms. Gentle. That loan was secured by way of a promissory note and a mortgage on lease hold property which was jointly owned by them (The Property). How simple life would be if it ended there. But since they have all found themselves before the court, there must be more.

2. It seems that Mr. Fairweather and Ms. Gentle failed to make payments as agreed. A clear term of the note was that:

> *"In the event that any instalment is not made when due on the payment date (30th of each month) the Principal then outstanding together with all interest accrued thereon shall immediately become due and payable."*

3. The Bank has therefore sought the assistance of the court in recovering the outstanding debt which, they say, includes legal fees, administrative costs and interest, through the enforcement of the promissory note.

4. Both Mr. Fairweather and Ms. Gentle (who separated in 2006) strenuously dispute the debt, but for different reasons. Mr. Fairweather says the loan was for the construction of a house in which they both lived since its completion. The Bank has foreclosed on The Property and sold it without

ensuring that the best price was obtained. Notwithstanding that, the entire debt had been paid off when the purchase money was applied.

5. The Bank refutes these assertions and maintains that as a mortgagee, it carried out its duty to exercise reasonable care to obtain a fair market value for The Property. Moreover, what is being claimed is the balance owing under the promissory note, after the proceeds of sale had been properly applied.

6. Ms. Gentle, on the other hand, attacks both the promissory note and the mortgage deed. She says she did sign them but had been told by a loan officer/employee of The Bank that the loan was being made to Mr. Fairweather and her signature on the documents was a mere formality to enable him to get said loan. She, personally, did not understand any of the documents and in any event, The Bank failed to satisfy itself that she had received independent legal advice before she was required to sign. In fact, it was The Bank, through it's employee, who, having asked her to sign the documents, neglected to explain their very nature and effect. Furthermore, even after Mr. Fairweather had defaulted, The Bank never notified her, nor served a demand or even a loan account on her. She urges that in such circumstances the bank is estopped from claiming payment from her. In the alternative, The Bank's alleged misrepresentation to her had caused her loss – in particular, The Property. She, accordingly, counterclaims for a declaration of the invalidity of the promissory note, damages, interest and costs.

7. The Bank denies these allegations made against it and its officers or employees. It likewise denies having any obligation to ensure that Ms. Gentle received independent legal advice. They maintain that she is not entitled to any of the reliefs prayed.

The issues for the court to determine are:

8. **1. Whether the loan documents were validly executed:**

a. Whether misrepresentations were made to Ms. Gentle by The Bank.

b. If misrepresentations were made, are they actionable.

c. If they are actionable, what, if any, loss did Ms. Gentle suffer thereby and is she entitled to damages.

d. Whether undue influence by The Bank could be presumed.

2. If the loan documents were validly executed, is there a debt outstanding under the promissory note:

a. In exercising the power of sale was the best price obtained for The Property.

b. What debt, if any, is owing under the promissory note.

c. Whether the claim is affected in anyway by the Bank's failure to disclose therein the exercise of their power of sale under the mortgage.

d. Is the claim statute barred.

3. If there is a debt outstanding against whom is it enforceable:

a. The effects of jointly and severally.

b. Whether The Bank is estopped from claiming the debt from Ms. Gentle by reason of her having not received a demand letter, notice of default or statement of accounts.

Whether the loan documents were validly executed:

9. The fact that a loan was granted by The Bank or that it was defaulted on is not in issue. The promissory note is duly signed by both Defendants and so is the mortgage deed. The parties had originally been written to about the availability of the loan and the terms under which it would be granted. They were asked thereby to sign an enclosed copy of the said letter if they were in agreement with the terms and conditions outlined. There is in evidence a copy signed by them which they have both admitted signing. Thus far this court can find no reason to impugn the mortgage or the promissory note.

10. No issues of capacity or mistake have been raised. As the authors state in ***Commonwealth Caribbean Contract Law at pg. 138***: *"It is a basic rule of contract law that a person who signs a written document is bound by its terms, whether or not he has read it or has understood it, for 'much confusion and uncertainty would result in the field of contracts and elsewhere if a man were permitted to disown his signature simply by asserting that he did not understand that which he had signed'* ***Muskham Finance Co Ltd v Howard [1063] 1 All ER at 83***.

11. Therefore, if the signatory was simply negligent (for example too lazy to read) then they cannot have the benefit of the non est factum defence.

12. In the present case Ms. Gentle says The Bank made certain misrepresentations to her which induced her to sign the documents. She does not admit to reading any of the documents: *"The lady at the bank gave Delroy and me some documents to sign. Delroy and I signed them.* In that regard she may have, herself been negligent. Had she read the documents she would certainly have seen what her obligations were under both the mortgage and

the promissory note. Whether she would have understood them is a completely different issue. But to say she did not understand when she gives no evidence of having read them leaves quite a gap. Although Ms. Gentle raised in her defence that The Bank never explained the nature and effect of the documents to her, she presented no evidence of this. It is assumed that that ground is abandoned. We must now consider whether any misrepresentations were made to her and their effect if they were in fact made.

Were misrepresentations made to Ms. Gentle by The Bank:

13. It is Ms. Gentle's testimony that she transferred her land into their joint names. This was to enable Mr. Fairweather to have collateral to secure a loan for the construction of his house on the said land. She therefore knew of his intention when she accompanied him to the bank, but she does not explain why she so accompanied him. However, on arrival, a female official spoke to them both. She, Ms. Gentle, informed the official that she did not want another house, and could not afford to commit herself to a mortgage. It was then that the bank official explained, *"No, Miss Gentle. The only reason we ask you to sign is that your name is on the land paper. You will not be responsible for any payments. It is Mr. Fairweather who will be responsible."*

14. Ms. Gentle does not remember what documents she signed but she accepts that she remembers the officer's words verbatim. She does not speak of any other conversations of this nature with a bank official and she claims that every loan document she signed was grounded on that understanding. Moreover, she contends that had The Bank informed her that she could seek legal advice, she would certainly have done so.

15. She states in her witness statement that she does not know who the employee was and so it seemed obvious that she could not give a name or otherwise identify her. However, under cross-examination she suddenly expressed that she could remember what the official looked like. She also volunteered that she dealt with two officers at The Bank but she only recalled going to The Bank on one occasion, during her lunch hour when she signed all the documents. I found her evidence to be contradictory at the very least. Perhaps the state of her testimony would carry minimal weight in balanced circumstances. However, when we then consider Mr. Fairweather's testimony the scales begin to tip.

16. Mr. Fairweather testified that the property was leased to them both and he presents the documentation to prove this. Although Ms. Gentle asserts that it was originally her property alone, she provided nothing in support. Under strenuous cross-examination she contradicted herself numerous times as to whether she in fact ever owned the property solely. This court found as a fact that she never did. Mr. Fairweather explains that having obtained the lease, they both decided to build a house on it. They anticipated building a life together. Ms. Gentle made it clear that Mr. Fairweather discussed the building of the house with her and not that they simply had a discussion on the issue. This she said, was while she lived at the corner of Nurse Findley Street (in her own home). Mr. Fairweather said they discussed moving because of a hurricane and not because he wanted his own home as Ms. Gentle postulated.

17. They eventually built and lived in that house as husband and wife from its completion in 2001. This has been accepted by Ms. Gentle and cannot be

overlooked. Mr. Fairweather continues that they had been in a relationship since 1999 but separated in May 2006 when it broke down. He moved out leaving Ms. Gentle there. In October of the same year Ms. Gentle obtained an exparte interim protection order against him from the Family Court. By that order he was prohibited from residing at The Property. He has never returned to live there.

18. He says Ms. Gentle was at all times *"integrally involved in all the negotiations and discussions with The Bank officers and representative, for the loan and she did not at any point ask or obtain any confirmation or advise from The Bank that she would not be responsible for the loan or that her signature was just a mere formality."*

19. Ms. Gentle herself explains that she has been a part of the banking system since she was 14 years old. She had had one personal loan prior to the current transaction and she has had one since. She admitted having no difficulty understanding those two loans or what her obligations were under them both. However, when asked whether it was a coincidence that this loan in issue was the only loan she had a difficulty understanding, her response was that it was no coincidence, it was unfortunate. Ms. Gentle is not only smart and intellectually sound (a middle management civil servant) she is astute and calculating.

20. Ms. Gentle, by her own admission, informed that she was the one who had banking relations with The Bank. Mr. Fairweather had had none prior to the loan. She was ten years his senior and certainly had more experience in banking affairs than he did. Perhaps this explains why The Bank was the one of choice.

21. Mr. Fairweather contends that Ms. Gentle was well aware of the implications of signing the loan documents. She had in fact made arrangements with him that he would service the loan from his salary while she would attend to the household utility expenses. Ms. Gentle, in her testimony in chief, did refer to the fact that he alone paid the mortgage through a standing order for direct deductions from his salary. That revelation, however, seemed to be an attempt to further distance herself from the loan. Under cross-examination she lied about these very arrangements, saying they never existed. When referred to her witness statement she grudgingly accepted that it had been so agreed "*but did not happen that way"*. She was not asked to elaborate.

22. Mr. Fairweather, in support of his contention, exhibits correspondence from Ms. Gentle's attorney, written during their tumultuous separation, where it is stated on her behalf:

> *'Our client informs that the property is jointly owned by Mr. Delroy Fairweather and her.*
> *Your client has no greater claim to the said property than our client…"*

23. This letter was in direct response to his own attorney's demand that she vacate the premises in 15 days. In that demand letter the premises were referred to as Mr. Fairweather's house and *"our client* (sic) *house."*

24. Ms. Gentle subsequently changed solicitors and sent another response on the 28th June, 2006. I wish to reproduce the body of same in its entirety:

> *"RE: Property Settlement – Lot No. 105 East Windmill Area, Hattieville village, Belize Carol Gentle vs. Delroy Fairweather*
> *Be informed that I act for and on behalf of Ms. Carol Gentle of Hattieville Village, Belize.*

> ***As you are aware the title to the property and mortgage was obtained through the sole effort of my client. In addition my client personally paid for all the major appliances in the premises and all household bills, so as the*** (sic) ***enable Mr. Fairweather to pay the mortgage.*** (emphasis mine)
> *Therefore, further to the letter from Arnold & Co. dated 24th May, 2006 on the said subject, with a view to settle this matter, my client proposes that Mr. Fairweather pays to her the sum of $75,000.00. Alternatively, if your client is unable to pay the said sum, Ms. Gentle would accept the items highlighted on the attached list, in addition to all household appliances. On the payment of the monies or the provision of the items, my client will vacate the premises, on obtaining another residence. In addition she will also transfer her interest in the said property to Mr. Fairweather.*
> *Anticipating a prompt and favourable reply."*

25. This counters entirely Ms. Gentle's early assertion that she had nothing to do with the house, it was supposed to be Mr. Fairweather's alone. And that she also had nothing to do with the mortgage, that was supposed to be Mr. Fairweather's sole responsibility. It also casts serious doubt on her allegation that she was unaware of the implications of the mortgage and was told that her signature on it was a mere formality. Her explanation, when asked about this letter under cross-examination, was that its contents were not her "*intent*". She had not seen the letter before it was sent out. Finally, and most disturbingly, she laid blame on her attorney for the request of the sum of $75,000.00 as settlement; saying it was his "*recommendation*". Nonetheless, she agreed with counsel under re-examination that it was the sum she thought she was entitled to.

26. Her counsel made much about Mr. Fairweather's own assertions in the letter from his lawyer that he was the owner of The Property. What counsel seemed to have overlooked is that the issue at hand was not ownership of The Property but rather liability to repay a debt in circumstances where his own client was vehemently denying same. Most damaging to her position

was when she eventually admitted under cross-examination that she had entered into the loan transaction freely and voluntarily because she was interested in building a house on the land. She understood herself to be an equal co-owner of The Property and the loan was intended to be for her benefit as well as that of Mr. Fairweather. When questioned as to her obligations to repay, Ms. Gentle became loud and definitive when again she denied same. I considered her less than truthful throughout.

27. She lied about having transferred The Property into their both names, eventually accepting that there had never been a lease granted to her solely. She said she was unfamiliar with the procedure to obtain a lease of national lands yet she admitted being the one who made the first contact to initiate the process. Further, she agreed with counsel when he outlined the said procedure for her. When she subsequently stated that the application for the said lease in her sole name, was the same application in their joint names, I was flabbergasted. An issue as simple as this evoked so blatant a lie from Ms. Gentle.

28. She even lied about something as mundane as whether during a three way conversation Mr. Fairweather indicated that he wanted to sell The Property. When referred to her witness statement she again grudgingly accepted that he had. It became apparent that she was intent on lying or misrepresenting the facts to prove that she knew absolutely nothing of her obligation under the loan documents or of the eventual foreclosure. I found her evasive and sometimes belligerent. The court rejected Ms. Gentle's testimony outright as unreliable and found that there was no evidence provided that The Bank

had made any of the alleged misrepresentations to her. He who asserts must prove.

The court therefore holds that no misrepresentations, actionable or otherwise were made by The Bank to Ms. Gentle. With that finding sub-issues b and c fall away leaving d now to be considered.

Whether undue influence by The Bank could be presumed:

29. Counsel for Ms. Gentle submitted that The Bank had a duty to inform her to seek independent legal advice. This court knows of no such duty. Issues regarding the nature and effect of documents not being explained, and not being given an opportunity to take independent legal advice arise only when undue influence is in issue. No claim for actual undue influence has been raised. However, as authority for his assertion, counsel presented the cases ***Lloyds Bank v Bundy (1975) Q.B. 326, Barclays Bank PLC v O'Brien [1994] 1 A.C. 180*** and ***Royal Bank of Scotland v Elridge (No. 2) [2001] UK HL 44***. They are, recognizably, all staple cases in undue influence. More specifically, counsel's submissions seemed geared towards presumed undue influence.

30. The relationship of banker and customer does not normally give rise to a presumption or inference of undue influence. However, in exceptional cases it may arise where the customer has placed his trust and confidence entirely in the hands of the bank to his manifest disadvantage (***Lloyds Bank v Bundy [1975] Q.B. 326)*** or if the transaction is of such a type that the bank is put on inquiry. Although the court in ***Royal Bank of Scotland v Etridge (No. 2) (2001) UK HL 44*** did not find the term *"put on inquiry"* particularly apt or appealing it seems to have been accepted as convenient. Paragraphs 46 and

47 of ***Etridge (ibid)*** explain that a bank is put on inquiry where for example a wife offers to stand surety for her husband's debts and vice versa.

> *"Similarly in the case of unmarried couples ..., where the bank is aware of the relationship* (see *O'Brien's case [1993] 4 All ER 417 at 431,… Per Lord Browne –Wilkinson). Cohabitation is not essential …"*

And at paragraph 48:

> *"As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in* ***CIBC Mortgages plc v Pitt [1993] 4 All ER 433, [1992] 1 AC 2000."*** (Emphasis mine)

31. The principles are exactly the same for unmarried couples. In the matter at bar, the debt was incurred for the benefit of both parties. The second Defendant herself admitted this. Ms. Gentle was not offering herself as surety for her partner's debts. It was their joint purpose. As far as this court is concerned undue influence, in any of its forms, has not been established. The stage has not been set for the court to make any inferences or presumptions of undue influence and I so hold. It stands to reason then that the burden of proof has not shifted to The Bank. They are not called upon to produce evidence to counter. Such evidence (was it deemed necessary) ought to prove that the other party in fact exercised freewill. The court could then possibly imply voluntariness by the Bank's proof that the party had received independent legal advice and the like. This need simply does not arise here.

32. Consequently, the court finds that the mortgage and promissory note were validly executed and can be enforced.

Is there a debt outstanding under the promissory note:

(a) In exercising the power of sale was the best price obtained for The Property

33. Mr. Fairweather pleaded at paragraph 4 of his defence:

> *"That the Claimant foreclosed as mortgagee and trustee and sold the house and land, Lot 105 Hattieville without ensuring that the best price for the property was obtained."*

34. Having so stated, there was no consequential counterclaim in negligence, bad faith, fraud or otherwise nor a claim for a declaration avoiding the sale or in the alternative for damages. This means that even if the court were to find that the "best price" was not obtained, Mr. Fairweather would be left without remedy and the debt would be unaltered. Be that as it may, the issue is considered if only for completeness.

35. The Claimant presented Sharmaine Augustus who is employed as a Cross Border Adjustor with The Bank. She was not personally involved with the creation of the loan or the execution of the loan documents. She speaks mainly to information and records on The Bank's computerised files. It was through her that the letter of commitment, deed of mortgage and promissory note were first introduced, without objection, into evidence.

36. She was strenuously cross-examined about not having first-hand knowledge of the matter. However, she never claimed to have such. She was simply a representative of The Bank. Further, she does not only rely on her own 'say so', she produces a number of documents (accepted by all parties as authentic) in support. Those documents, to my mind, speak volumes louder than the many mere 'say sos' of the Defendants.

37. Ms. Augustus explains that before the sale of The Property, The Bank requisitioned an appraisal report which was prepared by Calvin E.S. Neal Sr., and she exhibits that report.

38. The purpose of the report is stated therein to be *"To ascertain the current market value of the subject Property described herein."* The title particulars is for an appraisal *"on the assumption of good marketable title in fee simple possession" (*this is however leasehold property). The appraisal was undertaken on December 15, 2007. He found the neighbourhood to be residential without adverse influences. The value trend was stable with market attraction at medium. For all intents and purposes it seemed to be *"the Jones"* type of neighbourhood where there had been no sales for over the past three years. He valued the fenced in, elevated concrete structure sitting on its lot at $125,000. His forced sale value was $80,000.00. He did not inspect the inside.

39. Mr. Kevin Castillo, witness for The Bank, says that he was The Banks's instructed auctioneer for the sale of The Property. He has been licenced in Belize since 1989. In an attempt to sell The Property he caused several advertisements to be placed in newspapers and he exhibits these. They are four each in the Amandala and the Reporter dated the 7th and 14th October, 2007 and the 6th and 13th January, 2008. The Property was initially advertised to go on the Block on the 15th October, 2015. It appears from Mr. Castillo's evidence and documents he exhibited that it had a reserved price of $140,000.00. It was not sold, but on the 17th October, 2015 there was an on site auction for The Property using the same reserved price. There was one bidder who offered $25,000.00. A third auction, again on site, was held

on the 12th November, 2007 with the same reserved price. That too was unsuccessful, yielding one bidder in the sum of $60,000.00. On 14th January, 2008, with its fourth appearance on the auction block, and having a reduced reserve price of $70,000.00, The Property was sold for $76,000.00. The auctioneer testified that the reserved price was reduced at the directive of The Bank.

40. It is clear from Mr. Castillo's evidence and the appraisal report that contrary to what Ms. Augustus states, three of the four auctions were conducted prior to the appraisal of The Property. It is also apparent that The Property eventually sold when the reserved price was set closer to the forced sale price recommended by the expert. It begs the question of whether the reserved price had simply been set too high on the previous unsuccessful occasions.

41. Between the date of the first auction and the date of the appraisal there seems to have been some vandalism of The Property. In a letter addressed to Mr. Fairweather (and copied to Ms. Gentle) dated November 13, 2007, The Bank informs that at some time after foreclosure certain fixtures had been removed from The Property, significantly reducing its value. These included three complete mahogany doors with frame, locks and hinges, mahogany kitchen cabinets with bar, two ceiling fans with switches and remote control, one complete bathroom basin fixtures, one water pump, one water heather, pressure tank, one remote control gate opener complete with control and switch box, four wall lights, one metal closet organizer, one rear burglar bar door. Essentially the house was stripped of the things that made

it habitable and comfortable. Even Mr. Castillo the auctioneer described the house as not liveable.

42. By that letter, The Bank asked that the items be returned and that Mr. Fairweather and Ms. Gentle desist from interfering with The Property. They threatened legal action.

43. Mr. Fairweather speaks to the removal of the items in his witness statement. He says that after leaving and subsequently being prohibited by court order from being at The Property, he never returned while Ms. Gentle was in occupation. However, when he visited on November 8th, 2007 in the company of an officer of The Bank, he realized that furniture he had purchased, *"as well as doors, windows, fixtures, accessories for the home and other furnishing were missing."* He reported the matter to the police and exhibits his written report. The list he says he provided to the police is mainly of appliances, equipment and furniture which he refers to as *"personal items"*. He maintains that they were precisely the items Ms. Gentle had demanded during their settlement attempts.

44. Ms. Gentle in her evidence-in-chief is silent on the issue and states only that on or about the 1stAugust, 2006 she moved out of the house and went to reside in Lord's Bank. This date seems incorrect. If she was already living in Lords Bank and no longer cohabiting with Mr. Fairweather, why the need for an interim Protection Order in October, 2006? Why is her place of residence stated therein as #105 East Windmill Hill, Hattieville? Under cross-examination she explained that discrepancy as her living in between homes while trying to sort herself out. She says she was not living there

primarily and wanted to keep her real place of aboard a secret, for her own protection. It defies common sense that she would be between places while living in fear and while stating in her witness statement that she no longer wanted *"to get involved with him and I did not want to go to his surroundings."* She eventually concluded with a general, all encompassing, inability to recall when she in fact moved out.

45. I did not find Ms. Gentle to be truthful in many aspects of her testimony and I choose to believe Mr. Fairweather's testimony that she resided at The Property until October 2007. He says he realized she was no longer living there and that the items had been removed, when he accompanied The Bank official to The Property. Under cross-examination Ms. Gentle admitted to removing furniture from the home, as she felt she was entitled to them. She also admitted, after some hesitation, that she was fully aware that The Bank was trying to sell The Property so she moved out. Again contradicting her evidence-in-chief.

46. By the nature of the items allegedly missing and the fact that they were items which Ms. Gentle clearly desired, I am of the view that those fixtures etc. were in fact removed from The Property. I am not called upon to determine who removed same, so no more need be said. What can be said, however, is that the removal of fixtures etc may have affected the value of property somewhat. Mr. Castillo says the house was sold in the same condition he originally saw it in but he does not say when he originally saw it. His evidence on this issue is not very helpful.

47. Mr. Fairweather refers to best price but in fact The Bank's duty is to obtain the true market value. Legall J in ***Selvin Jones v The Scotia Bank (Belize) Ltd***., ***Claim No. 132 of 2012*** stated at paragraph 11 of his judgment:

> *"I think the power of a mortgagee to exercise the power of sale of property under a mortgagee deed, where there has been default in paying the installments under the mortgage, has been brilliantly expounded by Lord Moulton in the Privy Council decision of* ***McHugh v. Union Bank of Canada 1913 AC 311****, that: "It is well settled law that is the duty of a mortgagee when realizing the mortgaged property for sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold." In* ***Cuckmere Brick Co. Ltd.*** *above Salmon CJ at page 643 says that: "Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of sale." The mortgagee in exercising a power of sale under a mortgage deed is not in the position of an absolute owner selling his own property. The mortgagee has a duty to pay some regard to the interests of the mortgagor when he comes to exercise the power of sale. In exercising that power of sale, the mortgagee has a legal obligation, considering the facts and circumstances of the case, to act reasonably, and to take reasonable care to obtain the true market value or price for the property at the date of sale."*

48. Mr. Fairweather introduces a value of The Property of $175,000. He does not state the basis of his valuation but relies on a photograph as proof. He admits that he is not a valuator or other such professional. He seems to have completely overlooked the fact that (by his own admission) a number of fixtures had been removed from The Property. He offers no other evidence to support his allegation that the *"best price"* had not been obtained. However, he did accept under cross-examination that he may have been able to secure a higher price selling privately, than The Bank could at auction.

49. One considers the following: that The Property had been ravaged; that The Property had been repeatedly and adequately advertised for sale by auction; that there had been three unsuccessful auctions held previous to the final

one; that the original reserved price of $140,000.00 was never met or even closely approached; in fact, the bids offered then seemed absolutely ridiculous and had been rejected by the mortgagee and that the price The Property eventually sold for was a few thousand dollars less than the forced sale price advanced by the professional appraiser. I can find no basis on which to hold that the Claimant did not obtain the true market value for The Property.

b) What, if anything, is owed under the promissory note:

50. The Claimant has come not to enforce payment on the covenant to pay the mortgage principal with interest, but rather to enforce the terms of the promissory note. The promissory note speaks only to the unchanged principal of $81,750.00 and interest on that sum at the rate of 12% per annum. Therefore, claims for bank charges, late fees, interest on bank charges and the like cannot be claimed here and have been accordingly rejected. I take the remaining principal loan as being $1,474.87 as stated by Ms. Augustus in her evidence-in-chief. This is what she testified was left after the sale price for The Property had been deducted. No evidence at all was offered to refute this. The Bank is also entitled to interest on the principal. We must now consider what interest is due and owing.

51. The Civil Procedure Rules are clear. Rule 8.6 informs what must be included in a claim form.

> *"8.6(3) A claimant who is seeking interest must –*
> *(a) say so expressly in the claim form; and i*
> *(b) include details of –*
> *(i) the basis of entitlement;*
> *(ii) the rate;*
> ***(iii) the period for which it is claimed;***
> *and*

(iv) where the claim is for a specified sum of money,
(aa) the total amount of interest claimed to the date of the claim; and
(bb) the daily rate at which interest will accrue after the date of the claim, in the claim form or statement of claim. (emphasis mine)

52. I have perused the claim form and the statement of claim and can find no period for which the interest is claimed. The claim for interest has, therefore, not been properly pleaded. The court is bound by the decision in ***Blue Sky Belize Ltd. v Belize Aquaculture Ltd., Civil Appeal No. 8 of 2012***. Here, when faced with a similarly pleaded claim for interest, the court relied on section 166 of the Supreme Court of Judicature Act to nonetheless grant interest - Morrison JA stated:

> *"23. I would therefore conclude that the appellant is not entitled to interest, either on the basis that clause 5 of the agreement between the parties did not give it a right to contractual interest or, alternatively, on the basis that, even if it did, the claim for interest was not properly pleaded in accordance with rule 8.6(3) of the CPR."*
>
> *"24. But this is not the end of the matter: in the absence of agreement, as the respondent accepts, section 166 of the SCJ Act gives the court a discretion to order that a sum for interest should be included in the sum for which judgment is given, on all or part of the debt or damages, at such rate and for such period (between the date when the cause of action arose and the date of judgment) as the court thinks fit. In my view, there can be no doubt that … the appellant has been kept out of the money due to it … In these circumstances, I consider that the appellant is clearly entitled to an order for interest under section 166, on the principal sum outstanding from, at the very least, the date of filing of the action to the date of the judgment."*

53. Unlike the case above The Bank has pleaded and proven an agreed rate of interest. The court accepts same. However, the period for which it will be calculated would be from the date of the filing of the action up to the date of the judgment and I so hold.

54. When the terms of the promissory note are properly considered one quickly realises that the parties did not agree a rate of interest after judgment. In such circumstances it is accepted that on the date of judgment the undertaking to pay interest will merge in the judgment. Therefore, interest at the statutory rate of 6% would apply thereafter - ***Ex Parte Fewings, In re Sneyd (1883) 25 Ch D 338***. This old case was referred to in ***Director General of Fair Trading v First National Bank PLC [2000] EWCA Civ 27, [2000] QB 672*** where it was stated: *"It is trite law in England that once a judgment is obtained under a loan agreement for a principal sum and judgment is entered, the contract merges in the judgment and the principal becomes owed under the judgment and not under the contract. If under the contract interest on any principal sum is due, absent special provisions the contract is considered ancillary to the covenant to pay the principal, with the result that if judgment is obtained for the principal, the covenant to pay interest merges in the judgment. Parties to a contract may agree that a covenant to pay interest will not merge in any judgment for the principal sum due, and in that event interest may be charged under the contract on the principal sum due even after judgment for that sum."*

Whether the claim is affected in anyway by The Bank's failure to disclose therein the exercise of their power of sale under the mortgage:

55. In ***Heritage Bank (Belize) Limited v William Lindo Claim No. 503 of 2011*** Chief Justice Benjamin was called upon to strike out a claim for payment of a debt founded upon a promissory note. The Defendant averred that the Claimant was acting in bad faith by failing to disclose that it was concurrently taking action pursuant to the mortgage. They urged that such a claim was an abuse of process. The learned Chief Justice was at pains to explain the difference between enforcement of the personal covenant to

repay under the mortgage deed, the exercise of the power to sell as conferred by the mortgage deed and an action founded upon the promissory note.

56. At paragraph 15 he provided:

> *"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."*

57. Since The Bank's action is on the promissory note only and there is no evidence provided that they were attempting to be paid twice for the same principal, I can find no reason why the exercise of the power of sale of the mortgage property ought to have been disclosed. It affects the claim in no way.

Is the claim statute barred:

58. Counsel for the second Defendant again raised the issue of limitation. For the most part his argument remained unchanged and is therefore res judica having been determined by trial as a preliminary issue. However, there was one change which will now be considered. Counsel urges that the part payments made after the first default were made towards the mortgage and not the promissory note. This distracting though inviting submission, cannot be entertained. The mortgage and the promissory note were created to secure the same debt, this was never in issue. Their terms may have been different but the payments were towards the same singular debt. Notwithstanding what the Claimant's witness may have said in her testimony, this is in fact a question of law. The law is clear. This submissions must be rejected.

59. I therefore hold that there is a debt due and owing under the promissory note in the sum of $1,474.87 with interest at the rate of 12% per annum from the 30th June, 2010 until the date of the judgment herein and thereafter at the statutory rate of 6%.

Against whom is this debt enforceable:

60. The promissory note is clear in its terms – *"We the undersigned received the undersigned, jointly and severally (if more than one), promise to pay THE BANK of NOVA SCOTIA AT ITS BRANCH AS SET OUT ABOVE, THE SUM OF Eighty one thousand seven hundred and fifty dollars together with interest calculated on a daily basis at, the rate of 12.000% per annum …"*

61. Section 87 of the Bills of Exchange Act states:

> *"(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly or severally according to its tenor.*
> *(2) Where a note run "I promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note."*

62. **Byles on Bills of Exchange and Cheques 29th Ed at paragraph 24.013** explains:

> *"A note signed by more than one person and beginning "We promise" etc is a joint note only. Joint and several notes usually express that the makers jointly and severally promise."*

63. This note begins *"We"* but it is expressly stated to be *"jointly and severally"*. I therefore hold that the signatories are jointly and severally liable to repay the outstanding debt.

Whether The Bank is estopped from claiming the debt from Ms. Gentle:

64. In her pleadings Ms. Gentle says that she was never sent any notices, statement of account or a demand letter. It must be stated, with some haste, that the promissory note, which is the basis of this claim for payment, does not specify any of these requirements. The relevant term is as stated at paragraph 2 of this judgment. In an earlier decision in this matter the court found *"that the promissory note is not payable on demand."* As to its precise nature that decision states at paragraph 9: *"By its very terms, the promissory note before the court, requires payment of a certain amount (instalments, the exact number of which is not specified) on certain specified dates (there is no stated date of maturity), subject to acceleration. All of which are inconsistent with a demand note. The right to accelerate payment of the whole, may not be enforced unless the other party has indicated in some way that he is unable to perform in the time originally agreed. That is the trigger."*

65. The mortgage on the other hand speaks to a demand only. Paragraph 1 states:

> *"That the Borrowers hereby jointly and severally covenant with the bank that the Borrowers will on demand … pay to the Bank the balance if any then owing by the Borrowers on any account at the rate of 12% per-centum per annum and discount commission on the layout charges or expenses charged or incurred by the Bank in respect of any of the matters aforesaid or for keeping the Borrower's account.*
> *4. PROVIDED ALWAYS and it is hereby expressly declared as follows:*
> *(1) If the Borrowers shall duly pay all principal monies, liabilities, interest, commission and bank charges secured by these presents in accordance with the foregoing covenant in that behalf the bank will at any time thereafter at the request and cost of the Borrowers discharge this security or assign the benefit of the mortgage as the Borrowers may direct.*
> *4(6) A demand for payment of the balance intended to be hereby secured may be made by a notice in writing signed by any Manager of Cashier or other officer on behalf of the bank, and such notice shall be deemed to be sufficiently served on the Borrowers if it is left at the Borrower's usual or last known place of abode or business in Belize or if it is sent by post in a registered letter addressed to the Borrower's usual or last known place of abode or business and in the last*

mentioned case, the service shall be deemed to be made at the time when the registered letter would in the ordinary course be delivered.
(7) The powers given to the mortgagees by the Law of Property Act shall apply to this security with this variation that the power of sale conferred by the said Act shall be exercisable at any time after such demand as aforesaid has been made by the bank and that the mortgage money shall be due on demand.
(9) all costs, charges and expenses including legal and other expenses in the realization and enforcement of this security properly incurred hereunder by the bank and all monies properly paid by the Bank shall together with interest thereon at the rate hereinafter mentioned be charged on the mortgaged properties for the time being subject to this security and shall on the same being paid be repaid on demand to the bank by the Borrowers with interest thereon from the time of payment at the rate of 12% per-centrum per annum during the continuance of this security …
(10) …. PROVIDED ALWAYS that the power of sale hereby conferred shall be exercisable without the restrictions contained in Section 82 of the Law of Property Act and so that for the purpose of any sale of the mortgaged properties or any part thereof under the power of sale vested in the bank by virtue of those present the whole of the monies and liabilities the payment and discharge whereof is hereby secured shall be deemed to become due or liable to be discharged on the day on which demand for payment shall have been made."

66. From these, specifically agreed terms it is clear that a demand must be made before payment becomes due or the power of sale of The Property becomes exercisable. But is it necessary to serve such demand on both mortgagors?

67. Ms. Gentle's evidence is that she never had the courtesy of such a demand. The deed does not speak to the receipt of a demand as the trigger. It speaks instead of sufficient service if the written demand is left at the *"borrower's usual or last place of abode or business in Belize or if it is sent by registered post"* to said address. The demand letter exhibited by Ms. Augustus, is addressed to both Mr. Fairweather and Ms. Gentle at 35 Fairweather Street, Belize City. The Bank's evidence is that *"Owing to the failure of the Defendants to meet their obligations under the loan agreement the Claimant, Scotia Bank (Belize) led caused a Letter of demand to be issued to the Defendants through its attorneys at Musa &*

Balderamos. A copy of the said letter dated the 3rd day of April, 2007, which was addressed to both Defendants is hereto attached and marked …"

68. Their evidence does not state what this address indicates as per the requirements of the mortgage deed. Nor does it state the method by which service was effected. However, Mr. Fairweather under cross-examination admitted receiving the demand and explained that this is the address at which he usually receives mail. He makes no issue with service of same. He added, however, that it is not and has never been the usual mailing address for Ms. Gentle.

The Law:

69. Section 82(2) of the Law of Property Act states:

> *"A mortgagee shall not exercise his power of sale under section 69 unless and until –*
> *(a) notice in writing requiring payment of the mortgage money has been served on the mortgagor* ***or one of two or more mortgagors****, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or*
> *(b) Some interest or instalment of principal money due under the mortgage is in arrears and unpaid for fourteen days after it became due; or*
> *(c) there has been a breach of some covenant contained in the mortgage deed or of some provision of this Part, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than a covenant for payment of the mortgage money; and*
> *(d) he had given at least two months notice of his intention to exercise his power of sale by publication thereof in three issues of the Gazette and of one newspaper circulating in the country."* (emphasis mine)

70. As far as it is relevant Section 69(1) states:

> *"Where, by virtue of section 68(3), the mortgage deed provides that when the mortgage money has become due the mortgagee shall have a power without any order of the Court to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the*

> *mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, the mortgagee may exercise such power without applying to the court for an order for the sale of the mortgaged property."*

71. It is no mistake or oversight that the mortgage deed speaks to service on the borrowers at the borrower's address. It is plain that one borrower only need be served, as is in keeping with the statutory provision outlined above. Whether Ms. Gentle received a copy or not, for the purposes of the deed and in law, she is deemed to have been properly and adequately served in circumstances where Mr. Fairweather was properly and adequately served. Moreover, the sale of The Property or the fact that she was not personally served with the demand letter in no way affects The Bank's right to enforce payment under the Promissory Note.

72. Ms. Gentle also claims that she never got notice of the sale. Ms. Augustus also exhibited three notices of the sale of The Property by the mortgagee, published in three issues of the official gazette and three issues of The Belize Times newspapers. All in keeping with the statutory requirements outlined above.

73. By virtue of these notices, the Defendants are deemed to have been given notice of the intended sale of The Property.

74. I am compelled to state that I do not believe Ms. Gentle when she says she only knew of the foreclosure and sale of The Property after it had been sold. The court considers that on her departure from The Property she admits to taking all her possessions including appliances and furniture. There was

clearly no intention to return. Next we consider the three way conversation with Barney and Mr. Fairweather, and Ms. Gentle's admission that she refused to participate in selling The Property privately. She also admits to telling Mr. Fairweather to go deal with The Bank. Even when asked, she was hesitant and never explained what she meant by those words save and except that they had nothing to do with the foreclosure. This strikes me as an untruth since she also accepted that by that very conversation she was made aware that the loan was in default or would be in default. More important was her admission that she knew The Bank was going to sell The Property so she moved out.

Conclusion:

75. The parties were required to file an agreed list of issues. They complied and raised the issue of delay in prosecuting the claim and its effect on the calculation of interest. The court is uncertain whether this delay was in bringing the claim or in having the claim determined. If it is a delay in bringing the claim, then such delay ought to be specifically pleaded. Neither of the two defences filed addressed this. Rule 10.7 of the CPR clearly states that a Defendant may not rely on any allegation which is not set out in his defence unless the court gives permission. None was sought or given in this matter.

76. However, if the delay is as it relates to the determination of the claim, then I deign to consider the issue only because the parties in their obvious haste to belatedly comply with the case management order agreed to its inclusion.

77. The relevant background briefly being that the claim was initiated in 2010 but for reasons unknown was never heard until 2016. In fact, the first defendant only filed a defence with the leave of the court on the 28th August, 2015.

78. Rule 25 of the CPR confirms that it is the court's duty to actively manage cases in furtherance of the overriding objective. Part of that overriding objective is dealing with cases expeditiously. As I mix metaphors liberally, where a case seems to have fallen through the judicial cracks, then either party may be the catalyst to resistate it. The court relies on Rule 1.3 which directs that: *"It is the duty of the parties to help the court to further the overriding objective."* The onus for the efficient movement of a matter through the court system lies equally on both parties where the court has obviously faltered.

79. I therefore find that it lies in the mouth of neither Defendant to utter accusatory words at the Claimant, in an attempt to blame him solely or deny him what he is due. In any event, interest has been ordered to run only from the date of the filing of the claim for reasons already given.

80. In his written submissions counsel for the second Defendant raised a new issue regarding the identity of the promissory note. This was not an agreed issue and ought not properly to be discussed. I state only for completeness that failure to attach the promissory note to the statement of claim makes no difference. A document which is accordingly attached does not form part of the evidence in a matter. Moreover, the CPR state at Rule 8:7(3) that:

> *"The claim form or the statement of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."* (emphasis mine)

81. In this matter the promissory note was sufficiently identified. It was admitted by agreement and relied on throughout the trial. No issue was even raised prior to or during trial. It is certainly not proper now to do so or to entertain such an objection.

Costs:

82. Since all parties have seen some level of success each party shall bear their own costs.

83. **THE ORDER OF THE COURT IS AS FOLLOWS:**

1. Judgment for the Claimant against both Defendants in the sum of $1,474.87 with interest at the rate of 12% per annum from the 30th June, 2010 until the date of judgment herein, thereafter at the statutory rate of 6% per annum until payment in full.
2. The Second Defendant's counterclaim is dismissed.
3. Each party shall bear its own costs.

SONYA YOUNG
JUDGE OF THE SUPREME COURT