

**IN THE SUPREME COURT OF BELIZE, A.D. 2012**

**Claim No. 125 OF 2012**

**IN THE MATTER OF APPLICATION BY THE REGISTRAR OF LANDS UNDER SECTIONS 61 AND 79 OF THE GENERAL REGISTRY ACT, CHAPTER 327 OF THE LAWS OF BELIZE**

**-and-**

**IN THE MATTER OF APPLICATION BY THE REGISTRAR OF LANDS UNDER PART 61 OF THE SUPREME COURT (CIVIL PROCEDURE) RULES 2005**

**Before: Chief Justice Kenneth Benjamin**

**Appearances:        Mr. Nigel Hawke, Deputy Solicitor-General for the Applicant,  
                              The Registrar of Lands  
                              Ms. Darlene Vernon for Heritage Bank Limited  
                              Mr. Aldo-Reyes for Quick Stop Personal Finance Center Ltd.**

**JUDGMENT**

[1] The present application has been brought by the Registrar of Lands by way of a Fixed Date Claim Form for the written directions of the Court in relation to certain stated questions of difficulty.

**BACKGROUND**

[2] A document headed "DEED OF NOTICE OF INCUMBRANCE" dated the 27<sup>th</sup> day of October, 2011 was presented for and in the name of Heritage Bank Limited to the Registrar of Lands. The said Heritage Bank Ltd. requested and authorized the Registrar to record the said Deed in the Deeds Book of the General Registry. Registration of the said Deed was effected.

[3] By the wording in its body, the said Deed purports to be an incumbrance on certain property in favour of Heritage Bank Limited as an interest in the said property. The property is described in the schedule to the said Deed as follows:

“ALL THAT piece or parcel of land containing 82.50 acres of land situate at Vicente Point, Northwest of Turneffe Island, Belize District TOGETHER with all buildings and erections standing and being thereon, (the property)”

The said Deed identifies “FREDERICK PAUL GARCIA” as the proprietor of the said property held under and by virtue of a Minister’s Fiat (Grant) No. 460 of 2010 dated October 4, 2010.

- [4] The purported incumbrance is stated to be in relation to and in consideration for a judgment entered in default in the Supreme Court on the 28<sup>th</sup> day of October, 2009 against Fred Garcia in favour of Alliance Bank of Belize Limited for the sum of \$2,167,760.00 plus interest at the statutory rate from the date of judgment until payment in full.
- [5] In the affidavit filed in support of the Fixed Date Claim Form, the Registrar of Lands deposed that:
- a) The said Deed was submitted for registration in the name of Heritage Bank and not in the name of Alliance Bank of Belize Limited, the judgment-creditor named in the Order of court; and
  - b) The property in question was acquired by Frederick Garcia on the 7<sup>th</sup> day of September 2010 subsequent to the date of the judgment and the said property was sold and re-conveyed to Quick Stop Personal Finance Center Limited on September 8, 2011, a date prior to the registration of the said Deed.
- [6] The Registrar of Lands contended that the said ‘Deed of Incumbrance’ ought not to have been accepted for registration and that such acceptance was improper. The Registrar further stated that he is constrained from cancelling the registration of the said Deed, “because no statutory provision in the relevant legislation empowers the Registrar to cancel an improper noting of an incumbrance once it

has been accepted and before it has been paid or discharged". He further deposed as follows:

"That the powers granted to me in relation to this matter include the powers to reject an improper incumbrance submitted for registration; and to cancel an incumbrance that has been paid off or discharged; but there is no power to cancel an improper incumbrance that has been registered improperly."

On the basis of the foregoing, the Registrar sought to have the Court answer the following question:

- a) Whether the Registrar of Lands may cancel the registration of a "Deed of Notice of Incumbrance"? and
- b) Whether the Registrar of Lands may cancel an improper noting of a legal incumbrance on land?

The written direction of the Court is craved pursuant to sections 61 and 79 of the GRA.

## **THE PARTIES**

[7] The Applicant is the Registrar of Lands ("the Registrar") of the Lands and Surveys Department of the Ministry of Natural Resources whose duties and responsibilities include the registration and cancellation of incumbrances on land.

[8] Two interested parties intervened in the proceedings in which they both filed affidavit evidence and made written and oral submissions to the Court. Heritage Bank Limited, formerly Alliance Bank of Belize Limited and previously known as Provident Bank Limited, is an interested party, it is in the business of banking with offices at 106 Princess Margaret Drive, Belize City. The other interested party is Quick Stop Personal Finance Center Limited, ("Quick Stop") a company incorporated in Belize with its registered office at 99 Albert Street, Belize City. It

is in the business of providing retail financial services including short term cash advances to its customers; some such advances being secured by real property.

## **THE EVIDENCE**

- [9] Before the Court was evidence on affidavit exhibiting the documents upon which the Applicant and the Interested Parties relied. The affidavit of the Registrar, the contents of which were earlier alluded to in paragraph 5 above, exhibited the documents relevant to the present application, namely: (1) Deed of Notice of Incumbrance dated October 27, 2011; (2) Deed of Conveyance dated September 8, 2011 conveying the property from Frederick Paul Garcia to Quick Stop Personal finance Center Limited; and (3) a letter dated December 20, 2011 from Legal Counsel of the Ministry of Natural Resources on behalf of the Chief Executive Office to Mr. Stephen Duncan, the Managing Director of Heritage Bank Limited. Fiat Grant No. 406 of 2010 in the name of one Richard McDonald dated September 7, 2010 was erroneously exhibited. The applicable Fiat Grant in the name of Frederick Paul Garcia dated October 4, 2010 was subsequently exhibited to the first Affidavit of Gregory Anwar Barrow, a Director of Quick Stop.
- [10] In a subsequent affidavit sworn to by Rondine Twist, Legal Counsel at the Ministry of Natural Resources dated June 6, 2012, the Applicant supplemented the evidence previously provided and submitted additional legal arguments in support of his position. It was stated that the Lands and Surveys Department had not been able to be located on record. An encumbrance placed on land pursuant to a court judgment presented for recording and registration or where the Deed of Incumbrance was not signed by the owner of the land or the holder of a power of attorney as encumbrancer. It was said that the Department had thus far only acted upon court orders that gave specific directions for the transfer of land from one person to another.

[11] The affidavit of Luisa Swasey, the Loans Recovery Manager of Heritage Bank, detailed the loan transactions facilitated for Fred Garcia as guarantor for Central Aggregates Limited in the sums of \$1,340,000.00 and \$500,000. As a result of the non-performance of the loans, the Bank obtained judgment for the sum of \$2,167,760.00 on October 28, 2009 by default in Claim No. 745 of 2009. The said affidavit was supplemented by the affidavit of the Bank's General Manager, Mr. Stephen Duncan. He explained that the Bank had been made to understand that the judgment itself was an encumbrance and that the Deed was registered to comply with the law and to preserve the Bank's right to the assets owned by Fred Garcia. It was further sworn that the property was still in the name of Fred Garcia and had not been transferred to any other party at the time when the Deed of Notice of Incumbrance was lodged on October 27, 2011. Both affidavits urged that the Court validate the procedure adopted on behalf of the Bank to treat the error in the wording of the Deed as not being one of substance. It was prayed that the Registrar's application be refused.

[12] In his first Affidavit filed on behalf of Quick Stop, Gregory Anwar Barrow set out the history of the loan to Mr. Frederick Paul Garcia for \$36,000.00 upon a Loan Agreement executed on November 10, 2010. As security, the Minister's Fiat Grant for the property was proposed. Having defaulted on the loan and failing to respond to letters of demand, Mr. Garcia signed a Deed of Conveyance dated September 8, 2011 conveying the property to Quick Stop in settlement of the outstanding debt. The said Deed of Conveyance was filed on October 6, 2011 and the registration fee and stamp duty calculated on the sum stated as the consideration were paid. Quick Stop also paid outstanding property taxes in the name of Frederick Garcia. The Deed of Conveyance was submitted by the Land Titles Unit to the Valuation Department for verification of the value of the property and the amount of stamp duty payable. This process was to be completed in November 2011. On November 25, 2011 it was learnt that the Bank had on October 27, 2011 registered the Deed of Notice of Incumbrance to be attached to

the property. On the same date, Mr. Barrow was informed that the property had been re-valued thus attracting additional stamp duty of \$22,082.05.

[13] Mr. Barrow stated that Quick Stop was willing to pay the additional stamp duty upon the Deed of Notice of Incumbrance being removed. Quick Stop is seeking clear title to the property.

[14] In his Second Affidavit, Mr. Barrow exhibited the Deed of Conveyance numbered 1669/11 and bearing an endorsement that the said document had been lodged for recording by Quick Stop on October 7, 2011.

### **JURISDICTION**

[15] The parties did not dispute the jurisdiction of the Supreme Court to entertain the application. The relevant statutory provisions reside in the GRA. Section 61 confers discretion on the Registrar to approach the court to seek direction on questions of difficulty. The section enacts:

“61 (1) The Registrar may at all times take the advice, opinion or direction of the court upon questions of difficulty, notwithstanding that there are no contending parties, and may request that such advice, opinion or direction be given in writing to be preserved along with the papers connected with the issue of a certificate of title, or noting of legal charges or incumbrances.

(2) Where no special procedure has been provided by this Act for any case with regard to placing on the register, or removing therefrom the title of any person to any land, or any legal charge or incumbrance, or any fact in regard thereto which ought to be altered the court shall give directions in regard thereto, according to the intent and meaning of this Act.”

With respect to documents lodged for recording, the Registrar is empowered as follows by Section 79(2) to approach the Court:

“79 (2) The Registrar may apply to the Chief Justice in Chambers for his opinion in writing whenever he may entertain any serious doubt as to whether a document should or should not be recorded, and the opinion of the Chief Justice shall be regarded as final and conclusive.”

[16] The actual procedure to invoke the jurisdiction of the court is provided for in Part 61 of the Supreme Court (Civil Procedure) Rules, 2005. In circumstances where a question of law is referred to the Court by a person by way of case stated, the application is commenced by way of fixed date claim (See: Rule 61. 6(1)). In the present case, the Interested parties were given notice of the proceedings.

### **SUBMISSIONS**

[17] The learned Deputy Solicitor-General opened his submissions by highlighting that there was plainly a conflict between the Deed of Notice of Incumbrance recorded on October 27, 2011 by the Bank and the Deed of Conveyance by Quick Stop registered in Deeds Book No. 22 of 2011 Folios 181-192, prompting the questions as to whether the Registrar ought to cancel the registration or improper noting of the Deed of Notice of Incumbrance. Two points were urged. Firstly, it was submitted that the Deed of Notice of Incumbrance is not in its proper form in law having regard to the provisions of the Law of Property Act, Chapter 190 (“LPA”) for the recording of a deed of encumbrance. It was said that there was no provision for a Deed of Notice of Incumbrance in Section 104 of the LPA, which reads:

“104. An encumbrance in respect of unregistered land shall be made, constituted or created by a deed of encumbrance which shall be recorded under Part VI of the General Registry Act.”

Rule 38 of the General Registry Rules states:-

“A deed of encumbrance shall be in Form 30”.

It was noted that Form 30 is headed: “Deed of Incumbrance.” It was further observed that the document was signed by the Bank as the encumbrance and not by Frederick Garcia as the encumbrancer. On that basis, it was urged that the document was not in conformity with Section 104 of the LPA.

[18] The second point argued was that, should the court deem the document to be at the acceptable in its form at the time the Bank registered the Deed of Notice of Conveyance, a third party, namely, Quick Stop, would have acquired the equitable right to the property. It was accepted that title would not yet have passed to Quick Stop but an equitable right to the property existed. Since the Registrar had failed to recognise the rights of Quick Stop at the time of the registration of the Deed of Notice of Incumbrance.

[19] Having regard to Section 106 of the LPA, it was stated that, in any event, the Deed of Conveyance was lodged first in time and therefore enjoyed priority.

Section 106 reads:-

“Encumbrances shall rank among themselves in the order of their dates of recording or registration...”

This followed upon the purport of Section 105 of the LPA that an encumbrance over and upon any land registered or recorded under the GRA become binding from the moment of registration or recording.

[20] In response to the Court, the Learned Deputy Solicitor General said that the fact of Quick Stop not having paid the additional stamp duty was of no moment and did not affect the rights acquired by Quick Stop.



[21] Learned Counsel representing Quick Stop adopted the arguments preferred on behalf of the Registrar and augmented same by placing emphasis on the chronology of events set out in the first Affidavit of Mr. Gregory Anwar Barrow. It was contended that the Deed of Notice of Incumbrance ought to be treated as a nullity as priority was accorded to the Deed of Conveyance, by virtue of Sections 105 and 106 of the LPA. Attention was drawn to Section 84 of the GRA., which provides:

“84. Every document shall be held to be duly recorded from the moment that the Registrar indorses thereon the day and hour when it was presented to him for recording.”

It was thus argued that by failing to register the incumbrance ahead of the Deed of Conveyance the Deed of Notice of Incumbrance was void as against Quick Stop. It was pointed out that if the Bank had conducted a search at the Land Titles Department on the date the Deed of Notice of Incumbrance was presented for filing it would have been discovered that a Deed of Conveyance had already been lodged in respect of the property in favour of Quick Stop.

[22] In furtherance of the challenge to the form of the Deed of Notice of Incumbrance, reference was made to Rules 20, 24, 28, 33 and 35 of the General Registry Rules which allow for variations to certain forms. These Rules were contrasted with the rigid language of Rule 38 which mandated that Form 30 be used for a Deed of Incumbrance and required execution by both the encumbrancer and the incumbrancee. This argument was made while at the same time it was acknowledged that a judgment debtor would be reluctant to sign a Deed of Incumbrance against his own property.

[23] In its written submissions, Quick Stop invoked equity and argued that since the Bank was seeking to register an equitable interest against the property and since Quick Stop was the beneficial owner of the property, this was a case of two competing equitable interests. The court was invited to apply the maxim of equity. “Between equal equities, the first in order of time shall prevail.”

- [24] Learned Counsel for the Bank addressed the two issues: namely, whether the Deed lodged by the Bank on October 27, 2011 ought to be cancelled as not being in conformity with Rule 30; and whether given that the title of Quick Stop had not been perfected, the Deed lodged by the Bank ought to be cancelled.
- [25] The Court was at the outset invited to treat the word ‘Notice’ in the heading of the Deed as of no consequence. It was further stated that the Deed of Notice of Incumbrance does not offend Rule 38 and the prescribed Form 30, as when compared, the only component missing from the Deed is the signature of the encumbrancer who is the registered owner of the land. It was said that the body of the Deed sets out the circumstances leading to the encumbrance, a description of the land involved and the person concerned with the land. It was argued that given the provisions of Sections 103 and 104 of the LPA, there would be cases where incumbrances would be created without the permission or consent of the registered proprietor of the property in question; as for example in the present case. Learned Counsel insisted that there be a purposive interpretation as against a literal interpretation so as to carry into effect the intent of the legislation.
- [26] It was surmised, that the Registrar ought to have invoked section 79 of the GRA and applied to the Chief Justice for an opinion as to whether the Deed of Notice of Incumbrance ought to have been accepted. As such, it was said the Registrar cannot now be heard to seek the cancellation of the registration of the Deed of Notice of Incumbrance on the basis of lack of form.
- [27] Learned Counsel for the Bank took issue with the right of the Registrar to cancel the Deed of Notice of Incumbrance. The argument made was that Quick Stop not having paid the additional stamp duty and therefore not having acquired the legal title to the property, legal ownership of the property remained in Frederick Paul Garcia and Quick Stop did enjoy priority. The court was asked not to cancel the Deed of Notice of Incumbrance.

## **IS THE DEED OF INCUMBRANCE IN PROPER FORM?**

[28] The Registrar and Quick Stop have challenged the Deed of Notice of Incumbrance as not being in conformity with Form 30, a prescribed by Rule 38 of the GRA. Without reproducing the document in extenso, certain observations are made:

1. The heading reads “Deed of Notice of Incumbrance” and not “Deed of Incumbrance” as in Form 30.
2. The Deed does not refer to an encumbrancer and an encumbrance in its and in its body as compared to Form 30.
3. The Deed refers to a Notice of Incumbrance in its body as against the plain word ‘incumbrance’ in Form 30.
4. The Deed is executed solely by the signatories of the Bank as against by an encumbrancer and an encumbrancee as set out in the prescribed attestation clause of Form 30.

[29] As I see it, the inclusion of the word ‘notice’ is not fatal to the validity of the Deed. If the truth be acknowledged, the purport of registering and recording the deed is to inform and give notice of the existence of an incumbrance attaching to the property to persons wishing to deal with the said property. In that regard, the addition of the word ‘notice’ does not in any way detract from the intent and purpose of the document by rather it serves to highlight same.

[30] The definition of an encumbrance is provided in section 103 (1) of the LPA which enacts as follows:

“103(1) – The following rights, burdens and dealings other than legal charges, that is to say:-

- (a) rights for life or any other limited or conditional rights in or over the land enduring for three years and upwards;
- (b) burdens, securities, mortgages or liens upon land, arising in equity by which the land is subjected to particular interests in

favour of individuals, or the revenues thereof or affected for the payment of annuities or temporary charges;

(c) dealing with the land which, in the event of sale, would limit the free use and disposal thereof by the purchaser, such as leases for three years and upwards, restrictive covenants, easements, rights and privileges in, over or out of the land, rights in or over the land arising out of any trust or settlement, whether created by will or deed;

(d) judgments or orders of the Supreme Court affecting the land or to recover a sum of money against the proprietor thereof;

(e) an option to purchase the land for which a consideration amounting to five hundred dollars or upwards has been given,

shall be encumbrances registrable under Part IV or which may be recorded under Part VI of the General Registry Act.”

The Bank has invoked paragraph (d) of Section 103(1) which allows for judgments or orders of the Supreme Court to recover a sum of money against the proprietor of land to be registered as encumbrances under Part IV of the GRA or maybe recorded as a deed under Part VI of the GRA. There is no demur from any of the parties seeking the cancellation of the Deed that the judgment obtained by the Bank is not to be classified as falling under section 103 (1)(d). It follows, therefore, that such an encumbrance is amenable to registration as an incumbrance and its existence to recording as a deed.

[31] The Rules of Court contemplate the entering of judgment in default. And it does not require much common sense to assume that the predominance of judgment debtors, especially those who did not take part in the proceedings, would be

reluctant to sign a deed encumbering their property towards the satisfaction of the debt. For that reason coupled with the statutory provision creating such an encumbrance, the Form must be alterable to accommodate the circumstances of a judgment or court order, even if that judgment or order is specific to the property. Having carefully read the Deed, it cannot escape any reader that the language is indicative of the drafter having adapted the Form to meet the peculiar circumstances of the default judgment in favour of the Bank against Frederick Garcia. For these reasons, I am not satisfied that the Deed of Notice of Incumbrance ought to be cancelled for want of form and thus I decline to do so on that basis.

[32] For completeness, I will address the Registrar's contention that the deed was lodged by Heritage Bank Limited in respect of a judgment in favour of Alliance Bank of Belize Limited. Evidence was offered in the affidavits of Stephen Duncan and Luisa Swasey to the effect that Heritage Bank Limited was formerly known as Alliance Bank of Belize Limited. It seems to me that upon presentation of the Deed for registration, the Registrar ought logically to have requested proof of the judgment. Upon inspection of the Order of Court, the query would have arisen as to the variance between the names of the Banks. Having not done so, the Registrar, in the light of the clear evidence that was available at the time, cannot now be heard to complain about this matter.

### **DOES THE DEED OF NOTICE OF INCUMBRANCE ENJOY PRIORITY?**

[33] The facts presented on the affidavits filed on behalf of the Registrar and Quick Stop revealed that subsequently to the recording of the Deed of Conveyance on October 7, 2011 at which time the registration fee and stamp duty on the stated consideration had been paid the valuation Department assessed an additional sum for stamp duty. That assessment was made known to Quick Stop on November 25, 2011. Mr. Gregory Anwar Barrow has stated that Quick Stop is prepared to pay the said sum upon the purported incumbrance by way of the


Deed of Notice of Incumbrance being cancelled. The Bank says that the failure to pay the additional sum assessed as stamp duty has resulted in the property remaining under the legal ownership of Frederick Paul Garcia.

[34] The argument fails to recognise that upon payment of the full consideration for the purchase of the property, Quick Stop acquired a beneficiary interest in equity in the property, a fact of which the Bank would be fixed with notice given the recording of the Deed of Conveyance. Quick Stop being qua purchaser of the property' the holder of the legal title Frederick Paul Garcia became a trustee of the land for Quick Stop. (See: Lysaght v Edwards (1876) 2 Ch D. 499 at p. 507). Hence the bare legal ownership still resides in Frederick Garcia but the complete beneficial ownership of the property is in Quick Stop. It follows that Quick Stop enjoys priority given that the equities are equal. Accordingly, the Registrar ought not to have accepted the Deed of Notice of Incumbrance for filing and the same must be cancelled.

#### **ORDERS**

[35] The Registrar is directed to cancel the registration of the Deed of Notice of Incumbrance noted against the property on October 27, 2011. This order is made conditional upon the payment of the additional stamp duty of \$22,082.00 by Quick Stop Personal Finance Center Limited within 30 days of the date of this Order. Each party shall bear his or her own costs.

**DATED** this 3rd day of **November** , 2017.

  
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**KENNETH A. BENJAMIN**  
Chief Justice of Belize